

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Decision on Defence Request to Add D-0157 to its List of Witnesses

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

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Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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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) of the Rome Statute (the ‘Statute’) and Rule 68(2)(b) of the Rules of Procedure and Evidence (the ‘Rules’), issues the following ‘Decision on Defence Request to Add D-0157 to its List of Witnesses’.

I. Procedural history and submissions

1. On 4 June 2018, the Defence filed, *inter alia*, its final lists of witnesses and evidence for its evidence presentation.¹
2. On 1 October 2018, the Defence called its first witness.²
3. On 21 August 2019, the deadline of 30 September 2019 was set for the parties to submit any outstanding motions related to the introduction of evidence.³
4. On 30 September 2019, the Defence filed a request seeking authorisation to add witness D-0157 to its list of witnesses (the ‘Request’).⁴ It submits that the witness is ‘highly relevant, probative and will greatly assist the Court to establish the truth concerning the Defence’s affirmative defence of duress.’⁵ The Defence submits that since 9 August 2016, the Office of the Prosecutor (the ‘Prosecution’) has been aware of its intention to raise the affirmative defence of duress.⁶ It also states that the material to be submitted is minimal.⁷ The Defence further contends that ‘although there has been a lot of evidence on this topic’, contrary to much of the evidence on the record that refers to the 1980s and 1990s, the proposed testimony falls within the jurisdiction of the Court.⁸ The Defence also avers that the addition of D-0157 will not affect the length of the proceedings, if submission

¹ 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’, ICC-02/04-01/15-1272-Red2. The list of witnesses is contained in confidential annex A, ICC-02/04-01/15-1272-Conf-AnxA. The list of evidence is contained in confidential annex B, ICC-02/04-01/15-1272-Conf-AnxB.

² Transcript of hearing, ICC-02/04-01/15-T-180-Red-ENG.

³ Order Setting a Deadline for Evidence Related Requests, ICC-02/04-01/15-1570. *See also* Clarification on Order Setting a Deadline for Evidence Related Requests, ICC-02/04-01/15-1572.

⁴ 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, ICC-02/04-01/15-1619-Conf.

⁵ Request, ICC-02/04-01/15-1619-Conf, paras 1-2, 12, 21.

⁶ Request, ICC-02/04-01/15-1619-Conf, paras 2, 5, 12, 16, 19.

⁷ Request, ICC-02/04-01/15-1619-Conf, para. 18.

⁸ Request, ICC-02/04-01/15-1619-Conf, para. 20.

pursuant to Rule 68(2)(b) of the Rules is authorised.⁹ In this regard, it argues that the criteria for submission pursuant to this provision are met and that the factors in Rule 68(2)(b)(i) mitigate in favour of allowing the addition.¹⁰

5. On 4 October 2019, the Prosecution filed its response, opposing the Request (the ‘Prosecution Response’).¹¹ It submits that the Request comes 16 months after the initial deadline to file its lists of witnesses and other evidence. The Prosecution contends that the Defence has provided no explanation for this late addition, although information about the specific incident was included early in the Uganda investigation and was disclosed to the Defence already in 2015.¹² The Prosecution also argues that a significant amount of evidence about the specific incident is on the record which, in its view, is more relevant than the suggested evidence of D-0157.¹³ The Prosecution further submits that the suggested evidence is not relevant to the issue of duress and is of minimal prospective significance.¹⁴ In its view, ‘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’.¹⁵ Alternatively, in the event that the addition of the evidence is allowed, the Prosecution does not oppose the introduction pursuant to Rule 68(2)(b) of the Rules.¹⁶
6. On 7 October 2019, the Legal Representatives for Victims (the ‘LRV’) filed their response opposing the Request.¹⁷ They argue that the Defence fails to justify the lateness of its Request as well as the significance of the proposed evidence.¹⁸

II. Analysis

7. The Chamber notes the submissions of the parties with regard to the confidential classification of the filings.¹⁹ Accordingly, it directs the Registry to reclassify the LRV

⁹ Request, ICC-02/04-01/15-1619-Conf, paras 3, 17-18.

¹⁰ Request, ICC-02/04-01/15-1619-Conf, paras 22-34.

¹¹ Prosecution’s Response to Defence Request to add UGA-D26-P-0157 to its List of Witnesses (ICC-02/04-01/15-1619-Conf), ICC-02/04-01/15-1625-Conf. On 1 October 2019, the Chamber directed the parties to file any response to the Request by Monday, 7 October 2019 (*see* e-mail from Trial Chamber IX Communications to the parties).

¹² Prosecution Response, ICC-02/04-01/15-1625-Conf, para. 4.

¹³ Prosecution Response, ICC-02/04-01/15-1625-Conf, paras 5-6.

¹⁴ Prosecution Response, ICC-02/04-01/15-1625-Conf, paras 7-8.

¹⁵ Prosecution Response, ICC-02/04-01/15-1625-Conf, para. 7.

¹⁶ Prosecution Response, ICC-02/04-01/15-1625-Conf, para. 9.

¹⁷ Victims’ Response to “Defence Request to add UGA-D26-P-0157 to its List of Witnesses, Accompanying Documents to its List of Evidence and Submissions of the Accompanying Documents Pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence”, ICC-02/04-01/15-1629-Conf (the ‘LRV Response’).

¹⁸ LRV Response, ICC-02/04-01/15-1629-Conf, para. 2.

Response as ‘public’ and further directs the Defence and the Prosecution to file a public redacted version of their respective submissions within five days of notification of this decision.

8. The Chamber recalls its previous decisions in which it has set out the criteria to allow the late addition of evidence.²⁰ The Chamber further notes that the parties and participants have made submissions in favour of the application of the aforesaid criteria in the determination of the present Request.²¹
9. In the instant case, the Chamber must determine whether the Defence’s requested reliance on the testimony of D-0157 and accompanying documents causes undue prejudice to the procedural rights of the Prosecution. Relevant factors that the Chamber may take into consideration include the extent to which the Request is opposed by the Prosecution, the time when the addition of evidence is sought, the nature and amount of the material concerned, the intended purpose for the Defence’s requested reliance on the evidence of D-0157, as well as ‘its prospective significance in light of the charges brought against the accused and the rest of the available evidence’.²²
10. In line with the aforesaid criteria, the Chamber notes that the Prosecution opposes the Request as untimely, unjustified and irrelevant. The Chamber observes that the Request comes at a very late stage of the proceedings and, as pointed out by the Prosecution, the Defence made no effort to justify this late submission. Nonetheless, the Prosecution does not suggest that the late addition of the evidence related to D-0157 would affect its procedural rights or in general the fairness or expeditious conduct of the proceedings. Furthermore, the Chamber notes that the material concerned is limited both in length (total of 14 pages) and scope (one incident in one location).

¹⁹ Request, ICC-02/04-01/15-1619-Conf, para. 4; Prosecution Response, ICC-02/04-01/15-1625-Conf, para. 2; LRV Response, ICC-02/04-01/15-1629-Conf, para. 9.

²⁰ Decision on the ‘Prosecution’s Request to Add Transcripts and Seven Additional Documents to its List of Evidence’, 2 December 2016, ICC-02/04-01/15-619 (the ‘December 2016 Decision’), paras 8, 10; 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), 22 November 2016, ICC-02/04-01/15-600 (the ‘November 2016 Decision’), para. 14.

²¹ Request, ICC-02/04-01/15-1619-Conf, para. 13; Prosecution Response, ICC-02/04-01/15-1625-Conf, para. 3; LRV Response, ICC-02/04-01/15-1629-Conf, para 10.

²² December 2016 Decision, ICC-02/04-01/15-619, para. 10.

11. The Chamber is mindful of Article 67 of the Statute, in particular the right of the accused to raise defences and present evidence. It notes that there is already other evidence on the record related to the issue of duress and also in relation to the specific incident referred to in the statement of D-0157.²³ Notwithstanding, the Chamber also observes the Defence submissions that the suggested evidence is the personal account of ‘a victim of “Collective Punishment” meted out against villages of a person who escape[d] from the LRA’.²⁴ The Chamber further takes into account that, contrary to other evidence on the record related to the issue of ‘collective punishment’, this witness provides testimony relevant to the timeframe of the charges.²⁵ Although full consideration of the standard evidentiary criteria of the suggested evidence will be deferred to the Chamber’s deliberation of its judgment,²⁶ the Chamber considers that the suggested testimony provides evidence from a perspective that the accused deems useful for his defence on duress and is also within the scope of the charges. The Chamber further notes that granting the Request would not have any impact on the expeditiousness of the proceedings.
12. Turning to the part of the Request to introduce D-0157’s prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, the Chamber recalls its general findings as to the meaning of ‘prior recorded testimony’, the criteria and the factors guiding the Chamber’s discretion under this provision.²⁷ The Chamber considers that in the instant case the criteria of Rule 68(2)(b) of the Rules are met and are not contested by the Prosecution.²⁸ Specifically, the Chamber considers that the testimony in question does not go to the acts and conducts of the accused, as previously defined by the Chamber.²⁹ The Chamber further notes that the parties agree to the existence of the specific incident and what prompted it.³⁰ Accordingly, the evidence relates to an issue that is not materially in dispute. Although, as noted above, the Chamber defers its final assessment of the

²³ See evidence referred to in the Prosecution Response, ICC-02/04-01/15-1625-Conf, para. 5.

²⁴ Request, ICC-02/04-01/15-1619-Conf, para. 1.

²⁵ Request, ICC-02/04-01/15-1619-Conf, para. 20.

²⁶ Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, 1 December 2016, ICC-02/04-01/15-596-Red (the ‘First Rule 68(2) Decision’), para. 7.

²⁷ First Rule 68(2) Decision, ICC-02/04-01/15-596-Red, paras 9-20.

²⁸ Prosecution Response, ICC-02/04-01/15-1625-Conf, para. 9.

²⁹ Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b), 16 August 2018, ICC-02/04-01/15-1322-Red (the ‘August 2016 Decision’), para. 13. See also First Rule 68(2) Decision, ICC-02/04-01/15-596-Red, paras 11-13.

³⁰ Request, ICC-02/04-01/15-1619-Conf, paras 16-18; Prosecution Response, ICC-02/04-01/15-1625-Conf, para. 5.

relevance of D-0157's testimony for the deliberation of the judgment under Article 74 of the Statute,³¹ it notes that the parties appear to agree that the evidence of D-0157 is cumulative and corroborative in nature.³² Importantly, the Chamber considers that in light of the advanced stage of the proceedings, when, as the Defence submits, its case is 'coming to an end',³³ this manner of submission favours expeditiousness while respecting the rights of the accused pursuant to Article 64(2) of the Statute. As such, the interests of justice are best served by introduction of this evidence pursuant to Rule 68(2)(b) of the Rules.

13. Accordingly, the Chamber allows the addition of D-0157 to the Defence's list of witnesses and the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of D-0157, together with accompanying documents, as specified in Annexes A-C of the Request.
14. As noted in previous decisions of the Chamber, introduction is subject to a declaration by the witness pursuant to Rule 68(2)(b)(ii) and (iii) of the Rules.³⁴ In accordance with the previous practice established by the Chamber,³⁵ the Registry's Legal Counsel, or a person delegated by him, is designated to witness the said declaration. In view of the imminent end of the presentation of evidence in this case, the Chamber instructs the Registry to file the corresponding declaration no later than 6 December 2019.³⁶
15. The Defence is also instructed to file a proposed redacted version of the written record of the prior recorded testimony, or indicate that it may be made public in its entirety (including the witness's identity), within seven days of filing in the record of the case of the declaration of D-0157.

³¹ Initial Directions on the Conduct of Proceedings, 13 July 2016, ICC-02/04-01/15-497, para. 24. *See also* November 2016 Decision, ICC-02/04-01/15-600, para. 34; First Rule 68(2) Decision, ICC-02/04-01/15-596-Red, para. 19.

³² Request, ICC-02/04-01/15-1619-Conf, paras 31-32; Prosecution Response, ICC-02/04-01/15-1625-Conf, para. 5.

³³ Request, ICC-02/04-01/15-1619-Conf, para. 33.

³⁴ August 2016 Decision, ICC-02/04-01/15-1322-Red, para. 23. *See also* First Rule 68(2) Decision, ICC-02/04-01/15-596-Red, para. 222.

³⁵ August 2016 Decision, ICC-02/04-01/15-1322-Red, para. 23. *See also* First Rule 68(2) Decision, ICC-02/04-01/15-596-Red, para. 222.

³⁶ First Rule 68(2) Decision, ICC-02/04-01/15-596-Red, para. 223.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Request;

DECIDES that, subject to the receipt of the declaration required under Rule 68(2)(b)(ii) and (iii) of the Rules, the prior recorded testimony of D-0157 shall be introduced into evidence pursuant to Rule 68(2)(b) of the Rules;

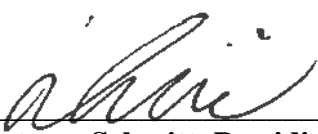
ORDERS the Registry to file the declaration of D-0157 pursuant to Rule 68(2)(b) of the Rules no later than 6 December 2019;

ORDERS the Defence to file a proposed redacted version of the written record of the prior recorded testimony, or indicate that it may be made public in its entirety (including the witness's identity), within seven days of filing in the record of the case of the declaration of the witness;

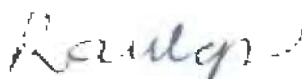
ORDERS the Defence and the Prosecution to respectively file a public redacted version of filings ICC-02/04-01/15-1619-Conf and ICC-02/04-01/15-1625-Conf within five days of notification of this decision; and

ORDERS the Registry to reclassify as 'public' filing ICC-02/04-01/15-1629-Conf.

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


Judge Bertram Schmitt, Presiding Judge


Judge Péter Kovács


Judge Raul C. Pangalangan

Dated 16 October 2019

At The Hague, The Netherlands