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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Peter Kovacs
Judge Raul C. Pangalangan

SITUATION IN UGANDA

**IN THE CASE OF
*THE PROSECUTOR v. DOMINIC ONGWEN***

Public

**Defence Response to "Prosecution's formal submission of intercept evidence *via*
the 'bar table'" (ICC-02/04-01/15-580)**

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

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor
Benjamin Gumpert, QC

Counsel for the Defence

Krispus Ayena Odongo
Chief Charles Achaleke Taku

Legal Representatives of the Victims

Joseph Manoba Akwenyu
Francisco Cox
Paolina Massidda

Common Legal Representatives of the Victims

Paolina Massidda
Jane Adong

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Paolina Massidda
Carolina Walter
Orchlon Narantsetseg

The Office of Public Counsel for the Defence

Xavier-Jean Keita

Amicus Curiae

REGISTRY

Registrar

Herman Von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Other

I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby responds to the Prosecution's submission of intercept evidence *via* the bar table ('Motion') filed on 28 October 2016. For reasons developed below, the Defence requests Trial Chamber IX ('Trial Chamber') to reject the Motion.

II. PROCEDURAL BACKGROUND

2. On 13 July 2016, the Trial Chamber issued initial directions on the conduct of proceedings where it indicated that the parties could submit evidence *inter alia*, *via* the bar table.¹
3. On 28 October 2016, the Prosecution filed the Motion requesting the admission intercept evidence *via* the bar table.²
4. The Motion requests the Chamber to recognise 2,507 items relating to LRA radio intercept evidence as formally submitted in advance of the commencement of trial. They are divided into six major categories:

Category I: shorthand rough notes of LRA radio communications (Annex A);

Category II: logbooks containing summaries of LRA radio communications (Annex B);

Category III: faxed copies of logbook entries (Annex C);

Category IV: intelligence reports (Annex D);

Category V: sound recordings of LRA radio communications (Annex E); and

Category VI: miscellaneous intercept evidence (Annex F).

¹ ICC-02/04-01/15-497, para. 27.

² ICC-02/04-01/15-580 ('Prosecution Motion').

III. SUBMISSIONS

1. General Considerations

5. The Defence notes the centrality of the radio intercepts to the Prosecution case. The Lead Trial-Attorney for the Prosecution has stated that the radio material plays “a very considerable role in the way the Prosecution puts its case”.³ In the Motion, it has stated that the intercepts go “directly to the heart of the issues at this case”⁴ and the log book category “contain[s] evidence on every aspect of the case against Dominic Ongwen”.⁵ This echoes previous submission of the Defence,⁶ that this material is at the very core of proving major elements of much of the charges brought by the Prosecution against Mr Ongwen.

6. The Article 69(4) evaluation of an item is in principle supposed to consider the item in isolation. The Appeals Chamber has stated that the Statute and Rules:

anticipates that a Chamber's determination of the relevance or admissibility of evidence be made on an *item-by-item basis*. Whether evidence is relevant, has probative value, or would be prejudicial to the accused will depend on the specific characteristics of each item of evidence; the factors that will require consideration will not be the same for all items of evidence.⁷

7. In other words, the items should be evaluated individually, yet the Prosecution’s approach seeks to establish the admissibility of the items through mutual self-reference and reference to Rule 68(2)(b) statements. If the Trial Chamber accepts this approach, which is a departure from prior practice, then the Prosecution could establish major elements of its case effectively on paper through an unorthodox legal process without a single witness appearing. This significantly diminishes the idea of a public trial premised on the principle of

³ ICC-02/04-01/15-T-25-ENG, p. 10, lines 17-18.

⁴ Prosecution Motion, para. 15.

⁵ Prosecution Motion, para. 39.

⁶ ICC-02/04-01/15-555-Conf, para. 23.

⁷ ICC-01/05-01/08-1386 (OA5, OA6), para. 53 (emphasis added).

orality,⁸ firstly because of the absence of live testimony and, secondly, because rarely in international trials is the evidence made available for the public to inspect and scrutinize.

8. The prior practice of other trial chambers is that before submitting a bar table motion, the moving party is required to seek the consent of the opposing party to tender items through this method or is required to give an indication of the opposing party's objection and the grounds for any such objection.⁹ While the Trial Chamber has not adopted this in its conduct of proceedings decision as a requirement, the prior practice suggests that the consent requirement is associated with fair proceedings. In this regard, the Defence was notified by the Prosecution about the filing, that it dealt with a bar table motion for the radio intercept material, and wished to know if the Defence would oppose a Regulation 35(2) request for a page limit extension.¹⁰ No substantive discussion about the content was discussed.
9. The Defence notes that bar table motions are an established procedural venue. However, these motions are supposed to cater for exceptional situations where documents or other items are directly placed into evidence because they *cannot* be produced by or through a witness during testimony.
10. The admission of any evidence directly from the bar, and not through an appropriate witness, constitutes an exception, rather than the rule. As such, strict parameters must be applied and the moving party must demonstrate that (i) the evidence is relevant to the issues, (ii) the evidence has probative value, including a showing of reliability and authenticity, and (iii) the probative value of the evidence outweighs any prejudicial effects on the right to a fair trial.

⁸ See Articles 64(7), Article 67(1), and Article 69(2) of the Statute, and Regulation 20 of the Regulations of the Court.

⁹ ICC-01/09-01/11-847-Corr, para. 17. See also, ICC-01/04-01/07-1665-Corr, paras 101-102.

¹⁰ See email from Prosecution to Trial Chamber IX, 21 October 2016 at 17h46 CET.

11. The above is succinctly stated in *Karadzic*. It was held that:

The bar table should not generally be the first port of call for the admission of evidence. It is, rather, a supplementary method of introducing evidence, which should be used sparingly to assist the requesting party to fill specific gaps in its case at a later stage in the proceedings. [...] Notwithstanding that it may result in the saving of time inside the courtroom, in the circumstances of the present case, the Chamber considers that it is essential to view the bar table as mechanism to be used on an exceptional basis and not simply as another means by which evidence may be introduced wholesale into the court record.¹¹

12. The Defence submits that Mr Ongwen's fair trial rights will be jeopardised by the blanket admission of the intercept evidence *via* the bar table. The Defence therefore requests that the Trial Chamber acts with caution in admitting the disputed intercept material, bearing in mind its volume and significance to the issues at hand which could greatly impact Mr Ongwen's fair trial rights.
13. The sheer volume of the items that the Prosecution seeks to have admitted *via* the bar table would amount to a decision heavily based on evidence that is not tested by the Defence. The Prosecution does not argue that these witnesses are not available and the alleged expediency and saving court time should not be at the expense of Mr Ongwen's fair trial rights. Rather the Prosecution argues that "will enable the Chamber to make use of it during the trial, understand other evidence in the case and ultimately assist in determining the truth."¹² If this is the purpose, the Prosecution fails to explain why the Motion is then needed when the Trial Chamber already has access to the material through eCourt and the Chamber has indicated that it will in most cases defer the assessment until deliberations.

¹¹ *Prosecutor v. Karadzic*, Case No. IT-95-5/18-T, 'Decision on Prosecution First Bar Table Motion', 13 April 2010, paras 9 and 15, available at: <http://www.icty.org/x/cases/karadzic/tdec/en/100413.pdf>; *Prosecutor v. Prlic et al.*, Case No. IT-04-74, 'Decision on Admission of Evidence', 13 July 2006, pg. 6, available at: <http://www.icty.org/x/cases/prlic/tdec/en/dec-ae060713.pdf>.

¹² Prosecution Motion, para. 4.

2. *Relevance and Admissibility*

14. A tendering party must demonstrate that the proffered evidence is *prima facie* relevant to trial and that it relates to the issues before the chamber.¹³ The Trial Chamber need not evaluate probative value if the moving party has not made a *prima facie* showing of relevance. As an example, a moving party must prove the originality and integrity of audio recordings, films, and photographs before they can be admitted by a chamber *via* the bar table, including the date and/or location of the recording.¹⁴ The Prosecution has not fulfilled this requirement and admits in its filing that not every page of the documents or each minute of the audios submitted are directly relevant or probative.¹⁵
15. Furthermore, counter to the Prosecution arguments of expediency and saving the court's time, the Prosecution instead seeks for the Trial Chamber to comb through the items and determine what is relevant or not. The Prosecution offers to identify portions of the materials that they may deem important at a later stage.¹⁶ This approach fails to specify the relevance of an item and should lead to the request being rejected. Moreover, such an approach goes against the grain of the prevailing law relating to bar table motions which requires that each item of evidence must be individually assessed for relevance and probative value before being admitted into evidence.¹⁷

3. *Probative Value*

16. In determining probative value, the Trial Chamber must examine reliability and authenticity of the submitted evidence. The Prosecution has not demonstrated

¹³ ICC-01/04-01/06-1399, para. 27.

¹⁴ ICC-01/04-01/07-2635, para. 24 ('Katanga BTM Decision').

¹⁵ Prosecution Motion, para. 17.

¹⁶ Prosecution Motion, para. 17.

¹⁷ See Katanga BTM Decision, para. 13. Therein, the Court stated that each item of evidence must be individually assessed for relevance and probative value before being admitted into evidence. This was to be demonstrated by the moving party without which, the item could not be admitted. The Court also held that it does not suffice to argue that contents may be corroborated by other evidence. See also ICC-01/05-01/08-1386 (OA5, OA6), para. 53.

that the intercept evidence in this case passes the necessary requirements. The arguments contained in the Prosecution Motion require the testimony of the witnesses referenced before the Trial Chamber can satisfy itself of the probative value of the intercept evidence. There are five preliminary points that can be made relating to the assessment of the probative nature of the material generally. Thereafter, the Defence discusses specific issues that apply to certain categories.

17. Firstly, contrary to the Prosecution allegations, whilst the Defence discussed the intercept material during the Confirmation of Charges phase of the case, it also challenged its reliability and in no circumstances has it agreed to its authenticity. There are many questions which have not yet been answered through testimony that impact upon both of these criteria.
18. Secondly, there are issues related to reliability of both a technical nature and resulting from human errors that, it is submitted, should delay the submission of the evidence. For example, the Defence has not yet examined technical issues related to radio equipment used and the training and experience of those involved. The Defence pursued this matter through a disclosure request *inter partes*. The Prosecution responded that it had no information as regards the radios used and the protocols adopted by the UPDF.¹⁸ In light of this, the Defence has been investigating and researching these issues.
19. The Defence may well engage an expert to address the technical matters. However, the Prosecution Motion creates procedural disorder through its pre-emptiveness. This is because the Defence must first comment upon the materials in the present filing. Then it will presumably re-visit the issues with the witnesses from the respective intercepting agencies. Should the Defence be

¹⁸ Disclosure Letter from Prosecution to Defence, 15 June 2016, pgs 4-5, received by email at 18h36 CET.

satisfied that it has identified issues meriting a supplement to the present response, it will then do so, but submissions spread across multiple filings create a needlessly complex process and greater room for error. It is submitted that a preferable process would be to reject the Prosecution's over-general request and oblige it to re-file it in a more focused manner at a later stage after specific incriminatory items are tendered through witnesses.

20. Secondly, there are several human factors that are clearly discernible from the statements which introduce major gaps, and potentially errors, into the collection process. These gaps and errors undermine the probative nature of the log-books and radio recordings and associated rough notes and faxes.
21. Witnesses P-0003,¹⁹ P-0029,²⁰ P-0032,²¹ and P-0291²² make clear that the purpose of the interceptions – be they in recording or paper form – was for military operations. This is to say troop movements and plans for attacks. The focus was not on criminal investigations or the collection of information relevant to criminal prosecutions – this is something admitted by the Prosecution at paragraph 43 of its Motion. In other words, the record of interceptions was focused on operational information. This impacts upon what is in the record and hence its reliability, but it also adds to the prejudice since the material was not collected with Article 54(1)(a) guiding the collection.
22. It is also clear that non-operational information will be less likely to be reflected in the materials put forward by the Prosecution. Witnesses P-0003,²³ P-0029,²⁴

¹⁹ UGA-OTP-0069-0803-R01, para. 17.

²⁰ UGA-OTP-0267-0455, paras 17-18.

²¹ UGA-OTP-0069-0796-R01, para. 15.

²² UGA-OTP-0246-0061, para. 18.

²³ UGA-OTP-0235-0049, para. 72: "At time stamp 00.21.12 there appears to be a change of recording. It is often practice for UPDF Technical Intelligence Officers to stop and start recordings dependent on relevance of what they hear".

²⁴ UGA-OTP-0027-0231-R01, para. 44.

P-0032,²⁵ and P-0059²⁶ state that not relevant material was not recorded. For example, P-0032 noted that “unimportant conversations” were not recorded.²⁷ The above information also has to be set against the statement of P-0029²⁸ that the process has developed and that the process is “home grown”.²⁹ In sum, the purpose for which the material was collected means that there is an intrinsic bias in what was selected to be preserved. What is or may not be reflected are exculpatory exchanges as for example threats being made against Mr Ongwen or his family.

23. Thirdly, and relatedly, it is clear that the radio transmissions were far from the only form of communication used. Many witnesses note the use of satellite phones by the LRA.³⁰ Witness P-0029 notes that monitoring of these did not begin until 2007. Also used were cell-phones,³¹ walkie-talkies,³² and simple passing of letters.³³ The Prosecution seeks to portray the radio intercepts as a nearly complete record of what was communicated between the LRA; however, it is abundantly clear that this is not the case.
24. These other communication channels lesson the probative value of the radio intercepts and related material because their absence in the record is a tremendous gap of potentially exculpatory material – for example communications of Mr Ongwen seeking to escape could have passed through these channels. Any such communications would undermine the notion that Mr

²⁵ UGA-OTP-0069-0796-R01, para. 15.

²⁶ UGA-OTP-0027-0244, para. 16.

²⁷ UGA-OTP-0069-0796-R01, para. 15.

²⁸ UGA-OTP-0027-0231-R01, para. 12.

²⁹ UGA-OTP-0027-0231-R01, para. 14.

³⁰ P-0027: UGA-OTP-0249-0444-R01, para. 29 and UGA-OTP-0207-0256-R01, para. 15; P-0029: UGA-OTP-0027-0231-R01, paras 38 and 52, UGA-OTP-0267-0455, para. 52, and UGA-OTP-0267-0455, para. 53; P-0032: UGA-OTP-0150-0030-R01, para. 14; P-0059: UGA-OTP-0027-0244, para. 31; and P-0291: UGA-OTP-246-0061, at 0070, para. 50.

³¹ UGA-OTP-0249-0444-R01, para. 29; UGA-OTP-0207-0256-R01, para. 15; and UGA-OTP-0027-0231-R01, paras 38 and 52.

³² UGA-OTP-0027-0231-R01, paras 38 and 52.

³³ UGA-OTP-0150-0030-R01, para. 20.

Ongwen endorsed the goals of the LRA or intended to implement its plans as alleged by the Prosecution.

25. Fourthly, the Prosecution's assertion that there is secure chain of custody is misleading and inadequate. As an example, the Prosecution submits that radio operators stored and locked the intercept evidence in wardrobes in their room³⁴ but there are allegations that the public and family members were invited into the secured facility, thus opening up the possibility of potentially tainted evidence.³⁵ Until the witnesses from the Gulu 4th Division intercept house testify, these questions will go unanswered and thus it is pre-mature to seek to submit the log-books, faxes, and radio recordings.
26. Fifthly, in *Katanga*, that trial chamber stated that documents emanating from persons or entities involved in the events that contain opinion evidence without qualifying their authors as experts should be admitted with caution.

Where they make specific factual assertions about relevant political or military events, they can only be admitted if it can be shown that the authors have made reliable and objective reports. This is not the case for many of them. Therefore, even though some of the documents may contain information that is directly relevant to contentious issues in the case, the fact that they are assertions made by interested persons severely diminishes their probative value.³⁶

27. In this case, the Prosecution admits that the intercepts were created and prepared by various military and law enforcement institutions of the Government of Uganda which was engaged in a protracted conflict with the LRA.³⁷

³⁴ Prosecution Motion, para. 29.

³⁵ UGA-OTP-0242-0219, handwritten page 1, para. 3. *See also*, handwritten page 2, para. 11, where P-0032 alleges that P-0003 might have torn pages from files at the office.

³⁶ *Katanga* BTM Decision, para. 32.

³⁷ Prosecution Motion, paras 12-13.

28. As State organs of a belligerent party, none of these institutions can be considered as a neutral independent source, especially since the much of the evidence was provide or generated after the referral of the Situation of Uganda to the Prosecutor. As such, the need for cross examination of the witnesses involved in the intercept operation is important. The Defence also points out that exculpatory evidence or other evidence that supports Mr Ongwen's defence of duress may come through cross examination.
29. Official documents that are not publicly available from official sources (e.g. the website of an organisation or official publications), and with no extrinsic indications as to its origin and author, are not self-authenticating and must be certified by the relevant authority.³⁸ The intercept evidence tendered by the Prosecution is not the kind of evidence that is publicly available from official sources. In addition, there is no extrinsic indication in them to show its origin and author, and as such, the Chamber should require that they be tendered through a witness or fulfil the requirements set out in this Court's jurisprudence.

Category II – Log-books

30. Witness P-0003 stated that the long-hand books do not reflect the order in which conversations occurred and that the short-hand – i.e. rough notes – is more accurate in this regard.³⁹ Neither the rough notes nor the audio recordings are as comprehensive as the log-books. Thus, it is submitted that the Trial Chamber should exercise caution in reading into too much narrative in the log-books. They are therefore less probative then they appear.
31. How probative the log-books are perceived to be must also be tempered by the fact that they are both translations from Luo and also attempts to make sense of

³⁸ Katanga BTM Decision, para. 24.

³⁹ UGA-OTP-0069-0803-R01, para. 16.

what P-0125 describes as mostly codes and proverbs.⁴⁰ Witness P-0291 says that the codes changed frequently⁴¹ and usually every 3-4 months.⁴² Witness P-0003 stated that the LRA have used up to seven codes in one day.⁴³ While in some cases TONFA code-books were captured, it appears that much of the code breaking was done in an intuitive and organic manner.⁴⁴ That process cannot be re-created and much of the process was on the rough notes of which there is an incomplete record. In other words, where there is no recording, it is not possible to verify whether the code-breakers accurately interpreted the proverbs and broke the codes as only the end product is available to the Trial Chamber.

32. The systematic issues discussed below with reference to the audio recordings would also impact upon the reliability of the body of log-books material because those issues impact upon the availability of information to the interceptors.

Category III – faxed copies of logbook entries

33. Assuming *arguendo* that the Trial Chamber admits some of the proffered intercept evidence, the Defence submits that some of the categories do not have probative value required for admission. For example, the Prosecution admits that items in Category III: faxed copies of logbook entries “add little probative value”. They may as well have admitted that they are repetitive and would be cumbersome on the Trial Chamber, unless of course upon examination of the originals in Category II, the Chamber sought to have better legible copies. However, since there is a lack of clarity as to which portions of the original

⁴⁰ UGA-OTP-0170-0047-R01, para. 37.

⁴¹ UGA-OTP-0249-0423-R01, para. 22.

⁴² UGA-OTP-0246-0061, para. 35.

⁴³ UGA-OTP-0027-0214-R01, para. 29.

⁴⁴ See, for example, UGA-OTP-0027-0214-R01, paras 23-28.

logbooks will be identified as ‘important’ by the Prosecution⁴⁵, it is impossible to know at this moment, if those portions would be the ineligible ones.

Category VI – Miscellaneous intercept evidence

34. The items in Category VI also lack probative value because they are either repetitive, the relevance has not been properly demonstrated by the Prosecution, or they will create an extra burden to the Defence and the Chamber to sift through while waiting for the Prosecution to identify the important portions therein. In particular, the rescanned UPDF logbooks and rough notes, as well as the photographic annexes to P-0256’s statement, should be denied because the former is unnecessary and the latter can be introduced through P-0256 himself.

Category V – sound recordings of LRA radio communications

35. The Prosecution admits that the sound recordings of LRA radio communications in Category V do not reflect entire communications,⁴⁶ and it is therefore impossible to contextualise the said communications. What the Prosecution does not discuss are the multiple ways in which many factors either bias the selection of material that has presented or introduce systematic weaknesses in the submitted material. These factors attenuate the probative value of the recordings. These factors can be broadly divided into two categories: (1) gaps in the record introduced through operational limitations of the UPDF or political decisions, and (2) major gaps in the record created through systematic issues.
36. Regarding factor category (1), what is clear is that more tapes would have had to have been recorded than were provided to the Prosecution. The material to

⁴⁵ Prosecution Motion, para. 17.

⁴⁶ Prosecution Motion, para. 46, *citing* P-0003, UGA-OTP-0246-0077-R01 at 0083-0084; and P-0059, UGA-OTP-0258-0699-R01 at 0703-0704.

be submitted by the Prosecution comprises 626 items. Simple arithmetic indicates that even if only one tape was produced per day, this would amount to 1460 tapes over the period of 2002 to 2005. The number of disclosed tapes suggests that a tape was created every two (2) and a bit days. Items 260 to 269 of Annex E of the Prosecution's request are illustrative. The tape number increases sequentially roughly at the rate of one per day, yet there are also gaps in the sequence of tapes. Where there are gaps in the numbering, the dates jump significantly.⁴⁷

37. One explanation could be that the Gulu intercept house was under-resourced. Some conversations do not get taped because he runs out of tapes⁴⁸ and that occasionally when he runs out of tapes, he will be told to tape over less important conversations.⁴⁹ Other details are also illustrative. Witness P-0027 discusses a tape which is labelled as "Music Afrika".⁵⁰ This suggests that the recording house was under-funded.
38. A further explanation may be political interference or selection of some kind. There are hints of this. Witness P-0242 stated that it is likely that some or all of the tapes were not originals due to the presence of silence at the beginning or ends of the tapes. They are described as 2nd generation.⁵¹ Witness P-0242 also notes that item UGA-OTP-0045-0064 has only about 7 minutes of audio per side⁵² which is also odd. More to the point, there simply does not seem to be enough tapes to cover the period in question.

⁴⁷ As for example between item 268 and 269 where the item title jumps from "843/G 3RD" to "846/G 3RD" and the purported date of recording jumps from 18 June 2004 to 26 June 2004.

⁴⁸ UGA-OTP-0027-0214-R01, para. 46.

⁴⁹ UGA-OTP-0027-0214-R01, para. 51.

⁵⁰ UGA-OTP-0246-0039-R01, at 0052.

⁵¹ UGA-OTP-0261-0333-R01, paras 28-32.

⁵² UGA-OTP-0261-0333-R01, paras 61-64.

39. Witness P-0003 states sometimes tapes can be changed many time in the same day.⁵³ This is confirmed by P-0301, who notes that on a busy day they would go through three tapes.⁵⁴ There must be therefore many more record tapes. Whatever the explanation, there is a large gap in the record which has not been explained. This conspicuous gap undermines the probative value of the material because it suggests that what has been provided is either selective or at least far from a complete picture.
40. Factor category (2) – systematic issues – concern those factors that intrinsically impact upon the reliability of the totality of the material collected. This comprises primarily technical factors. Witnesses P-0027,⁵⁵ P-0029,⁵⁶ P-0032,⁵⁷ P-0125,⁵⁸ and P-0301⁵⁹ referred to weather induced interference. Other factors included terrain and distance from the radio receiver.⁶⁰ Of particular note, P-0032 claimed that during the rainy season the LRA find it hard to communicate because their solar panels do not work so well.⁶¹ Another environmental factor seems to be simply that at night-time there is a lot of interference.⁶² Witness P-0059 indicates that sometimes the LRA would communicate during this time.⁶³
41. Other technical limitations also systematically impact upon the completeness of the record and thus its probative value. Witness P-0027⁶⁴ and P-0303⁶⁵ both discuss that sometimes power-outages would prevent recording.

⁵³ UGA-OTP-0027-0214-R01, para. 44.

⁵⁴ UGA-OTP-0249-0423-R01, para. 41.

⁵⁵ UGA-OTP-0207-0256-R01, para. 9.

⁵⁶ UGA-OTP-0027-0231-R01, paras 38 and 52.

⁵⁷ UGA-OTP-0246-0003-R01, para. 37.

⁵⁸ UGA-OTP-0170-0047-R01, para. 20.

⁵⁹ UGA-OTP-0249-0423-R01, para. 45.

⁶⁰ UGA-OTP-0246-0003-R01, para. 37.

⁶¹ UGA-OTP-0150-0030-R01, para. 19.

⁶² UGA-OTP-0027-0244, para. 33.

⁶³ UGA-OTP-0027-0244, para. 34.

⁶⁴ UGA-OTP-0207-0256-R01, para. 9.

⁶⁵ UGA-OTP-0258-0723-R01, para. 27.

Independently, P-0242 notes that the change in pitch of some of the tapes that he analysed could be attributable to patchy power.⁶⁶

42. A final technical limitation was the number of radio channels that could be simultaneously monitored. Seemingly one of the well-supplied bases compared, P-0059 suggests that the Gulu intercept house had typically three radios.⁶⁷ Witness P-0029 and other witnesses indicate that sometimes the LRA would switch channels, part due to weather interference.⁶⁸ According to P-0301, LRA would change radio bands frequently.⁶⁹ P-0059 indicates that the other radios were tuned in to continue to monitor LRA transmissions;⁷⁰ however, it is obvious that should LRA commanders shift to more than 3 channels, as noted by P-0059,⁷¹ those intercepting would be unable to intercept all discussions. The Police interceptors only realised that the LRA used certain channels after some time.⁷²
43. According to P-0059, Kony and Otti used their own secret channels.⁷³ If this was the case, then exculpatory conversations – such as the making of plans without Mr Ongwen – may have never been recorded. This should lead to caution in concluding that the existing material is as probative as the Prosecution makes it out to be.
44. These various issues discussed with regards to Category V diminishes the probative value that they may have for the Chamber and this is outweighed by the prejudice suffered by Mr Ongwen.

⁶⁶ UGA-OTP-0261-0333-R01, para. 36.

⁶⁷ UGA-OTP-0027-0244, para. 15.

⁶⁸ UGA-OTP-0027-0231-R01, paras 38 and 52.

⁶⁹ UGA-OTP-0249-0423-R01, para. 33.

⁷⁰ UGA-OTP-0027-0244, para. 15.

⁷¹ UGA-OTP-0027-0244, para. 29.

⁷² UGA-OTP-0170-0047-R01, para. 15.

⁷³ UGA-OTP-0027-0244, para. 30.

4. *Prejudice*

45. Procedural fair trial rights require that in principle, all items of evidence should be admitted in a manner that affords an accused the opportunity to challenge the evidence against him, for instance by having the opportunity to examine witnesses. The Rome Statute gives full effect to this principle and the existing legal framework gives a special place for live testimony for incriminating evidence.⁷⁴
46. Under Article 64(2) of the Rome Statute, the Chamber has an obligation to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the Accused. The right to a fair trial must be understood to involve a right to elicit exculpatory oral evidence where there is a reasonable expectation that a witness can do so. Failure to afford such an opportunity is a denial of the Accused's right under Article 67(1)(e) to examine witnesses against him. In this case, the Defense submits that there is a reasonable expectation that potential exculpatory evidence, as well as evidence that will support the defence of duress will be extracted from the witnesses through cross examination. As such, the Trial Chamber should refrain from denying this opportunity to Mr Ongwen.
47. Relevant evidence may nonetheless be excluded if it may prejudice the fairness of the trial, including the rights of the Accused or the fair evaluation of testimony or other evidence.⁷⁵ Here, the Prosecution seeks to diminish the importance of Mr Ongwen's fair trial rights. As a matter of fact, the Prosecution's motion states that the formal submission of the intercept evidence causes no prejudice to a fair trial and that it will enable the Trial Chamber to make use of it during the trial, understand other evidence in the case and ultimately assist in the determination of the truth. Further, the Prosecution

⁷⁴ Article 67(1)(e) of the Rome Statute.

⁷⁵ ICC-01/09-01/11-1353, para. 16 ('Ruto BTM Decision').

avers that the intercept evidence will also ensure an expeditious trial and help in the streamlining of the presentation of evidence thus saving valuable court resources and time.⁷⁶

48. Given the size of defence teams, and the cultural and linguistic requirements that are clearly needed to interpret the recorded intercepts, it is virtually impossible for the Defence to confirm that each and every sound-recording is accurately captured in the log-books. The Prosecution's reluctance to tender specific items or even indicate the relevance of material within the sea of material it readily admits is irrelevant is prejudicial to notice and fairness.
49. Nowhere does the Prosecution address the prejudice that will be caused by the admission of this evidence to the rights of Mr Ongwen enshrined in Article 67(1), in particular, the right to challenge the evidence proffered against him. This is notwithstanding the Prosecution's admission that the intercept evidence is significant to its case.
50. Any items containing anonymous hearsay evidence should be rejected by the Chamber because it is more prejudicial than probative.⁷⁷ In this case, the Prosecution concedes that items in Category IV: intelligence reports, contain information from *inter alia*, human intelligence reports but these sources are not identified or named⁷⁸. While the Defence notes that other trial chambers have previously accepted anonymous hearsay, they have evaluated its probative value with due consideration of the impossibility of cross-examining the information source.⁷⁹

⁷⁶ Prosecution Motion, para. 4.

⁷⁷ Ruto BTM Decision, para. 63.

⁷⁸ Prosecution Motion, para. 43.

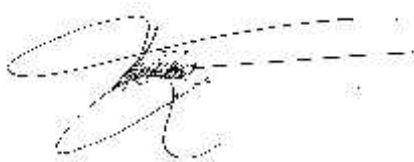
⁷⁹ ICC-01/04-01/07-3436-tENG, Prosecutor v. Katanga, Judgment, 7 March 2014, para. 90.

51. That said, the Defence submits that this consideration should not be applied in this case because as the Prosecution admits, the intercept evidence “goes directly to the heart of the issues at this case...” and is central to each thematic area of the case.⁸⁰ As the trial chamber in *Ruto* observed, the nature of intelligence documents is that they rely on unverified anonymous sources and often contain predictions, rather than accounts of events that have actually happened. That chamber noted that this limits the probative value of such documents and it is outweighed by prejudice when relied upon in a direct manner for “central aspects of the charges”.⁸¹ The admission of these intelligence reports will curtail the ability of the Defence to examine the sources of the information within these reports in order to verify the methods applied to, and the context of their preparation, and thus their reliability, validity, and relevance.

IV. RELIEF

52. The Defence respectfully request the Chamber to dismiss the prosecution motion in its entirety.

Respectfully submitted,



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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 21th day of November, 2016

At Lira, Uganda

⁸⁰ Prosecution Motion, paras 15 and 18.

⁸¹ Ruto BTM Decision, para. 50.