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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 Redacted Version of Filing No. ICC-02/04-01/15-1561-Conf

**CLRV's Response to "Defence's request to add Expert Witness UGA-D26-P-0158
and Fact Witness UGA-D26-P-0013 to its List of Witnesses and Accompanying
Documents 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:

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I. INTRODUCTION

1. The Common Legal Representative of the Victims¹ (the “CLRv”) opposes the “Defence’s request to add Expert Witness UGA-D26-P-0158 and Fact Witness UGA-D26-P-0013 to its List of Witnesses and Accompanying Documents to its List of Evidence” (the “Defence’s Request”).²

2. The CLRv submits that the Defence fails to identify a proper legal and factual basis for granting its Request at this late stage of the trial proceedings. Moreover, the addition of the two witnesses and related material will cause undue prejudice to the interests of the participating victims by prolonging the proceedings when evidence of a similar nature is already before the Chamber.

II. PROCEDURAL BACKGROUND

3. On 13 October 2017, the Single Judge issued the “Preliminary Directions for any LRV or Defence Evidence Presentation” requesting the Legal Representatives and the Defence to provide a preliminary list of their witnesses and an estimate of how many hours of witness examination they will require by 14 December 2017.³

4. On 27 October 2017, the Defence filed its Observations on the Preliminary Directions requesting, *inter alia*, a revision of the timeline for submitting the

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’s request to add Expert Witness UGA-D26-P-0158 and Fact Witness UGA-D26-P-0013 to its List of Witnesses and Accompanying Documents to its List of Evidence”, No. ICC-02/04-01/15-1559-Conf with Confidential Annexes A to C, 10 July 2019 (the “Defence’s Request”).

³ See the “Preliminary Directions for any LRV or Defence Evidence Presentation” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1021, 13 October 2017, para. 3.

Defence's Final Lists.⁴ On 6 November 2017, in form of a reply to the Prosecution's response, the Defence modified its First Extension Request and further requested the Chamber to change the deadline set for submitting the Defence's Final Lists to 1 June 2018 or three weeks after the close of the Prosecution case, whichever is later.⁵ On 16 November 2017, the Chamber rejected said request.⁶

5. On 6 March 2018, the Chamber decided *proprio motu* to modify the deadline provided in the Preliminary Directions for submitting the Defence's Final Lists to 31 May 2018,⁷ deadline subsequently postponed to the 4th of June 2018.⁸

6. On 10 July 2019, the Defence filed its Request.⁹

III. LEVEL OF CLASSIFICATION

7. This submission is filed confidential in accordance with regulation 23*bis*-2 of the Regulations of the Court, following the level of classification chosen by the Defence. A public redacted version will be filed in due course.

⁴ See the "Defence Observations on the Preliminary Directions for any LRV or Defence Evidence Presentation and Request for Guidance on Procedure for No-case-to-answer Motion", with Confidential Annexes A-C, No. ICC-02/04-01/15-1029-Conf, 27 October 2017, paras. 41-46.

⁵ See the "Defence Reply to Prosecution Response ICC-02/04-01/15-1048-Conf", No. ICC-02/04-01/15-1064-Conf, paras. 23-26.

⁶ See the "Decision on Defence Observations on the Preliminary Directions for any LRV or Defence Evidence Presentation and Request for Guidance on Procedure for No-Case-to-Answer Motion" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1074, 16 November 2017, paras. 20-27.

⁷ See the "Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests", No. ICC-02/04-01/15-1199-Conf, 06 March 2018, para. 84. A public redacted version of the decision was filed on the same day. See No. ICC-02/04-01/15-1199-Red.

⁸ See the Email from Trial Chamber IX, 'RE: Defence Request for a Two Day Extension for the 31 May 2018 Deadline', dated 24 May 2018 at 09:58.

⁹ See the Defence's Request, *supra* note 2.

IV. SUBMISSIONS

8. In the Request, the Defence seeks the addition of an expert witness, D-0158 and of a fact witness, D-0013 to its List of Witnesses (the “LoW”), and of the corresponding related material to its List of Evidence (the “LoE”).

9. Preliminarily, the CLRV underlines that the Defence’s factual and legal basis for requesting the addition of these two witnesses and the related material are imprecise and, therefore, said Request lacks a clear legal foundation.

10. Indeed, on the one hand, citing the jurisprudence of this Chamber on a similar request introduced by the Prosecution, the Defence submits that regulation 35(2) of the Regulations of the Court, which requires the Chamber to determine whether *good cause* has been shown before granting an extension of time-limit, is not applicable to the addition of items and witnesses to the relevant respective lists.¹⁰ On the other hand, however, the Defence places, at the core of its argument in relation to one of the two witnesses, that “*all of the circumstances [...] demonstrate good cause for the addition of D-0158 to the Defence’s LoW*”.¹¹ A showing of *good cause* further appears to be the reading by the Defence of the relevant legal basis for any amendment of a LoW when the latter more recently opposed the CLRV’s request with regard to her own LoW.¹²

11. In its Decision Setting the Commencement Date of the Trial, the Single Judge held that “*Witnesses and evidence may be added to these lists [the LoW and the LoE] after*

¹⁰ *Idem*, *supra* note 2, para. 8.

¹¹ *Ibidem*, para. 14 [we underline].

¹² See the “Public Redacted Version of “Defence Response to the Common Legal Representative’s Request for a Time Extension to File Her List of Witnesses”, filed on 30 January 2018”, No. ICC-02/04-01/15-1157-Red, 30 January 2018, paras. 1 and 13-14: “[...] *the Defence presumes that the list of witnesses required of the LRVs on 2 February 2018, whilst being its final list of witnesses, may be modified if good cause is shown*” [we underline].

the deadline only with leave of the Chamber".¹³ Subsequently, the Chamber specified that "any request to add further items to the List of Evidence is not a request pursuant to Regulation 35 of the Regulations but a request for leave from the Chamber to add items, in accordance with the 30 May Decision. Furthermore, even if Regulation 35 of the Regulations were to be applied, the Chamber notes the jurisprudence of other Chambers, holding that the non-fulfilment of the requirements of Regulation 35 of the Regulations does not mean that a request must be dismissed when a different outcome can be reached while preserving the fair and expeditious conduct of the proceedings".¹⁴ In the same Decision, the Chamber added: "In respect to the Defence argument that the belated addition of P-1 to the witness list does not satisfy the criteria of Regulation 35 of the Regulations, the terms of the 30 May Decision and the Chamber's legal application of it above apply equally to the context of adding witnesses".¹⁵ Finally, the Chamber also established that it must determine such request *in concreto*, having regards to factors such as: (1) the extent to which the requested addition is opposed, (2) the time when the addition is sought, (3) the nature and amount of the material concerned, (4) the intended purpose for the requested reliance on such material, as well as its prospective significance in light of the charges brought against the accused and (5) the rest of the available evidence.¹⁶ These factors should also be assessed having due regard to the existence of exceptional circumstances and sufficient cause as established by the Chamber's jurisprudence. Indeed, in a Decision dated 16 November 2017, the Single Judge noted that, "in exceptional circumstances and with sufficient cause, the Defence may request to

¹³ See the "Decision Setting the Commencement Date of the Trial" (Trial Chamber IX), No. ICC-02/04-01/15-449, 30 May 2016, para. 8 [we underline].

¹⁴ See the "Decision on Prosecution Request to Add Items to its List of Evidence, to include a Witness on its List of Witnesses and to Submit Two Prior Recorded Testimonies under Rule 68(2)(b) and (c)", No. ICC-02/04-01/15-600, 22 November 2016, para. 14 [we underline].

¹⁵ *Idem*, para. 22 [we underline].

¹⁶ See 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, para. 10. See also the Defence's Request, *supra* note 2, para. 16.

[...] *modify its list of witnesses and evidence after the presentation of the Defence case has begun*".¹⁷

12. The CLRV consequently understands that the legal basis on which such a request must be founded is somehow multifaceted. In light of the list of possible criteria the Chamber must use to assess it, the CLRV takes particular issue with the following factors, which will be developed *infra*: (1) whether the request is opposed; (2) the time when the addition of the evidence is sought; (3) the nature of the material and the intended purpose for the requested reliance on such material, as well as its prospective significance in light of the rest of the available evidence. The CLRV further submits that these criteria should be assessed with the additional lens of whether exceptional circumstances and sufficient cause are demonstrated to justify the addition requested.

(1) Whether the request is opposed

13. For the reasons detailed *infra*, the CLRV opposes the Defence's Request.

(2) The time when the addition of the evidence is sought

14. In particular, the CLRV opposes the Defence's Request as untimely, deliberately unjustified and misleading as to the reasons underpinning its late submission at this advanced stage of the proceedings.

15. The CLRV recalls that, in relation to a Request introduced by the Defence, the Single Judge earlier clarified that he "*will not pre-approve additions to the LoW or LoE prior to the Defence having the names and materials available*" and therefore rejected the Defence's Request *in limine*, "*without prejudice to a complete request being filed at a later*

¹⁷ See the "Decision on Defence Observations on the Preliminary Directions for any LRV or Defence Evidence Presentation and Request for Guidance on Procedure for No-Case-to-Answer Motion", *supra* note 6, para. 27 [we underline].

time”.¹⁸ Indeed, a bit more than a year ago and prior to starting the presentation of its case, the Defence notably requested leave to add unidentified potential experts on certain topics and further materials at a later time, arguing that due to reasons outside of its control, it has been unable to fulfil the deadline.¹⁹ At that time, the Defence argued that finding “an expert on SGBC who is both knowledgeable about the culture and the impact of SGBC within the LRA on both women and men”, i.e “on issues which also evoke high levels of emotion can be difficult”, and it requested a variation of the time limits to identify such an expert and submit the relevant material. This statement as to the difficulty encountered dates 4 June 2018 and is also reiterated in the current Request.

16. Firstly, the CLRV notes that, although the Single Judge’s ruling did not specify at which later stage such a request could be admitted, choosing to submit it more than half way into its presentation of evidence, just a few months before the completion of its case is, according to all accounts, late – especially and specifically when nothing seems to have prevented the Defence from doing so at a much earlier stage.

17. With regard to the addition of D-0158, the CLRV underlines that the work and researches of [REDACTED] have been known to the Defence at least and at the latest since September 2016, in other words, almost three years ago and in any case almost two years before the submission of its final LoW. [REDACTED];²⁰ [REDACTED].²¹ In the Defence’s Request, however, interestingly, the latter only indicates that part of said material was recognised by the Chamber as formally submitted in relation to D-0133 on 22 March 2019, and somehow leads the reader to understand that the

¹⁸ See the “Decision on Requests Following Final Defence Witness and Evidence Lists” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1289, 21 June 2018, para. 7.

¹⁹ See the “Corrected version of ‘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”’, No. ICC-02/04-01/15-1272-Red2-Corr, 20 June 2018, paras. 12-17 and 40-43.

²⁰ [REDACTED].

²¹ [REDACTED].

Defence itself, like the Prosecution, the Legal Representatives of Victims and the Chamber, might have become aware of it only from that later date.²² In this regard, the CLRV notes the unconcealed absence of due diligence when the Defence alleges that sourcing for such an expert was very difficult and that it was still searching for a Sexual and Gender Based Crimes (“SGBC”) expert until, it is understood, it filed the current Request;²³ when in fact, it appears clearly from the record of the case that the Defence was aware of the work and researches of [REDACTED] since, at the very least, September 2016. After all, following the Defence’s own argument, [REDACTED]²⁴ as much as it was mentioned in one of its own Expert witness’ report, which is undoubtedly what the Defence did too in full cognisance of the evidence it itself presented. For that reason alone, and because the Defence did not even attempt to explain why the request is submitted at such a belated stage of the proceedings,²⁵ this part of the Request should be rejected. Moreover, the Defence’s Request also fails to demonstrate exceptional circumstances and sufficient cause.

18. With regard to D-0113, the Defence does not explain why this witness and any relevant related material could not have been added to its LoW and LoE before the 4th of June 2018 deadline and rather goes on discussing how this late addition does not unduly prejudice the Prosecution²⁶ – while, incidentally, completely disregarding the eventual impact on other participants’ rights, such as the ones recognised to victims in these same proceedings.²⁷ In any case, such an argument appears at odds with the Defence previous position with regards to a request for belated addition of a witness on the Prosecution’s LoW.²⁸

²² See UGA-OTP-0285-0439. See also the email from Trial Chamber IX dated 22 March 2019, at 19:11.

²³ See the Defence’s Request, *supra* note 2, paras. 13 and 18.

²⁴ *Idem*, para. 19.

²⁵ *Ibidem*, para. 18.

²⁶ *Ibid.*, paras. 22-23.

²⁷ As much as it does too when arguing for the addition of Witness D-0158 in the same Request. See the Defence’s Request, *supra* note 2, para. 18-19 and 22-23.

²⁸ See the “Defence Consolidated Response to Prosecution Filings ICC-02/04-02/15-577 and ICC-02/04-01/15-579-Conf”, No. ICC-02/04-01/15-587-Red, 8 November 2016, paras. 23-25.

19. Indeed, it is clear from the Request and from the record of the case that this witness' testimony has been known to the Defence since, to its own account, the 6th of January 2016²⁹ – in other words, more than three years and a half ago, and two years and a half before the Defence submitted its LoW and LoE. Yet, the Defence does not seem to feel compelled to either explain or even justify why an extremely belated addition such as the one requested in relation to this witness should be granted.

20. In conclusion, the existence of these two proposed witnesses and the related nature of their possible respective testimony became known to the Defence at the latest in September 2016 for D-0158, and as soon as January 2016 for D-0013. Therefore, the Request should be dismissed for not providing any reasonable explanation about the reasons for which calling these two witnesses could not have been foreseen earlier (including before the submission of its final LoW and LoE).

21. Finally, the CLRV submits that, if authorised, the addition of these witnesses will cause undue prejudice to the victims participating at trial. The CLRV underlines that ensuring the expeditiousness of the proceedings has a vital importance for the participating victims who have been anxiously waiting for justice for more than 15 years now. In this regard, the victims reiterate their appreciation of the Chamber's efforts to streamline the proceedings and conduct hearings in an expeditious manner, while respecting the rights of all parties and participants. In line with the principle of a fair trial, none of the party or participant should be allowed to act in clear defiance of the principle of due diligence, with the added impact of prolonging the proceedings. The CLRV is not submitting that the Defence is acting in bad faith, but she respectfully notes that the references given in its Request and the correlative absence of justification for such a belated application *give* the appearance of bad faith. The CLRV merely draws this oddity to the attention of the Chamber, as one piece of

²⁹ See the Defence's Request, *supra* note 2, para. 3.

the proverbial pie when deciding on the matter.³⁰ The Defence also indeed fails to demonstrate how granting such a late request would preserve the fair and expeditious conduct of the proceedings. In this regard, the CLRV is particularly concerned by [REDACTED].³¹ Not only does the Defence fail to explain how the involvement of the witness [REDACTED]; but this element, in the complete absence of provision of any further details and [REDACTED] to adding her to the Defence's LoW.

(3) The nature of the material and the intended purpose for the requested reliance on such material as well as its prospective significance in light of the rest of the available evidence

22. Regarding D-0158 and the nature and scope of evidence anticipated by the Defence, the CLRV submits that ample evidence exists in the record of the case on all the issues targeted by the Defence and related to *alleged SGBC within the LRA*,³² and has further been heard by the Chamber via the testimonies of live witnesses since the beginning of the trial. The CLRV refers in particular to the testimonies of numerous individuals (males and females) abducted as former child soldiers, ting tings and wives of LRA soldiers – whom for some knew Mr Ongwen personally and for some others, were living with him directly. Moreover, many male former child soldiers recounted their first-hand experience as to being given wives while in the LRA; and finally the Chamber already had the benefit of an expert on SGBC – indeed not called by the Prosecution,³³ but called by the CLRV at trial in 2018.³⁴ All these Witnesses were questioned by both parties and participants, as well as by the Chamber. In this regard, the Defence fails to demonstrate why additional evidence on this issue is necessary for the determination of the truth. However, and remarkably, the

³⁰ See the "Defence Request for Orders Regarding ICC-02/04-01/15-1105-Conf, ICC-02/04-01/15-1106 and ICC-02/04-01/15-1106-Conf-Anx", No. ICC-02/04-01/15-1109-Conf, 15 December 2017, paras. 39-40.

³¹ See the Defence's Request, *supra* note 2, para. 7.

³² *Idem*, paras. 4, 6, 7, 14, 20 and 21.

³³ *Ibidem*, paras. 4 and 18.

³⁴ See the Expert Report of UGA-PCV-0001, Mental Health Outcomes of Rape, Mass Rape, and other Forms of Sexual Violence and Forced Marriage and Forces Pregnancy, UGA-PCV-0001-0020.

Defence's Request is silent on the evidence already heard by the Chamber on this very same topic.³⁵

23. Similarly with D-0013, while submitting that her *"evidence is highly relevant, probative and will greatly assist the Court in relation to the SGBC which Mr Ongwen is alleged to have directly perpetrated"*,³⁶ as well as to information related to *"Mr Ongwen's injury post-Iron Fist, his arrest by Vincent Otti, the torture endured thereafter and his time/length in sickbay, all of which are relevant to Pajule and Mr Ongwen's health at that time"*,³⁷ the Defence fails to demonstrate how such evidence is necessary for the Chamber's determination of the truth. The Defence's fails notably to refer to the [REDACTED] whose testimonies have been recognised as formally submitted at trial and which go, essentially and redundantly, to the heart of the charges brought against Mr Ongwen in relation to the alleged direct commission of Sexual and Gender Based Crimes – as, indeed, much like witness D-0013 [REDACTED].³⁸

24. Furthermore, the CLRV also underlines that it does not stem out from the Defence's Request that a new line of questioning would have arisen in the course of the trial which would constitute exceptional circumstances and possibly sufficient cause for adding this testimony at this stage of the proceedings to the ones of these witnesses [REDACTED] and already also previously questioned by the Defence.

25. As recalled by the Chamber in its Decision on the first Defence Extension request to submit its list of witnesses, *"[t]he Single Judge is of the view that with its advance knowledge of the Prosecution case, the Defence will have had sufficient time to devise its case in defence of Mr Ongwen by the conclusion of the Prosecution's case-in-chief. The*

³⁵ See the Defence's Request, *supra* note 2, para. 20.

³⁶ *Idem*, paras. 5 and 25.

³⁷ *Ibidem*, para. 24.

³⁸ See the "Decision on Defence Request for Leave to Appeal the Decision on Article 56 Evidence" (Trial Chamber IX), No. ICC-02/04-01/15-535, 9 September 2016; see also the "Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute" (Trial Chamber IX), No. ICC-02/04-01/15-520, 10 August 2016.

deadline set in the Preliminary Directions allows the Defence sufficient time to finalise its list of witnesses and provide the relevant information.”³⁹

26. The CLRV further notes that in this very instance, the Defence “*has been allowed adequate time to identify, contact and finalise its witnesses. No unforeseen circumstances or competing deadlines relating to complex filings have been alleged. [...] A continuation of foreseeable challenges and failure to deal with the challenges in a timely manner – absent any special circumstances – does not constitute good cause,⁴⁰ or more adequately in the present instance, sufficient cause.⁴¹*

27. Lastly, should the Chamber be minded to nonetheless grant the Request, the CLRV further submits that the Defence should be reminded of the exceptional nature of such a late addition. In this regard, the eventual granting of the Request must not lead to further delays and successive similar applications in the near future before the closing of the Defence’s case which is foreseen in the coming months.

V. CONCLUSION

28. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Chamber to reject the Defence’s Request.



Paolina Massidda

³⁹ See the “Decision on Defence Observations on the Preliminary Directions for any LRV or Defence Evidence Presentation and Request for Guidance on Procedure for No-Case-to-Answer Motion”, *supra* note 6, para. 26.

⁴⁰ See the “Decision on Common Legal Representative’s Request for an Extension of Time to File its Final List of Witnesses” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1160, 31 January 2018, paras. 6-7.

⁴¹ See the “Decision on Defence Observations on the Preliminary Directions for any LRV or Defence Evidence Presentation and Request for Guidance on Procedure for No-Case-to-Answer Motion”, *supra* note 6, para. 27.

Principal Counsel

Dated this 19th day of August 2019

At The Hague, The Netherlands