

**Cour
Pénale
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**International
Criminal
Court**

Original: English

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

Date: **4 June 2018**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

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

Public Redacted Version with Confidential Annexes A, B, and C

**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’**

Source: Defence for Dominic Ongwen

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. The present filing provides the specified notifications and certifications required by Trial Chamber IX ('Trial Chamber') on 13 October 2017.¹ Also included is a request ('Request') for leave to add witnesses to the Defence List of Witnesses ('LoW') and materials to the Defence List of Evidence ('LoE') at a later point in relation to several expert witnesses.

II. CONFIDENTIALITY

2. Pursuant to Regulation 23 *bis*(1) of the Regulations of the Court ('RoC'), the Defence files this response confidentially *ex parte* Defence only, because it refers to information of the same classification² and also refers to information that may lead to the identification of witnesses. Concurrently, the Defence files a confidential redacted version and public redacted version.

III. BACKGROUND

3. On 30 May 2016, the Trial Chamber set at 6 September 2016 the time limit for the Prosecution to disclose all materials falling under its disclosure obligations and provide a list of evidence 'containing the materials which [it] intends to submit as evidence during trial'. The Chamber also clarified that the Prosecution may disclose materials after the time limit, but that 'leave of the Chamber is required for the Prosecution to rely on materials disclosed after the deadline as incriminating evidence at trial'. Similarly, the Chamber indicated that leave must be obtained for the Prosecution to add materials to its list of evidence after the expiration of the time limit.³
4. On 13 October 2017, the Trial Chamber issued its 'Preliminary Directions for any LRV or Defence Evidence Presentation' whereby it indicated that "[w]ithin three weeks from notification of the Prosecution's notice" of closing its case, the Defence must provide (i) its final lists of evidence and witnesses; (ii) certify that all necessary witness information forms have been completed and given to the VWU; (iii) provide anticipated testimony summaries for all witnesses; (iv) complete disclosure of all items it intends to use during its evidence

¹ ICC-02/04-01/15-1021, para. 7.

² See para. 38 below.

³ ICC-02/04-01/15-449, paras 7 and 8.

presentation (to the extent not already disclosed); and (v) request any protective measures or relief under Rule 68 of the Rules.⁴

5. On 6 March 2018, following Defence submissions relating to time and resources, the Trial Chamber modified the 13 October schedule noting “[i]n order to protect the rights of the accused to a fair trial and adequate time and facilities to prepare its defence, the Chamber hereby modifies the deadline provided for in paragraph 7 of the Preliminary Directions and orders the Defence to provide the required information by 31 May 2018.”⁵
6. On 24 May 2018, the Trial Chamber granted a Defence email request to modify the 31 May deadline. The request was made pursuant to Regulation 35 of the RoC and founded upon delays caused by computer service problems. The Trial Chamber noted “that the requested extension is minimal and that the Request is unopposed”. In granting the two day extension, it noted that “[d]ue to the fact that 2 June 2018 is a Saturday, this pushes the due date for the information required by the directions -1021, para. 6 to Monday, 4 June 2018.”⁶

IV. SUBMISSIONS

A. Notification

7. The Defence hereby provides to the Trial Chamber, Prosecution, and Participants its List of Evidence in Annex B as required by directions -1021, para. 6. The list contains 1095 items.
8. In Annex A, the Defence hereby provides its List of 72 Witnesses. With the exception of the expert witnesses discussed below, the Defence certifies that all necessary witness information forms have been completed and given to the VWU.
9. In Annex C, the Defence provides 64 summaries of anticipated witness testimony as required by the Trial Chamber.
10. Simultaneous to the filing of the present notification, the Defence has submitted its request for protective measures. Also filed concurrently are a series of Defence Rule 68 requests.

⁴ *Ibid.*, para. 7.

⁵ ICC-02/04-01/15-1199-Red, para. 81.

⁶ Email of 24 May 2018 subject line ‘RE: Defence Request for a Two Day Extension for the 31 May 2018 Deadline’.

B. Request for leave to add witnesses to the LoW and materials to the LoE

11. The Defence requests leave to (1) disclose and add to its LoE anticipated Expert Reports and other materials discussed below in paragraphs 18 to 44 and 48 to 50 to its LoE and (2) provide summaries of anticipated testimonies at a later date.
12. In addition, the Defence requests leave to add to its LoW a Sexual and Gender Based Crimes ('SGBC') Expert, Military Structure, and a Radio Direction Finding Expert, discussed below at paragraphs 35 to 44.
13. The Defence submits that this Request is appropriate in the interest of justice under the present circumstances. Due to the nature of the material, the Trial Chamber, in its truth finding mandate, would be assisted in hearing the evidence of the proposed Experts. Also, given the notice in this filing, the request will not be prejudicial to the parties and participants.
14. The Defence has been unable to fulfil the deadline for reasons outside its control. In the interests of providing the most clarity possible, the Defence has sought to secure details related to deadlines discussed below. It was unable; however, as of the date of filing to provide all information and materials as directed by the Trial Chamber.
15. Briefly summarised, the delays are consequent to a domino effect of delays in resolving several funding requests with the Registry's Counsel Support Section ('CSS') and also due to the multiple demands upon the Defence office staff's limited time.
16. The Defence engaged an Expert Consultant to review the technical material disclosed by the Prosecution and advised the Defence on more specialised technical experts. The request was made in November 2017 and appointment was confirmed on 12 February 2018. The delay in securing funding meant that the Expert Consultant himself was delayed in reviewing the material.
17. A further factor that impacted upon the identification and instruction of the other experts was that CSS did not assure the Defence of funding for its experts until April 2018. Additionally, as has been demonstrated in a previous request,⁷ the Defence has limited personnel resources. With the unconfirmed funding, the Defence focused its limited resources on the crucial phase

⁷ ICC-02/04-01/15-1029-Red, paras 11-28.

of the Prosecution case, notably its presentation of expert witnesses seeking to counter the affirmative defences pursuant to Article 31, and the continuing investigations in the field.

1. D26-0041 and D26-0042

18. As the Trial Chamber and Parties are aware the Defence has [REDACTED].⁸ In addition, many documents and materials relating to their work have been disclosed contemporaneously to this filing and are included on the Defence List of Evidence.
19. The Defence, however, asked [REDACTED].
20. The Defence submits that the nature of this evidence is [REDACTED].⁹ Further, the Defence intends to call these Experts towards the end of its case and submits that the short delay in provision of the report does not cause prejudice to the Prosecution.

2. D26-0127

21. The importance of the intercepts to the Prosecution case is not lost on the Defence.¹⁰ The Defence submits that the interests of justice merit leave being granted with regards to the provision of a report and summary. These interests are succinctly summed up in Article 67(1)(b) whereby the Accused has a right to “have adequate time and facilities for the preparation of the defence” and Article 67(1)(e) where the Accused has the right to “to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her”.
22. D26-0127’s expertise is in the areas of acoustics, phonetics, and the analysis of evidential recordings. The Defence submits that having a critical analysis of the Prosecution audio materials is necessary and will assist the Trial Chamber in the final determination of the truth in this case. The Defence expects that this expert will provide further depth to some of the issues raised during the cross-examinations of the Prosecution witnesses.

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ “The second point I was finding slightly hard to understand. It seemed to be concerned with the intercepted radio material, which your Honours will know plays a very considerable role in the way the Prosecution puts its case.”, ICC-02/04-01/15-T-25-ENG, p. 19, lines 16-18.

23. Demands upon Defence resources, as mentioned above, has meant that instructions for D26-0127 have not been completed and thus a report is not ready. The Defence submits that the reasons for the delays were beyond the control of the Defence and beside the interests of justice justify the Request.
24. In relation to Article 67(1)(b), the Defence recalls its prior requests and filings in relation to inadequate Defence resources.¹¹ With respects to Article 67(1)(e) the Defence notes that the Prosecution called three specific individuals¹² concerning the audio intercepts. The Defence notes that two of the individuals are members of the Office of the Prosecutor. Securing their efforts and testimony in support of the Prosecution case, from material provided,¹³ appears to have been a simple exercise. In contrast, the Defence had to enter discussions with CSS.
25. The Prosecution also called testimony from members of the Ugandan security services and fact witnesses on the content of the intercepts and submitted multiple Rule 68(2)(b) statements in relation thereto. Equality of arms in respect to these merits, at an absolute minimum, the provision of one Defence expert report in relation to the audio intercepts.

3. D26-0139

26. The Prosecution called witness Tim Allen to discuss *inter alia*: “The origins of the LRA; The LRA’s purpose and objectives; The LRA’s development into a politico-military force; The means, up until July 2002, that the LRA had used to achieve its purpose and objectives; The level, extent, intensity, geographic spread and duration of any acts of armed violence or hostilities involving the LRA in Uganda up until July 2002; The historic and continuing effect of the activities of the LRA upon the civilian population in Uganda.”¹⁴ The Defence submits that equality of arms as specifically codified in Article 67(1)(e) necessitates that, in addition to the resource issues noted above, it is in the interests of justice to grant this Request for the delayed provision of D26-0138’s expert report and summary.
27. D26-0139 will provide information on the political and social structure of the camps and the patterns of mortality. The Prosecution has alleged that the camps and civilians were attacked because of persecutory intentions in relation to the perceived civilian support for the

¹¹ ICC-02/04-01/15-1029-Red.

¹² P-403, P-256, and P-242.

¹³ UGA-OTP-0269-0015, p. 3 para. 12; UGA-OTP-0269-0041.

¹⁴ ICC-02/04-01/15-532-Conf-AnxC, para. 2.

Government of Uganda;¹⁵ however, D26-0139's research, which will inform his report, offers doubts regarding this.

28. D26-0139 will also discuss the formation of the IDP camps. This will address both the timing of the creation of particular camps and the reasons for particular camps being constructed. According to D26-0139's research, the patterns of creation of camps varied according to both ethnic regions (Acholi, Lango, and Teso) and by individual district and the reasons for these variations are important in relation to the Prosecution charges regarding the attacks on the camps. Notably, these reasons will assist the Trial Chamber in its truth finding mandate by placing in context the testimony of Defence fact witnesses and indeed Prosecution fact witness testimony.

4. *D26-0060*

29. D26-0060 is a political scientist. Since 2004, he has conducted extensive research on the Lord's Resistance Army with a special focus on cosmological and military space in the rebel.
30. The witness will discuss the importance of cosmological space in the LRA including cosmological manifestations, their origins, how they were understood and how particular rules and regulations emanating from spirits through Joseph Kony, led an understanding of what was 'normal' and acceptable and how abductees grow to believe in the powers of the spirits.
31. He will discuss how the rules and regulations of the spirits had to be strictly followed, were closely monitored and how digressions resulted into severe punishments that often included death.

5. *D26-0133*

32. The confirmed charges against Mr Ongwen of conscription and use of child-soldiers have been supported by Prosecution fact witnesses and expert witnesses from the victim's representatives. Considering that it is not disputed that Mr Ongwen himself was abducted, conscripted, and used as a child-soldier in the LRA, the Defence submits that the interests of justice warrant the Request being granted for disclosure of the Expert report and provision of a summary.

¹⁵ See for example in brief: ICC-02/04-01/15-533, para. 158.

33. The proposed expert witness, himself a former child-soldier [REDACTED], will substantially assist the Trial Chamber in its truth finding mission. He will bring a fresh perspective and insight into the experiences of child-soldiers to the proceedings.
34. D26-0133 is unique in that he has experience as a child-soldier, [REDACTED] international promotion of the protection of children in armed conflict.

6. Direction Finding Expert

35. The Defence has identified an individual who may be able to provide expertise in relation to the Direction Finding material; however, is still pursuing their engagement. The Defence requests leave to add their name to its LoW, pending their consent, and to present an expert report and summary.
36. The Prosecution has sought to distance the Direction Finding material as unreliable¹⁶ as opposed to the audio intercepts. This is notwithstanding the Prosecution's own evidence which shows that these two bodies of technical evidence are tightly connected.¹⁷ During the Pre-Trial phase, the Defence has argued that the Direction Finding material is exculpatory.¹⁸ The issue of Mr Ongwen's location and the RV points is a disputed issue in the case and Prosecution fact witnesses have been inconsistent on both matters.
37. The Defence submits that, for two reasons, the requests should be granted. Firstly, as previously described, un-certainties over funding impacted upon the search for an expert.

¹⁶ ICC-02/04-01/15-533, para. 78 ("The UPDF and the Police compiled typed intelligence reports. UPDF reports were used to brief senior military officials in Kampala. They contained summaries of the logbooks, human intelligence reports from UPDF units stationed in the field and geographic coordinates pinpointed by UPDF direction-finding equipment. The Prosecution does not rely on this direction-finding evidence; the Prosecution is not satisfied as to the reliability of the process by which direction finding information was obtained, but has disclosed the material relating to this aspect of the Ugandan authorities' operations to the Defence. [...]").

¹⁷ ICC-02/04-01/15-465-Corr-Red2, para. 127; P-0337, UGA-OTP-0267-0445-R01, para. 15 ("In addition to my command over the UPDF direction finding (DF) team, in 2003 I took control of the static interception team in Gulu. This was to streamline administrative issues. *It made sense because the interception and the DF teams were doing the same work*, and both were UPDF." – emphasis added); see further: P-0003, UGA-OTP-0246-0077-R01 at 0082-0083, 0086; P-0029, UGA-OTP-0267-0455 at 0458-0459, UGA-OTP-0267-0455 at 0463-0464; P-0337, UGA-OTP-0256-0201-R01 at 0204-0211; P-0404, UGA-OTP-0267-0470-R01 at 0474; P-0339, UGA-OTP-0258-0732-R01 at 0737-0738.

¹⁸ ICC-02/04-01/15-T-23-CONF-ENG, p. 35, line 24 to p. 36, line 8; see also ICC-02/04-01/15-659, para. 17.

38. Secondly, the Defence has had not opportunity to cross-examine or question Prosecution witnesses involved with Direction Finding since their evidence was submitted through Rule 68(2)(b) and [REDACTED].¹⁹
39. The Defence considers that it would be unfair at present to identify the individual until consent has been given by him.

7. SGBC Expert

40. Like child-soldiers, sexual and gender based crimes in this case, especially allegations of Mr Ongwen's direct perpetration, have been the focus of extensive media coverage.
41. As highlighted by the Defence in cross-examination, much of this coverage has focused upon the experience of women and has failed to consider the experiences of men and boys in the LRA. The Defence has through cross-examination attempted to highlight how the spiritual aspects of the LRA have impacted the mental element required for the charged sexual and gender based crimes.
42. The Defence is endeavouring to identify an expert on SGBC who is both knowledgeable about the culture and the impact of SGBC within the LRA on both women and men.
43. As the Trial Chamber is aware, finding experts on issues which also evoke high levels of emotion can be difficult, and the Defence respectfully requests a variation of the time limits to identify its expert and submit the relevant materials.

8. Military Structure Expert

44. The alleged military structure of the LRA is a central element of the Prosecution's case against the Accused.²⁰ The Defence has identified an individual to provide expertise in relation to military structure and is pursuing his engagement. The Defence requests leave to add the person's name to its LoW, pending his consent, and to present an expert report and summary.

¹⁹ [REDACTED].

²⁰ ICC-02/04-01/15-533, paras 89 to 155.

9. *Prejudice to the Prosecution*

45. By providing previews of themes in relation to each proposed Expert and the names of the Experts the Defence allays any prejudice to the parties and participants. They are now at liberty to review the materials already in the case and scrutinise publicly available materials²¹ before the reports and summaries are provided.
46. For the unidentified witnesses, the Defence certifies that when an agreement is reached, and subject to the Trial Chamber granting this Request, the Defence will expeditiously provide the names of the individuals in advance of the provision of a report and summary.
47. Additionally, the Defence submits that the Chamber shall be assisted by hearing the anticipated Expert evidence. The Defence shall endeavour that the timing of the proposed experts testimony shall be in such a way so as to facilitate adequate preparations by the parties and participants. The Defence submits that this further mitigates any prejudice that the delay in the provision of the reports and summaries could create.

10. *Material generated and used by the experts in relation to this Request, Rule 68(3), and materials from outstanding Requests for Assistance ('RFA')*

48. The Defence also notifies the Trial Chamber that it may seek leave to add items to its LoE in relation to the Expert witnesses who are subject to this Request. The Defence anticipates that this may include, but is not limited to, additional items requested by the Experts in the course of their duties and/or materials that they may provide the Defence in relation to the preparation of their reports.
49. Pending receipt of the expert reports and their review by the Defence, the Defence notifies the Trial Chamber and parties of its provisional intent to submit the reports referred to in the present filing through Rule 68(3) as has been the practice in the proceedings.
50. [REDACTED].²² The Defence recalls that the Trial Chamber acknowledged the Prosecution's undertaking not to "oppose reasonable requests to add witnesses or evidence filed after the Defence Deadline which were affected by the outstanding RFAs".²³

²¹ [REDACTED].

²² [REDACTED].

²³ ICC-02/04-01/15-1254, para. 17.

V. CONCLUSION AND REQUEST

51. In compliance with ICC-02/04-01/15-1021, para. 7 directions, the Defence hereby provides:

- a. The Defence List of Evidence in Annex A to this filing;
- b. The Defence List of Witnesses in Annex B to this filing;
- c. Summaries of the witnesses on the Defence List of Witnesses in Annex C to this filing;
- d. Has disclosed the items it intends to use during its evidence presentation; and
- e. Certifies that all necessary witness information forms with respects to the witnesses in Annex B have been completed and given to the VWU;

52. The Defence requests leave to add expert witnesses to its LoW and materials to its LoE at a later time as described in paragraphs 18 to 50 above.

Respectfully submitted,



.....
 Hon. Krispus Ayena Odongo
 On behalf of Dominic Ongwen

Dated this 4th day of June, 2018
 At Gulu, Uganda