

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **15 May 2019**

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

Defence Third Request to Add 12 Items 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 Defence for Dominic Ongwen ('Defence') hereby seeks leave from the Trial Chamber IX ('Trial Chamber') to add 12 items to its list of evidence ('LoE').
2. The addition of the items to the Defence LoE is warranted for the following reasons:
 - a) 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 LRVs;
 - c) the Defence's prior disclosure of the items in a timely manner and notification of the Prosecution and LRVs in advance; and
 - d) because the fair and expeditious conduct of the proceedings is best served by permitting the Defence to add the items to its LoE.¹

II. PROCEDURAL HISTORY

3. On 4 June 2018 the Defence filed, *inter alia*, its LoE in accordance with the deadline set by the Trial Chamber.² 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-0060,⁴ D-0139⁵ and D-0133.⁶
4. In this respect, 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

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 26-28.

⁶ ICC-02/04-01/15-1272-Conf-Red-Corr, paras 32-34.

the materials already in the case and scrutinise publicly available materials before the reports and summaries are provided.”⁷

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.”⁸

III. APPLICABLE LAW

6. The Trial Chamber allowed nine amendments⁹ to the Prosecution’s LoE, after the original deadline for the submission of its LoE. Amendments to LoE following the deadline for the submission of the list, have been accepted in a number of cases, pursuant to, *inter alia*, Articles 64(2),¹⁰ 64(6)(d),¹¹ 64(6)(f)¹² and/or 69(3)¹³ of the Statute.
7. As previously held by the Trial Chamber, a determination of whether leave to add items to the LoE should be granted is not to be made 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.”¹⁴
8. The Trial Chamber also found 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

⁷ ICC-02/04-01/15-1272-Conf-Red-Corr, paras 45 and 46.

⁸ ICC-02/04-01/15-1289, para. 7.

⁹ 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.

¹⁰ ICC-02/11-01/15-183-Red.

¹¹ ICC-01/04-01/07-2325-Red, para 15.

¹² ICC-01/05-01/13-1191, para 10.

¹³ ICC-01/04-01/07-2325-Red, para 15.

¹⁴ ICC-02/04-01/15-610, para. 10.

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.”¹⁵

9. As a final point, 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.”¹⁶

IV. SUBMISSIONS

10. The Defence seeks leave to add 12 items to the Defence LoE for the following reasons:

A. Items related to UGA-D26-P-0139

1. Item UGA-D26-0015-1164

11. The Defence seeks the addition of *curriculum vitae* of the Defence’s expert witness D-0139. The *curriculum vitae* provides additional information about D-0139’s expertise to the Trial Chamber, Prosecution and LRVs. The Defence obtained the final version on 21 November 2018. The Defence duly disclosed the document to the Prosecution and LRVs on 20 December 2018.¹⁷
12. Given that a) the Defence gave notice of intent to call D-0139 as its expert witness;¹⁸ b) the Defence disclosed D-0139’s *curriculum vitae* to the Prosecution and LRVs before the expected testimony of D-0139; and c) D-0139 is expected to testify during the week of 27 May 2019, there is no prejudice that arises from adding D-0139’s *curriculum vitae* to the Defence LoE.¹⁹

¹⁵ ICC-02/04-01/15-619, para. 8.

¹⁶ ICC-02/04-01/15-1314, para. 7.

¹⁷ Defence Disclosure: ‘2018-12-20 Rule 78 Pack 56’.

¹⁸ ICC-02/04-01/15-1272-Conf-AnxA, paras 26-28, and para. 45.

¹⁹ 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.”

2. *Item UGA-D26-0015-1172*

13. This item is an expert report prepared by the Defence's expert witness D-0139. The Defence gave notice of intent to disclose and add the report in its filing accompanying the original LoE.²⁰ Moreover, the Defence duly disclosed the report to the Prosecution and LRVs on 20 December 2018.²¹
14. The report discusses the emergence of the IDP camps in Northern Uganda. It also details the reasons behind the formation of IDP camps and information about the social and political structure of the camps and the sequence of mortality within the camps. Therefore, it has a prospective significance in light of the charges against Mr Ongwen.²²
15. The Defence submits that addition of this item to its LoE will assist the Trial Chamber, the Prosecution and LRVs during D-0139's testimony and will enhance the fair and expeditious conduct of the *Ongwen* proceedings.

B. Items related to UGA-D26-P-0060

Item UGA-D26-0015-1213

16. The Defence also seeks the addition of item UGA-D26-0015-1213. This item is an article written by D-0060 concerning the metaphysical and spiritual realm of the LRA. This article can be of assistance during the examination of other Defence witnesses scheduled to testify in order to obtain a greater understanding of the abovementioned spiritual realm. This article was not available to the Defence before the testimony of expert witness D-0060,²³ as the item became available to the Defence on 17 January 2019.
17. Given the public nature of the document and that the Defence disclosed it to the Prosecution and LRVs on 24 January 2019,²⁴ there is no prejudice that arises from adding the aforementioned article to the Defence LoE at this point.²⁵

²⁰ ICC-02/04-01/15-1272-Conf-Red-Corr, paras 26-28 and 45-47.

²¹ Defence Disclosure: '2018-12-20 Rule 78 Pack 56'.

²² ICC-02/04-01/15-1272-Conf-Red-Corr, paras 26-28.

²³ D-0060 testified on 19 November 2018.

²⁴ Defence Disclosure: '2019-01-24 Rule 78 Pack 58'.

²⁵ 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

C. Item related to UGA-OTP-P-0038

Item UGA-OTP-0285-0136

18. The item is a letter addressed to the Prosecution regarding its Request for Assistance ('RFA'), dated 14 October 2018. The information therein is related to some of the witnesses that already testified or are set to testify in the *Ongwen* case. Given that this item is dated 14 October 2018 and was disclosed by the Prosecution to the Defence and LRVs on 19 October 2018,²⁶ there is no prejudice caused by adding this item to its LoE. Had the item been available to the Defence prior to the original LoE deadline, it would have included it on its LoE.

D. Items related to UGA-OTP-P-0078

19. The three 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.

Items UGA-OTP-0069-0773-R01, UGA-D26-0017-0136 and UGA-D26-0017-0139

20. The Defence seeks the addition of item UGA-OTP-0069-0773-R01. This item is an interview provided by the Prosecution potential witness P-0078 to the Prosecution on 8-9 December 2004. In the Defence view, it provides essential and relevant information about the alleged informants and collaborators active during the conflict. The Prosecution disclosed this item on 15 October 2015.²⁷ However, given that this item was available to all the parties since 15 October 2015, there is no prejudice that arises from adding this item to the LoE.
21. The Defence also seeks the addition of item UGA-D26-0017-0136. The item is a letter of a Defence request of Disclosure pursuant to Rule 77 materials that relate to the interpreters used by the Prosecution in the context of witness statements and transcripts, the disclosure of information that would detail, if any, the political party affiliation of the interpreters used or currently in use by the Prosecution, the employment history of the interpreters and the immediate disclosure of all the persons who testified for the Prosecution, identified as a

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."

²⁶ Prosecution Disclosure: 'Trial Rule 77 package 101 19 October 2018'.

²⁷ Prosecution Disclosure: 'Pre-Confirmation INCR package 12 15 October 2015'.

potential witness, or a potential interviewee that had contact with the Prosecution's potential witness P-0078. The Defence disclosed this letter to the Prosecution and participants on 24 January 2019.²⁸ That said, given that the Prosecution was the recipient of this letter dated 21 April 2017, the Defence avers that the addition of this letter to its LoE does not cause prejudice.

22. Item UGA-D26-0017-0139 is a reply to UGA-D26-0017-0136 by the Prosecution. It provides responses to the disclosure requests of the Defence which are articulated in UGA-D26-0017-0136. UGA-D26-0017-0139 is dated 11 May 2017. Given that the response was written by the Prosecution, and that the recipient is the Defence and it disclosed the item to the Prosecution and LRVs on 24 January 2019,²⁹ no prejudice arises by including the item on its LoE.

E. Other relevant items

1. *Items UGA-D26-0015-1212, UGA-D26-0018-4000, UGA-D26-0018-3999, UGA-OTP-0285-0169, UGA-OTP-0286-0014*

23. Item UGA-D26-0015-1212 is an excerpt of the opening of the trial for the *Ongwen* case. The Defence intends to use this to demonstrate the non-guilty plea entered by Mr Ongwen.
24. The Defence avers that the item is of public nature and available on open source website being YouTube and has been disclosed to the Prosecution and LRVs on 10 January 2019.³⁰ Additionally, given that the Prosecution and LRVs were present during the opening of the trial prejudice does not arise by adding the video excerpt to the Defence LoE.³¹
25. Regarding the item UGA-D26-0018-4000, it concerns the Article 56 witness P-0235 (D-0004) and the alleged request of the witness to meet with Mr Ongwen. It was obtained by the Defence on 24 December 2018 and disclosed to the Prosecution and parties on 24 January 2019,³² and thus the Defence avers that no prejudice arises from adding the item to its LoE.
26. Item UGA-D26-0018-3999 is an email communication between the CLRV and the Defence regarding item UGA-D26-0018-4000 discussed above concerning the Prosecution witness P-

²⁸ Defence Disclosure: '2019-01-24 Rule 78 Pack 58'.

²⁹ Defence Disclosure: '2019-01-24 Rule 78 Pack 58'.

³⁰ Defence Disclosure: '2019-01-10 Rule 78 Pack 57'.

³¹ 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."

³² Defence Disclosure: '2019-01-24 Rule 78 Pack 58'.

0235 (D-0004). This item was disclosed by the Defence to the Prosecution and LRVs on 24 January 2019,³³ and adding the email communication on the Defence LoE does not result in prejudice.

27. Item UGA-OTP-0285-0169 is a report which discusses the LRA collaboration of witness D-0028. Given that the Prosecution disclosed this report to the Defence on 19 October 2018,³⁴ after the conclusion of D-28's testimony on 4 October 2018³⁵ is the reason why the Defence did not include this document in its previous request to add items to its LoE. Since the Prosecution had this report in its possession since 14 October 2018 and disclosed it to the Defence and LRVs on 19 October 2018, no prejudice arises by adding the report to the Defence LoE.³⁶
28. Item UGA-OTP-0286-0014 is a Request for Information or Assistance by the Prosecution to the Government of Uganda for information on individuals which include, *inter alia*, Defence witness D-0028. This document was disclosed to the Defence on 26 October 2018³⁷ following the 4 June 2018 deadline. That said, based on the chain of custody, the Prosecution obtained the item on 19 October 2018 which explains the post 4 June disclosure. Had the item been available to the Defence prior to the 4 June deadline, it would have included it on its LoE. Due to this, the Defence respectfully requests the Trial Chamber to allow the Defence to add this item to its LoE.

V. RELIEF SOUGHT

29. For the reasons stated above, the Defence respectfully requests leave from the Trial Chamber to add the following 12 items to its LoE:

UGA-D26-0015-1164, UGA-D26-0015-1172, UGA-D26-0015-1213, UGA-OTP-0285-0136, UGA-OTP-0069-0773-R01, UGA-D26-0017-0136, UGA-D26-0017-0139, UGA-D26-0015-1212, UGA-D26-0018-4000, UGA-D26-0018-3999, UGA-OTP-0285-0169, UGA-OTP-0286-0014.

³³ Defence Disclosure: '2019-01-24 Rule 78 Pack 58'.

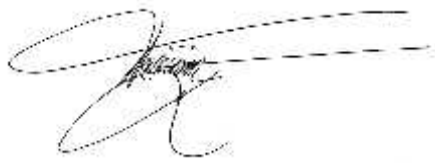
³⁴ Prosecution Disclosure: 'Trial Rule 77 package 101 19 October 2018'.

³⁵ Transcript of hearing, 4 October 2018, ICC-02/04-01/15-T-182-CONF-ENG.

³⁶ 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".)

³⁷ Prosecution Disclosure: 'Trial Rule 77 package 102 26 October 2018'.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 15th day of May, 2019
At The Hague, Netherlands