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**International
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No.: **ICC-02/04-01/15**
Date: **7 February 2017**

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
with Confidential Annex A and Public Annexes B and C

**Defence Response to “Prosecution’s request to submit 1006 items of evidence from the
‘bar table’”
(ICC-02/04-01/15-654)**

Source: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') responds to the "Prosecution's request to submit 1006 items of evidence from the 'bar table'" ('Application').¹ The Defence generally opposes the Application, with limited exceptions to certain documents listed therein. The Defence submits that the Application misapplies the essence of the bar table as defined by the Appeals Chamber and Trial Chamber IX ('Chamber').

II. BACKGROUND

2. On 16 January 2017, the Prosecution submitted the Application which requests the submission of 1,006 items into evidence.²
3. On 17 January 2017, the Defence requested an extension of time to file its response to the Application.³ The Legal Representatives subsequently requested the same extension.⁴ That same day, the Chamber granted a time limit extension to 7 February 2017.⁵

III. SUBMISSIONS

4. The Defence has distributed its observations and objections between the present response and Confidential Annex A thereto. Where observations or objections are of a more general nature, or can address a selection of items, they are made in the cover filing. Some columns containing the Prosecution's arguments concerning relevance and probative value have been left in Confidential Annex A where it will facilitate comparison of the Prosecution's arguments and Defence objections.

A. Preliminary observations

5. The Defence notes with dismay that the Prosecution attempts to submit into evidence voluminous amounts of items which have no relevance to the case-at-bar, or, if submitted, will unreasonably expand the scope of the case with prolonged needless

¹ ICC-02/04-01/15-654 with Confidential Annex A.

² *Ibid.*

³ Email from Defence to Trial Chamber IX on 17 January 2017 at 17h49 CET.

⁴ Email from Legal Representatives for Victims to Trial Chamber IX on 17 January 2017 at 18h19 CET.

⁵ Email from Trial Chamber IX to Parties and Participants on 17 January 2017 at 18h28 CET.

litigation and waste judicial time. Furthermore, certain items content do not conform to the itemised description provided by the Prosecution.

6. The Defence recalls the words of Judge Henderson in his dissent in the Gbagbo and Blé Goudé case, whereby he cautioned an overly generous approach to the submission of material that “may result in the evidential record being flooded with evidence of dubious or no relevance.”⁶
7. Moreover, the accuracy of the Prosecution’s cover filing, which describes the categories of material to be submitted, obscures the actual purported relevance which is claims in its Confidential Annex. Submitting the evidence will obviate the fair trial requirements of orality, and deny Mr Ongwen the opportunity to test the evidence submitted in support of seventy charges and multiple forms of criminal liability. As Judge Henderson also observed, the Defence is under an obligation to raise issues as soon as they arise,⁷ yet the Prosecution would have the Defence respond without being able to support its arguments with testimony of cross-examined live witnesses.
8. The approach taken in the Application hides important items – with very limited comment by the Prosecution – amongst items that are either peripheral or – as indicated in Confidential Annex A to this filing – should be submitted following the testimony of live witnesses. Even if the Chamber agrees with the Prosecution that the protocol permits the submission of evidence that should either (a) be raised with a witness or (b) permits the submission of evidence prior to the witnesses that address the same subject matter – fairness for the Defence is affected.
9. The Chamber is requested to rule on several items up-front so as to enable the Defence to prepare for the cross-examination of witnesses. The specifics of this request are outlined in this response and attached confidential Annex A. Stated generally, the items falling within this request are (a) those items which are irrelevant and (b) those items for which a decision impacts upon cross-examination preparation. Such a request is consistent with the Appeals Chambers caution that “the Trial Chamber must

⁶ ICC-02/11-01/15-773-AnxI, para. 15.

⁷ ICC-02/11-01/15-773-AnxI, para. 5.

balance its discretion to defer consideration of [relevance and admissibility] with its obligations under [Article 64(2) of the Statute].”⁸

10. Finally, two procedural objections run the various categories presented by the Prosecution. Firstly, as decided by Pre-Trial Chamber II, the temporal jurisdiction of the case is 1 July 2002 to 31 December 2005.⁹ Much of what the Prosecution seeks to submit falls well outside the temporal jurisdiction, as described below in paragraph 47 and within Defence Confidential Annex A.
11. Secondly, some of the material – and particularly prominent amongst the audio/visual materials – that the Prosecution seeks to submit has no translation to an official language of the court. Also, witness statements taken in the course of official police investigations have not been translated into Acholi as required by Rule 76(3) of the Rules of Procedure and Evidence (‘RPE’). This causes prejudice because the evidence cannot be reviewed properly and hinders receiving instructions from Mr Ongwen. For this reason, it is submitted that the Chamber should order the Prosecution to re-file its Application when the material is translated, or at least reject submission the noted materials until the correct procedural steps have been followed by the Prosecution.

B. Objections to categories

1. Audio / Video Material and Media / Press Articles

12. As indicated in Defence Confidential Annex A, the descriptions of some of the contents of the videos and audios simply do not match the contents indicated by the Prosecution in its annex. This impacts upon all of the standard evidentiary criteria. The Defence cannot properly respond to the relevance and probative value where the material does not reflect what is purported and this prejudices the Defence. For this reason, the item should not be submitted.
13. As a general comment, news reports should be approached with caution as standards of proof for the purposes of journalism are not to the same level as for criminal trials. If the Prosecution wants to submit the accounts contained in these news reports, then it should have independently interviewed the persons concerned. In that respect, the

⁸ ICC-01 /05-01 /08-1386. para. 37.

⁹ See ICC-02/04-01/15-422-Conf, pp. 71-104.

Prosecutor has also not demonstrated that the evidence could not have been obtained in the ten years of investigation with reasonable due diligence. Moreover, where the news source is Ugandan, it must be recalled that the context was that of a conflict. The aphorism “in war the first casualty is the truth” is relevant to assessing the probative value of material generated by the news media that was protected by one party to the conflict.

14. Additionally, as noted in Confidential Annex A, many¹⁰ items have been provided which lack transcripts in one of the official languages of the Court linked to the item. Neither the Chamber nor most members of Mr Ongwen’s Defence can understand the material and thereby evaluate its veracity or indeed even content.

2. *Certificates and Personal Data*

15. The cover filing of the Prosecution’s Application downplays the scope of different facts it seeks to prove or support with the items in this category. The material actually is submitted to prove ‘information relating to [sexual and gender based crimes] involving Ongwen or LRA fighters under his command’, sexual slavery, forced marriage, information relating to the attacks against Pajule, Odek, Lukodi and Abok, attacks directed against a civilian population, enslavement, torture, persecution, and more. The evidence therefore goes to the guilt or innocence of Mr Ongwen and are not mere background material as such.
16. As indicated in greater detail in Defence Confidential Annex A to the present response, the Prosecution has sought to submit material relating to witnesses who will testify live.¹¹ The material should therefore be submitted through live witnesses and be tested by the defence in cross-examination. It is prejudicial to the Defence to be obliged to comment on the material before the live testimony as new information will almost undoubtedly be revealed through testimony which should – under a procedurally correct process – be included in the present response. It is also may cause a needless administrative burden, whereby the Defence provides new and additional

¹⁰ For example, UGA-OTP-0208-0504, UGA-OTP-0021-0006, UGA-OTP-0021-0010 and UGA-OTP-0032-0017.

¹¹ For example P-0352 (item 60), P-0314 (items 61, 68, 69, 70, 116, and 119), and P-0097 (items 62, 79, 81, and 114).

observations on the material post testimony. This exhausts defence resources as arguments must be made and then re-adjusted and also potentially impacts upon the expeditiousness of the trial as work is duplicated.

17. It is also noted that the Prosecution seeks to submit material relating to individuals who will not testify¹² and for whom no statement is provided. This deprives the defence the opportunity to comprehensively test the evidence through these witnesses. The prejudice of admission clearly outweighs the probative value of these materials. These items are typically intake-files from NGOs which received abductees. The writing and account is that of someone whom is interviewing an individual – in other words not an eye witness. The information was not taken pursuant to any oath to tell the truth, and moreover, the materials contain limited details to which the Defence can respond – often merely assertions regarding unspecified mal-treatment by individuals other than Mr Ongwen.
18. Although Mr Ongwen may not be personally mentioned, the reports, if submitted, may be used to establish the crimes and forms of criminal liabilities alleged against Mr Ongwen – including attempting to establish, at the least, Article 28(a) before calling witnesses to that effect. This is highly prejudicial as it will relieve the Prosecution of its burden of proof beyond reasonable doubts and deny the Defence an opportunity to challenge evidence relating to forms of criminal liability against Mr Ongwen.
19. Many items in category 2 comprise items purporting to establish the ages of individuals which is relevant to the charges relating to child-soldiers. As a general point, most of these documents are not legal birth-certificates, but rather items such as education certificates, and forms created when an individual was introduced to the abductee reception centres. Many of these documents do not list a date of birth and simply list the age. Age is a critical factor in the charges relating to the conscription of child soldiers. Evidence establishing the ages of child soldiers must be submitted when these category of witnesses are called to testify and considered on a case by case basis. Failing that, these items have limited probative value as there is no indication that there is any form of verification done by the issuing entities.

¹² See for example item 108 (UGA-OTP-0233-0986), there is no Rule 68 statement tendered and this witness will not testify.

20. Where birth-certificates have been submitted, even if the Chamber considers the birth-certificates authentic, the probative value or reliability of the information contained therein is not necessarily reliable.¹³ This is because (1) the prior birth-certificate regime was not entirely reliable and (2) a culture in Northern Uganda that places a less great emphasis on knowing the precise date of birth.
21. Firstly, for birth-certificates created before 1 January 2016,¹⁴ the information contained should be approached with caution by the Chamber due to the administrative regime in place at the time of their creation. The previous legal regime¹⁵ did not require a rigorous level of proof. That regime permitted local District Registrars to adopt their own procedures and manners of proof¹⁶ and provided for a fairly flexible regime for others to register a child.¹⁷ This regime was replaced by the Government of Uganda in 2015.¹⁸ A press release¹⁹ from UNICEF, as well as a power-point presentation given by a Ugandan civil servant²⁰ on the subject of improvements to birth-registration strongly suggests that the motivation underlying the change in laws was the previous system's inadequacy. This is the prior legal regime which was in force between 1974 and 2016. As indicated in a Ugandan government report in 2011,²¹ 3 in 10 individuals had their birth registered. This tendency is also indicated by the number of birth-certificates for which the Prosecution reimbursed witnesses for in 2016.
22. Secondly, the likelihood of at least moderate inaccuracies is high for at least two other reasons. People from the Northern region of Uganda do not place as great an emphasis on knowing precise birthdays as people's from Western-European cultures. Even the Prosecution's evidence underscores this. In video UGA-OTP-0032-0005 at 3 minutes

¹³ Application, para. 24.

¹⁴ See <http://www.nira.go.ug/index.php/2015/12/30/migration-birth-and-deaths/>, accessed 7 February 2017.

¹⁵ See Annex B, to be disclosed as evidence subsequently.

¹⁶ See Annex B, The Births and Deaths Registration Act 1974, Chapter 309, s. 7(1).

¹⁷ See Annex B, The Births and Deaths Registration Act 1974, Chapter 309, s. 7(2) ("If the father and mother of the child are dead or unable to register particulars concerning the birth, the occupier of the house in which the child was, to the knowledge of the occupier, born, or any person present at the birth, or any person having charge of the child, shall register particulars concerning the birth").

¹⁸ See <http://www.nira.go.ug/index.php/2015/12/30/migration-birth-and-deaths/>, accessed 7 February 2017.

¹⁹ See https://www.unicef.org/infobycountry/uganda_57195.html, accessed 7 February 2017, to be subsequently disclosed.

²⁰ See Annex C.

²¹ See <https://dhsprogram.com/pubs/pdf/FR264/FR264.pdf>, p. 19, accessed 7 February 2017, to be subsequently disclosed.

and 12 seconds, an old man – speaking Luo – comments that how could he remember his birthday since he was a baby and babies do not remember things.

23. What is more relevant is the time of year that an individual was born. This lack of emphasis on precision leads to “guesstimates” or rounding off. This can be seen in the evidence where, even in a small sample, several children were “born” on the 1 January.²² Moreover, on the Prosecution’s own theory, many of these children were abducted at young ages. When their birth-certificates were issued post-return from the bush, it cannot be assumed that a date remembered for a child is more than an estimate – which could be off by at least several months. This is particularly pronounced where the child’s parents were killed.
24. Where an individual was born before 1 July 1988, then it is impossible for that individual to have been a child under 15 during the charged period for the purposes of Article 8(2)(e)(vii). Only children born after 31 December 1990 must by definition have been under the age of 15 during the temporal jurisdiction. Though a patently incorrect (e.g. inaccurate by greater than 5 years) certificate is unlikely, it is certainly possible that a birth-certificate that is incorrect by a half year to a whole could be issued.
25. Thus, evidence which indicates that an individual was close to the age of 15 for the period for which Mr Ongwen is charged is not clearly and definitively probative. The Defence submits that given the uncertainties related to both remembering and proving a birthday this uncertainty could extend to a least a year of imprecision.

3. *Correspondence – Letters*

26. At the forefront, the Defence does not object to the submission into evidence item 122.²³ The Defence still requests the Chamber to carefully judge this item’s credibility, reliability, relevance and probative value, due-in-part to the explanation at paragraph 29 below.

²² See for example P-314 (UGA-OTP-0248-0992), P-252 (UGA-OTP-0272-1018), and P-307 (UGA-OTP-0248-1035).

²³ UGA-OTP-0015-0101.

27. The information tendered within category 3 for the purpose of demonstrating that the LRA was a structured and organised armed group²⁴ lacks probative value due to either the absence of dates or absence of identifying material of the sender, which would support the claim for a particular time-period. It is a bare assertion without credible evidence in support. This being a critical element in the war crime charges, it must be proved beyond reasonable doubt. This process is an attempt to obviate the discharge of the evidential burden by the Prosecution. This is a legal requirement of some of charges alleged which have been contested at pre-trial. It will therefore be prejudicial to submit it under this procedure.
28. Items 123²⁵, 124²⁶, 126²⁷, 128,²⁸ are handwritten letters purported to have originated from LRM/A HQ. The items contain no signatures or names of the author. These items are handwritten and not on letterhead alleged to have been used by the LRA during that time period.²⁹ Furthermore, the handwriting styles are different from that of alleged commanders of the LRA during that time period. These are matters for which the Prosecution should have conducted detailed investigations. It failed to do so. These items lack reliability/credibility and have low probative value as the author cannot be verified, and thus should be excluded. Finally, as item 135³⁰ is a translation of item 126, it should be excluded too.
29. Items 125,³¹ 132,³² and 133³³ are reproductions of item 122 at 0129-0132, 0123-0124 and 0126-0127 respectively. As a copy of the original has been requested for submission into evidence by both parties, items 125, 132 and 133 have no probative value or relevance, and pursuant to Rule 64(3) of the RPE, should be excluded from submission. Furthermore, the Defence notes with complete bewilderment that items 132 and 133 have completely different chains-of-custody from item 122.

²⁴ Application, para. 29.

²⁵ UGA-OTP-0025-0147.

²⁶ UGA-OTP-0025-0148.

²⁷ UGA-OTP-0025-0352.

²⁸ UGA-OTP-0026-0426.

²⁹ See UGA-OTP-0015-0101, at 0105.

³⁰ UGA-OTP-0268-0007.

³¹ UGA-OTP-0025-0207.

³² UGA-OTP-0206-0136.

³³ UGA-OTP-0206-0138.

30. Item 127³⁴ falls outside the jurisdiction of the Court and lacks contextual information to assess it properly. This document should be introduced by a witness either through live testimony or *via* a Rule 68(2)(b) application so it can be assessed properly.
31. Items 129,³⁵ 130,³⁶ 131,³⁷ like the items listed above in paragraph 28, contain no signature or author, and thus lack reliability/credibility and have low probative value. Furthermore, these purported messages are from varying dates. Also in item 129, page 0429 is a duplicate of 0428, which casts doubt on the item's reliability. Finally, these items, on face value, appear to be radio intercept logs and not internal communications of the LRA (as the Prosecution has suggested). Why would the LRA communicate internally in English? Simply put, it would not. These items do not appear to be what the Prosecution purports them to be and should be excluded because the items are not reliable or credible.
32. Finally, item 134 is an alleged letter from the LRA to the Acholi Chiefs on 29 December 2003, signed by "Lt. Col. Ocayotoo".³⁸ The only Ocayotoo found in a global search of Ringtail who was associated with the LRA is a person abducted in May 2004, returning in September 2004.³⁹ The Prosecution has proffered no explanation or evidence as to the identity of this person and the Defence has never heard of a person by this name and rank in the LRA. This letter appears to be a forgery with a false signatory, and should be excluded by the Chamber because it lacks reliability, credibility and has no probative value.

4. *Dossiers and Police Crime Files*

33. The Prosecution argues that certain material should be received as submitted because it *could* have been submitted as joined to several Rule 68(2)(b) statements that it previously submitted.⁴⁰ It is submitted that to be procedurally proper, the materials *should* have been submitted with the Rule 68(2)(b) statements. The prosecution provides no reasonable explanation why it did not follow that procedure. The Defence

³⁴ UGA-OTP-0026-0291.

³⁵ UGA-OTP-0026-0427.

³⁶ UGA-OTP-0026-0430.

³⁷ UGA-OTP-0026-0431.

³⁸ UGA-OTP-0233-0222, *see also* Application, Confidential Annex A, p. 37.

³⁹ *See* UGA-OTP-0165-0124, ln. 2959.

⁴⁰ Application, para. 31.

notes that the explanation, which is buried within footnote 26 of its Application, fails to provide the citation or basis that led the Prosecution to appreciate the source of the material. Furthermore, as indicated in Confidential Annex A, names in the materials are redacted that are crucial to evaluating whether the material is corroborated by the Rule 68(2)(b) statements. The Defence reserves its right to comment upon the material should the redactions be lifted.

34. The Prosecution also seeks to tender material through the bar-table which should be submitted through Rule 68(2)(b). Trial Chamber's, including Trial Chamber IX, have defined a statement for the purposes of Rule 68 in the following terms:

a statement can be considered a prior recorded testimony if the person when providing the statement understands that 'he or she is providing information which may be relied upon in the context of legal proceedings', namely when he or she is 'questioned in the capacity as [a] witness[] in the context of or in anticipation of legal proceedings',⁴¹

35. As was made clear during the testimony of P-0059,⁴² the Ugandan government was actively involved in collecting material for the purposes of a criminal prosecution. Particularly the purported statements taken by Ugandan police after Pajule fall within the definition of those items that must be submitted through Rule 68, and this respect, Trial Chamber V(a) has rejected a Prosecution motion to submit material related to the High Court of Kenya at Nakuru stating "the Chamber considers that certain of the material is testimonial in nature and notes that a 'bar table' motion should not be used in manner which would be duplicative of the Rule 68 of the Rules procedure." (sic)⁴³
36. Many documents in category 4 purport to show widespread and systematic attacks on a civilian population, which is a requirement for the crimes against humanity charges alleged against Mr Ongwen. The degree of scrutiny in admitting evidence tending to establish legal elements of the crimes alleged must be very high. Submitting the items *via* the bar table will relieve the prosecution of its burden of proof. The relevance and probative value of these documents is limited because the document provides no means to ascertain the civilian status of the individuals at the time of death and do not indicate whether individuals died in cross-fire or through direct-participation in

⁴¹ ICC-02/04-01/15-596-Conf, para. 9.

⁴² ICC-02/04-01/15-T-36-CONF-ENG, p. 21, lines 10-16.

⁴³ ICC-01/09-01/11-1553, para. 85.

hostilities. In fact, some evidence disclosed by the Prosecution appears to indicate that the attacks on the civilian population were perpetrated by the UPDF.⁴⁴

37. As described by the Prosecution and as raised in testimony,⁴⁵ parts of the population were mobilised, and many were integrated into local-defence units (LDUs) which were described by various names. Those units were armed members of the military and fought alongside the UPDF. Under these circumstances, that an individual was not listed as a member of a conventional UPDF unit does not lead to the conclusion that the individual had a civilian status at the time of death. Therefore, even where a list is found to be an authentic and reliable list of inhabitants of the IDP camps, without more, it has limited relevance and probative value as to whether the attack was targeted against a civilian population.

5. *Forensic, Scientific and Medical Records or Reports*

38. The Prosecution Document Containing the Charges,⁴⁶ and Pre-Trial Brief,⁴⁷ does not mention Pagak IDP camp at any point, nor is the camp referred to in the Confirmation of Charges decision.⁴⁸ The camp is only mentioned at one paragraph in the Prosecution Pre-Confirmation Brief.⁴⁹
39. The Prosecution impermissibly submits post-mortems examinations of civilians killed during attacks at Barlonyo and Pagak IDP Camps at items 195 and 235-427.⁵⁰ These post-mortem reports serve no legal purpose, and appear to have been included in the Application for “shock-value” as the items have little relevance to the Article 7 caveat of widespread of systematic attack on a civilian population. The prejudicial effect of these items far outweighs the relevance and probative value (which are minimal), and thus should be excluded.
40. Furthermore, if permitted, this will impermissibly expand the scope of the charges against Mr Ongwen to include charges for which he was neither charged nor provided

⁴⁴ Item 141 (UGA-OTP-0150-0118).

⁴⁵ ICC-02/04-01/15-T-38-CONF-ENG, pp. 45 and 46; ICC-02/04-01/15-T-29-CONF-ENG, pp. 80 to 84.

⁴⁶ ICC-02/04-01/15-375-Conf-AnxA.

⁴⁷ ICC-02/04-01/15-533.

⁴⁸ ICC-02/04-01/15-422-Conf.

⁴⁹ ICC-02/04-01/15-375-Conf-AnxC, p. 31.

⁵⁰ Application, para. 35.

notice. During the first status conference dated 23 May 2016, the Chamber stated that although Mr Ongwen stands charged in 70 charges, the case before the Chamber relates to 4 crime bases, the charges on child soldiers and gender crimes. Allowing this evidence to be submitted violates this statement.

41. In relation to Barlonyo IDP Camp, the Defence notices that there are 152 post-mortem requests. The epitaph on the Barlonyo memorial states 121 people died in the attack.⁵¹ The Prosecution's original Article 58 application stated that a conservative number of deaths was 138, but that a realistic estimate was around 250.⁵² If 250 people died in Barlonyo, and the LRA is allegedly responsible for 121 of them, the other 129 would be attributed to the Government of Uganda, meaning that this attack would fall outside of the purview of Article 7.
42. Item 196 is an alleged sketch of Pagak IDP Camp drawn by P-0036.⁵³ It is an annex to a statement of P-0036. The Defence objects to this item being submitted and avers that its submission *via* the bar table is procedurally incorrect, and should be denied as this document should be submitted *via* Rule 68(2)(b).⁵⁴ Furthermore, it lacks relevance and probative value as it is not one of the alleged crime sites in the Confirmation of Charges Decision.
43. Items 210-234 are medical reports generated during an official police investigation into the attack in Lukodi. The Chamber should treat these reports for what they are, witness statements of the medical examiner, and thus should not be submitted *via* the bar table.⁵⁵ These documents are also items of a forensic nature which should be properly submitted through live testimony or Rule 68(3).
44. Similarly, items 428-443 should not be submitted *via* the bar table. These documents should be properly submitted through live testimony or Rule 68(3) since P-0414 and P-0256 are testifying before the Chamber. Additionally, items 428-431 have no probative value and of are little relevance. The videos are panoramic photographs

⁵¹ UGA-D26-0001-0013.

⁵² ICC-02/04-01/15-3-Conf-Red2, para. 403.

⁵³ UGA-OTP-0036-0064.

⁵⁴ See para. 35 above.

⁵⁵ The Defence also argues that these statements should be translated into a language which Mr Ongwen understands and reads, *i.e.* Acholi.

made into a video of the four (4) alleged crime bases in late 2015. The only relevance of items 428-431 is that the items give the Chamber a panoramic view of the alleged crime bases more than a decade after the alleged crimes. As such, items 428-431 should not be allowed submission *via* the bar table.

6. Photographs

45. The Prosecution attempts to submit items 444-770 through the bar table.⁵⁶ The Defence proffers the following reasons why these items should not be submitted as evidence through the bar table.
46. Submission through witnesses – With the exclusion of a few items,⁵⁷ these items should be submitted either through a witness’s live testimony, Rule 68(2)(b) or through Rule 68(3). Almost all of the photographs were received by the Prosecution from P-0009 (241 photographs), P-0038 (23 photographs), P-0017 (21 photographs) and P-0256 (four photographs). A further 35 photographs (items 468-502) were collected from a “UPDF Liaison Officer”.⁵⁸ Prosecution witnesses P-0009, P-0038 and P-0256 are all testifying before the Chamber, and the evidence should be proffered at that time either through testimony or through Rule 68(3). Prosecution witness P-0017’s testimony has yet to be officially submitted *via* Rule 68(2)(b), and the Chamber should require the Prosecution to follow the proper procedure for submitting evidence.
47. Outside the jurisdiction of the case – Items 525-765 and 770 are subsequent to the jurisdiction of the case as decided by Pre-Trial Chamber II.⁵⁹ These photographs are irrelevant to the case. The Prosecution proffers three (3) reasons as to the relevance: 1) “structured, organised, and functioning armed groups” 2) “Information showing Dominic Ongwen was not under duress” and 3) “background information concerning Dominic Ongwen”. Firstly, it is wholly irrelevant whether Mr Ongwen was under duress in October 2007 and/or September 2006. Secondly, as shown at UGA-OTP-0257-1649, para. 49, the witness who supplied item 770 described that Mr Ongwen

⁵⁶ Application, Confidential Annex A, pp 138-223.

⁵⁷ Items 444, 445, 468-502 and 770.

⁵⁸ Items 468-502.

⁵⁹ ICC-02/04-01/15-422-Conf, pp 71-104.

quite possibly could have been under duress in September 2006, and thus the Prosecution's interpretation of the photograph is contrary to the information supplied by the person from whom the photograph was collected. Thirdly, the alleged command structure of the LRA is equally irrelevant in October 2007 as it is more than 19 months past the jurisdiction of the case. Fourthly, these items lack probative value as the items fall heavily outside the jurisdiction of the case. Finally, duress is special defence pleaded by Mr Ongwen, and the rebuttal of that defence cannot be submitted through this procedure. All these items should be excluded from submission *via* the bar table.

48. Unknown location of the photograph – The Prosecution attempts to proffer items 444-446, 449-467 and 492-502 without noting the location of the photograph. It appears the Prosecution's intent is for shock value and to inflame the passion of the Judges only. The prejudicial effect outweighs the probative value and relevance. Specifically noting items 492-502, the Prosecution advances the claim that if an item *could* be from an alleged crime site, it should be taken as fact that the item *is* from the crime site.⁶⁰ The legal maxim *in dubio pro reo* is directly applicable to these items, and thus should be excluded from submission *via* the bar table.
49. Lack of probative value – Items 766-769 lack probative value. These four (4) photographs are monuments in Lukodi and Odek which purport to list persons who died during attacks. The Prosecution submits no testimony explaining the relevance or probative nature of the photographs, no explanation as to the process in which the names were chosen for inscription on the monuments, and lists in the Application at Confidential Annex A that these items related to the allegations of murder. Without further information, these items should be excluded from submission as they have no probative value, little to no relevance and amount to hearsay evidence which is highly prejudicial to the Defence.
50. Lack of relevance – Items 468-491 lacks relevance to the case as the photographs are from Pagak IDP Camp. Whether or not the attack on Pagak IDP Camp was systematic or against a civilian population is wholly irrelevant to this case, especially as the

⁶⁰ See the column "Crime location/SGBC/Persecution/Child Soldiers" in Confidential Annex A of the Application. The Prosecution admits that it does not know whether the photographs in items 492-502 are from Lukodi or Pagak, but yet it states in that column that it concerns the allegations concerning Lukodi.

Prosecution does not alleged that Mr Ongwen was there or alleged subordinates were there. The prejudicial effect of these items far outweighs the relevance and probative value.

51. For the abovementioned reasons, the Defence requests the Chamber to reject the submission into evidence the items 444-770.

7. *Reports*

52. The Defence does not object to the submission into evidence items 786 and 792.
53. The Defence objects to the submission into evidence items 772, 781, 782, 784, 789, 790 and 793.⁶¹ As stated in paragraph 13 above, these are journalist articles void of the standards and practices found in criminal trials. The reliability and probative value of the content of these articles, regardless of the organisation which published them, is low, and the Chamber should take great circumspect when deciding on the submission of these items, and the Defence avers that the prejudicial effect outweighs the reliability and probative value, and thus should be denied.
54. Item 771 is a partial report of the Uganda Human Rights Commission. It is not a report in-and-of itself – it is a small part of a larger report. Without the full report, neither the Chamber nor the Defence can properly judge its reliability, credibility and relevance. As found by Trial Chamber V(a), methodology of the report and reference to anonymous sources lower the probative value of “reports”,⁶² especially when the material attempts to prove core elements of the charges. The methodology is missing and whilst names of NGOs and international organisational are present, the persons interviewed for the report generally missing.
55. Item 773 is an annual report from the Uganda Human Rights Commission. The Defence challenges the reliability and probative value of the report as it was commissioned by one of the many alleged belligerents in the conflict, and is therefore littered with biased conclusions.

⁶¹ In addition to the arguments in the paragraph, the Defence notes that this document, UGA-OTP-0273-0041, is testimonial in nature and should be put to the witness during her direct and cross examination when she testifies.

⁶² See ICC-01/09-01/11-1353, paras 39, 40, 42, 43, 44 and 45

56. Items 774, 778, 783 and 787 are NGO reports. There is little by way of methodology for the reports, and contain many anonymous statements from alleged victims. HRW, Redress and Amnesty International are the publishers of the reports, which are also known as a victim-based organisation, and reports authored by employees or written on contract should be treated with caution by the Chamber. The Defence maintains that the probative values of these items are low and should be rejected for submission.
57. Items 775, 776, 780 and 781 are UN related documents. These items have little relevance and low probative value to the case as the items do not discuss any of the alleged crime bases, and one item has several redactions. Finally, the Defence challenges the motives of the UN within of this conflict, as it provided support to the Government of Uganda. These items should be rejected for submission.
58. Item 777 purports to come from the ARLPI. This item has low probative value as it is void of a section outlining its methodology and its authors, whilst apparently members of ARLPI, are unknown. This item is merely a list of dates and alleged occurrences of the conflict.
59. Item 779 is an academic article. The Defence does not specifically argue against its submission, and notes that its methodology is lacking. In assessing this item, the Chamber should give less weight to its probative value and relevance.
60. Item 785 is a report submitted to the US Embassy in August 1997. The Defence makes two observations. First, the document is of little relevance as it is far before the jurisdiction of the case. Second, the United States is a belligerent to the conflict,⁶³ and any report commissioned by the United States should be seen with circumspect and cause its probative value to be lower.
61. Item 791 is an apparent report received from a current Member of Parliament of Uganda. The document lacks any details about the methodology used to compile the statistics, and the metadata does not give the identity of the author of this document. It is highly prejudicial, and lacks reliability and credibility as the author and

⁶³ The Defence notes that there are claims that the US did not enter this conflict until the end of the first decade of the 21st century, but Prosecution evidence shows that at least by 2004 the US was involved in some manner in the conflict. (see UGA-OTP-0016-0503, at 0508 where it reads “US Team”).

methodology are completely void. This is unsubstantiated anonymous hearsay evidence which is not peer reviewed, and must not be allowed submission through the bar table.

8. *Calendar / Diary*

62. The prosecution in its cover filing states that the diary is relevant because it provides insight into how the LRA engaged with external communities; has information about LRA policies and therefore supports the assertion that the LRA was an organised and structured group engaged in an armed conflict against the UPDF and that it participated in widespread and systematic attacks on the population. This is a misrepresentation of the contents of the diary. A quick perusal makes it apparent that the Prosecution has not carefully evaluated this evidence to determine its probative value or relevance. As an example, item 826⁶⁴ is an entry for Saturday 14 June 2003 where the author writes that the situation is reported as normal and that malaria is still disturbing him/her. In the corresponding Annex, the prosecution states that this entry is relevant, has probative value and is incriminatory in nature because it supports the assertion that the LRA was (1) structured, organised, and functioning armed group, (2) the existence of an armed conflict not of an international character, and (3) attack directed against a civilian population. Further, several entries in the diary are not in the official language of the Court.⁶⁵ These examples indicate an abuse of the purpose and intent of the admission of evidence via the Bar Table.
63. Further, the Prosecution is seeking to submit materials obtained from an individual; Mr Sam Kolo who was a high ranking LRA commander for a long time until February or March 2005 when he left the bush. However, this individual will not testify and the Defence has not received any disclosure indicating that he has even been interviewed by the Prosecution. This is notwithstanding the fact that he is alive and vocal on matters regarding the conflict. To further complicate matters, the excerpts stand alone and the purported diary has not been disclosed in its entirety. Apart from Item No. 794⁶⁶ which contains Mr Kolo's name and title, there's nothing else to demonstrate that he is the author of the diary. Even if he was the author, the fact that a personal

⁶⁴ UGA-OTP-0162-0205.

⁶⁵ See for instance items 799 and 836 (UGA-OTP-0162-0178 and UGA-OTP-0162-0215 respectively)

⁶⁶ UGA-OTP-0162-0173.

diary has a random notation of the owner's name and title (and not at the pages specifically designed for this information) is bizarre. No information is availed to this Chamber about why this is so and this is critical to the issue of veracity. As such, the prejudice of admission clearly outweighs any probative value of these materials.

64. The Defence notes that these alleged excerpts from Mr Sam Kolo's diary were not received from Mr Kolo himself but from the UPDF. Specifically, they were received from P-0038 who is scheduled to testify. It is unclear if these random pages were handed over to P-0038 because there is no notation to that effect, which further undermines its probative value in this case. Not conceding to the truthfulness of the contents therein or the veracity of authorship, the Defence submits that these could be submitted into evidence through P-0038 who could explain to the Chamber the circumstances in which he got them. To illustrate this, the Defence points the Chamber to the Prosecution's own submissions in its motion where it intends to introduce the photographs of the 2007 peace talks through P-0009.⁶⁷
 65. Even if it was possible to introduce these diary intercepts through P-0038, the Defence further submits that the circumstances are distinguishable from those of admission of the photographs through P-0009. It may be argued that P-0009 took the photos contained in the CD and thus can attest to their general veracity, but the same cannot be said for P-0038 attesting to the contents in the incomplete diary. Also, since these purported entries were made during the conflict, submitting them into evidence by authenticating them through a witness who worked and continues to work with the UPDF, and not the author would be prejudicial to Mr Ongwen. As such, the Defence submits that the excerpts should not be submitted in their entirety for the reasons expounded above.
9. *Intelligence Material - Lists / Tables, Notebooks, Notes, Organisational Diagrams, Intelligence Reports and Technical Manuals*
66. As indicated in Defence Confidential Annex A, many of the items described by the Prosecution in category 9 lack probative value, relevance and indicia of reliability or

⁶⁷ See ICC-02/04-01/15-654, at para. 19, fn. 15.

authenticity because there is little to no indication that the documents were produced by the LRA, or in some cases, concern the LRA.

67. While the Prosecution submits much of the material to show that the LRA was a structured, organised and functioning armed group, even accepting the authenticity of the material, there is, in some cases, significant gaps between what is on paper and even the Prosecution's own theory which limits the probative value of the material. The constitution of the LRA, for example, requires an age of 18 for membership,⁶⁸ and provides for part-time membership.⁶⁹ These provisions are clearly at odds with the Prosecution's characterisation of the LRA.
68. Furthermore, as written above in paragraph 35, there are several items which should be submitted properly through Rule 68(2)(b).⁷⁰ Severing the submission of the statement and the associated materials prejudices the Defence because the Defence is forced to hit a moving target.
69. Finally, some of the items are not in a working language of the Court.⁷¹

10. Maps and Sketches

70. Individuals observations and objections to the three items are noted in Confidential Annex A.

IV. RELIEF

71. The Defence respectfully requests that Trial Chamber IX to:
 - a. REJECT the submission of the material contained in the Prosecution Application identified in the present filing and accompanying Confidential Annex A; and
 - b. DECIDE upon the material identified by the Defence as relating to witnesses who will testify in advance of their testimony by at least 5 days.

⁶⁸ UGA-OTP-0012-0326, at 0334.

⁶⁹ UGA-OTP-0012-0326, at 0335.

⁷⁰ Items 884 and 976-997.

⁷¹ Items 850-852, 880 and 944-945.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 7th day of February, 2017

At Kampala, Uganda