

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-02/04-01/15

Date: 24 July 2018

**TRIAL CHAMBER IX**

**Before: Judge Bertram Schmitt, Single Judge**

**SITUATION IN UGANDA**

**IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN***

**Public**

**Decision on Defence Request to Add 14 Items to its List of Evidence**

To be notified, in accordance with regulation 31 of the Regulations of the Court, to:

**The Office of the Prosecutor**

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**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**Judge Bertram Schmitt**, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 64(2) of the Rome Statute, issues the following 'Decision on Defence Request to Add 14 Items to its List of Evidence'.

### **I. Procedural history and submissions**

1. On 13 October 2017, a decision by the Single Judge stipulated a deadline whereby the defence for Mr Ongwen ('Defence') was required to, *inter alia*, provide its final list of evidence ('LoE') within three weeks of receipt of a formal notification from the Office of the Prosecutor ('Prosecution') regarding the conclusion of its evidence presentation.<sup>1</sup>
2. On 6 March 2018, the Chamber modified the above deadline to 31 May 2018,<sup>2</sup> which was subsequently extended to 4 June 2018.<sup>3</sup>
3. On 4 June 2018, the Defence filed, *inter alia*, its LoE along with a request for leave to later add materials to its LoE ('Initial Request').<sup>4</sup>
4. On 21 June 2018, the Single Judge issued a decision indicating that he will not pre-approve additions to the LoE prior to the materials being made available.<sup>5</sup> The Initial Request was dismissed *in limine*, without prejudice to a complete request being filed at a later time.<sup>6</sup>

<sup>1</sup> Preliminary Directions for any LRV or Defence Evidence Presentation, ICC-02/04-01/15-1021, para. 7.

<sup>2</sup> Decision on the Legal Representative for Victims Requests to Present Evidence and Views and Concerns and related requests, ICC-02/04-01/15-1199-Red, para. 84.

<sup>3</sup> In response to a Defence request for an extension of deadline: Email from Trial Chamber IX Communications to parties and participants on 24 May 2018 at 09:58.

<sup>4</sup> Public Redacted Version of 'Defence notification of List of Witnesses and Evidence in compliance with ICC-02/04-01/15-1021 and Request for Leave to Add Witnesses its List of Witnesses and Materials to its List of Evidence, ICC-02/04-01/15-1272-Red2 (with three confidential annexes; a corrected version was notified on 20 June 2018) ('Defence Notification of List of Witnesses and Evidence').

<sup>5</sup> Decision on Requests Following Final Defence Witness and Evidence Lists, ICC-02/04-01/15-1289, para. 7.

<sup>6</sup> ICC-02/04-01/15-1289, para. 7.

5. On 4 July 2018, the Defence filed a request to add 14 items to its LoE ('Request').<sup>7</sup> These consist of: (i) an expert report and an open-source material referenced in the report; (ii) an audio recording; (iii) medical records; and (iv) a signature page relating to D-33.<sup>8</sup>
6. It is noted that the Request is unopposed.

## II. Applicable law and analysis

7. The Single Judge recalls the applicable legal framework for considering additions to the LoE as set out in previous decisions.<sup>9</sup> He reiterates that relevant factors to take into account include, *inter alia*, the extent to which the requested addition is opposed, the time when the addition is sought, the nature and amount of material concerned, the intended purpose as well as the prospective significance of the materials in light of the charges brought against the accused.<sup>10</sup>
8. Additionally, the Single Judge emphasises that, in principle, recognising the formal submission of audio-visual materials automatically includes the formal submission of any associated transcripts or translations duly disclosed, and vice versa. Similarly, if a document has been recognised as formally submitted, it generally includes both the original and translated version. This is the case irrespective of whether all versions of the documents/audio-visual material were included on the list of evidence or formally submitted.<sup>11</sup> This is solely to ensure the logical completeness of the evidence record — needless to say, the Chamber

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<sup>7</sup> Defence Request to Add 14 Items to its List of Evidence, ICC-02/04-01/15-1299-Conf (a public redacted version was filed on 6 July 2018, ICC-02/04-01/15-1299-Red).

<sup>8</sup> Request, ICC-02/04-01/15-1299-Red, paras 10-24.

<sup>9</sup> Decision on Prosecution's Request to Add 14 Items to its List of Evidence, 24 August 2017, ICC-02/04-01/15-957, para. 6; Decision on the 'Prosecution's Request to Add Transcripts and Seven Additional Documents to its List of Evidence', 2 December 2016, ICC-02/04-01/15-619, para. 10; Decision on Prosecution Request to Add Items to its List of Evidence, to include a Witness on its List of Witnesses and to Submit Two Prior Recorded Testimonies under Rule 68(2)(b) and (c), 22 November 2016, ICC-02/04-01/15-600, para. 14.

<sup>10</sup> ICC-02/04-01/15-957, para. 6.

<sup>11</sup> See Initial Directions on the Conduct of Proceedings, ICC-02/04-01/15-497, para. 30.

will only use the working languages of the Court when considering the words in any submitted materials.

### **A. Expert report and open source material**

9. The Request seeks the addition of a second expert report and an open-source material (i.e. an article)<sup>12</sup> referred to in the report. The report provides an assessment of Mr Ongwen's mental health and the experts were also instructed to review and analyse the testimony of experts called by the Legal Representatives of Victims.<sup>13</sup> Both the report and the article were disclosed to the parties and participants on 29 June 2018.<sup>14</sup>
10. Given that: (i) the nature of the evidence contained in the report is important to the Defence's Article 31(1)(a) defence; (ii) the report and the article have been disclosed well in advance of when the experts are expected to appear as witnesses (i.e. towards the end of the Defence presentation of evidence); and (iii) the Request is unopposed – the Single Judge grants the addition of the expert report and the article to the LoE.

### **B. Audio recording**

11. In relation to the audio recording,<sup>15</sup> it is noted that the corresponding English<sup>16</sup> and Acholi transcripts<sup>17</sup> are already included in the LoE provided by the Defence and disclosed to the parties and participants on 4 June 2018.<sup>18</sup> The audio

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<sup>12</sup> Request, ICC-02/04-01/15-1299-Red, paras. 10-14 (UGA-D26-0015-0948 and UGA-D26-0015-0885 respectively).

<sup>13</sup> Request, ICC-02/04-01/15-1299-Red, para. 11.

<sup>14</sup> Defence Notification of Disclosure of Rule 78 Material on 29 June 2018, 29 June 2018, ICC-02/04-01/15-1293-Conf-AnxA.

<sup>15</sup> Request, ICC-02/04-01/15-1299-Red, paras 15-18 (UGA-D26-0017-0086, which is the same as UGA-OTP-0283-1508).

<sup>16</sup> UGA-D26-0017-0052 (same as UGA-OTP-0283-1502-R01).

<sup>17</sup> UGA-D26-0017-0056 (same as UGA-OTP-0283-1510-R01).

<sup>18</sup> Defence notification of List of Witnesses and Evidence, ICC-02/04-01/15-1272-Conf-AnxB; *See* Defence Notification of Disclosure of Rule 78 Material on 4 June 2018, 4 June 2018, ICC-02/04-01/15-1274-Conf-AnxA.

recording was not included in the LoE due to an inadvertent omission on the part of the Defence.<sup>19</sup> It is further noted that the Prosecution has been in possession of the audio recording since November 2007.<sup>20</sup>

12. Given that the transcripts of the audio recording have already been included in the LoE and the audio recording has been disclosed, the Single Judge grants the request to add the audio recording to the LoE.

### C. Medical records

13. The Request seeks the addition of the original medical records (in Dutch) obtained from the ICC Detention Centre to the LoE.<sup>21</sup> The English translations<sup>22</sup> of the medical records sought to be added have previously, upon the Prosecution's request, been recognised as formally submitted.<sup>23</sup> The Defence in its Request notes that the medical records have been available to the parties and participants since April 2017.<sup>24</sup>
14. Given that the English translations of the documents have been recognised as formally submitted, there is no need for the original versions to be added to the LoE. The original records are automatically deemed to have been formally

<sup>19</sup> Request, ICC-02/04-01/15-1299-Red, para. 16.

<sup>20</sup> See Public Redacted Version of Prosecution's Notice of Filing of an Item Received in Response to an RFA, 22 February 2018, ICC-02/04-01/15-1189-Conf-Exp, 23 February 2018, ICC-02/04-01/15-1189-Red, paras 6 and 7; The Prosecution disclosed the audio recording to the Defence *via* email following the Decision on Prosecution Request under Paragraph 9 of Decision 1207, 20 April 2018, ICC-02/04-01/15-1234 and Decision in Response to an Article 72(4) Intervention, 1 June 2018, ICC-02/04-01/15-1267-Corr2 (the corrected version was notified on 26 June 2018); See also Email from Prosecution to Trial Chamber IX Communications on 4 July 2018 at 14:07; Email from Prosecution to Trial Chamber IX Communications on 9 July 2018 at 11:05. A disclosure report was attached to the email listing the items disclosed *via* E-Court (one of the items listed was the audio recording in question: UGA-OTP-0283-1508).

<sup>21</sup> Request, ICC-02/04-01/15-1299-Red, para. 19 (UGA-D26-0015-0087, UGA-D26-0015-0088, UGA-D26-0015-0089, UGA-D26-0015-0090, UGA-D26-0015-0091, UGA-D26-0015-0093, UGA-D26-0015-0094, UGA-D26-0015-0095, UGA-D26-0015-0096, UGA-D26-0015-0097).

<sup>22</sup> UGA-D26-0015-0098, UGA-D26-0015-0100, UGA-D26-0015-0102, UGA-D26-0015-0104, UGA-D26-0015-0106, UGA-D26-0015-0109, UGA-D26-0015-0110, UGA-D26-0015-0112, UGA-D26-0015-0113, UGA-D26-0015-0115.

<sup>23</sup> Decision on Submitted Materials for P-446, Email from Trial Chamber IX Communications to parties and participants on 27 March 2018 at 9:54.

<sup>24</sup> Request, ICC-02/04-01/15-1299-Red, para. 20.

submitted and recognised as such. For these reasons, the Single Judge dismisses the request to add the medical records to the LoE as unnecessary.

#### **D. Signature page relating to D-33**

15. Finally, the Defence requests the addition of a page containing D-33's signature, as well as the signatures of two Defence team members and a registry interpreter.<sup>25</sup> The Defence alleges that the signature is relevant to issue of 'reliability and credibility of the Prosecution evidence' and witnesses.<sup>26</sup> The Prosecution interviewed D-33 in July 2016<sup>27</sup> and another similar item has already been included in the LoE.<sup>28</sup>
16. Given the nature of the evidence sought to be added (i.e. one page containing signatures) and the fact that there is no opposition to including this item, the Single Judge grants the request to add the page containing D-33's signature to the LoE.

#### **FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY**

**GRANTS** the Defence request for leave to add to its list of evidence the following materials UGA-D26-0015-0948, UGA-D26-0015-0885, UGA-D26-0017-0086 and UGA-D26-0025-0181;

**DISMISSES** the Request in relation to leave to add 10 documents containing medical records;

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<sup>25</sup> Request, ICC-02/04-01/15-1299-Red, paras 21-24 (UGA-D26-0025-0181).

<sup>26</sup> Request, ICC-02/04-01/15-1299-Red, para. 21.

<sup>27</sup> See UGA-OTP-0269-0764-R01.

<sup>28</sup> Defence notification of List of Witnesses and Evidence, ICC-02/04-01/15-1272-Conf-AnxB (UGA-OTP-0266-0468).

**ORDERS** the Registry to update E-Court to reflect the recognition of formal submission of documents UGA-D26-0015-0087, UGA-D26-0015-0088, UGA-D26-0015-0089, UGA-D26-0015-0090, UGA-D26-0015-0091, UGA-D26-0015-0093, UGA-D26-0015-0094, UGA-D26-0015-0095, UGA-D26-0015-0096 and UGA-D26-0015-0097.

Done in both English and French, the English version being authoritative.



**Judge Bertram Schmitt, Single Judge**

Dated 24 July 2018

At The Hague, The Netherlands