

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-02/04-01/15**
Date: **19 October 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, with CONFIDENTIAL Annexes A, and B

Public Redacted Version of ‘Defence Second Request to Add 79 Items to its List of Evidence’, filed on 3 October 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 79 items to its list of evidence ('LoE').
2. The addition of the items to the Defence LoE is warranted because
 - a) of the intended purpose as well as the prospective significance of the items in light of the charges brought against Mr Ongwen;
 - b) the timing of the request, and the nature and amount of material to be added cause no prejudice to the Prosecution and Participants;
 - c) the Defence disclosed the items in a timely manner and notified the Prosecution and Participants in advance; and
 - d) the fair and expeditious conduct of the proceedings is best served by permitting the Defence to add the items to its LoE.¹

II. CONFIDENTIALITY

3. Pursuant to Regulation 23bis(1) of the Regulations of the Court ('RoC'), the Defence files this request confidentially, because it contains evidentiary information which has been disclosed as confidential. A public redacted version will be filed in due course.

III. PROCEDURAL HISTORY

4. On 4 June 2018, on a deadline set by the Trial Chamber,² 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.³ The Defence also gave notice about the expertise and intended testimonies of the Defence witnesses D-0060⁴ and D-0133.⁵

¹ Article 64(2) of the Statute; ICC-02/04-01/15-600, para. 14.

² 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.

³ ICC-02/04-01/15-1272-Conf-Red-Corr, para. 11.

⁴ ICC-02/04-01/15-1272-Conf-Red-Corr, paras 29-31.

⁵ ICC-02/04-01/15-1272-Conf-Red-Corr, paras 32-34.

5. In this regard, the Defence also noted in the accompanying filing to its LoE that “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 materials before the reports and summaries are provided.”⁶
6. 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.”⁷

IV. APPLICABLE LAW

7. The Trial Chamber allowed nine amendments⁸ 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),⁹ 64(6)(d),¹⁰ 64(6)(f)¹¹ and/or 69(3)¹² of the Statute.
8. 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 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.”¹³

⁶ ICC-02/04-01/15-1272-Conf-Red-Corr, paras 45 and 46.

⁷ ICC-02/04-01/15-1289, para. 7.

⁸ 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.

⁹ ICC-02/11-01/15-183-Red.

¹⁰ ICC-01/04-01/07-2325-Red, para 15.

¹¹ ICC-01/05-01/13-1191, para 10.

¹² ICC-01/04-01/07-2325-Red, para 15.

¹³ ICC-02/04-01/15-610, para. 10.

9. 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 circumstance, be used by the Prosecution at trial if not itemised in the list of evidence three months before the trial commences.”¹⁴
10. Finally, the Single Judge also held 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.”¹⁵

V. SUBMISSIONS

11. The Defence seeks leave to add 79 items to the Defence LoE for the following reasons:

A. Defence Expert D-0133

1. Item UGA-D26-0015-1022

12. The Defence seeks the addition of an expert report from D-0133. The proposed expert and the report provide a unique perspective and insight into the conscription and use of child-soldiers in the LRA. This, *inter alia*, relates to the war crimes charges 69¹⁶ and 70.¹⁷
13. The Defence obtained a final and signed version of the report on 22 September 2018. The report was disclosed to the Prosecution *via* Ringtail on 24 September 2018 and released to the Prosecution and Participants *via* eCourt on 25 September 2018.¹⁸ The Defence processed and disclosed the report at the earliest opportunity, in order to allow the Prosecution and Participants to properly review and assess its contents.

¹⁴ ICC-02/04-01/15-619, para. 8.

¹⁵ ICC-02/04-01/15-1314, para. 7.

¹⁶ ICC-02/04-01/15-533, paras 706-732.

¹⁷ ICC-02/04-01/15-533, paras 733-738.

¹⁸ ICC-02/04-01/15-1346 (with Confidential Annex A).

14. Given that a) the Defence gave notice of intent to add and disclose the expert report in its filing 1272,¹⁹ b) the Defence duly disclosed the expert report to the Prosecution and Participants two days after it received it,²⁰ and c) the expert D-0133 is projected to appear as witness during the middle of the third evidence block, which is approximately in the middle of February 2019, there is no prejudice that arises from adding the expert report to the Defence LoE.²¹

2. Item UGA-D26-0015-1032

15. This item is terms of reference for Defence expert D-0133. The Defence received the final and signed document on 11 July 2018. Hence, the delayed request to add this item to the Defence LoE. Nonetheless, the Defence notes and regrets the ‘last-minute’ disclosure of this item.²² Due to an internal oversight, it omitted to disclose this item together with D-0133’s report on 24 September 2018.
16. The Defence avers that addition of this item to its LoE will assist the Trial Chamber, Parties and Participants during D-0133’s testimony and will enhance the conduct of proceedings.

B. Defence Expert D-0060

1. Items UGA-D26-0018-3901, UGA-D26-0018-3888, UGA-D26-0018-3462, UGA-D26-0018-3581, UGA-D26-0018-3612, UGA-D26-0018-3803, UGA-D26-0018-3836, and UGA-D26-0018-3874

17. The Defence seeks addition of an item UGA-D26-0018-3901. This item is a report prepared by the Defence expert D-0060. The Defence gave notice of intent to disclose and add the report in its filing accompanying the LoE.²³
18. The report discusses the importance of cosmological space in the LRA and provides an assessment of how particular rules and regulations emanating from spirits through Joseph Kony led to an understanding of what was ‘normal’ and acceptable and how abductees, including Mr

¹⁹ ICC-02/04-01/15-1272-Conf-Red-Corr, paras 32-34, and 45.

²⁰ ICC-02/04-01/15-1346 (with Confidential Annex A).

²¹ See ICC-02/04-01/15-600, para. 16: (This aligns with the Trial Chamber’s ruling on the Prosecution’s prior request to add material to its LoE, which found that where 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 of these items”).

²² ICC-02/04-01/15-1356.

²³ ICC-02/04-01/15-1272-Conf-Red-Corr, paras 29-31, and 45-47.

Ongwen, grow to believe in the powers of the spirits.²⁴ Information provided in the report is also relevant to the preparation of affirmative defence under Article 31(1)(d) of the Statute.

19. Moreover, the Defence requests the addition of item UGA-D26-0018-3888. This item is a CV of the Defence expert D-0060 and provides relevant information about D-0060's expertise.
20. The Defence also seeks the addition of items UGA-D26-0018-3462, UGA-D26-0018-3581, UGA-D26-0018-3612, UGA-D26-0018-3803, UGA-D26-0018-3836, and UGA-D26-0018-3874. These items are open-source materials (*i.e.* articles, reports, and a book) used and referred to by D-0060 in the above expert report.²⁵
21. The Defence obtained the final and signed report on 17 July 2018, the CV on 18 July 2018, and six open-source materials on 27 May 2018. All eight items were duly disclosed to the Prosecution and Participants on 20 July 2018.²⁶ Additionally, D-0060 is projected to appear as a witness on 19 November 2018, which is the last Defence witness in 2018. This will have given the Prosecution and Participants approximately four months to comprehensively review and assess the substance of these items. Therefore, the addition of the eight items related to D-0060 is in line with the Trial Chamber's jurisprudence²⁷ and causes no prejudice to the Prosecution and Participants.

2. *Item UGA-D26-0015-1039*

22. This item is terms of reference for Defence expert D-0060. Addition of this item to the Defence LoE will assist the Trial Chamber, Parties and Participants during the testimony of the Defence expert D-0060 and make the proceedings run fairly and expeditiously. The Defence received the final and signed document on 5 August 2016.
23. Even so, the Defence regrets the delayed disclosure of the item. As with the item related to Expert D-0133 (UGA-D26-0015-1032), the Defence omitted to disclose this item together with D-0060's expert report, CV, and six open-source items on 20 July 2018.

²⁴ ICC-02/04-01/15-1272-Conf-Red-Corr, paras 29-31.

²⁵ UGA-D26-0018-3901, at 3908.

²⁶ ICC-02/04-01/15-1311.

²⁷ See ICC-02/04-01/15-600, para. 16: (This aligns with the Trial Chamber's ruling on the Prosecution's prior request to add material to its LoE, which found that where 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 of these items".)

C. Terms of Reference for Defence Experts D-0041, D-0042, and D-0139

1. Item UGA-D26-0015-1035

24. The Defence seeks the addition of item UGA-D26-0015-1035. This item is terms of reference for Defence experts D-0041 and D-0042. Similarly, as with terms of references for experts D-0060 and D-0133, the Defence regrets the delayed disclosure and addition of this item to its LoE. Due to an internal management failure, the Defence omitted to disclose this item together with D-0041's and D-0042's expert report and related items on 29 June 2018.²⁸
25. However, given that the Prosecution and Participants have had access to D-0041's and D-0042's expert report (*i.e.* the focus of their expertise)²⁹ since 29 June 2018, the Defence notes that no prejudice arises by adding the terms of reference to its LoE. On the contrary, addition of this item to the Defence LoE will potentially assist the Trial Chamber and all involved parties during the testimony of D-0041 and D-0042.

2. Item UGA-D26-0015-1043

26. The Defence also seeks the addition of item UGA-D26-0015-1043. This item is terms of reference for Defence expert D-0139. The Defence received the final and signed version of this document on 1 September 2018 and decided to disclose it together with the above terms of references,³⁰ on 2 October 2018.³¹ Moreover, D-0139's terms of reference are being disclosed in advance of his expert report.
27. The Defence is cognisant of the post 4 June Deadline addition. However, given that the Defence gave notice of intent to add items related to its experts, including D-0139,³² and that D-0139 is not set to testify in 2018, the Defence avers that no prejudice arises from adding this item to the Defence LoE.

²⁸ ICC-02/04-01/15-1299, paras 10-14.

²⁹ [REDACTED]

UGA-D26-0015-1035, UGA-D26-0015-1039, and UGA-D26-0015-1032.

³¹ ICC-02/04-01/15-1356.

³² ICC-02/04-01/15-1272-Conf-Red-Corr, paras 26-28.

D. Defence Witness D-0008 Statement

1. Item UGA-D26-0010-0307

28. The Defence seeks the addition of item UGA-D26-0010-0307. This item is a statement of Defence witness D-0008. The statement contains information that are of prospective significance and probative value in light of the charges brought against Mr Ongwen.
29. The statement was disclosed to the Prosecution and Participants on 6 January 2016.³³ The Defence notes that it asked for submission of UGA-D26-0010-0307 as a Rule 68(2)(b) witness,³⁴ the Prosecution did not object to the request³⁵ and the Trial Chamber granted the request on 2 July 2018.³⁶
30. Finally, the Defence seeks leave to add this item to its LoE only now because of an inadvertent omission, which it regrets. However, the Defence notes that D-0008's statement has been available to the Prosecution and Participants since the beginning of January 2016. Thus, the addition of D-0008's witness statement to LoE will not prejudice the Prosecution and Participants.

E. Report of the Registry on Mr Ongwen's Voluntary Surrender

1. Item UGA-D26-0017-0087

31. The item UGA-D26-0017-0087 is Annex 10³⁷ to the *Report of the Registry on the voluntary surrender of Dominic Ongwen and his transfer to the Court*,³⁸ filed on 23 January 2015.³⁹ The Defence seeks addition of this item in LoE because it contains information that is of an exculpatory nature and has prospective significance in relation to the line of submissions that the Defence will present as affirmative defences during its 'Defence case'.
32. In particular, the Defence considers the section [REDACTED] of significant relevance to the *Ongwen* case. The relevant parts note that [REDACTED]

³³ ICC-02/04-01/15-393 (with confidential Annex A).

³⁴ ICC-02/04-01/15-1271-Conf, para. 16.

³⁵ ICC-02/04-01/15-1282-Red, para. 6.

³⁶ ICC-02/04-01/15-1294, para. 7.

³⁷ ICC-02/04-01/15-189-Conf-Anx10.

³⁸ ICC-02/04-01/15-189.

³⁹ Annex 10 to the Report of the Registry on the voluntary surrender of Dominic Ongwen and his transfer to the Court was reclassified as confidential on 15 December 2015, pursuant to Decision ICC-02/04-01/15-369.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] and that [REDACTED]

[REDACTED]

[REDACTED]

33. Moreover, the Defence submits that this item was prepared by the Registry, as the neutral body of this Court, directly at the time of Mr Ongwen's voluntary surrender. Therefore, it provides a specific insight into Mr Ongwen's cognizance between his escape from the LRA and his transfer to the ICC-DC.
34. It is because of an evidentiary management failure that the Defence omitted to include this report in its LoE on 4 June 2018. After conducting an additional review of all the pleadings in the *Ongwen* case, the Defence discovered this report. Regrettably, the discovery occurred after the 4 June Deadline.⁴² However, given that the Prosecution had access to this item as of 23 January 2015 and that the Defence disclosed the item to the Prosecution and Participants on 20 July 2018,⁴³ the Defence avers that there is no prejudice that arises from adding this item to its LoE.

F. Materials related to the conjugal relations between Mr Ongwen and witnesses/victims

1. *Items UGA-D26-0018-3406, UGA-D26-0018-3407, UGA-D26-0018-3410, UGA-D26-0018-3414, UGA-D26-0018-3418, UGA-D26-0018-3421, UGA-D26-0018-3423, UGA-D26-0018-3426, UGA-D26-0018-3428, UGA-D26-0018-3438, UGA-D26-0018-3440, UGA-D26-0018-3441, UGA-D26-0018-3442, UGA-D26-0018-3444, UGA-D26-0018-3445, UGA-D26-0018-3446, UGA-D26-0018-3448, UGA-D26-0018-3451, UGA-D26-0018-3453, UGA-D26-0018-3455, UGA-D26-0018-3458, and UGA-D26-0018-3460*

35. These 22 items are [REDACTED]
- [REDACTED] Their relevance relates to, *inter alia*, sexual and gender based crimes. [REDACTED]
- [REDACTED]
- [REDACTED]

⁴⁰ UGA-D26-0017-0087, at 0091.

⁴¹ UGA-D26-0017-0087, at 0092.

⁴² See, ICC-02/04-01/15-1302-Conf-Exp, para. 5.

⁴³ ICC-02/04-01/15-1311.

36. This is evidence that originated in the course of this trial and relates to witnesses who are also categorized as victims. [REDACTED]

37. [REDACTED]
[REDACTED] Hence, the delayed request to add these items to the Defence LoE. The Defence disclosed the items to the Prosecution and Participants on 20 July 2018. Moreover, the Prosecution and Participants [REDACTED]
[REDACTED] Therefore, there is no prejudice to the Prosecution and Participants by adding these items to the Defence LoE.

2. Item UGA-OTP-0282-0522-R01

38. The Defence seeks the addition of item UGA-OTP-0282-0522-R01 to its LoE because it relates to the issue of the purported nature of the relationship between Mr Ongwen and certain individuals who are concerned by several charges and the above 22 items. In particular, this item is [REDACTED]

⁴⁴

39. The Prosecution disclosed this item to the Defence on 15 August 2018, which is after the 4 June deadline. The post 4 June disclosure prevented the Defence from adding the document to its LoE on 4 June 2018. Notably, even if the Prosecution had access to this document and the information therein from 31 January 2018, it disclosed the report on 15 August 2018, only after 7 months.

⁴⁴ UGA-OTP-0282-0522-R01, at 0522.

G. Other Relevant Materials

1. *Items UGA-OTP-0196-0021, UGA-OTP-0283-1632, UGA-OTP-0263-2671-R01, UGA-OTP-0263-2681-R01, UGA-OTP-0263-2685-R01, UGA-OTP-0263-2688, UGA-OTP-0263-2689-R01, and UGA-OTP-0150-0047*

40. The eight items primarily relate to the collection of witnesses and evidentiary items by the Prosecution and its intermediaries to support the 70 charges and eight modes of liability against Mr Ongwen. They also provide an understanding into the conduct of the Prosecution's liaison persons and intermediaries, such as, potential witness P-0078.
41. P-0078, acting as an intermediary and a liaison person, collected evidentiary evidence and several Prosecution witnesses specifically for the purpose of the *Ongwen* case (*i.e.* covering the charged crimes and charged period in this case).⁴⁵ As the evidentiary items sought to be added show, P-0078 was also [REDACTED]
[REDACTED] The addition of such items will therefore enable the Defence to examine the legality and credibility of the evidence collected by the Prosecution and its intermediaries against Mr Ongwen.
42. In particular, item UGA-OTP-0196-0021 is [REDACTED]
[REDACTED] The Prosecution disclosed this item to the Defence on 15 August 2018. Therefore, the 15 August disclosure prevented the Defence from assessing the substance of the report before the 4 June deadline. Had this item been available to the Defence at that time, the Defence would have included it on its LoE.
43. Even so, the Defence avers that the item is relevant⁴⁶ and should be added to the LoE because it [REDACTED]
[REDACTED]

⁴⁵ [REDACTED]

ICC-02/04-01/15-T-179-CONF-ENG ET, p. 64, lines 11-23: [REDACTED]

[REDACTED] see also, ICC-02/04-01/15-T-179-CONF-ENG ET, p. 65.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

44. Item UGA-OTP-0283-1632 is a UPDF report prepared by [REDACTED] (P-0078). This item discusses the conduct and actions of the LRA during the charged period [REDACTED].⁵⁰ It, *inter alia*, notes that [REDACTED].⁵¹
45. This item was disclosed to the Defence on 20 August 2018, after the 4 June Deadline. From reading the chain of custody, the Prosecution obtained this item from [REDACTED] (P-0078) on 2 July 2018. This explains the post 4 June disclosure on the Prosecution side. Even so, had this item been available to the Defence before 4 June, the Defence would have included it on its LoE. In light of this, the Defence requests the Trial Chamber to allow the Defence to add this item to its LoE.
46. Items UGA-OTP-0263-2671-R01 and UGA-OTP-0263-2681-R01 are e-mail communications between the Prosecution and [REDACTED] (P-0078). These e-mail communications shed light into [REDACTED] (P-0078's) professional conduct as a Prosecution intermediary, a liaison person with the Government of Uganda, and a handler of double-informants, when collecting evidence for the purpose of the *Ongwen* case. They thus form an essential part of the Defence

⁴⁷ UGA-OTP-0196-0028-R01, at 0031 (This statement was included in the Defence LoE on 4 June 2018).

⁴⁸ UGA-OTP-0196-0028-R01, at 0031.

⁴⁹ UGA-OTP-0196-0028-R01, at 0031.

⁵⁰ UGA-OTP-0283-1632, at 1636.

⁵¹ UGA-OTP-0283-1632, at 1639.

assessment of the legality and credibility of the Prosecution's investigations of the alleged crimes against Mr Ongwen.

47. Item UGA-OTP-0150-0047 is P-0078's witness statement that was made on 24 June 2005. Among other issues, P-0078 states that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵² The Defence considers this statement relevant to preparation of its defence against the charges in this case and therefore requests its addition at this later stage.

48. The Prosecution disclosed the item UGA-OTP-0150-0047 on 15 October 2015, the item UGA-OTP-0263-2671-R01 on 15 July 2016, and the item UGA-OTP-0263-2681-R01 on 25 July 2016. Therefore, the Defence had access to these three items before the 4 June Deadline. However, the Defence seeks addition of the items now because it inadvertently omitted to include the items on its LoE. Given that the Prosecution and Participants had access to these items since July 2016, the Defence avers that no prejudice arises from adding the items to its LoE at this time point in the proceedings.

49. Similarly, items UGA-OTP-0263-2685-R01, UGA-OTP-0263-2688, and UGA-OTP-0263-2689-R01 are Prosecution's investigation reports that discuss [REDACTED] (P-0078's) professional conduct and involvement as a Prosecution intermediary and a liaison person with the Government of Uganda. The information contained in these reports is significantly relevant to the preparation of the defence because it enables the Defence to analyse and assess the credibility and legality of the Prosecution's investigations – with an essential assistance from [REDACTED] (P-0078) – of the crimes allegedly committed by Mr Ongwen.⁵³

⁵² UGA-OTP-0150-0047, at 0048.

⁵³ ICC-02/04-01/15-T-179-CONF-ENG ET, p. 63, lines 5-20 [REDACTED]

50. Item UGA-OTP-0263-2685-R01, for example, notes that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
⁵⁴ Item UGA-OTP-0263-2688 notes that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁵⁵
51. Item UGA-OTP-0263-2689-R01 also informs that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁵⁶
52. Finally, during its investigations, the Defence came upon information about [REDACTED] (P-0078) being used by the Prosecution as an interpreter during a Prosecution interview. When the Defence requested information about interpreters, specifically noting and inquiring about [REDACTED] (P-0078),⁵⁷ the Prosecution refused to acknowledge the truth of the information and stated that it did not believe that it was disclosable pursuant to Rule 77 of the RPE.⁵⁸
53. The Prosecution disclosed the items UGA-OTP-0263-2685-R01, UGA-OTP-0263-2688, and UGA-OTP-0263-2689-R01 on 15 July 2016. Therefore, it is the Defence's inadvertent oversight that prevented the Defence from adding these items to its LoE on 4 June 2018. The Defence regrets this omission. Nonetheless, the proceedings in this case are constantly evolving. The Defence diligently continues to review and re-assess all the disclosed items (above 25,000 items) as it comes across items that become relevant or corroborative of the

[REDACTED]
[REDACTED]
UGA-OTP-0263-2685-R01, at 2686.

⁵⁵ UGA-OTP-0263-2688.

⁵⁶ UGA-OTP-0263-2689-R01, at 2689.

⁵⁷ Confidential Annex A: Email from the Defence to Prosecution titled, "Rule 77 Disclosure Request Related to Interpreters/Intermediaries," sent on 21 April 2017 at 15h38 CET.

⁵⁸ Confidential Annex B: Email from the Prosecution to Defence titled, "RE: Rule 77 Disclosure Request Related to Interpreters/Intermediaries," received on 12 May 2017 at 12h12 CET.

newly disclosed evidentiary items by the Prosecution⁵⁹ or newly collected evidentiary items during the Ongwen Defence investigations. This is the case of the above items.

54. In particular, the item UGA-OTP-0196-0021 [REDACTED] [REDACTED]⁶⁰ is a good example of how a newly disclosed⁶¹ evidentiary item completes a forensic picture of other related documents⁶² that were accessible to the Defence, Prosecution and Participants beforehand and makes them relevant to the preparation of the defence.

55. Finally, the Defence concludes that no prejudice in terms of an effective review and assessment of the above items arises because the Prosecution and Participants had access to these items since 15 July 2016. Accordingly, the Defence requests the Trial Chamber to add these items to its LoE.

2. *Items UGA-OTP-0284-0681, UGA-OTP-0284-0684, UGA-OTP-0284-0685, UGA-OTP-0284-0686, UGA-OTP-0284-0687, UGA-OTP-0284-0689, UGA-OTP-0284-0694, UGA-OTP-0284-0698, UGA-OTP-0284-0699, UGA-OTP-0284-0701, UGA-OTP-0284-0703, UGA-OTP-0284-0704, UGA-OTP-0284-0712, UGA-OTP-0284-0714, UGA-OTP-0284-0715, UGA-OTP-0284-0716, UGA-OTP-0284-0717, UGA-OTP-0284-0719, UGA-OTP-0284-0720, UGA-OTP-0284-0721, UGA-OTP-0284-0723, UGA-OTP-0284-0724, UGA-OTP-0284-0730, UGA-OTP-0284-0732, UGA-OTP-0284-0734, UGA-OTP-0284-0735, UGA-OTP-0284-0738, and UGA-OTP-0284-0743*

56. These 28 items were disclosed to the Defence on 9 August 2018.⁶³ As such, the items were not available to the Defence to evaluate before the 4 June Deadline⁶⁴ set by the Trial Chamber. Had the items been available at that time, the Defence would not have needed to justify their inclusion on its LoE and thus the Defence submits that no justification beyond noting the late provision should be required now.

57. Nevertheless, in the alternative, the Defence notes that the items, as previously described in a request for late disclosure remedies,⁶⁵ are relevant because they relate to the essential issue of

⁵⁹ Prosecution Disclosures after the 4 June Deadline: Trial Rule 77 Packages 91, 92, 93, 94, 95, 96, 97, and 98.

⁶⁰ See above, paras 42-43.

⁶¹ Disclosed by the Prosecution on 15 August 2018.

⁶² UGA-OTP-0263-2671-R01, UGA-OTP-0263-2681-R01, UGA-OTP-0263-2685-R01, UGA-OTP-0263-2688, and UGA-OTP-0263-2689-R01.

⁶³ ICC-02/04-01/15-1319-Conf-AnxA.

⁶⁴ Email of 24 May 2018 subject line 'RE: Defence Request for a Two Day Extension for the 31 May 2018Deadline'. For a summary, see ICC-02/04-01/15-1272-Conf-Red, paras 3-6.

⁶⁵ ICC-02/04-01/15-1329-Conf-Corr, paras 74-75.

duress. This is because they describe fears of retribution for leaving the LRA, the network of collaborators and informants that informed upon escapees, that Mr Odhiambo and Mr Ongwen are ‘mere tools’ of Joseph Kony, and examples of attempted personal and actual collective punishment being visited upon individual’s families and villages for escaping from the LRA.⁶⁶ Other items relate to testimony led by the Defence⁶⁷ or relate to witnesses who have testified.⁶⁸

58. Additionally, the Defence has requested that it will be permitted to recall witnesses should a review of the material in combination with the trial transcripts identify missed opportunities.⁶⁹

The Prosecution has accepted [REDACTED]

[REDACTED]

[REDACTED]⁷⁰ and acknowledges:

[T]he theoretical possibility that the Defence may petition the Trial Chamber to recall particular witnesses, or add particular items to its list of evidence, as a result of this error. If such requests are made, and reasonably arise from the late disclosure of this information, the Prosecution will not oppose them.⁷¹

59. It therefore follows that the material should also be available on the Defence LoE for this eventuality.

3. *Items UGA-D26-0022-0444, UGA-D26-0022-0445, UGA-D26-0022-0448, UGA-D26-0022-0450 and UGA-D26-0025-0334*

60. The five items relate to Defence witness D-0079. All items were disclosed to the Prosecution and Participants on 28 September 2018⁷² after an oral request made by the CLRV and confirmed by the Defence in writing on 14 September 2018.⁷³ As the request was made by a CLRV, and the CLRV noted that she was going to disclose the document identified above as item UGA-D26-0025-0334 to the Prosecution, and she did so in filing ICC-02/04-227-Conf by giving the reference to the victim application, the Defence avers that it is only proper to allow these items onto its LoE.

⁶⁶ ICC-02/04-01/15-1329-Conf-Corr, para. 75.

⁶⁷ UGA-OTP-0284-0738; see, ICC-02/04-01/15-1329-Conf-Corr, para. 76.

⁶⁸ UGA-OTP-0284-0743.

⁶⁹ ICC-02/04-01/15-1329-Conf-Corr, para.29 and 81(e).

⁷⁰ ICC-02/04-01/15-1341-Conf, para. 25.

⁷¹ ICC-02/04-01/15-1341-Conf, para. 25.

⁷² ICC-02/04-01/15-1353.

⁷³ Email from Defence to CLRV titled, “Follow-up on D-0079,” sent on 14 September 2018 at 12h58 CET.

61. The Defence states that the items are relevant as the items corroborate the expected testimony of D-0079, [REDACTED]. There is no prejudice faced by the Prosecution as it has had access to UGA-D26-0022-0445 and UGA-D26-0025-0334 since 29 July 2015 by virtue of Decision ICC-02/04-01/15-280.⁷⁴ In relation to the other three items, those are corroborative of the previous two items and are three pages in total. While the witness is scheduled to testify during the second witness block, the limited amount of pages and specificity of the documents do not require an extensive amount of time to be properly reviewed.
62. As such, the Defence requests the abovementioned five items be added to its LoE.

VI. RELIEF SOUGHT

63. For the reasons stated above, the Defence respectfully requests leave from the Trial Chamber to add the following 79 items to its LoE:

UGA-D26-0015-1022, UGA-D26-0015-1032, UGA-D26-0018-3901, UGA-D26-0018-3888, UGA-D26-0018-3462, UGA-D26-0018-3581, UGA-D26-0018-3612, UGA-D26-0018-3803, UGA-D26-0018-3836, UGA-D26-0018-3874, UGA-D26-0015-1039, UGA-D26-0015-1035, UGA-D26-0015-1043, UGA-D26-0010-0307, UGA-D26-0017-0087, UGA-D26-0018-3406, UGA-D26-0018-3407, UGA-D26-0018-3410, UGA-D26-0018-3414, UGA-D26-0018-3418, UGA-D26-0018-3421, UGA-D26-0018-3423, UGA-D26-0018-3426, UGA-D26-0018-3428, UGA-D26-0018-3438, UGA-D26-0018-3440, UGA-D26-0018-3441, UGA-D26-0018-3442, UGA-D26-0018-3444, UGA-D26-0018-3445, UGA-D26-0018-3446, UGA-D26-0018-3448, UGA-D26-0018-3451, UGA-D26-0018-3453, UGA-D26-0018-3455, UGA-D26-0018-3458, UGA-D26-0018-3460, UGA-OTP-0282-0522-R01, UGA-OTP-0196-0021, UGA-OTP-0283-1632, UGA-OTP-0263-2671-R01, UGA-OTP-0263-2681-R01, UGA-OTP-0263-2685-R01, UGA-OTP-0263-2688, UGA-OTP-0263-2689-R01, UGA-OTP-0150-0047, UGA-OTP-0284-0681, UGA-OTP-0284-0684, UGA-OTP-0284-0685, UGA-OTP-0284-0686, UGA-OTP-0284-0687, UGA-OTP-0284-0689, UGA-OTP-0284-0694, UGA-OTP-0284-0698, UGA-OTP-0284-0699, UGA-OTP-0284-0701, UGA-OTP-0284-0703, UGA-OTP-0284-0704, UGA-OTP-0284-0712, UGA-OTP-0284-0714, UGA-OTP-0284-0715, UGA-OTP-0284-0716, UGA-OTP-0284-0717, UGA-OTP-0284-0719, UGA-OTP-0284-0720, UGA-OTP-0284-0721, UGA-OTP-0284-

⁷⁴ The Defence notes that UGA-D26-0022-0445 is contained within the witness's victim application.

0723, UGA-OTP-0284-0724, UGA-OTP-0284-0730, UGA-OTP-0284-0732, UGA-OTP-0284-0734, UGA-OTP-0284-0735, UGA-OTP-0284-0738, UGA-OTP-0284-0743, UGA-D26-0022-0444, UGA-D26-0022-0445, UGA-D26-0022-0448, UGA-D26-0022-0450, and UGA-D26-0025-0334.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 19th day of October, 2018

At Nairobi, Kenya