

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/04-01/15
Date: 11 February 2019

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

Public

**Decision on Prosecution Request for Disclosure of Material Provided to
Defence Expert**

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

The Office of the Prosecutor

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**The Office of Public Counsel for
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Counsel Support Section

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Detention Section

**Victims Participation and Reparations
Section**

Others

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 Articles 64(2) and 64(3)(c) of the Rome Statute ('Statute') issues the following 'Decision on Prosecution Request for Disclosure of Material Provided to Defence Expert'.

A. Procedural history and submissions

1. On 31 January 2019, the Office of the Prosecutor ('Prosecution') filed a motion ('Request')¹ that the Defence for Mr Ongwen ('Defence') be ordered to disclose the material it provided to one of its experts, D-133, in order to assist him in the preparation of his expert report ('Material').
2. The Prosecution notes that the terms of reference for the witness contain a section 'materials to be provided'.² Since the report produced by D-133 does not indicate which material has been provided to him, the Prosecution submits that disclosure of the Material 'is necessary to assess the expert's credibility [and the] reliability of his opinion'.³
3. On 1 February 2019, the Common Legal Representative of Victims filed a response, supporting the Request and submitting that the Material should also be provided to the Legal Representatives of Victims ('LRVs').⁴
4. On 6 February 2019, the Defence filed its response, seeking that the Request be rejected ('Response').⁵

¹ Prosecution's Request for Disclosure of Material Provided to D-0133, ICC-02/04-01/15-1428, with confidential annex, ICC-02/04-01/15-1428-AnxA.

² UGA-D26-0015-1032, at 1034.

³ Request, ICC-02/04-01/15-1428, para. 1.

⁴ CLRV Response to the "Prosecution's Request for Disclosure of Material Provided to D-0133", ICC-02/04-01/15-1434.

⁵ Defence Response to the Prosecution's Request for Disclosure, ICC-02/04-01/15-1437.

5. The Defence submits that the disclosure obligations between Prosecution and Defence differ, imposing a significantly smaller duty on the Defence.⁶ The Defence also submits that the accused has the right not to incriminate himself and to remain silent⁷ and that the jurisprudence relied upon to justify the Request is not applicable.⁸
6. In the alternative, should the Request be granted, the Defence requests that the Prosecution and LRVs also be ordered to disclose all materials provided to the experts called by them ('Defence Request').⁹

B. Analysis

7. The Single Judge recalls his previous decision, in which he stated that sources used in support of the production of Defence expert reports must be indicated and easily accessible. The Single Judge found that a disclosure obligation regarding these sources existed, irrespectively of whether the expert 'used' the material or was merely 'relying upon' them.¹⁰
8. The underlying reasoning which motivated the finding of a disclosure obligation in the previous decision was that each party must be put in a position to meaningfully question the witnesses called by the opposing party. In the case of an expert witness, this must extend to the ability to effectively assess the report produced by the expert witness, which is a prerequisite for meaningful questioning by the non-calling party. The Single Judge considers that for these purposes the non-calling party must have knowledge of the material which was provided to an expert in the course of writing his or her report.

⁶ Response, ICC-02/04-01/15-1437, para. 3.

⁷ Response, ICC-02/04-01/15-1437, para. 3.

⁸ Response, ICC-02/04-01/15-1437, paras 4 – 10.

⁹ Response, ICC-02/01-01/15-1437, para. 15.

¹⁰ Decision on the 'Prosecution Request for Disclosure of Material Underlying the Defence Psychiatric Expert Report', 21 February 2017, ICC-02/04-01/15-709, paras 12-13.

9. It is noted that the report at issue does not contain this information. It can be presumed that the expert will have looked at all the information and material which is provided to him, and it is also reasonable to assume that this information or material will form part of the expert's starting point for the production of the report. Indeed, in the terms of reference the Defence states that the material is provided '[t]o aid in preparation of the report'.¹¹ In order to be able to meaningfully assess the report and question the expert about it, the non-calling party must be aware of the entirety of such materials, irrespective of whether the expert ultimately used the information or material in the production of the report. The fact that the expert chose not to rely upon certain material which was specifically provided to him or her by the hiring party might also be important for understanding the report.
10. The fact that the Prosecution is able to question the expert during his testimony on this matter does not contradict obliging the Defence to disclose the Material beforehand. The non-calling party must be able to question a witness on an informed basis. In case the Material is voluminous, the Prosecution would be unable to immediately analyse it and conduct an effective questioning on its basis. This would go against the expeditiousness of the proceedings.
11. As to the argument by the Defence that the accused has a right to remain silent,¹² the Single Judge is of the view that disclosure of the Material does not implicate Article 67(1)(g) of the Statute. The Defence has voluntarily provided the Material to D-133 with the intention to aid him in the production of his report. By using it, and having given the Material a certain value and role in the proceedings, it cannot subsequently oppose disclosure by claiming the right to remain silent.

¹¹ UGA-D26-0015-1032, at 1034.

¹² Response, ICC-02/04-01/15-1437, para. 3.

12. Accordingly, the Single Judge grants the Request and orders the Defence to provide the Material to the Prosecution and LRVs within 3 days of the reception of this decision at the latest.
13. As to the Defence Request, the Single Judge notes that the sort of information requested by the Defence has already been provided in past instances.¹³ More importantly, the Defence does not seem to have asked for the requested information on an *inter partes* basis before making the request. For this reason, the Single Judge rejects the Defence Request, without prejudice.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Request;

ORDERS the Defence to provide the Material the Prosecution and LRVs in accordance with paragraph 12 above; and

DISMISSES the Defence Request.

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



Judge Bertram Schmitt, Single Judge

Dated 11 February 2019

At The Hague, The Netherlands

¹³ See, for instance, for P-447: UGA-OTP-0280-0674, at -0717 to -0717.