

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **13 August 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

**Decision on Defence Request to Add Two Witnesses to its List of Witnesses and
Accompanying Documents to its List of Evidence**

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

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**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

The Office of Public Counsel for the Defence

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IX of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 64(2) and 67(1)(e) of the Rome Statute (‘Statute’) issues the following ‘Decision on Defence Request to Add Two Witnesses to its List of Witnesses and Accompanying Documents to its List of Evidence’.

I. Procedural history and submissions

1. On 13 October 2017, the Chamber issued preliminary directions on the presentation of evidence by the Defence and the Legal Representative and Common Legal Representative of Victims (together ‘Victims Representatives’). Therein, it, *inter alia*, ordered the Defence to confirm its final list of evidence and list of witnesses three weeks after the Office of the Prosecutor (‘Prosecution’) provided formal notice of the closure of its case.¹
2. On 6 March 2018, the Chamber extended this deadline to 31 May 2018,² which was again extended until, *de facto*, 4 June 2018.³
3. On 4 June 2018, the Defence duly filed its list of evidence and list of witnesses.⁴
4. On 10 July 2019, the Defence filed a request to add two witnesses to its list of witnesses and documents related to these two witnesses to its list of evidence (‘Request’).⁵
5. The first witness, D-158, is an expert witness the Defence intends to call on sexual and gender based crimes. It submits that the admission of D-158 as a witness will not cause undue prejudice to the Prosecution since part of a book which D-158 authored is already in evidence and D-158 was discussed during the testimony of another Defence witness, D-133.⁶ Therefore, according to the Defence, is the Prosecution already familiar with

¹ Preliminary Directions for any LRV or Defence Evidence Presentation, ICC-02/04-01/15-1021, para. 7.

² Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, 6 March 2018, ICC-02/04-01/15-1199-Red, para. 84.

³ E-mail from the Trial Chamber to the parties on 24 May 2018, ICC-02/04-01/15-1483-AnxXVI. The Defence requested an extension until 2 June 2018, which was a Saturday and the Chamber granted the request.

⁴ 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, with three annexes. Further public redacted version filed on 5 June 2018.

⁵ 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, with three annexes, ICC-02/04-01/15-1559-Conf.

⁶ Request, ICC-02/04-01/15-1599-Conf, para. 19.

D-158's work.⁷ Additionally it submits that the report to be prepared by D-158 is expected to be less than 50 pages⁸ and that the issue of sexual and gender based crimes is important to the charges against the accused.⁹

6. The second witness, D-13, considered herself a wife of the accused while she was with the LRA. The Defence submits that the Prosecution would also not suffer any undue prejudice with the addition of D-13, who was previously interviewed by the Prosecution.¹⁰ Further, it argues that the Prosecution produced the majority of the documents the Defence requests to add to its list of evidence in relation to D-13 and is therefore already familiar with its contents.¹¹
7. On 17 July 2019, the Prosecution filed its response ('Prosecution Response').¹² It does not oppose the Request with regard to D-13.¹³ However, in respect to the addition of D-158, the Prosecution submits that the Chamber should deny Request. It argues that the timing of the addition of D-158,¹⁴ the nature of the material sought for additional submission¹⁵ and the purpose and expected significance of the additional witness and the related material¹⁶ all militate against the belated addition.
8. Further, the Prosecution undertakes that it will not oppose any addition of already existing academic work authored by D-158, should the Defence wish to submit it.¹⁷
9. On the same day, the Common Legal Representative for Victims ('CLR V') also filed a response, submitting that the Chamber should deny the entire Request.¹⁸ Similarly to the Prosecution Response, the CLR V argues that neither the timing of the Request, the

⁷ Request, ICC-02/04-01/15-1599-Conf, paras 18-19.

⁸ Request, ICC-02/04-01/15-1559-Conf, paras 18-19.

⁹ Request, ICC-02/04-01/15-1559-Conf, para. 20.

¹⁰ Request, ICC-02/04-01/15-1559-Conf, para. 22.

¹¹ Request, ICC-02/04-01/15-1559-Conf, para. 23.

¹² Prosecution's Response to "Defence 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", ICC-02/04-01/15-1560-Conf.

¹³ Prosecution Response, ICC-02/04-01/15-1560-Conf, para. 3.

¹⁴ Prosecution Response, ICC-02/04-01/15-1560-Conf, para. 8.

¹⁵ Prosecution Response, ICC-02/04-01/15-1560-Conf, para. 9.

¹⁶ Prosecution Response, ICC-02/04-01/15-1560-Conf, paras 10-12.

¹⁷ Prosecution Response, ICC-02/04-01/15-1560-Conf, para. 12.

¹⁸ CLR V'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", ICC-02/04-01/15-1561-Conf ('CLR V Response').

nature of the material, the intended purpose and prospective significance nor the already available evidence justify the addition of D-158¹⁹ or D-13.²⁰

II. Analysis

10. As a preliminary matter, the Chamber recalls²¹ that public-redacted versions of any request should be filed concurrently with the confidential ones. The Chamber notes the submissions on the level of confidentiality of the Request.²² The fact that the Chamber has not yet ruled on the issue that is subject of the request, as submitted by the Defence, can, on its own, never be a justification for not providing a public-redacted version. Accordingly, the Defence is ordered to provide a public-redacted version of its Request within five days of the notification of this decision. The CLRV is ordered to file a public-redacted version of its response within the same timeframe. Taking note of the submissions of the Prosecution,²³ the Chamber orders the Registry to reclassify the Prosecution Response as public.

11. The Chamber will discuss the addition of the two witnesses and their associated materials separately.

1) *D-158*

12. The Chamber notes that the Defence wishes to call D-158 for his expertise on sexual and gender based crimes since his ‘evidence is crucial and necessary to the Defence’s case and necessary for the determination of the truth regarding SGBC’ which form part of the charges.²⁴

13. As to the timing of the requested addition, the Chamber notes that the Request is filed over a year after the deadline to provide the final lists of witnesses and of evidence expired. While the Defence indicated on the day of the deadline that it was

¹⁹ CLRV Response, ICC-02/04-01/15-1561-Conf, paras 17, 22

²⁰ CLRV Response, ICC-02/04-01/15-1561-Conf, paras 18-20 and 23-24.

²¹ Decision on Prosecution Request for Disclosure of a Report produced by Defence Experts, 6 March 2019, ICC-02/04-01/15-1475, para. 11.

²² Request, ICC-02/04-01/15-1559-Conf, para. 7.

²³ Prosecution Response, ICC-02/04-01/15-1560-Conf, para. 5.

²⁴ Request, ICC-02/04-01/15-1559-Conf, para. 14.

‘endeavouring to identify an expert on SGBC’,²⁵ this does not mean that it can add such witness at any point in time. As previously stated, such late addition can be granted even after the presentation of the evidence has begun ‘in exceptional circumstances and with sufficient cause’.²⁶ However, the current request comes at a very late stage in the proceedings, after the Defence has already called two thirds of its *viva voce* witnesses and when its presentation of evidence is expected to be finished in the upcoming months.

14. Further, the Chamber notes that the expert the Defence ultimately chose to approach, D-158, has been known to the parties and participants for a considerable period of time. The first witness to testify in this trial in January 2017, P-422, identified D-158 as having written ‘an excellent book called Social Torture about the region’²⁷ and stated in his expert report that he supervised D-158’s PhD thesis which is relevant to the environment in which events related to the proceedings took place.²⁸ D-158 has been referenced by other witnesses²⁹ and been quoted in documents submitted by the Prosecution³⁰ as well as the Defence.³¹
15. Furthermore, CLRV cited to work of D-158 in its Pre-Trial Brief in September 2016.³² The Defence even litigated in February 2019 that part of the book ‘Social Torture’ should not be used during the questioning of one of its witnesses.³³ Considering the number of times D-158 was previously mentioned in the proceedings by almost all parties and participants, the Chamber is therefore of the view that the Defence must have been familiar with D-158’s work for a considerable span of time. The Defence does not provide any explanation as to why it seeks to add D-158 only now.

²⁵ 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, para. 42.

²⁶ 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, 16 November 2017, ICC-02/04-01/15-1074.

²⁷ Transcript of hearing, 16 January 2017, ICC-02/04-01/15-T-28-ENG, p. 39, line 20 to 22.

²⁸ UGA-OTP-0270-0004.

²⁹ See, testimony of D-133, transcript of hearing, 28 February 2019, ICC-02/04-01/15-T-204-ENG.

³⁰ See, for example UGA-OTP-0272-0002, at 0303.

³¹ See, for example UGA-D26-0018-0003 and UGA-D26-0018-3836.

³² Pre-Trial Brief on behalf of Victims represented by the Common Legal Representative, 6 September 2016, ICC-02/04-01/15-531, para. 26, fn. 22.

³³ See, oral decision in transcript of hearing, 28 February 2019, ICC-02/04-01/15-T-204-ENG, page 3, lines 1 to 15.

16. As to the nature of the testimony of D-158 and the content of the related items, the Chamber is not in the possession of D-158's report. However, the terms of reference instructing D-158 to produce the report³⁴ indicate that much of the expected report – and anticipated testimony of D-158 – has already been discussed by other witnesses called by the Defence.
17. For instance, topics listed under point number 3 relate to the experience of the abducted children, the role of spirits and the question of 'free choice and will'. The Defence called D-133 as an expert on child soldiers and questioned him extensively on their role in the LRA, their experiences and the issue of 'free will'.³⁵
18. The Defence also called D-60 as a witness, who extensively testified on the issue of spirituality in general, in the LRA in particular and the role of Joseph Kony in this process.³⁶ The Chamber therefore considers that further additional testimony on these matters does not justify D-158's addition.
19. Regarding the topics listed under point 1 and 2 of the terms of reference, the Chamber notes that the LRA command structure, the rules of punishment in relation to marriage and sexual relations in the LRA, the distribution of wives and the possibility to disobey rules in the LRA have been extensively discussed during the proceedings. The Defence has called numerous witnesses and questioned Prosecution witnesses who provided direct testimony on these matters.
20. Further, the Prosecution has undertaken not to object to any submission of D-158's already existing academic work. The Chamber notes that D-158 discusses several points listed in the terms of reference in his published work. For instance, in his PhD thesis D-158 touches on several issues listed under points 1 and 2.³⁷
21. Considering the already available evidence, the Chamber does not find that the additional testimony of D-158 and his report would cover aspects which have not been treated up to now. It would merely be additional evidence for topics for which direct evidence has

³⁴ ICC-02/04-01/15-1559-Conf-AnxA.

³⁵ Transcript of hearing, 28 February 2019, ICC-02/04-01/15-T-204-ENG.

³⁶ Testimony of D-60, transcript of hearing, 19 November 2018, ICC-02/04-01/15-T-197-ENG.

³⁷ *See for example*, Understanding War and Its Continuation, pages 122 f., 397, 411, 429.

already been elicited by the Defence. Further, the Chamber takes into account that both the Prosecution and the CLRV object to the addition of D-158.

22. Considering the above, the Chamber does not consider it appropriate to grant the addition of D-158 and the associated materials. However, as explained above, the Defence can submit any existing academic work of D-158 if it wishes to do so.

2) *D-13*

23. Regarding the timing of the request, the Chamber notes that D-13 had been included on the preliminary list of witnesses filed by the Defence on 14 December 2017.³⁸ The Defence does not address why it took D-13 off its witness list and now requests her addition again. No explanation is provided as to the timing of the request.
24. However, D-13 can provide relevant evidence due to her relationship with the accused. The Chamber also notes that the Prosecution does not object to her addition. The Chamber is aware that the CLRV objects that D-13 be added, citing arguments of expeditiousness of the proceedings.³⁹ While the Chamber takes these concerns into account, it considers that the addition of one witness will not prolong the proceedings in an unreasonable manner.
25. The CLRV further argues that other witnesses, in the framework of Article 56, have already provided evidence on the same issues D-13 is expected to testify on.⁴⁰ The Chamber notes that these witnesses were called by the Prosecution. The fact that the Defence wants to elicit evidence on issues already commented on by Prosecution witnesses does not necessarily make the Defence evidence repetitive or redundant.
26. Considering the above, the Chamber grants the addition of D-13 to the Defence's list of witnesses and the related documents⁴¹ to its list of evidence.

³⁸ Annex to 'Defence Submission of its Provisional List of Witnesses and Estimated Examination Times', ICC-02/04-01/15-1107-Conf-Exp-AnxA.

³⁹ CLRV Response, ICC-02/04-01/15-1561-Conf, para. 21.

⁴⁰ CLRV Response, ICC-02/04-01/15-1561-Conf, para. 23.

⁴¹ ICC-02/04-01/15-1559-Conf-AnxC.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

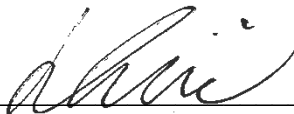
ORDERS the Defence and CLRV to file a public-redacted version of their submissions in accordance with paragraph 10;

ORDERS the Registry to reclassify the Prosecution Response (ICC-02/04-01/15-1560-Conf) as 'public';

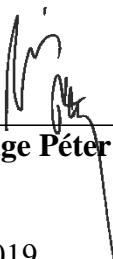
GRANTS the addition of D-13 to the Defence list of witnesses and the related documents to the Defence list of evidence; and

REJECTS the remainder of the Request.

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



Judge Bertram Schmitt, Presiding Judge



Judge Péter Kovács



Judge Raul C. Pangalangan

Dated 13 August 2019

At The Hague, The Netherlands