

**Cour
Pénale
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**International
Criminal
Court**

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

Date: **16 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

Public Redacted Version of “Defence Request to add UGA-D26-P-0157 to its List of Witnesses, Accompanying Documents to its List of Evidence and Submission of the Accompanying Documents Pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence”, filed on 30 September 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], Witness UGA-D26-P-0157 ('D-0157') 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-0157 is a victim of "Collective Punishment" meted out against villages of a persons who escape from the LRA.
2. Witness D-0157's evidence is highly relevant, probative and will greatly assist the Court to establish the truth concerning the Defence's affirmative defence of duress. His addition to the LoW and accompany documents to the List of Evidence ('LoE') is in the interests of justice and will not unduly prejudice the Prosecution as it has been aware of the Defence's duress argument since no later than 9 August 2016.²
3. Furthermore, pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, the Defence requests Trial Chamber IX ('Chamber') to accept the submission of D-0157's statement and annexes as evidence, subject to the filing of a declaration under Rules 68(2)(b)(ii) and (iii). As the Defence seeks only to add D-0157 as a Rule 68(2)(b) witness, the addition of D-0157 will not affect the length of the trial proceedings. The signed statement and annexes are annexed to this pleading as Confidential Annexes A-C.

II. CONFIDENTIALITY

4. 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-0157 its LoW. A public redacted version shall be filed after a decision is rendered by the Chamber.

III. BACKGROUND

5. On 9 August 2016, the Defence gave its formal notice of its intention to raise the affirmative defence of duress.³

¹ ICC-02/04-01/15-1272-Conf-AnxA.

² ICC-02/04-01/15-517.

³ *Ibid.*

6. 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.⁴ The Chamber stated that Regulation 35 of the RoC was not applicable to the addition of items and witnesses to the Prosecution's lists.⁵ 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."⁶ 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."⁷
7. On 2 December 2016, the Chamber further delineated the standard applied on 22 November 2016 after a request from the Prosecution.⁸ 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."⁹ 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."¹⁰
8. On 13 October 2017, the 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.¹¹
9. On 6 March 2018, following Defence submissions relating to time and resources, the 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

⁴ ICC-02/04-01/15-600.

⁵ *Ibid*, paras 14 and 22.

⁶ *Ibid*, para. 1.

⁷ *Ibid*, para. 22.

⁸ ICC-02/04-01/15-619, para. 5.

⁹ *Ibid*, para. 10.

¹⁰ *Ibid*, para. 10.

¹¹ ICC-02/04-01/15-449, para. 7.

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.”¹²

10. On 24 May 2018, the 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 Chamber noted “that the requested extension is minimal and that the request is unopposed.”¹³ In granting the two day extension, 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.”¹⁴
11. On 4 June 2018, the Defence notified the Chamber of its LoW and List of Evidence (‘LoE’).¹⁵

IV. SUBMISSIONS

A. Defence Request to add D-0157 to its List of Witnesses and Accompanying Documents to its List of Evidence

12. The Defence seeks to add D-0157 to its LoW and LoE 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-0157 to the Defence’s LoW and LoE. His evidence is highly probative and relevant to the Defence’s case of duress. The Prosecution does not suffer undue prejudice as a result of the addition of D-0157 to the Defence’s LoW and LoE as the Defence requests his statement and annexes be submitted pursuant to Rule 68(2)(b) and the Prosecution has been aware of the Defence’s duress argument since on or before 9 August 2016.
13. Relevant factors when determining whether to allow the Defence to add D-0157, including any statements or documents thereto, to the Defence’s LoW and LoE are:
 - 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

¹² ICC-02/04-01/15-1199-Red, para. 81.

¹³ Email from Trial Chamber IX, ‘*RE: Defence Request for a Two Day Extension for the 31 May 2018 Deadline*,’ received 24 May 2018.

¹⁴ *Ibid.*

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

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.¹⁶

14. Finally, the Defence notes that the Defence does not intend to use D-0157 as a *viva voce* witness.

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

15. The Defence notes that it has been approximately 16 months since it submitted its LoW and LoE.¹⁷ While the timing is late, the undue prejudice placed on the Prosecution is minimal.

16. As noted above, the Prosecution has known since 9 August 2016 that the Defence would present an Article 31(1)(d) duress argument. Furthermore, the Collective Punishment which affected [REDACTED] was described in some of the earliest material the Prosecution collected in the case.¹⁸ Furthermore, UGA-OTP-0032-0038-R1 describes the incident as being a "Squad under Joseph Kony".¹⁹

17. Finally, the Defence seeks to introduce Confidential Annexes A-C pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence. As this material goes to acts and conduct not attributed to Mr Ongwen and is a simple linear statement (with annexes), the additional workload to the Prosecution by this addition would be minimal.

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

18. The Defence submits that the addition of D-0157 to its LoW and accompanying documents to its LoE is minimal. It consists of a 10-page statement and two annexes totalling four pages.²⁰ The statement is linear and mainly describes incidents happened from [REDACTED]. The nature of this incident, the attack on [REDACTED], is known to the Prosecution. The addition of D-0157 and accompanying documents will place the additional workload to the

¹⁶ ICC-02/04-01/15-619, para. 10.

¹⁷ ¹⁷ ICC-02/04-01/15-1272-CONF-AnxA.

¹⁸ E.G., UGA-OTP-0018-0047, p. 0113; UGA-OTP-0027-0036, p. 0144; and UGA-OTP-0032-0038-R01, p. 0038.

¹⁹ UGA-OTP-0032-0038-R01, p. 0038.

²⁰ See Confidential Annexes A-C.

Prosecution counted not in days, but in hours. The Defence does not propose to have D-0157 testify *viva voce*, but yet pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence.

iii. The reliance on the proposed witness and material is significant in light of the affirmative defence notified by Mr Ongwen

19. As noted, the Defence gave notification of its affirmative defence of duress on 9 August 2016. Since then, the area of Collective Punishment has inundated the Defence's questioning of all witnesses. As an example of its importance, the Defence opened its first "non-technical" witness with questions about collective punishment.²¹
20. While there has been a lot of evidence on this topic, the Defence notes that this instance falls within the jurisdiction of the Court. While many people have discussed about Collective Punishment befalling villages in the 1980s and 1990s, this material gives further credence that Collective Punishment was still enforced in the 2000s.²²
21. Proposed witness D-0157's 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.

B. Defence Request to Submit D-0157's Witness Statement and Annexes pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence

22. Rule 68(2)(b) provides the Chamber with a discretion to permit the introduction of prior recorded testimony where it 'goes to proof of a matter other than the acts and conduct of the accused.' Should the Chamber allow the addition of D-0157's to the Defence's LoW and his statement and annexes to its LoE, the Defence requests the submission of his statement and annexes into evidence through Rule 68(2)(b) of the Rules of Procedure and Evidence.

i. Meaning of 'prior recorded testimony'

23. The notion of 'prior recorded testimony' under Rule 68 includes audio- and video-recorded testimony, transcripts of a witness' testimony and written statements taken under Rules 111 and 112.²³ Further, a statement is capable of amounting to 'prior recorded testimony' when it is

²¹ ICC-02/04-01/15-T-49-CONF-ENG, p. 3. ln. 14 to p. 6, ln. 13.

²² *E.g.* ICC-02/04-01/15-T-208-CONF-ENG, p. 51, ln. 22 to p. 52, ln. 18 (*noting* ICC-02/04-01/15-3-CONF-Red2, footnote 103 where the Prosecution states **Wia-nono**, aka **Wianono**, is a nickname for **Pagak IDP Camp**).

²³ *Prosecutor v. Dominic Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, ICC-02/04-01/15-596-CONF, para. 9 ('Rule 68(2)(b) Decision').

given by a person on the understanding that ‘he or she is providing information which may be relied upon in the context of legal proceedings’,²⁴ *i.e.* where the person is ‘questioned in the capacity as [a] witness in the context of or in anticipation of legal proceedings.’²⁵ Annexes and documents that form an integral part of a witness’ statement are also to be considered part of the testimony.²⁶

ii. Acts and conduct of the accused

24. The Chamber has held that the ‘expression “acts and conduct of the accused”...must be interpreted in its plain natural meaning, referring to the personal actions and omissions of the accused, rather than a broader normative meaning, extended to the actions and omissions of others which are attributable to the accused under the modes of liability charged by the Prosecution.’²⁷ The term ‘acts and conducts of the accused’ refers exclusively to the actions of the accused set out in the charges brought against him or which are relied upon to establish his criminal responsibility for the crimes charged.²⁸

iii. Factors guiding the Chamber’s discretion under 68(2)(b)(i)

25. Rule 68(2)(b)(i) provides a non-exhaustive list of factors that the Chamber shall consider in the exercise of its discretion.²⁹ The factors are not mandatory preconditions; they are intended to guide the Chamber’s exercise of its discretion.³⁰ These factors include whether the prior recorded testimony: (a) relates to issues that are not materially in dispute; (b) is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts; (c) relates to background information; (d) is such that the interests of justice are best served by its introduction; and (e) has sufficient indicia of reliability.

1. Issues that are not materially in dispute

26. In order for the Chamber to determine whether an issue is materially in dispute, it will ‘consider whether the prior recorded testimony relates to matters which are soundly and conceivably disputed between the parties, and are crucial, or of at least sufficient significance

²⁴ Rule 68(2)(b) Decision, para. 9.

²⁵ *Ibid.*

²⁶ *Ibid.*, para. 10.

²⁷ *Ibid.*, para. 11.

²⁸ *Ibid.*

²⁹ *Ibid.*, para. 6.

³⁰ *Ibid.*

for the Chamber's eventual determination of the charges against the accused in its judgment under Article 74 of the Statute.³¹ In reaching its determination, the Chamber will objectively assess the degree to which the prior recorded testimony impacts upon material matters actually contested in the proceedings.³²

2. Cumulative or corroborative nature

27. In the *Ntaganda* case, Trial Chamber VI admitted prior recorded testimony under Rule 68(2)(b) on the basis that, *inter alia*, 'other witnesses [had] provided potentially corroborative testimonies'³³ on the same matters. In making its determination, Trial Chamber VI noted that 'the relevant consideration is whether other testimony has been, or will be, provided on "similar facts"'. It is not required that the accounts accord in every detail.'³⁴

3. Background information

28. The determination of whether prior recorded testimony concerns background information will inevitably occur during the Chamber's assessment of whether an issue is 'materially in dispute'. For example, Trial Chamber I in *Gbagbo & Blé Goudé* denied a request to introduce the prior recorded testimony of a witness on the basis that its content was 'significant to the determination of the core issues materially in dispute' contrary to 'mere background information'.³⁵

4. Interests of justice

29. Within the context of Rule 68(2)(b), the Chamber has held that the interests of justice are better served by the admission of prior recorded testimony when such introduction allows, *inter alia*: (a) to ensure the expeditiousness of the proceedings; (b) streamline evidence presentations; (c) focus live testimony topics that are of the most relevance to the proceedings; (d) minimise cumulative in-court testimony on aspects which will be addressed by other witnesses; (e) save

³¹ *Ibid*, para. 15.

³² *Ibid*.

³³ *Prosecutor v. Bosco Ntaganda*, Public redacted version of Decision on Prosecution application for admission of prior recorded testimony of Witness P-0039 under Rule 68(2)(b), ICC-01/04-02/06-1715-Red, 12 January 2017, para. 15.

³⁴ *Ibid*, para. 14.

³⁵ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the Prosecutor's Application to Introduce Prior Recorded Testimony under Rules 68(2)(b) and 68(3), ICC-02/11-01/15-573-Red, 9 June 2016, para. 18 ('Gbagbo Decision'). See also para.15 of the Gbagbo Decision, which states that the 'Chamber notes, in light of the positions of the parties, that the precise unfolding and proper interpretation of the events which occurred in Abidjan on 16 December 2010 and in the days that followed constitute one of the core, and disputed, issues in the present case. The evidence which can reasonably assist the Chamber in the resolution of this matter therefore relates to issues that are materially in dispute, and not mere background information'.

the resources of the institutions; (f) avoid witnesses having to travel in order to appear in court.³⁶

5. Sufficient indicia of reliability

30. Insofar as formal procedures concerning prior recorded testimony are concerned, relevant indicia of reliability have been found to be that the statement was: (a) signed by witness and; (b) given voluntarily; (c) obtained in the presence of a qualified interpreter or a lawyer who is a native speaker; (d) declared to be accurate by the witness at the time of creation; and (e) includes information that the witness was given an explanation of the procedure and was informed of the significance of providing the statement.³⁷ However, the Chamber has held that ‘no single indicator is, in and of itself, conclusive or mandatory.’³⁸

Request for Submission of Prior Recorded Statement

31. Proposed witness D-0157 is corroborative of many persons who spoke of Collective Punishment.³⁹ More specifically, D-0157’s statement corroborates that Collective Punishment persisted during the jurisdiction of the case,⁴⁰ which is corroborated by D-0092’s mention of the Collective Punishment inflicted upon Pagak IDP Camp.⁴¹ This type of punishment is a part of the Defence’s overall affirmative defence of duress.
32. Furthermore, D-0157 discusses his actions as an abductee of the LRA for approximately 50-60 hours.⁴² This is similar and corroborative of almost every witness who spoke before the Chamber. Mr Ongwen was not present for D-0157’s captivity, and the statement does not contain any reference to Mr Ongwen.
33. Finally, the Defence’s case is coming to an end, and processing the witness for *viva voce* would increase the workload of the Defence at the final stages of the proceedings. As the end is near, the submission of D-0157’s statement and annexes would promote the

³⁶ Rule 68(2)(b) Decision, para. 16.

³⁷ *Ibid*, para. 18.

³⁸ *Ibid*, para. 18.

³⁹ *E.g.* ICC-02/04-01/15-T-49-CONF-ENG, p. 3, ln. 14 to p. 6, ln. 13 (P-0205); [REDACTED]; ICC-02/04-01/15-T-107-CONF-ENG, p. 9, ln. to p. 10, ln. 5 and p. 11, ln. 7 to p. 12, ln. 9 (P-0070); and *E.g.* ICC-02/04-01/15-T-208-CONF-ENG, p. 51, ln. 22 to p. 52, ln. 18 (D-0092). The Defence notes this is only a few of the dozens of persons who corroborated this type of punishment.

⁴⁰ Confidential Annex A, paras 28-31.

⁴¹ *E.g.* ICC-02/04-01/15-T-208-CONF-ENG, p. 51, ln. 22 to p. 52, ln. 18 (*noting* ICC-02/04-01/15-3-CONF-Red2, footnote 103 where the Prosecution states **Wia-nono**, aka **Wianono**, is a nickname for **Pagak IDP Camp**).

⁴² Confidential Annex A, paras 4-26.

expeditiousness of the case, allowing the Defence to ensure that the final witnesses appear on time their respective testimonies.

34. The Defence requests the submission of D-0157's statement⁴³ and annexes⁴⁴ pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence. This addition 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

35. For the reasons described above, the Defence respectfully requests Trial Chamber IX to:
- a. Permit the Defence to add Witness UGA-D26-P-0157 to its List of Witnesses;
 - b. Permit the Defence to add the materials related to D-0157 found in Confidential Annexes A-C to its List of Evidence; and
 - c. Submit into evidence the statement and annexes attached in Confidential Annexes A-C, subject to the filing of a declaration under Rules 68(2)(b)(ii) and (iii).

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 16th of October, 2019
At The Hague, Netherlands

⁴³ Confidential Annex A.

⁴⁴ Confidential Annexes B and C.