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**International
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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
With Confidential Annex A**

Prosecution's request to submit 1006 items of evidence from the 'bar table'

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 Office of the Prosecutor (“Prosecution”) requests the Chamber to accept as formally submitted 1006 items of evidence (“Requested Items”).¹
2. This request is made pursuant to the Chamber’s “Initial Directions on the Conduct of the Proceedings” (“Rule 140 Decision”)² and the “Decision on Prosecution Request to Submit Interception Related Evidence” (“Decision on Submitted Evidence”).³ These Decisions hold that absent procedural bars, the Chamber may exercise its discretion to recognise the formal submission of items of evidence.⁴ They further confirm that the submitted items of evidence will be considered when the Chamber deliberates its judgment.⁵
3. The Prosecution submits that there are no procedural bars to the Requested Items being submitted and that each item can be “fairly relied upon”.⁶ The Chamber should therefore receive the Requested Items as formally submitted.
4. In order to facilitate the Chamber’s future assessment of the Requested Items, each item is dealt with in detail in the table attached as annex A. This filing explains how these items have been organised into categories. It also explains how the table was populated and what each column in the table represents. This filing also includes preliminary submissions on the general relevance, probative value and potential prejudice of each category of items.

¹¹ A table listing the Requested Items is attached as annex A.

² ICC-02/04-01/15-497, para. 27

³ ICC-02/04-01/15-615.

⁴ ICC-02/04-01/15-615, para. 5 ; ICC-02/04-01/15-497, para. 24.

⁵ ICC-02/04-01/15-615, paras. 12-13.

⁶ ICC-02/04-01/15-615, para. 11.

Confidentiality

5. Annex A is classified as “confidential” because the items of evidence listed were disclosed to the Defence as “confidential”.

Legal Framework

6. The Chamber ruled in its Rule 140 Decision that participants may submit evidence “in writing through a ‘bar table’ application”.⁷
7. The Chamber further ruled in its Decision on Submitted Evidence that the “relevance, probative value and the potential prejudice of each item of evidence”⁸ submitted through a bar table “will be part of the Chamber’s assessment of evidence when evaluating the guilt or innocence of the accused”.⁹
8. For an item of evidence to be relevant it “must be logically connected to one or more facts at issue, in the sense that the item must have the capacity to make a fact at issue more or less probable than it would be without the item”.¹⁰

⁷ ICC-02/04-01/15-497, para. 27. The Trial Chamber in *Gbagbo and Blé Goudé* has also held that parties may submit evidence from the bar table, without producing it by or through a witness (ICC-02/11-01/15-498-AnxA, para.43). It held that “in general, [...] a rule that documents can only be submitted ‘through a witness’ has no basis in the Statute or the Rules and does not form part of the Court’s applicable law” (ICC-02/11-01/15-573-Red, para.9). *See also* ICC-01/04-01/06-1399-Corr, paras.22, 42; ICC-01/04-01/06-1981; ICC-01/04-01/07-2635; ICC-01/04-01/07-1665, para.100; ICC-01/09-01/11-1353, para.13; ICC-01/05-01/08-2012-Conf; ICC-01/05-01/08-2299-Red.

⁸ ICC-02/04-01/15-615, para. 12.

⁹ ICC-02/04-01/15-615, para. 12.

¹⁰ ICC-01/05-01/08-2012-Red, para. 14; *see also* ICC-01/09-01/11-1353, para. 15 (stating that “in order to establish relevance it must be demonstrated that the item relates to a material issue or fact properly to be considered by the Chamber in the sense of making it more or less probable, that is, tending to prove or disprove the material issue or fact in question”); Sir Rupert Cross, *Cross on Evidence*, 4th Edition, p. 16, 1974 explaining relevance in the law of evidence as follows: “For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter.”

9. The probative value of an item of evidence will always be a fact-specific inquiry. The Chamber “may take into account multiple factors, including the indicia of reliability, trustworthiness, accuracy or voluntariness that inhere in the item of potential evidence, as well as the circumstances in which the evidence arose”.¹¹
10. ICC jurisprudence establishes that the probative value of an item of evidence must be weighed against the unfair prejudicial effect that it “may cause to a fair trial or to a fair evaluation of the testimony of a witness”. This is also a fact-specific inquiry and the Chamber may consider various factors including whether an item of evidence encroaches on an accused’s rights under article 67(1) of the Statute.¹²

Annex A

11. Annex A to this filing is a table listing each submitted item. The table groups items into ten categories according to their type. The categories are listed below:¹³
- Category 1: Audio / Video Material and Media / Press Articles
 - Category 2: Certificates and Personal Data
 - Category 3: Correspondence – Letters
 - Category 4: Dossiers and Police Crime Files
 - Category 5: Forensic Records or Reports
 - Category 6: Photographs
 - Category 7: Reports
 - Category 8: Calendar / Diary
 - Category 9: Intelligence Documents (Lists/Tables, Notebooks, Notes, Organisational Diagrams, Intelligence Reports and Technical Manuals)

¹¹ ICC-01/05-01/08-2012-Red, para. 15; *see also* ICC-01/05-01/13-1989-Red, para. 208.

¹² ICC-01/05-01/08-2012-Red, para. 16; *see also* ICC-01/04-01/07-2635, para. 37.

¹³ These categories are not aligned with those to be found in Ringtail/eCourt. The Prosecution has re-categorised items where it makes their nature clearer.

- Category 10: Maps and Sketches

12. For each item of evidence the following details are provided: (i) evidence registration number (“ERN”); (ii) category; (iii) item description; (iv) relevance and probative value (v) incriminatory characterisation; (vi) crime location/SGBC/persecution/child soldiers; (vii) source; and (viii) disclosed date. The methodology used to populate the table is described below.

Category and Item Description

13. The “category” and “item description” columns in the table are self-explanatory and are designed to provide the reader with a basic understanding of the nature of the item and when it was created.

Relevance, Incriminatory Characterisation and Crime Location

14. When read together the columns: “relevance and probative value”; “incriminatory characterisation”; and “crime location” explain the relevance of each submitted item of evidence. They explain when an item is relevant to a charged crime location, persecution, sexual and gender based crimes or crimes relating to the conscription or use of child soldiers. The table also explains when and how an item relates to a witness.

15. In addition to the table, submissions in this filing summarise the relevance of each category of items as a whole.

Probative Value

16. The column “relevance and probative value” also explains the probative value of each submitted item by identifying evidence that corroborates the item. In particular, the table specifies parts of the Prosecution’s Pre-Trial Brief that refer

to evidence corroborating the item and reflect on its probative value. Where possible, details of witnesses whose prior recorded testimony corroborate the item are also provided.¹⁴

17. In addition to the table, submissions in this filing illustrate non-exhaustive indicia of reliability for each category of items.

Dates

18. The table includes the dates when submitted items were created in so far as this can be determined. It also shows the date that an item was disclosed to the Defence.

Source

19. The table specifies the source of each item of evidence. This is either the author/creator of the item or the institution that generated it. The source of some of the items are witnesses who will testify live before the Chamber. These items have been included because it would be inefficient to expend significant court time introducing them during live testimony. Unless otherwise directed, the Prosecution intends to limit its examination of these items to establishing their general provenance.¹⁵

Submissions

¹⁴ The Prosecution intend to elicit such corroborative evidence during the course of the trial.

¹⁵ For example, Witness P-0009 provided the Prosecution with a CD containing 241 photographs. The Prosecution will ask P-0009 during his live testimony to confirm that he provided a CD to the Prosecution and that the CD contained several photographs. The Prosecution will not, however, show each photograph contained on the CD to Witness P-0009.

Category 1: Audio / Video Material and Media / Press Articles

20. This category of evidence includes contemporaneous news reports, radio broadcasts and press articles. It includes documentaries and recent news reports following the surrender of Dominic Ongwen in January 2015. The items also include video footage of locations in Northern Uganda following attacks perpetrated by the LRA.¹⁶
21. Most of the evidence in this category was created by Ugandan and international media organisations. They are based, in part, on interviews of LRA fighters (including Joseph Kony and Vincent Otti)¹⁷ as well as victims and witnesses who had first-hand experiences of the period relevant to the charges. Other items in this category were generated by the Uganda People's Defence Force ("UPDF"), in the course of their investigations into LRA attacks soon after they occurred.
22. The evidence included in category 1 is relevant. It contains information on the background, existence and nature of the armed conflict. The submitted items identify the LRA as an armed group involved in the conflict in Northern Uganda. They contain information on crimes perpetrated by the LRA against civilians. The items also corroborate evidence that will be presented to the Chamber by witnesses who will provide oral testimony at trial.
23. The evidence is probative and has sufficient indicia of reliability. Items within category 1 include open source materials that were created contemporaneously to the charges, at a time before International Criminal Court ("ICC") proceedings were contemplated. Several items were generated by local media organisations with particular knowledge of the conflict: NTV Uganda, New

¹⁶ See UGA-OTP-0021-0006 and UGA-OTP-0021-0012.

¹⁷ See UGA-OTP-0208-0504 and UGA-OTP-0207-0745.

Vision, The Daily Monitor and Mega FM.¹⁸ Other items were generated by well-known media organisations with a global presence. These international organisations have no direct interest in current proceedings and include Channel 4, Al Jazeera, Sky News, the BBC and RFI.

Category 2: Certificates and Personal Data

24. This category consists of items containing biographical information of witnesses who will testify orally at trial and other related material. In most instances, these items relate to the age of individuals or other relevant information such as issuance of amnesty. The items include birth certificates, education certificates, voting certificates, health certificates and amnesty cards, compiled or issued by governmental bodies or agencies in Uganda (e.g. the Ministry of Education, the Ministry of Health and the Electoral Commission).
25. Other items were created by independent religious institutions and non-governmental organisations (“NGOs”) that were responsible for rehabilitation of children and young adults after their return from the LRA (e.g. Rachele Rehabilitation Centre and Gulu Support the Children Organisation (“GUSCO”).
26. The evidence is relevant because it provides age-related information that supports charges relating to the conscription or use of child soldiers. The items are also probative. This Court and other *ad hoc* tribunals have considered favourably features such as stamps, signatures and/or seals appearing on proffered items, as well as considerations such as the identification of the author, the date of the item, and whether it is consistent with or corroborated by

¹⁸ See UGA-OTP-0181-0034 and transcript at UGA-OTP-0248-0002: Mega FM, a radio broadcast organisation based in Gulu, Uganda hosted a regular program called “Dwog Paco”. This broadcast involved former LRA members encouraging others still fighting with LRA to leave and return home.

other evidence, in their assessment of probative value.¹⁹ Several items in category 2 contain official stamps and/or signatures. Many items were also generated contemporaneously to the charged crimes, at a time before ICC proceedings were contemplated.

Category 3: Correspondence – Letters

27. This category of evidence includes correspondence between the LRA and the Ugandan government, internal LRA communications, internal communications of the Ugandan authorities, and letters written by the LRA to Ugandan civilians.
28. The evidence within this category is relevant. The substance of the correspondence supports the existence of an armed conflict between the Government of Uganda and the LRA in Northern Uganda. For example, this category includes a letter from Yoweri Museveni, President of Uganda to Joseph Kony the head of the LRA. The letter discusses “a peaceful solution to the conflict”.²⁰
29. Items within this category also demonstrate that the LRA was a structured and organised armed group. They contain information relating to the LRA’s policies as well as its capabilities. For example, one letter contains information on the treatment and distribution of women and girls within the LRA.²¹ Another letter provides details of an LRA request for weapons.²²

¹⁹ The various chambers have not drawn up an exhaustive list of these factors, but the jurisprudence reveals that the factors identified above have been considered in the probative value of evidence sought to be tendered from the bar table. See for instance ICC-01/04-01/06-1399-Corr, paras. 37-40. *See also Prosecutor v. Boskoski and Tarculovski*, Case No. It-04-82-T, Decision on Prosecution’s Third Motion for Admission of Exhibits from the Bar Table with Confidential Annexes A through B, 5 December 2007, para. 4.

²⁰ UGA-OTP-0015-0101.

²¹ See UGA-OTP-0026-0426.

²² See UGA-OTP-0025-0147 and UGA-OTP-025-0148.

30. The items are also probative. Some of the items result from official correspondence between the Government of Uganda and the LRA.²³ Several items bear hallmarks of reliability such as dates, signatures and stamps. Several items were also created contemporaneously and in advance of contemplated proceedings before this Court.

Category 4: Dossiers and Police Crime Files

31. This category includes records produced and/or maintained by local Ugandan government officials responsible for Pajule/Lapul, Lukodi and Abia IDP camps. Six of these items were provided to the Prosecution by Witnesses P-0001, P-0007 and P-0008.²⁴ The Chamber has already recognised the formal submission of documents related to these witnesses pursuant to rule 68(2).²⁵ The Prosecution submits that the six items could have been included in its Rule 68(2) application because these items fall within the annexes of these witnesses' statements.²⁶

32. It also includes excerpts from police crime files that were generated by Ugandan police authorities during their investigation into the Pajule/Lapul IDP attack on 10 October 2003. These excerpts contain information from civilian victims of the attack.

33. The items are relevant because they provide details of civilians affected by attacks attributed to the LRA. They support the widespread and systematic nature of the conflict. Some of the items directly support the charges relating to

²³ See for example, UGA-OTP-0015-0101.

²⁴ UGA-OTP-0175-0085; UGA-OTP-0175-0137; UGA-OTP-0175-0187; UGA-OTP-0175-0238; UGA-OTP-0209-0918 and UGA-OTP-0137-0089.

²⁵ ICC-02/04-01/15-596-Red; ICC-02/04-01/15-600.

²⁶ The Prosecution did not include these items in its rule 68(2) application because it failed to appreciate their source. This appreciation was developed after a recent review of items on the list of evidence for the purpose of submitting this bar table.

the attack at Pajule on 10 October 2003.²⁷ In particular, the Pajule police crime files document the scale of LRA abductions during the attack at Pajule.

34. The items are also probative. In addition to being corroborated by evidence summarised in the Prosecution's Pre-Trial Brief²⁸, some of the items were created contemporaneously. Other items were created during a police investigation carried out at Pajule Police Station. The number of civilian victims that participated in the Ugandan police investigation increases their collective probative value. Several items also contain hallmarks of authenticity such as dates and stamps and were created for purposes other than ICC proceedings.

Category 5: Forensic, Scientific and Medical Records or Reports

35. This category consists of a variety of items with a scientific or medical element. It includes medical and post-mortem examination records relating to civilians who were the victim of LRA attacks. Several such records were generated by Gulu Hospital following the treatment of civilians injured during the Lukodi IDP camp attack in May 2004. Other records relate to the carrying out of post-mortems examinations of civilians killed during LRA attacks at Barlonyo and Pagak IDP camps.
36. This category also includes results of DNA testing performed by the Netherlands Forensic Institute in order to assess whether there was a parental link between Dominic Ongwen and individuals alleged to be his children. It also includes 360-degree video footage produced by Witness P-0256 during a forensic visit to Pajule, Lukodi and Odek in 2015.

²⁷ UGA-OTP-0209-0918 at 0919 (This item contains details of people killed and abducted during the attack)

²⁸ ICC-02/04-01/15-579-Conf.

37. Items within this category are relevant because they relate directly to the charged crimes including crimes committed during the attack at Lukodi IDP camp. Forensic reports that contain the result of DNA analysis are relevant to support sexual and gender based crimes. The material included within this category is also probative. Hospital and post-mortem records have significant indicia of reliability. They were generated contemporaneously and in response to the attacks by trained experts, and for purposes unrelated to this criminal litigation. The DNA analysis, while performed for purposes of this investigation, was conducted by neutral experts, whose methodology and procedures can be evaluated by the Chamber through the expert's report.

Category 6: Photographs

38. This category consists of photographic images. Many of these images were generated by Ugandan authorities in the course of investigating attacks attributed to the LRA. For example, one photograph shows the body of a civilian killed during the attack at Lukodi IDP camp in May 2004.²⁹ These are relevant because they provide a contemporaneous image of the nature and effect of LRA attacks against the civilian population. It is corroborative of evidence that will be presented to the Chamber by witnesses who will provide oral testimony at trial.

39. This category also contains photographs provided by Witness P-0009. These images document peace talks in 2007 between the LRA and Ugandan officials. The photographs are relevant to show the structured and organized nature of the LRA. They include photographs showing senior LRA commanders Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen participating in

²⁹ UGA-OTP-0016-0638.

peace talks.³⁰ The Prosecution submits that these photographs are also relevant to the issue of duress. This is because peace talks provided LRA members an opportunity to return home and/or escape. The issue of amnesty was also discussed with LRA members including with Dominic Ongwen.

40. The evidence is probative and has sufficient indicia of reliability. The images speak for themselves and are consistent with the Prosecution's case as outlined in its Pre-Trial Brief. The attack on Lukodi IDP camp, for example, is well documented by open-source material. Several photographs were generated contemporaneously during investigative activities.

Category 7: Reports

41. This category contains reports issued by the United Nations and other NGOs such as Human Rights Watch, Uganda Human Rights Commission, Redress, Refugee Law Project and Amnesty International. It also contains reports relating to the situation in Uganda drafted by individuals. These reports collectively provide detailed information on the background to the armed conflict in Uganda, the identities of the armed groups involved and the command structure of the LRA. They also contain information about the victimization of civilians in different parts of Uganda.

42. The items within this category are probative because they bear significant indicia of authenticity and reliability. Several reports are the product of contemporaneous investigations. These investigations were led by independent and reputable NGOs with qualified staff. They also reflect interviews of victims,

³⁰ See UGA-OTP-0241-0665 showing Vincent Otti; UGA-OTP-0241-0703 showing Vincent Otti and Okot Odhiambo; UGA-OTP-0241-0705 showing Joseph Kony; UGA-OTP-0241-0711 showing Joseph Kony and Dominic Ongwen.

eye-witnesses as well as other persons present in Northern Uganda during the armed period relevant to the charges.

Category 8: Calendar / Diary

43. This category includes scanned images of the diary of Sam Kolo. Sam Kolo served as the LRA's Chief Political Commissar or head of political affairs. His role was to liaise with the international community as well as other external entities. The diary contains entries for the year 2003 and is relevant because it provides valuable insight into how the LRA engaged with external communities. It also contains information about LRA policies. Its contents support the assertion that the LRA was an organised and structured armed group. It indicates that the LRA were engaged in an armed conflict against the UPDF. It also shows that the LRA participated in a widespread and systematic attack on the population. For example, a diary entry dated 11 May 2003, records that LRA troops entered a school and abducted 44 pupils.³¹
44. The diary is probative because it contains various hallmarks of authenticity. Information within the diary can also be verified against independent open source materials. For example, several pages of the diary record the reporting of international media houses such as the BBC.

Category 9: Intelligence Material - Lists / Tables, Notebooks, Notes,

Organisational Diagrams, Intelligence Reports and Technical Manuals

45. This category consists of items obtained by and/or generated by various Ugandan authorities including the UPDF, Internal Security Organisation ("ISO"), Uganda Police and the Amnesty Commission.³² The items contain

³¹ UGA-OTP-0162-0173.

³² Three items within this body of material are translations of other documents (UGA-OTP-0253-0162; UGA-OTP-0253-0165; UGA-OTP-0270-0196). These translations were generated by the Language Service Unit within the Office of the Prosecutor.

assessments of the LRA's command structure and its military capabilities. They record the various organs of the LRA as well as list names and positions of LRA members, including information showing that LRA members were transferred between units and were promoted. For example, one notebook records that Dominic Ongwen was appointed as Brigade Commander of Sinia Brigade.³³ Some items contain information about LRA attacks against the civilian population. Some items also contain information about the LRA's policies. For example, one item entitled "constitution" of the LRA contains information as to the reason for the LRA's existence.³⁴ These items are relevant to understand the nature of the LRA and support the assertion that the LRA was an organised armed group engaged in an armed conflict against Ugandan authorities.

46. The Prosecution submits that this body of intelligence material provides a valuable contemporaneous record of the conflict. The accuracy of such items was critical to Ugandan authorities, who depended on them for their war effort. The items were also generated before ICC proceedings were contemplated. Several items also contain dates and signatures. For these reasons, these items are probative.

Category 10: Maps and Sketches

47. Items within this category include a map dated 2009 showing the locations of IDP camps within the Acholi Sub-Region of Northern Uganda³⁵ and sketches of locations within Northern Uganda that have experienced attacks against the civilian population attributed to the LRA. The map was generated by the United Nations Office for the Coordination of Humanitarian Affairs and is an open

³³ UGA-OTP-0023-0241 at 270.

³⁴ UGA-OTP-0012-0326.

³⁵ UGA-OTP-0252-0353.

source item. The sketches were generated by Ugandan authorities during the course of investigations in to LRA attacks.

48. These items are relevant to understand the background to the conflict as well as the extent to which the civilian population was affected. They support the existence of an armed conflict and the widespread and systematic nature of attacks. They are also probative.

The Probative Value of the Items of Evidence Outweighs any Prejudicial Effect

49. The Prosecution submits that the probative value of the Requested Items outweighs any prejudicial effect they may have. This is because:

- the Prosecution specifically outlines in annex A how each proposed items fits into the case;
- each item is relevant and probative of the charges and will assist the Chamber in the determination of the truth as explained in detail in the table at annex A;
- each item tends to prove one or more discrete issues in the Prosecution's case;
- each item corroborate facts that will be presented to the Chamber by witnesses who will provide oral testimony at trial; and
- each item possesses indicia of reliability to warrant its admission and to enable the Chamber to fairly evaluate it.

Conclusion

50. The Prosecution requests the Trial Chamber to recognise the Requested Items listed in annex A as formally submitted.



Fatou Bensouda

Prosecutor

Dated this 16th day of January 2017

At The Hague, The Netherlands