

**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 “Prosecution’s Response to Defence Request to add UGA-D26-P-0157 to its List of Witnesses (ICC-02/04-01/15-1619-Conf)”, 4 October 2019, ICC-02/04-01/15-1625

Source: The Office of the Prosecutor

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

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Introduction

1. The Prosecution opposes the 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 Evidence¹ (“Defence Request”). The Request fails to meet the criteria established by the Trial Chamber for adding new witnesses to the List of Witnesses (“LOW”) and new evidence to the List of Evidence (“LOE”). D-0157’s statement does not add anything new to the evidence about the [REDACTED] attack that is not already in the case record, in particular with regard to what prompted the attack. Moreover, the threat of possible collective punishment for escape cannot be advanced as the kind of threat which would cause Dominic Ongwen to engage in charged conduct. The prospective significance of D-0157’s evidence in light of the charges brought against the accused and the evidence already before the Chamber is therefore minimal.

Confidentiality

2. In accordance with regulation 23*bis*(2) of the Regulations of the Court, this document is filed as confidential because it responds to a request with the same classification. The Prosecution will file the public redacted version of this response as soon as a public redacted version of Defence Request or a public decision is available.

Submissions

3. The Trial Chamber, as correctly summarised by the Defence Request, has previously cited to the following factors when determining whether late additions to

¹ ICC-02/04-01/15-1619-Conf.

the LOW and the LOE should be permitted: (i) the extent to which the requested addition is opposed, (ii) the time when the addition is sought, (iii) the nature and amount of the material concerned, (iv) the intended purpose for the party's requested reliance on the material and (iii) the material's prospective significance in light of the charges brought against the accused and the rest of the available evidence.² When assessed against these factors, the Defence Request should be rejected.

4. *First*, the Defence Request comes 16 months after the initial deadline for submitting the LOW and the LOE expired.³ At this point in the proceedings, the Defence has called more than three quarters of its *viva voce* witnesses and is expected to conclude its presentation of evidence in less than two months. The Defence acknowledges that the information about the attack on [REDACTED] was included in some of the earliest material the Prosecution collected in the Uganda investigation.⁴ It was also some of the earliest material the Prosecution disclosed to the Defence back in 2015.⁵ No explanation is provided why the addition of D-0157 is sought only now.

5. *Second*, the case record already contains a significant amount of evidence about the [REDACTED] attack and what prompted it. D-0157's evidence does not add anything new to that evidence. For example, former LRA fighter P-0245 testified that a recently abducted individual escaped with a gun after shooting at the LRA, which resulted in Kony's instructions to retaliate and kill people in [REDACTED].⁶ P-0245 heard that people were killed in [REDACTED].⁷ Similarly, witnesses P-0231⁸

² ICC-02/04-01/15-619, para.10, cited in Defence Request, para.13.

³ The deadline expired on 4 June 2018.

⁴ Defence Request, para.16.

⁵ Items UGA-OTP-0032-0038, UGA-OTP-0018-0047 and UGA-OTP-0027-0036, referenced in para.16 of the Defence Request, were disclosed on 15 June 2015, 16 July 2015 and 17 August 2015 respectively.

⁶ ICC-02/04-01/15-T-100-Red2-ENG CT WT, p.31 lns.1-15.

⁷ ICC-02/04-01/15-T-100-Red2-ENG CT WT, p.31 ln.22.

⁸ ICC-02/04-01/15-T-123-Conf-ENG ET, p.21 ln.14 – p.22 ln.11 (albeit P-0231 states the attack was in 1997).

and P-0233⁹ testified that the attack on [REDACTED] was a retaliatory attack of the LRA because an individual escaped with a gun. Items UGA-OTP-0032-0038, UGA-OTP-0018-0047, UGA-OTP-0195-0105 and UGA-OTP-0231-0662 (all formally submitted into evidence) are examples of documentary evidence about [REDACTED] killings. Item UGA-OTP-0063-0194, also formally submitted into evidence, is an intercept logbook which includes an entry of 27 July 2002 about an LRA order to kill individuals in the [REDACTED] area in response to an individual escaping with a gun.¹⁰

6. The Defence overstates the significance of D-0157's evidence. Whilst the witness gives a detailed account of his abduction and escape, his conclusion about what prompted the attack does not come from direct knowledge but is necessarily a speculation. The subheading in the statement itself introduces the relevant section as "[k]nowledge of the LRA's *possible* punishment to my home area" (emphasis added).¹¹ In this regard, evidence from the abovementioned former LRA fighters and documentary sources is more relevant than the evidence of D-0157 for the argument the Defence is constructing about the retaliatory nature of the [REDACTED] attack.

7. *Finally*, even if escaping with a gun did occasionally result in collective punishment, this does not illuminate the duress issue in the case. The threat of alleged collective punishment might have inhibited some people from trying to escape from the LRA (although thousands nevertheless did so). But even if a person did remain in the LRA for this reason, the threat of possible collective punishment for escape cannot be advanced as the kind of threat which would cause Dominic Ongwen to engage in charged conduct. The two must be differentiated. Similarly, there is no useful comparison to be drawn between the perceptions of a recently

⁹ ICC-02/04-01/15-T-112-Red2-ENG WT, p.24 lns.16-23.

¹⁰ See UGA-OTP-0063-0194 at 0327, an entry dated 27 July 2002. The Prosecution notes that the entry records the name of the individual who escaped as one [REDACTED].

¹¹ Defence Request, Annex A, p.9 ln.31.

abducted individual like D-0157 and a senior, long-serving LRA commander like Dominic Ongwen.

8. In conclusion, the addition of D-0157 to Defence's LOW is not justified. In light of the charges brought against the accused and the evidence already before the Chamber, the prospective significance of D-0157's evidence is minimal.

9. In the event that the Trial Chamber nonetheless grants the first limb of the Defence Request and allows D-0157's evidence, the Prosecution does not oppose introducing it pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence.

Relief Sought

10. For the foregoing reasons, the Prosecution requests the Trial Chamber to reject the addition of D-0157 to Defence's LOW and his evidence to the LOE.



Fatou Bensouda, Prosecutor

Dated this 16th day of October 2019

At The Hague, the Netherlands