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Pénale
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**International
Criminal
Court**



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

Date: **24 May 2019**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR* v. *DOMINIC ONGWEN*

Public

Decision on Defence Third Request to Add 12 Items to its List of Evidence

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX (‘Single Judge’ and ‘Chamber’, respectively) of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 64(2) of the Rome Statute issues the following ‘Decision on Defence Third Request to Add 12 Items to its List of Evidence’.

I. Procedural history and submissions

1. In accordance with the deadline established by the Single Judge,¹ the Defence filed its initial list of evidence on 4 June 2018.² On 15 May 2019, the Defence filed a request to add 12 items to its list of evidence.³
2. On 16 May 2019, the Chamber shortened the response deadline to 21 May 2019.⁴
3. The Office of the Prosecutor (the ‘Prosecution’) filed its response on 21 May 2019,⁵ not opposing eight of the items,⁶ but objecting to the addition to the Defence list of evidence of four items.⁷ Specifically, the Prosecution argues that:
 - UGA-D26-0015-1213, an article written by D-0060 and published after his testimony before the Court, is ‘testimonial in nature’ as it addresses aspects of his testimony and therefore cannot be submitted through another witness or a bar table motion, for which reason addition to the list of evidence is ‘pointless’ unless D-0060 is recalled;⁸
 - UGA-D26-0015-1212 is a video excerpt the use of which by the Defence had been restricted by the Presiding Judge on an earlier occasion, and the addition of

¹ E-mail from Trial Chamber IX Communications, 24 May 2018 at 09:58; Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, ICC-02/04-01/15-1199-Red, para. 84; Preliminary Directions for any LRV or Defence Evidence Presentation, 13 October 2017, ICC-02/04-01/15-1021, para. 7.

² Public Redacted Version of ‘Defence notification of List of Witnesses and Evidence in compliance with ICC-02/04-01/15-1021 and Request for Leave to Add Witnesses its List of Witnesses and Materials to its List of Evidence’, ICC-02/04-01/15-1272-Red2-Corr, notified on 20 June 2018 (with three confidential annexes).

³ Defence Third Request to Add 12 Items to its List of Evidence, ICC-02/04-01/15-1513 (the ‘Request’).

⁴ E-mail from Trial Chamber IX Communications, 16 May 2019 at 09:12.

⁵ Prosecution’s Response to the “Defence Third Request to Add 12 items to its List of Evidence” (ICC-02/04-01/15-1513), ICC-02/04-01/15-1518 (the ‘Prosecution Response’).

⁶ UGA-D26-0015-1164; UGA-D26-0015-1172; UGA-D26-0017-0136; UGA-D26-0017-0139; UGA-OTP-0069-0773-R01; UGA-OTP-0285-0136; UGA-OTP-0285-0169; UGA-OTP-0286-0014.

⁷ UGA-D26-0015-1212; UGA-D26-0015-1213; UGA-D16-0018-3999; UGA-D26-0018-4000.

⁸ Prosecution Response, ICC-02/04-01/15-1518, paras 5-6.

which to the list of evidence will be of no assistance to the Chamber, parties or participants during the testimony of any of the scheduled witnesses;⁹

- UGA-D26-0018-3999 and UGA-D26-0018-4000 relate to an alleged request of P-0235 to meet the accused regarding which a ‘contact restrictions regime’ by the Chamber is still in place, and that the Defence failed to establish the intended purpose and prospective significance of the items.¹⁰

4. The Common Legal Representative of Victims (the ‘CLR V’) responded that the Request in its entirety should be rejected.¹¹ With regard to ten items the CLR V submits that the Defence did not demonstrate the need to use them during direct examination of prospective witnesses and have them submitted,¹² and in relation to two items it avers that the Request was filed too late.¹³ Moreover, it is submitted that inclusion of any of these items on the Defence list of evidence would cause undue prejudice to the interests of the victims participating in the proceedings.¹⁴

II. Analysis

5. The Single Judge recalls the applicable legal framework for considering additions to the list of evidence as set out in previous decisions.¹⁵
6. Turning first to the two items which are related to the testimony of witness D-0139, scheduled to testify in the week of 27 May 2019,¹⁶ the Single Judge is satisfied that the reasons put forward by the Defence suffice to justify their addition to the Defence list of evidence. While the Single Judge recognises that the request to add the items to the list of evidence was submitted some time after their disclosure to the other parties and

⁹ Prosecution Response, ICC-02/04-01/15-1518, para. 7.

¹⁰ Prosecution Response, ICC-02/04-01/15-1518, para. 8.

¹¹ CLR V’s Response to “Defence Third Request to Add 12 Items to its List of Evidence”, 21 May 2019, ICC-02/04-01/15-1520 (the ‘CLR V Response’), para. 1.

¹² CLR V Response, ICC-02/04-01/15-1520, paras 1, 6-8. This concerns items UGA-D26-0015-1212; UGA-D26-0015-1213; UGA-D26-0017-0136; UGA-D26-0017-0139; UGA-D26-0018-3999; UGA-D26-0018-4000; UGA-OTP-0069-0773-R01; UGA-OTP-0285-0136; UGA-OTP-0285-0169; UGA-OTP-0286-0014.

¹³ CLR V Response, ICC-02/04-01/15-1520, paras 1, 11. This concerns items UGA-D26-0015-1164; UGA-D26-0015-1172.

¹⁴ CLR V Response, ICC-02/04-01/15-1520, paras 9-10, 12-13.

¹⁵ Decision on Defence Request to Add 14 Items to its List of Evidence, 24 July 2018, ICC-02/04-01/15-1314, para. 7; Decision on Prosecution’s Request to Add 14 Items to its List of Evidence, 24 August 2017, ICC-02/04-01/15-957, para. 6; Decision on the ‘Prosecution’s Request to Add Transcripts and Seven Additional Documents to its List of Evidence’, 2 December 2016, ICC-02/04-01/15-619, para. 10.

¹⁶ UGA-D26-0015-1164; UGA-D26-0015-1172.

participants, this means also that the parties and participants have been aware of their existence and nature significantly in advance of the testimony of D-0139. In particular, the Single Judge considers that due to the nature of these items – the curriculum vitae and a report of the witness – it was not unreasonable to expect their addition to the Defence list of evidence in advance of the witness’s testimony. With the witness having been scheduled to testify in the first half of 2019 also already at the time the items were disclosed,¹⁷ the Single Judge is therefore of the view that the addition of these two items to the Defence list of evidence is justified and also does not cause any undue prejudice to any of the other parties and participants. Thus, the Request is granted with regard to UGA-D26-0015-1164 and UGA-D26-0015-1172.

7. Turning to the items related to witnesses P-0038, P-0078, and D-0028,¹⁸ the Single Judge is satisfied, also noting the lack of opposition to their addition to the list of evidence by the Prosecution,¹⁹ that the Request provides sufficient justification for their addition to the Defence list of evidence. While the Single Judge takes note of the CLRV’s argument that the Defence failed to demonstrate with which witnesses it would specifically intend to use these items, the Defence does indicate that the items are related to some witnesses who have testified or are yet to testify, as well as provide information with regard to liaison persons and intermediaries.²⁰ The Single Judge also considers that given the nature of these items – one witness statement as well as correspondence to and from the Prosecution, and from the Defence – as well as their disclosure significantly in advance of the Request, no undue prejudice arises to the parties and participants through their inclusion in the Defence list of evidence. For this reason, the Request is granted in relation to UGA-D26-0017-0136, UGA-D26-0017-0139, UGA-OTP-0069-0773-R01, UGA-OTP-0285-0136, UGA-OTP-0285-0169, and UGA-OTP-0286-0014.
8. With regard to the item related to witness D-0060,²¹ the Single Judge notes the argument of the Defence that it ‘can be of assistance’ during upcoming testimonies ‘to obtain a greater understanding of the abovementioned spiritual realm’²² and accepts this to be

¹⁷ See e-mail from Defence to Trial Chamber IX communications, 3 December 2018 at 15:11.

¹⁸ UGA-D26-0017-0136; UGA-D26-0017-0139; UGA-OTP-0069-0773-R01; UGA-OTP-0285-0136; UGA-OTP-0285-0169; UGA-OTP-0286-0014.

¹⁹ Prosecution Response, ICC-02/04-01/15-1518, para. 2.

²⁰ Request, ICC-02/04-01/15-1513, paras 18, 19, 27-28.

²¹ UGA-D26-0015-1213.

²² Request, ICC-02/04-01/15-1513, para. 16.

sufficient justification for the item to be added to the Defence list of evidence. With regard to the argument of the Prosecution that the item is ‘testimonial in nature’,²³ the Single Judge takes note of the clarification as to what would constitute a prior recorded testimony provided by Trial Chamber VII.²⁴ The Single Judge also considers that given the nature of the item – a brief newspaper article by an expert witness – no undue prejudice arises to the parties and participants through its inclusion in the Defence list of evidence. Therefore, the Request is granted with regard to UGA-D26-0015-1213.

9. In relation to the two items concerning witness P-0235,²⁵ the Single Judge considers that the Defence did not in any way specify for which reason their addition to the list of evidence is warranted. Indeed, the Defence merely indicates that in light of the timing of the disclosure of the items, no prejudice is caused to the other parties and participants through their addition to the Defence list of evidence.²⁶ Given the lack of indication for which reason the addition of these items to the Defence list of evidence would be warranted, the Single Judge is of the view that the request to add items UGA-D26-0018-3999 and UGA-D26-0018-4000 must be rejected.
10. In relation to item UGA-D26-0015-1212 the Single Judge notes that it constitutes an excerpt of the video recording of the opening of the trial proceedings on 6 December 2016. With the transcript being the official record of these proceedings,²⁷ and the statements of the accused in the excerpt concerned indeed having been made in front of the Chamber, the Single Judge sees, at this stage, no reason to add the video recording of the hearing to the Defence list of evidence in order to, as indicated by the Defence, ‘demonstrate the non-guilty plea entered by Mr Ongwen’. If the Defence wishes to refer to the statements made by the accused in front of the Chamber, it can always rely on the transcript of the hearing, as it was directed to do by the Chamber on a prior occasion.²⁸ Therefore, the Request is rejected with regard to item UGA-D26-0015-1212.

²³ Prosecution Response, ICC-02/04-01/15-1518, para. 6.

²⁴ Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, ICC-01/05-01/13-1478-Red-Corr, para. 32.

²⁵ UGA-D26-0018-3999; UGA-D26-0018-4000.

²⁶ Request, ICC-02/04-01/15-1513, paras 25-26.

²⁷ See Transcript of hearing, 6 December 2016, ICC-02/04-01/15-T-26-ENG, p. 16, line 3 to p. 17, line 7.

²⁸ See Transcript of hearing, 26 February 2019, ICC-02/04-01/15-T-203-ENG, p. 69, line 22 to p. 70, line 20.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Request with regard to items UGA-D26-0015-1164, UGA-D26-0015-1172, UGA-D26-0015-1213, UGA-D26-0017-0136, UGA-D26-0017-0139, UGA-OTP-0069-0773-R01, UGA-OTP-0285-0136, UGA-OTP-0285-0169, and UGA-OTP-0286-0014; and

REJECTS the Request in relation to UGA-D26-0015-1212, UGA-D26-0018-3999, and UGA-D26-0018-4000.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Single Judge

Dated 24 May 2019

At The Hague, The Netherlands