

**Cour
Pénale
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**International
Criminal
Court**

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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

**CLRV's Response to "Defence Third Request to Add 12 Items
to its List of Evidence"**

Source: Office of Public Counsel for Victims

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 Benjamin Gumpert

Counsel for the Defence

Mr Krispus Ayena Odongo

Mr Chief Charles Achaleke Taku

Ms Beth Lyons

Legal Representatives of the Victims

Ms Paolina Massidda

Ms Jane Adong

Mr Joseph Akwenyu Manoba

Mr Francisco Cox

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

Mr Orchlon Narantsetseg

Ms Caroline Walter

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Common Legal Representative of Victims¹ (the “CLRV”) opposes the Defence’s “Third Request to Add 12 Items to its List of Evidence” (the “Request”).² In relation to 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 and UGA-OTP-0286-0014, the CLRV submits that the Defence does not demonstrate its need to both use them during the direct examination of the prospective witnesses and have them formally submitted following the conclusion of the actual witnesses’ testimonies. Thus, the Defence fails to fulfil the legal requirements established by the Chamber for the inclusion of items in the List of Evidence. Moreover, the Request is filed too late with regard to UGA-D26-0015-1164 and UGA-D26-0015-1172. Finally, the inclusion of these items in the Defence’s List of Evidence will cause undue prejudice to the interest of the victims participating in the proceedings.

II. PROCEDURAL BACKGROUND

2. On 15 May 2019, the Defence filed the Request.³

3. On 16 May 2019, the Chamber shortened the deadline to submit responses to the Request until 21 May 2019.⁴

¹ See the “Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, p. 19; the “Decision on issues concerning victims’ participation” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; the “Second decision on contested victims’ applications for participation and legal representation of victims” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-384, 24 December 2015, pp. 20-22; and the “Decision on the ‘Request for a determination concerning legal aid’ submitted by the legal representatives” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-445, 26 May 2016, para. 13.

² See the “Defence Third Request to Add 12 Items to its List of Evidence”, No. ICC-02/04-01/15-1513, 15 May 2019 (the “Request”).

³ *Idem.*

⁴ See the email from the Chamber sent on 16 May 2019 at 9:11.

III. SUBMISSIONS

A. Applicable Law on the Inclusion of Items in the List of Evidence

4. The Single Judge of the Chamber previously held that *“the purpose of a list of evidence is to have a document itemising all the materials which the filer of the document intends to submit as evidence during a trial. Accordingly, if a party or participant does not wish to submit an item as evidence (or have it recognised as formally submitted, in accordance with the evidentiary system established by this Chamber) there is no need to include it on a list of evidence. [...] [There is no] established practice before this Chamber that items which are only intended to be used during the questioning of witnesses are always included on the list of evidence. To the contrary, the Prosecution’s lists of materials intended to be used during the examination of its witnesses regularly contained items which were not on the Prosecution’s list of evidence. [...]”*.⁵

5. The Single Judge further clarified that *“[i]f the Defence does not seek to formally submit a duly disclosed item into evidence, it need not include it on its list of evidence as a pre-requisite to using it during Defence witness examinations [...] If the Defence seeks to both use and formally submit an item which has yet to be submitted at trial, then this item must be on the Defence list of evidence. This is irrespective of whether the same document appeared on the Prosecution’s list of evidence”*.⁶ This evidentiary regime *“provides certainty to the other participants as to the universe of materials which could be submitted to the Chamber as evidence”*.⁷

⁵ See the “Decision on Defence Request to Deny the Use of Items from the CLRV List of Evidence” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1241, 25 April 2018, paras. 9-10. See also the “Decision Setting the Commencement Date of the Trial” (Trial Chamber IX), No. ICC-02/04-01/15-449, 30 May 2016 paras. 5-8 and the “Decision on the ‘Prosecution’s Request to Add Transcripts and Seven Additional Documents to its List of Evidence’” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-619, 2 December 2016, paras. 7 to 10, 15-16 and 20.

⁶ See the email from the Chamber sent on 4 May 2018 at 12:30.

⁷ See the email from the Chamber sent on 25 May 2018 at 09:33.

B. Merits of the Request

6. In the Request, the Defence seeks, among others, the addition of item UGA-D26-0015-1213 (an article written by D-0060 concerning the metaphysical and spiritual realm of the LRA) which “*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.*”⁸ In other words, the Defence does not concretely seek to use it during its direct examination of specific witnesses or have it recognised as formally submitted in relation to the actual witness (D-0060) in accordance with the applicable evidentiary regime set out by the Chamber. Rather, the Defence simply stipulates that this item *can be of assistance* during the examination of other Defence’s witnesses. Therefore, the Request with regard to item UGA-D26-0015-1213 fails to fulfil the most important legal criterion for the inclusion of materials in the Defence’s List of Evidence. Additionally, the Defence’s arguments as to the unavailability of the item before the testimony of expert witness D-0060 and its disclosure to the Prosecution and the Victims in the past are irrelevant and inconsequential. In case the Defence simply intends to use it during the examination of other prospective witnesses, there is no need to include it in its List of Evidence *as per* the Chamber’s previous rulings.⁹

7. Moreover, the CLRV submits that item UGA-D26-0015-1213 exemplifies in general the nature of other items contained in the Request. Consequently, the same reasoning applies to the following items:

- a. UGA-OTP-0285-0136 (a letter addressed to the Prosecution regarding its Request for Assistance that allegedly contains information *related to some of the witnesses that already testified or are set to testify*);
- b. UGA-OTP-0069-0773-R01 (an interview of potential witness P-0078 to the Prosecution that allegedly contains information about *some alleged informants and collaborators active during the conflict*);

⁸ See the Request, *supra* note 2, para. 16.

⁹ See *supra* paras. 4-5.

- c. UGA-D26-0017-0136 (a letter of a Defence request of Disclosure pursuant to Rule 77 materials that relate to *the interpreters used by the Prosecution*);
- d. UGA-D26-0017-0139 (a reply to UGA-D26-0017-0136 by the Prosecution);
- e. UGA-D26-0015-1212 (an *excerpt* of the opening of the trial);
- f. UGA-D26-0018-4000 (an alleged request of witness P-0235 to meet with Mr Ongwen *which appeared on a news article and whose testimony is concluded a long time ago*);
- g. UGA-D26-0018-3999 (an email communication between the CLRV and the Defence regarding item UGA-D26-0018-4000);
- h. UGA-OTP-0285-0169 (a report which discusses the LRA collaboration of witness D-0028 *whose testimony is concluded*);
- i. UGA-OTP-0286-0014 (a request for information or assistance by the Prosecution to the Government of Uganda for information on individuals which include, *inter alia*, witness D-0028 *whose testimony is already concluded as mentioned above*).

8. The CLRV submits that the Defence fails to show that these items are specifically intended to be used during the examination of the prospective witnesses and to be formally submitted and recognized after the conclusion of the testimonies of the concerned witnesses in accordance with the procedural rules for submission of evidence established by the Chamber.

9. Moreover, the Chamber held that, in deciding whether to allow the inclusion of new items to a party's list of evidence, it must determine *in concreto* if such addition causes an undue prejudice to the procedural rights of other parties and participants, taking into account, *inter alia*, the extent to which the requested addition is opposed by the other parties and participants, the time when the addition is sought, the nature and amount of the material concerned, the intended purpose of the moving party'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.¹⁰

¹⁰ See the "Decision on the 'Prosecution's Request to Add Transcripts and Seven Additional Documents to its List of Evidence'", *supra* note 5, para. 10.

10. In this regard, the CLRV submits that, if allowed, the addition of the items contained in the Request will cause undue prejudice to the victims participating in the proceedings. In fact, due to the unspecific and vague nature of the proposed items, the CLRV is unable to properly prepare for her eventual questioning of the prospective witnesses. For example, the Defence simply states that item UGA-OTP-0285-0136 contains information related to *some of the witnesses who are set to testify* without indicating exactly which witness or witnesses. As for the *witnesses who had already concluded their testimonies* (P-0235 and D-0028), the CLRV was deprived of her ability to use the respective material (UGA-OTP-0285-0136, UGA-OTP-0285-0169 and UGA-OTP-0286-0014) and eventually test the relevant evidence in court. As for the material concerning the individuals who are not called as witnesses (such as *alleged informants and collaborators* or *certain OTP interpreters* referred to in UGA-OTP-0069-0773-R01 and UGA-D26-0017-0136), the CLRV cannot possibly assess the relevance and probative value of the concerned evidence and eventually challenge their content in court either. Thus, the addition of these items will cause undue prejudice to the interests of the victims participating in the case. Therefore, the Request with regard to items 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 and UGA-OTP-0286-0014 should be rejected.

11. As for UGA-D26-0015-1164 (a *curriculum vitae* of the Defence's expert witness D-0139) and UGA-D26-0015-1172 (a report prepared by said expert witness), the Defence does demonstrate its intention to use them during the examination of the expert witness and to have them formally submitted after the conclusion of the expert testimony. Yet, these items became available prior to - and were disclosed on 20 December 2018. In other words, the current Request regarding these items is filed five months after becoming available to the Defence. The Defence does not provide any reasonable explanation about the reasons for which these two items could not have been provided earlier and thus appears to have failed to exercise due diligence.

The Chamber ruled previously that the passage of approximately two months after the deadline for filing a request for addition of items (to the CLRV's List of Evidence) was too late and thus rejected it.¹¹ Consequently, the addition of items UGA-D26-0015-1164 and UGA-D26-0015-1172 to the Defence's List of Evidence should be rejected as well due to their lateness and in the absence of any reasonable explanation about why they could not have been provided at an earlier date than full five months after becoming available to the Defence.

12. Furthermore, the addition of these two items will cause an undue prejudice to the participating victims. Indeed, the Defence moves to include these items which are central to the credibility and the content of the testimony of expert witness D-0139 less than two weeks prior to his appearance in court. While being disclosed in December 2018, the parties and participants did not have any guarantee that the Defence will definitely use them during the questioning of the expert witness and will have them formally submitted since these items were not officially included in the List of Evidence. As held by the Chamber, the definite inclusion of items in the List of Evidence "*provides certainty to the other participants as to the universe of materials which could be submitted to the Chamber as evidence*".¹² As a result, the inclusion of these items by virtue of the Request does not afford the CLRV adequate time to properly prepare for her eventual questioning of expert witness D-0139.

13. In addition, according to the Defence, UGA-D26-0015-1172 discusses the emergence of the IDP camps in Northern Uganda, as well as the reasons behind the creation of IDP camps and their social and political structure etc. In this regard, the CLRV submits that these topics do not form part of the real and contentious issues between the parties and participants and thus have a negligible importance in determining the criminal responsibility of Mr Ongwen within the context of the confirmed charges. Therefore, the addition of these items to the Defence's List of

¹¹ See the "Decision on Defence Request to Deny the Use of Items from the CLRV List of Evidence", *supra* note 5, paras. 1-4 and 12.

¹² See *supra* note 7.

Evidence at this late stage will cause undue prejudice to the fair and expeditious conduct of the proceedings. Consequently, the Request with regard to items UGA-D26-0015-1164 and UGA-D26-0015-1172 should be equally rejected.

IV. CONCLUSION

14. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Chamber to reject the Request in its entirety.

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line drawn underneath the name.

Paolina Massidda
Principal Counsel

Dated this 21st day of May 2019

At Genoa, Italy