

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/04-01/15**
Date: **12 November 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 Defence Request to Add Three 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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Legal Representatives of Applicants

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**Unrepresented Applicants for
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**The Office of Public Counsel for
Victims**

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**Victims Participation and Reparations
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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 Article 64(2) of the Rome Statute issues the following ‘Decision on Defence Request to Add Three Items to its List of Evidence’.

I. Procedural history and submissions

1. In accordance with the deadline established by the Single Judge,¹ the Defence filed its initial list of evidence on 4 June 2018.²
2. On 4 November 2019, the Defence filed a request to add three items to its list of evidence (the ‘Request’).³ The Defence regrets not having sought addition of the items to its list of evidence earlier.⁴ Yet it argues that the three open-source articles are related to the expertise and testimony of Defence expert witnesses D-0041 and D-0042 (the ‘Defence Experts’), scheduled to testify in the second half of November 2019.⁵
3. On the same day, the Chamber shortened the response deadline to 8 November 2019.⁶
4. The Office of the Prosecutor (the ‘Prosecution’) filed its response on 7 November 2019, opposing the Request.⁷ The Prosecution argues that (i) the nature of the items is such that they should not be added to the list,⁸ (ii) the time limit for such additions has expired and the grounds for extending the time limit are not made out,⁹ and (iii) the justifications advanced are unpersuasive.¹⁰

¹ E-mail from Trial Chamber IX Communications, 24 May 2018 at 09:58; Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, ICC-02/04-01/15-1199-Red, para. 84; Preliminary Directions for any LRV or Defence Evidence Presentation, 13 October 2017, ICC-02/04-01/15-1021, para. 7.

² 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-Corr, notified on 20 June 2018 (with three confidential annexes).

³ Defence Request to Add Three Items to its List of Evidence, ICC-02/04-01/15-1654.

⁴ Request, ICC-02/04-01/15-1654, para. 10.

⁵ Request, ICC-02/04-01/15-1654, paras 5-9.

⁶ E-mail from Trial Chamber IX Communications, 4 November 2019 at 12:44.

⁷ Prosecution’s Response to “Defence Request to Add Three Items to its List of Evidence”, ICC-02/04-01/15-1657 (the ‘Prosecution Response’).

⁸ Prosecution Response, ICC-02/04-01/15-1657, paras 1, 2-4.

⁹ Prosecution Response, ICC-02/04-01/15-1657, paras 1, 5-7.

¹⁰ Prosecution Response, ICC-02/04-01/15-1657, paras 1, 8-14.

5. In their response filed on 8 November 2019, the Legal Representatives of Victims (the ‘LRV’) equally oppose the Request, echoing the arguments made by the Prosecution.¹¹

II. Analysis

6. The Single Judge recalls the applicable legal framework for considering additions to the list of evidence as set out in previous decisions.¹² The Single Judge further notes that a time limit of 30 September 2019 had been set for the parties and participants to submit any requests related to evidence.¹³
7. With regard to item UGA-D26-0015-1395, the Single Judge notes that it has been in possession of the Defence since early September 2019. It is unclear from the Request why addition of this item to the Defence list of evidence could not have been sought in accordance with the time limit of 30 September 2019. At the same time, the Single Judge considers that the subject matter of the article is related to the anticipated testimony of the Defence Experts, the topic of which is of high importance in this case.¹⁴
8. In this regard, the Single Judge notes that the Prosecution submits it would cause ‘significant prejudice’ to the Prosecution and participating victims if, bearing in mind the subject matter of this article, the Chamber were at this stage asked to consider a possibly new condition the accused may have suffered from.¹⁵ However, the issue of complex post-traumatic stress disorder was referred to in the report submitted by Dr De Jong,¹⁶ and, more importantly, brought up as such by Prosecution counsel during the questioning of witness P-0446.¹⁷ Therefore, it cannot reasonably be argued that the Prosecution or the participating victims would not have been aware of the subject matter discussed in this article before and that for this reason prejudice would result from its addition to the

¹¹ Victims’ Response to “Defence Request to Add Three Items to Its List of Evidence”, ICC-02/04-01/15-1660 (the ‘LRV Response’).

¹² Decision on Defence Request to Add 14 Items to its List of Evidence, 24 July 2018, ICC-02/04-01/15-1314, para. 7; 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.

¹³ See Clarification on Order Setting a Deadline for Evidence Related Requests, 23 August 2019, ICC-02/04-01/15-1572; Order Setting a deadline for Evidence Related Requests, 21 August 2019, ICC-02/04-01/15-1570.

¹⁴ See Decision on Requests related to the Testimony of Defence Expert Witnesses D-0041 and D-0042, 1 October 2019, ICC-02/04-01/15-1623, para. 16.

¹⁵ Prosecution Response, ICC-02/04-01/15-1657, para. 12. See also LRV Response, ICC-02/04-01/15-1660, paras 4-6.

¹⁶ Annex II to Registry’s Transmission of Expert’s Report concerning Mr Ongwen’s Psychiatric Examination pursuant to Decision ICC-02/04-01/15-691-Conf, 8 February 2017, ICC-02/04-01/15-702-Conf-AnxII, pp. 6-7.

¹⁷ Transcript of hearing of 19 March 2018, ICC-02/04-01/15-T-162-Red-ENG, p. 27, line 8 – p. 28, line 10.

Defence list of evidence. In light of the foregoing, the Request is granted, on an exceptional basis, with regard to item UGA-D26-0015-1395.

9. Turning to item UGA-D26-0015-1410, the Single Judge firstly takes note of the fact that this item has been in possession of the Defence since July 2019,¹⁸ thus well in advance of the time limit of 30 September 2019, and even before the order setting this time limit was issued. The Defence does not provide sufficient justification for which reason addition of this item to its list of evidence could not reasonably have been sought earlier. In addition, the Single Judge is of the view that the subject matter of the article, which seems to concern how to assess criminal responsibility,¹⁹ goes to ultimate issues beyond the proper scope of expert witness testimony. For these reasons, the Request is rejected with regard to item UGA-D26-0015-1410.

10. Finally, in relation to item UGA-D26-0015-1418, the Single Judge notes that it is unclear from the Request whether the item was known to the Defence before the time limit of 30 September 2019.²⁰ It is not sufficient in this regard for the Defence to merely indicate that addition of this item to its list of evidence had not been sought earlier due to ‘inadvertent omission’, without further specification.²¹ However, the Single Judge takes into account that the article, on its face, is directly related to the anticipated testimony of the Defence Experts. Also, the Prosecution indicates that it concerns a condition ‘which the Defence Experts have contended afflicted the Accused at the time of the alleged crimes’.²² The Single Judge notes the argument of the Prosecution that the article was not referenced in any of the reports prepared by the Defence Experts even though it could have been.²³ Yet, since the subject matter of the article is directly connected to the reports prepared by the Defence Experts, and thus has been known by the other parties and participants for a considerable amount of time, no prejudice arises from the addition of the article to the Defence list of evidence. Accordingly, and on an exceptional basis, the Request is granted in relation to item UGA-D26-0015-1418.

¹⁸ See Request, ICC-02/04-01/15-1654, para. 7.

¹⁹ See also Request, ICC-02/04-01/15-1654, para. 7 ([...] its discussion concerning the issue of appreciation of the nature and wrongfulness of one’s behaviour’).

²⁰ See Request, ICC-02/04-01/15-1654, para. 8.

²¹ See Request, ICC-02/04-01/15-1654, para. 10.

²² Prosecution Response, ICC-02/04-01/15-1657, para. 4.

²³ See Prosecution Response, ICC-02/04-01/15-1657, para. 4.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Request with regard to UGA-D26-0015-1395 and UGA-D26-0015-1418; and

REJECTS the Request with regard to UGA-D26-0015-1410.

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



Judge Bertram Schmitt, Single Judge

Dated 12 November 2019

At The Hague, The Netherlands