

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **3 October 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

Second Public Redacted Version of “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”, filed on 10 July 2019

Source: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. The Defence of Dominic Ongwen seeks authorization to add [REDACTED], as Expert Witness UGA-D26-P-0158 ('D-0158' or 'Expert') to its list of witnesses ('LoW')¹ pursuant to Articles 64(6)(f) and 69(3) of the Statute and Rule 79(1)(b) of the Rules of Procedure and Evidence. Witness D-0158 is a Sexual and Gender based Crimes ('SGBC') Expert and is on the List of Experts maintained by the Registry pursuant to Regulation 44 of the Regulations of the Court and is highly knowledgeable about the nature of SGBC within the LRA.
2. Additionally, the Defence seeks authorization to add Ayot Florence, Witness UGA-D26-P-0013 ('D-0013') to its LoW pursuant to Articles 64(6)(f) and 69(3) of the Rome Statute.
3. The Defence filed its List of Witnesses on 4 June 2018 and indicated that it was endeavouring to identify an expert on SGBC and thus requested for variation of the time limits for this task.² The Prosecution was thus put on notice of the Defence's intention to add an SGBC expert. In relation to D-0013, this witness appeared on the Defence's provisional LoW filed on 14 December 2017.³ The Defence also notes that the Parties and Participants have been in possession a witness statement from D-0013 since 6 January 2016,⁴ and the Prosecution interviewed D-0013 from 30 June 2015 to 3 July 2015.⁵
4. Witness D-0158's evidence is highly relevant, probative and will greatly assist the Court to establish the truth concerning alleged SGBC within the LRA. His addition to the LoW is in the interests of justice and will not unduly prejudice the Prosecution as it did not call any expert in this area.
5. Likewise, D-0013's 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.
6. The Expert will talk about rules, regulations, punishment regime in relation to sexual relations and LRA command structure and will inter alia:

¹ ICC-02/04-01/15-1272-Conf-AnxA 04-06-2018

² ICC-02/04-01/15-1272-Conf, para. 42.

³ ICC-02/04-01/15-1107-Conf-Exp-AnxA, p. 2.

⁴ See UGA-D26-0010-0173.

⁵ UGA-OTP-0253-0415-R01, UGA-OTP-0253-0424-R01, UGA-OTP-0253-0436-R01, UGA-OTP-0253-0448-R01, UGA-OTP-0253-0464-R01, UGA-OTP-0253-0480-R01, UGA-OTP-0253-0493-R01, UGA-OTP-0253-0499-R01, UGA-OTP-0253-0514-R01, UGA-OTP-0253-0524-R01, UGA-OTP-0253-0532-R01, UGA-OTP-0253-0550-R01, UGA-OTP-0253-0563-R01, UGA-OTP-0253-0573-R01, UGA-OTP-0253-0587-R01, UGA-OTP-0253-0602-R01, UGA-OTP-0253-0613-R01, UGA-OTP-0253-0623-R01 and UGA-OTP-0253-0636-R01.

- a) Analyse the rules, regulations and punishment regimes that governed marriages and sexual relations within the LRA and how and by who they were issued;
- b) Analyse the impact of these rules, regulations and punishment regime on persons in the group, in particular those abducted as children and forced into LRA ranks;
- c) Analyse how orders for abduction and distribution of wives and husbands were issued and regulated and the person(s) with the power to issue such orders; and
- d) Analyse the rules relating to sexual morality, the concept of rape within the LRA and the consequences and punishment for sexual crimes within the LRA context and rules.

II. CONFIDENTIALITY

- 7. Pursuant to Regulations 23*bis* of the Regulations of the Court ('RoC'), this request and its annexes are submitted as confidential. The request is premised on account that the Chamber has not yet allowed the Defence to add D-0158 and D-0013 to its LoW. Furthermore, [REDACTED]. A public redacted version shall be filed after a decision is rendered by Trial Chamber IX ('Chamber')

III. BACKGROUND

- 8. On 22 November 2016, the Chamber delivered a decision allowing the Prosecution to add 407 items to its list of evidence and two witnesses to its list of witnesses.⁶ The Chamber stated that Regulation 35 of the RoC was not applicable to the addition of items and witnesses to the Prosecution's lists.⁷ It wrote 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."⁸ The Chamber confirmed later that "the terms of the 30 May Decision and the Chamber's legal application of it above apply equally to the context of adding witnesses."⁹

⁶ ICC-02/04-01/15-600.

⁷ ICC-02/04-01/15-600, paras 14 and 22.

⁸ ICC-02/04-01/15-600, para. 1.

⁹ ICC-02/04-01/15-600, para. 22.

9. On 2 December 2016, the Chamber further delineated the standard applied on 22 November 2016 after a request from the Prosecution.¹⁰ The Chamber noted that it would determine whether the additional items (and/or witnesses) would “cause[] an undue prejudice to the procedural rights to the Defence.”¹¹ Relevant factors include “the extent to which the requested addition is opposed by the Defence, 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.”¹²
10. On 13 October 2017, the Trial Chamber issued its ‘Preliminary Directions for any LRV or Defence Evidence Presentation’ whereby it indicated that “[w]ithin three weeks from notification of the Prosecution’s notice” of closing its case, the Defence must provide (i) its final lists of evidence and witnesses; (ii) certify that all necessary witness information forms have been completed and given to the VWU; (iii) provide anticipated testimony summaries for all witnesses; (iv) complete disclosure of all items it intends to use during its evidence presentation (to the extent not already disclosed); and (v) request any protective measures or relief under Rule 68 of the Rules.¹³
11. On 6 March 2018, following Defence submissions relating to time and resources, the Trial Chamber modified the 13 October Schedule noting “[i]n order to protect the rights of the accused to a fair trial and adequate time and facilities to prepare its defence, the Chamber hereby modifies the deadline provided for in paragraph 7 of the Preliminary Directions and orders the Defence to provide the required information by 31 May 2018.”¹⁴
12. On 24 May 2018, the Trial Chamber granted a Defence email request to modify the 31 May deadline. The request was made pursuant to Regulation 35 of the RoC and founded upon delays caused by computer service problems. The Trial Chamber noted “that the requested extension is minimal and that the request is unopposed.”¹⁵ In granting the two day extension,

¹⁰ ICC-02/04-01/15-619, para. 5.

¹¹ ICC-02/04-01/15-619, para. 10.

¹² ICC-02/04-01/15-619, para. 10.

¹³ ICC-02/04-01/15-449, para. 7.

¹⁴ ICC-02/04-01/15-1199-Red, para. 81.

¹⁵ Email from Trial Chamber IX, ‘*RE: Defence Request for a Two Day Extension for the 31 May 2018 Deadline*,’ received 24 May 2018.

it noted that “[d]ue to the fact that 2 June 2018 is a Saturday, this pushes the due date for the information required by directions -1021, para. 6 to Monday, 4 June 2018.”¹⁶

13. On 4 June 2018, the Defence notified the Chamber of its LoW and List of Evidence (‘LoE’).¹⁷ In the notification, the Defence indicated thus, “the Defence is endeavouring to identify an expert on SGBC who is both knowledgeable about the culture and the impact of SGBC within the LRA on both women and men.”¹⁸ As further noted in the notification,¹⁹ it was very difficult to source for such an expert on issues.

IV. SUBMISSIONS

14. The Defence seeks to add D-0158 to its LoW after expiration of the 4 June 2018 filing deadline. Nevertheless, all of the circumstances as highlighted below demonstrate good cause for the addition of D-0158 to the Defence’s LoW. His evidence is crucial and essential to the Defence’s case and necessary for the determination of the truth regarding SGBC with which Mr. Ongwen is charged. The Prosecution does not suffer undue prejudice as a result of the addition of D-0158 to the Defence’s LoW since the Prosecution did not present an SGBC expert, but submitted part of D-0158’s research into evidence.²⁰ The Prosecution will have adequate time to continue to investigate the proposed new witness.
15. The Defence also seeks to add D-0013 to its LoW and her accompanying documents to the LoE after the 4 June 2019 filing deadline. As with D-0158, the Defence shall demonstrate below how the addition of D-0013 and her accompanying documents at this time is not prejudicial to the Prosecution and shall significantly aid the Chamber in the determination of the truth relating to no fewer than 19 of the allegations against Mr Ongwen. Witness D-0013 shall also speak of Mr Ongwen’s injury, his arrest and his time in sickbay from her personal experiences in these relevant and probative issues before the Chamber.
16. As noted above in paragraph 7, relevant factors when determining whether to allow the Defence to add D-0013 and D-0158, including any statements or documents thereto, to the Defence’s LoW and LoE are:

¹⁶ Email from Trial Chamber IX, ‘*RE: Defence Request for a Two Day Extension for the 31 May 2018 Deadline*,’ received 24 May 2018.

¹⁷ This was in compliance with ICC-02/04-01/15-1021

¹⁸ ICC-02/04-01/15-1272-Conf, para. 42.

¹⁹ ICC-02/04-01/15-1272-Conf, para. 43.

²⁰ See UGA-OTP-0285-0439, recognised as submitted into evidence in emailed decision from Trial Chamber IX, ‘*Decision on Submitted Materials for D-133*,’ received 22 March 2019 at 19h11 CET.

- a. the extent to which the requested addition is opposed by the Prosecution;
 - b. the time when the addition is sought;
 - c. the nature and amount of the material concerned; and
 - d. the intended purpose for the Defence'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.²¹
17. Finally, the Defence notes that it would not call these witnesses until the end of its presentation of evidence, thus aiding to reduce any possible prejudice to the Prosecution.

Expert Witness D-0158

A. The time at which the addition is sought does not place an undue prejudice on the Prosecution

18. The Defence notes that it has been slightly over one year since it submitted its LoW and LoE.²² However as already noted, the Defence indicated that it was still searching for a SGBC expert who is both knowledgeable about the culture and the impact of SGBC within the LRA on both women and men.²³ The Prosecution also submitted part of D-0158's research into evidence and therefore they will not suffer undue prejudice. The defence is further alive to the fact that the Prosecution contacted UGA-OTP-P-0239 ([REDACTED]), an expert in this field sometime in 2015 although she was not called as a witness.

B. The nature and amount of material concerned is minimal and does not place an undue prejudice on the Prosecution

19. The Defence submits that the Prosecution having already researched about D-0158 and submitted his book into evidence, the amount of material concerned is minimal and will not place an undue prejudice to them. This is further augmented by the Prosecution's [REDACTED]. The report by this expert is expected to be less than 50 pages, and the ToR is being given in advance, thus the work can be started on the witness even before the expert report is given. Finally, the Defence notes that his expected time for his testimony would be

²¹ ICC-02/04-01/15-619, para. 10.

²² ²² ICC-02/04-01/15-1272-Conf- Anx A 04-06-2018

²³ ICC-02/04-01/15-1272-Conf, para. 42.

two days or less with his statement being submitted pursuant to Rule 68(3) of the Rules and Procedure and Evidence.

C. The reliance on the proposed expert witness and material is significant in light of the charges brought against Mr. Ongwen

20. SGBC comprises 25.7% of the charges²⁴. While a lot has been said about the manner of wife distribution by different fact witnesses, the links between the person, position, manner and control needs to be put in context by a person with extensive research in this specific area.
21. D-0158 expertise combines research, publication and practice in the areas of conflict related sexual violence, gender, sexuality, masculinities and militarisation, dynamics of inclusion/exclusion in conflict and forced migration settings, enabling disclosures in humanitarian and transitional justice processes. He is a co-investigator in the research project ‘Conflict-Related Sexual Violence: Understanding What, When and Why’ which seeks to understand better the forms, contexts, logics and impacts of sexual violence in conflict in order to work more effectively for its’ prevention. Since 2006, he has done extensive work with survivors of conflict-related sexual violence in the LRA situation in Uganda. His research project ‘Conjugal Slavery in War: Partnerships for the study of enslavement, marriage, and masculinities’ explores men’s experiences of coercion within the LRA. [REDACTED].

Witness D-0013

A. The time at which the addition is sought does not place an undue prejudice on the Prosecution

22. While the Defence is approximately two-thirds completed with its presentation of evidence, D-0013 is not unknown to the Prosecution and her addition will not prejudice the Prosecution. The Prosecution interviewed D-0013 in June and July of 2015.²⁵ In fact, the overwhelming majority of the information about D-0013 on the Court’s eCourt system has been disclosed by the Prosecution. The Prosecution is highly knowledgeable about D-0013 and it will not be over burdensome or cause undue prejudice to the Prosecution if she is admitted to the LoW and her documents added to the Defence’s LoE.

²⁴ Charges 50-68 of the Confirmed charges

²⁵ *Supra*, footnote 5.

B. The nature and amount of material concerned does not place an undue prejudice on the Prosecution

23. The Defence admits that there is a sizable amount of material related to D-0013 which the Defence requests to add to its LoE. The Defence highlights that almost all of the material was generated and disclosed by the Prosecution. As such, the Prosecution should be rather knowledgeable about her and the content of the material. As much of this material has been in the possession of the Prosecution for three to four years, it does not place an undue prejudice against the Prosecution by the inclusion of the material on the Defence's LoE or her addition to the Defence's LoW. The list of material which the Defence asks to include on its LoE is attached as Confidential Annex C.

C. The reliance on the expected testimony and material is significant in light of the charges brought against Mr. Ongwen and his special notice under Rule 79(1)(a)

24. Witness D-0013's testimony will be material and significant in relation 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. Witness D-0013 was present with Mr Ongwen during this time and can speak to these issues, which will give further evidence to the Defence's notice about the Pajule attack.
25. Witness D-0013 is also a wife to Mr Ongwen. She has intimate knowledge of the manner in which a widow and a man courted, how the widow decided whether or not she wanted a new husband, how she chose the man if she decided to take a new husband. This witness also has further details into the manner in which Mr Ongwen related to others, included persons named in the charges.
26. Her addition to the Defence's LoW, and the addition of the documents to the Defence's LoE, would prove highly relevant, probative and significant to the allegations facing Mr Ongwen and to the Chamber's ability to determine the truth.

V. RELIEF

27. For the reasons described above, the Defence respectfully requests Trial Chamber IX to:
- a. Permit the Defence to add Witness UGA-D26-P-0013 and Expert Witness UGA-D26-P-0158 to its List of Witnesses, and

- b. Permit the Defence to add the materials discussed above related to D-0158 and materials listed in Confidential Annex A related to D-0013 to its List of Evidence.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 3rd day of October, 2019