

**Cour
Pénale
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**International
Criminal
Court**

Original: English

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

Date: **6 July 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

**Public Redacted Version of “Defence Request to Add 14 Items to its List of Evidence”,
filed on 4 July 2018**

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 Defence for Dominic Ongwen ('Defence') seeks leave from the Trial Chamber IX ('Trial Chamber') to add 14 items to its list of evidence ('LoE').
2. The addition of the items to the Defence LoE is justified because a) the items are of significant probative value and relevance in light of the charges brought against Mr Ongwen and the defence; b) the timing of the request,¹ and the nature and amount of material to be added cause no prejudice to the Prosecution and participants;² c) the Defence disclosed the items in a timely manner³ and notified the Prosecution and participants in advance;⁴ and d) the fair and expeditious conduct of the proceedings is best served by permitting the Defence to add the items to its LoE.⁵

II. CONFIDENTIALITY

3. Pursuant to Regulation 23bis of the Regulations of the Court ('RoC'), the Defence files this request confidentially, because it contains evidentiary information which has been disclosed as confidential.

III. PROCEDURAL HISTORY

4. On 4 June 2018, on a deadline set by the Trial Chamber,⁶ the Defence filed, *inter alia*, its LoE. In the accompanying filing, the Defence requested leave to add experts and materials to its LoE at a later time.⁷ [REDACTED].⁸

¹ The Defence filed its original LoE one month ago, on 4 June 2018; See also, ICC-02/04-01/15-1275, p. 4: (The Single Judge decided that the first block for the Defence presentation of evidence will run from 27 September 2018).

² The items comprise of 10 original (Dutch) versions of English translations of medical and forensic records recognised as formally submitted by e-mail decision for P-0446; one expert report, along with one open-source article; one audio recording that is in the Prosecution's possession since 23 November 2007; and one document containing a signature of D-0033.

³ ICC-02/04-01/15-1293-Conf (with confidential Annex A). ICC-02/04-01/15-1297 (with confidential Annex A).

⁴ ICC-02/04-01/15-1272-Conf-Red-Corr, para. 19.

⁵ Article 64(2) of the Statute; See also, ICC-02/04-01/15-600, para. 14.

⁶ Email from the Trial Chamber on 24 May 2018, at 09:58; ICC-02/04-01/15-1199-Red, para. 84; ICC-02/04-01/15 1021, paras 67.

⁷ ICC-02/04-01/15-1272-Conf-Red-Corr, para. 11.

⁸ ICC-02/04-01/15-1272-Conf-Red-Corr, para. 19.

5. On 21 June 2018, the Single Judge issued the ‘Decision on Requests Following Final Defence Witness and Evidence Lists and, *inter alia*, held that “[the Single Judge] will not pre-approve additions to the LoW and LoE prior to the Defence having the names and materials available. Accordingly, this request is dismissed *in limine*, without prejudice to a complete request being filed a later time.”⁹

IV. APPLICABLE LAW

6. The Trial Chamber allowed nine amendments¹⁰ to the Prosecution’s LoE, after the original deadline for the submission of its LoE. Amendments to LoEs, after the deadline for the submission of the list, have been accepted in a number of cases, pursuant to, *inter alia*, Articles 64(2),¹¹ 64(6)(d),¹² 64(6)(f)¹³ and/or 69(3)¹⁴ of the Statute.
7. As previously found by the Trial Chamber, a determination of whether leave to add items to the LoE should be granted is not a decision under Regulation 35 of the Regulations of the Court (‘RoC’). Rather, the relevant factors for the Trial Chamber’s determination include, *inter alia*, “the time when the addition is sought, the nature and amount of the material concerned, the intended purpose for the Prosecution’s requested reliance on such material as well as its prospective significance in light of the charges brought against the accused and the rest of the available evidence.”¹⁵
8. The Trial Chamber also held that “[e]rrors, while unfortunate and hopefully isolated and limited, may also occur and, insofar as made in good faith and in the absence of indications of an abuse on the part of the Prosecution, may also justify late insertions into the list of evidence. In other words, it would be unreasonable for the Chamber, to which a truth-seeking function is assigned by the Statute, to determine that potentially relevant evidence could not, under any

⁹ ICC-02/04-01/15-1289, para. 7.

¹⁰ ICC-02/04-01/15-600 (Decision on requests 577 and 585); ICC-02/04-01/15-619 (Decision on request 604); ICC-02/04-01/15-906 (Decision on request 899); ICC-02/04-01/15-956 (Decision on request 933); ICC-02/04-01/15-957 (Decision on request 927); ICC-02/04-01/15-1073 (Decision on request 1024); E-mail Decision from 21 December 2017 (Decision on request to add UGA-OTP-0282-0219); and ICC-02/04-01/15-1202 (Decision on request 1098). The Defence notes that ICC-02/04-01/15-707 denied a Prosecution request to add two witnesses and submit their statements.

¹¹ ICC-02/11-01/15-183-Red.

¹² ICC-01/04-01/07-2325-Red, para 15.

¹³ ICC-01/05-01/13-1191, para 10.

¹⁴ ICC-01/04-01/07-2325-Red, para 15.

¹⁵ ICC-02/04-01/15-610, para. 10.

circumstance, be used by the Prosecution at trial if not itemised in the list of evidence three months before the trial commences.”¹⁶

V. SUBMISSIONS

9. The Defence seeks leave to add 14 items to the Defence LoE for the following reasons:

1. Items UGA-D26-0015-0948 and UGA-D26-0015-0885

10. Item UGA-D26-0015-0948 is a second expert report provided by experts D26-0041 and D26-0042. Item UGA-D26-0015-0885 is an open-source material referenced¹⁷ by the Defence experts in their second report. The Defence disclosed these two items to the Prosecution and participants on 29 June 2018,¹⁸ as indicated in the Defence’s promise that these items [REDACTED]¹⁹
11. The expert report, along with the open-source article, details the forensic assessment of Mr Ongwen’s mental health. Furthermore, the Defence reiterates its submission from filing 1272²⁰ and avers that it instructed its experts to further examine Mr Ongwen, and provide a second report. Since the Victims’ cases concluded on 24 May 2018, the Defence also asked its experts to review and analyse the testimony of the Victims’ experts. The Defence experts finalised their report and transmitted it to the Defence on 28 June 2018.
12. There is no prejudice that arises from adding the expert report, along with the open-source article, to the Defence LoE. First, the Defence gave notice of intent to add and disclose the second expert report by the end of June 2018 in its filing 1272.²¹ Second, the Defence duly disclosed the expert report to the Prosecution and participants one day after it received it.²² Third, the timing of the request to add the report, along with the article, occurs one month after the submission of the original LoE and almost three months before the start of the Defence presentation of evidence.

¹⁶ ICC-02/04-01/15-619, para. 8.

¹⁷ UGA-D26-0015-0948, pp. 30, 35.

¹⁸ ICC-02/04-01/15-1293-Conf (with confidential annex A), para. 2: ([REDACTED]).

¹⁹ ICC-02/04-01/15-1272-Conf-Red-Corr, para. 19.

²⁰ ICC-02/04-01/15-1272-Conf-Red-Corr, paras 11, 18-20.

²¹ ICC-02/04-01/15-1272-Conf-Red-Corr, paras 11, 18-20.

²² ICC-02/04-01/15-1293-Conf (with confidential annex A).

13. Moreover, D26-0041 and D26-0042 are projected to appear as witnesses with numbers 61 and 62 in the proposed order of appearance of witnesses, which is at the end of the Defence presentation of evidence.²³ In this regard, this aligns with the Trial Chamber's ruling on the Prosecution's prior request to add material to its LoE, which found that where the materials sought to be added "are not connected to the very first witnesses expected to testify in the case, which will enable the Defence to conduct any further necessary limited investigations prior to the appearance of the witnesses of relevance to these items."²⁴ Therefore, the addition of expert materials will not prejudice the Prosecution and participants.
14. In light of the above, the request for addition is in the interests of justice and preserves the fair and expeditious conduct of the proceedings because the expert material is highly relevant and probative in proving the Defence's Article 31(1)(a) affirmative defence.

2. UGA-D26-0017-0086

15. Item UGA-D26-0017-0086 is an audio recording provided by the Prosecution *ex parte* only to the Defence²⁵ pursuant to the Single Judge's orders.²⁶ The audio recording contains information that is of significant probative value and relevant to the preparation of defence of duress.²⁷
16. The Defence regrets its inadvertent omission to add the audio recording to its LoE on 4 June 2018. The Defence notes that the audio recording reflects the corresponding English²⁸ and Acholi²⁹ transcripts, which were added to the Defence LoE and duly disclosed to the Prosecution on 4 June 2018.³⁰

²³ E-mail Communication, OTP vs Ongwen, DEF List of Witnesses, from [REDACTED] to Trial Chamber IX Communications, on 2 July 2018, at 15:56.

²⁴ ICC-02/04-01/15-600, para. 16.

²⁵ The Defence notes that item UGA-D26-0017-0086 was disclosed as 'Conf Ex Parte-D26 and OTP', because it was provided by the Prosecution *ex parte* only to the Defence. ICC-02/04-01/15-1293-Conf (with confidential Annex A): (The Defence disclosed the audio recording on 29 June 2018).

²⁶ ICC-02/04-01/15-1207, para. 9: ("[T]he Single Judge considers it appropriate for the Prosecution to provide the Sound Recording and RFA 24"); ICC-02/04-01/15-1234, p. 6: ("**ORDERS** the Prosecution to disclose RFA 24, the UPDF report, the sound recording and any transcripts of the sound recording via E-Court"). The Defence is cognizant of the Single Judge's decisions ordering to withhold the identity of the UPDF informant from the Defence. However, the Defence notes that the Prosecution failed to comply with the Single Judge's order to disclose RFA 24, the UPDF report, the sound recording and any transcripts of the sound recording *via* E-Court, while maintaining necessary redactions of UPDF informant's identity and associated meta-data in E-Court.

²⁷ ICC-02/04-01/15-1290, paras 13, 16.

²⁸ UGA-D26-0017-0052.

²⁹ UGA-D26-0017-0056.

³⁰ ICC-02/04-01/15-1274-Conf (with confidential Annex A).

17. Being mindful of the ‘Initial Directions on the Conduct of the Proceedings,’³¹ the Single Judge held that “[t]he Single Judge considers the transcripts at issue to be duly disclosed since the Prosecution disclosed them as soon as they became available. Accordingly, the listing of the two transcriptions on the List of Evidence is not a prerequisite for the formal submission of the radio interview into evidence, and the submission of the latter will extend automatically to the transcripts. However, for reasons of clarity the addition of the two transcripts to the List of Evidence is welcome.”³² In light of this, the Defence avers that the addition of the audio recording will avoid any confusion³³ as to the status of the transcripts³⁴ and preserve the fair and expeditious conduct of the proceedings.
18. Finally, the addition of the audio recording to the LoE will not prejudice the Prosecution as it has been in possession of the *ex parte* audio recording since 23 November 2007.³⁵

3. 10 Medical and Forensic Records

19. Items 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 are original versions (in Dutch) of the medical and forensic records from the ICC Detention Center. The corresponding translations (in English) of these records were formally recognised as submitted by e-mail decision for witness P-0446, on 27 March 2018.³⁶
20. The Defence seeks leave to add these 10 records to its LoE now because of an inadvertent omission. However, the Defence notes that the records have been available to the Prosecution and participants since the beginning of April 2017. Additionally, the Defence recalls paragraph

³¹ ICC-02/04-01/15-497, para. 30: (“In principle, recognising the formal submission of audio-visual material automatically includes recognising the formal submission of any associated transcripts or translations which were duly disclosed. This would be the case irrespective of whether these transcripts/translations were on the list of evidence or formally submitted, though it is clearly preferable to do both so there is no confusion as to their status.”).

³² ICC-02/04-01/15-906, para. 4.

³³ ICC-02/04-01/15-906, para. 4; ICC-02/04-01/15-1202, para. 18.

³⁴ UGA-D26-0017-0052 and UGA-D26-0017-0056.

³⁵ ICC-02/04-01/15-1189-Red, para. 6.

³⁶ Corresponding English translations: 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; E-mail communication, Decision on Submitted Materials for P-0446, from Trial Chamber IX Communications to parties and participants, 27 March 2018, at 9:54.

30 of the Single Judge's 'Initial Directions on the Conduct of the Proceedings',³⁷ and avers that even if the addition of 10 original versions in Dutch is not strictly necessary, it is still preferable to avoid any confusion as to their status.³⁸ Thus, there is no prejudice that arises from the addition of these items.

4. UGA-D26-0025-0181

21. Item UGA-D26-0025-0181 is a signature of D-0033, along with the signatures of two Defence Team members and the Registry interpreter. The witness applied his signature to this item on 8 June 2018 during a short interview. The signature contained on the item from the witness is highly probative and relevant to the reliability and credibility of the Prosecution evidence, Prosecution witnesses and the Defence witness.
22. This item could not have been on the Defence's 4 June 2018 LoE as it was created on 8 June 2018. The Defence regrets not having the witness sign a paper earlier for presentation to the witness and Trial Chamber during his examination.
23. The addition of item UGA-D26-0025-0181 does not prejudice the Prosecution. The Prosecution interviewed D-0033 from 1-4 July 2016,³⁹ and a similar item is already contained in the Defence LoE.⁴⁰
24. In sum, the Defence avers that the Trial Chamber will preserve the fair and expeditious conduct of the proceedings by permitting the Defence to add 14 items to its LoE. The Prosecution and participants still have adequate time to prepare and are not duly prejudiced by their addition.

VI. RELIEF SOUGHT

25. For the reasons stated above, the Defence respectfully requests leave from the Trial Chamber to add items 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-

³⁷ ICC-02/04-01/15-497, para. 30: ("In principle, recognising the formal submission of audio-visual material automatically includes recognising the formal submission of any associated transcripts or translations which were duly disclosed. This would be the case irrespective of whether these transcripts/translations were on the list of evidence or formally submitted, though it is clearly preferable to do both so there is no confusion as to their status.").

³⁸ ICC-02/04-01/15-906, para. 4; ICC-02/04-01/15-1202, para. 18.

³⁹ See UGA-OTP-0269-0764-R01.

⁴⁰ UGA-OTP-0266-0468.

0015-0095, UGA-D26-0015-0096, UGA-D26-0015-0097, UGA-D26-0015-0885, UGA-D26-0015-0948, UGA-D26-0017-0086, and UGA-D26-0025-0181 to the Defence LoE.

Respectfully submitted,



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

Dated this 6th day of July, 2018
At Kampala, Uganda