

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **21 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

Prosecution's Response to the "Defence Third Request to Add 12 items to its List of Evidence" (ICC-02/04-01/15-1513)

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Benjamin Gumpert

Counsel for Dominic Ongwen

Mr Krispus Ayena Odongo
Mr Charles Taku
Ms Beth Lyons

Legal Representatives of Victims

Mr Joseph Akwenyu Manoba
Mr Francisco Cox

Common Legal Representatives for Victims

Ms Paolina Massidda
Ms Jane Adong

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Ms Caroline Walter
Mr Orchlon Narantsetseg

The Office of Public Counsel for the Defence

Mr Xavier-Jean Keita

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Defence for Dominic Ongwen ('Defence') has requested leave to add 12 items to its list of evidence ('LOE'). The items include documents related to Defence expert witnesses D-0139 and D-0060, Defence witness D-0028, Prosecution witnesses P-0038 and P-0078 as well as other material the Defence considers relevant.
2. The Prosecution requests the Chamber to:
 - a. Grant the Defence request in relation to the material related to witness D-0139,¹ D-0028,² P-0038³ and P-0078;⁴ and
 - b. Reject the Defence request to add the remainder of the items to its LOE.
3. The Prosecution adopts the procedural history and applicable law stipulated in the Defence Third Request to Add 12 items to its LOE ('Defence Third Request').⁵

Submissions in relation to the remainder of the items

4. The Prosecution is opposed to the addition of UGA-D26-0015-1213, UGA-D26-0015-1212, UGA-D26-0018-4000 and UGA-D26-0018-3999 to the Defence LOE. The Defence has not established the intended purpose of their addition or their prospective significance in the light of the charges against Dominic Ongwen and the rest of the available evidence.⁶
5. **UGA-D26-0015-1213** is an article written by D-0060 and published two months after he completed his testimony before this Chamber. In the article D-0060 addresses

¹ UGA-D26-0015-1164; UGA-D26-0015-1172.

² UGA-OTP-0285-0169; UGA-OTP-0286-0014.

³ UGA-OTP-0285-0136.

⁴ UGA-OTP-0069-0773-R01; UGA-D26-0017-0136; UGA-D26-0017-0139.

⁵ ICC-02/04-01/15-1513, paras 3-9.

⁶ ICC-02/04-01/15-1314, para 7.

aspects of his testimony and criticises the Prosecution for not having cross-examined other Defence witnesses that testified about the spiritual elements in the LRA.⁷

6. The intended purpose of relying on an item is one of the factors for (dis)allowing additions to the LOE.⁸ The Defence does not state the intended purpose for relying on this article. D-0060 has already testified. The article is testimonial in nature and cannot be submitted through another witness or bar table motion. Therefore, its addition to the LOE is pointless unless D-0060 is recalled. Moreover it would be inappropriate to rely on the article, given that (i) the Chamber, Parties and Participants have not had the opportunity to question D-0060 about its contents, (ii) the utility and relevance of cross-examination is a legal matter to be decided by the Chamber, not a witness and (iii) it may open the floodgates to witnesses supplementing their testimonies by making public statements of this nature about them.

7. **UGA-D26-0015-1212** is a video excerpt of the 6 December 2016 hearing in this trial, the content of which is already captured in transcript ICC-02/04-01/15-T-26-ENG ET at pages 16 and 17. The Presiding Judge restricted the Defence from using the video excerpt during the examination of D-0133 and directed that the transcript of the 2016 hearing be referred to instead.⁹ Dominic Ongwen's not-guilty plea has been on the case record since 2016 and need not be further demonstrated now in 2019, through a video excerpt of the same trial proceedings. Adding this video excerpt to the LOE will be of no assistance to the Chamber, Parties or Participants during the testimony of any of the witnesses scheduled to testify and neither will it enhance the proceedings in this trial.

⁷ UGA-D26-0015-1213 at 1214-1218.

⁸ ICC-02/04-01/15-619, para 10.

⁹ ICC-02/04-01/15-T-203-ENG ET, page 69, line 22- page 70, line 21.

8. **UGA-D26-0018-4000** and **UGA-D26-0018-3999** are documents related to an alleged request by witness P-0235 to meet Dominic Ongwen. The Prosecution recalls that Pre-Trial Chamber II has issued a contact restrictions regime¹⁰ that is still binding on this witness and Dominic Ongwen.¹¹ The Defence has not established the intended purpose and prospective significance of the items in light of the charges against Dominic Ongwen. Nor has it demonstrated how the fair and expeditious conduct of the proceedings in this trial is best served by adding them to the LOE.

Conclusion

9. For the reasons set out above, the Prosecution requests the Chamber to reject the Defence request for leave to add items UGA-D26-0015-1213, UGA-D26-0015-1212, UGA-D26-0018-4000 and UGA-D26-0018-3999 to its LOE.



Fatou Bensouda, Prosecutor

Dated this 21st day of May 2019

At The Hague, The Netherlands

¹⁰ Decision concerning the restriction of communications of Dominic Ongwen, 3 August 2015, ICC-02/04-01/15-283; Order concerning a request by the Prosecutor under regulation 101(2) of the Regulations of the Court, 8 June 2015, ICC-02/04-01/15-242.

¹¹ Decision on Mr Ongwen's Request to Add New Persons to his Non-Privileged Telephone Contact List, 4 October 2016, ICC-02/04-01/15-553; Decision on issues related to the restriction of communications of Dominic Ongwen, 30 May 2016, ICC-02/04-01/15-450-Red, para. 4.