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Pénale
Internationale**



**International
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Court**

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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

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

Public

Decision on Prosecution's Request to Submit 1006 Items of Evidence

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

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Trial Chamber IX ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64(2) and (9), 69 and 74(2) of the Rome Statute ('Statute'), Rules 63-64 and 68 of the Rules of Procedure and Evidence ('Rules') and Regulation 39 of the Regulations of the Court, issues the following 'Decision on Prosecution's Request to Submit 1006 Items of Evidence'.

I. Procedural history

1. On 16 January 2017, the Office of the Prosecutor ('Prosecution') filed its request that the Chamber recognise 1006 items of evidence as submitted ('Request').¹ The Prosecution groups the 1006 items of evidence it seeks to submit into ten categories: (i) Audio/Video Material and Media/Press Articles; (ii) Certificates and Personal Data; (iii) Correspondence – Letters; (iv) Dossiers and Police Crime Files; (v) Forensic Records or Reports; (vi) Photographs; (vii) Reports; (viii) Calendar/Diary; (ix) Intelligence Documents (Lists/Tables, Notebooks, Notes, Organisational Diagrams, Intelligence Reports and Technical Manuals) and (x) Maps and Sketches.²
2. The Prosecution states that there are no procedural bars to recognising all the materials as submitted³ and each item of evidence can be 'fairly relied upon'.⁴ It also provides details on each item including, *inter alia*, the description, relevance and probative value.⁵

¹ Prosecution's request to submit 1006 items of evidence from the 'bar table', ICC-02/04-01/15-654, paras 1 and 50, with confidential Annex A.

² ICC-02/04-01/15-654, para. 11. *See also* Annex A to the Request, ICC-02/04-01/15-654-Conf-AnxA.

³ Request, ICC-02/04-01/15-654, para. 3.

⁴ Request, ICC-02/04-01/15-654, para. 3.

⁵ Annex A to the Request, ICC-02/04-01/15-654-Conf-AnxA. *See also* Request, ICC-02/04-01/15-654.

3. On 7 February 2017,⁶ the legal representatives of victims ('LRVs') filed their joint response ('LRVs Response'),⁷ submitting that: (i) the Request should be granted;⁸ (ii) each item of evidence can be fairly relied upon for the determination of the truth;⁹ (iii) there are no procedural bars to recognising all the materials as submitted¹⁰ and (iv) there is no 'obligation for the Chamber to exceptionally consider standard evidentiary criteria at this point of the submission of the evidence'.¹¹
4. The same day, the defence for Mr Ongwen ('Defence') filed its response ('Defence Response'),¹² requesting that the Chamber reject the Request and decide on the material relating to witnesses who will testify in-court.¹³

II. Analysis

5. The Chamber recalls its approach to the submission of evidence other than through a witness as set out in previous decisions.¹⁴

A. Objections related to procedural bars to submission

6. The Defence's filing states that it has two procedural objections to the submission of some of the materials offered by the Prosecution: (i) the first

⁶ The Defence and the legal representatives of victims requested and were granted an extension of the time limit for their responses. E-mail from the Chamber to the participants on 17 January 2017 at 18.28.

⁷ Joint Response to the 'Prosecution's request to submit 1006 items of evidence from the "bar table"', ICC-02/04-01/15-698, para. 1.

⁸ LRVs Response, ICC-02/04-01/15-698, para. 1.

⁹ LRVs Response, ICC-02/04-01/15-698, para. 11.

¹⁰ LRVs Response, ICC-02/04-01/15-698, para. 9.

¹¹ LRVs Response, ICC-02/04-01/15-698, para. 9.

¹² Defence Response to 'Prosecution's request to submit 1006 items of evidence from the "bar table"', ICC-02/04-01/15-701, with confidential Annex A and public Annexes B and C. The Chamber notes that within its submission, the Defence states that it does not object to the submission of certain items. *See, inter alia*, ICC-02/04-01-15-701, para. 1.

¹³ Defence Response, ICC-02/04-01/15-701, para. 71.

¹⁴ *See, inter alia*, Decision on Prosecution Request to Submit Interception Related Evidence, 1 December 2016, ICC-02/04-01/15-615 and Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497 ('Initial Directions').

procedural objection concerns the temporal scope of certain items¹⁵ and (ii) the second procedural objection relates to the lack of translation of certain items into an ‘official’ or ‘working’ language of the Court.¹⁶ The Defence also raises another objection that the Chamber considers procedural: that certain items should be rejected presently and instead submitted through Rules 68(2)(b) or 68(3) of the Rules or through live testimony.¹⁷

1. Temporal scope

7. The Defence argues that the Prosecution seeks to submit material that falls outside the ‘temporal jurisdiction’ of the case.¹⁸ The Chamber does not consider this argument to constitute a procedural bar preventing the recognition of the items as formally submitted. The fact that something occurred outside the temporal scope of the attacks does not make it automatically irrelevant for the charged crimes. In this respect, the Chamber considers that issues related to the temporal scope of certain items concerns the relevance of the materials, which is part of the final evidentiary assessment. At this point in the proceedings, the Chamber is not prepared to rule on the scope of evidentiary detail that will be considered in its final judgment. Such issues will be addressed in the Chamber’s judgment pursuant to Article 74 of the Statute.

2. Lack of translations

8. The Defence objects to the submission of certain materials, contending that they are not fully translated into an ‘official’ or ‘working’ language of the Court.¹⁹ It

¹⁵ Defence Response, ICC-02/04-01/15-701, para. 10.

¹⁶ Defence Response, ICC-02/04-01/15-701, para. 11.

¹⁷ Defence Response, ICC-02/04-01/15-701, paras 16, 19, 30, 33-35, 42-44, 46, 64 and 68.

¹⁸ Defence Response, ICC-02/04-01/15-701, paras 10 and 47. *See also* ICC-02/04-01/15-701-Conf-AnxA.

¹⁹ Defence Response, ICC-02/04-01/15-701, paras 11, 14, 62 and 69; ICC-02/04-01/15-701-Conf-AnxA, rows 1, 2, 4-18, 24, 26, 29, 139, 799, 836, 850-852, 865, 880, 905, 910, 920, 921, 944 and 945. The Defence also argues that the witness statements taken in the course of a police investigation, and discussed in paragraphs 20 and 21 below, should be translated into Acholi, pursuant to Rule 76(3) of the Rules, before being recognized as

requests that the Chamber order the Prosecution to re-file its Request when the material is translated, or at least reject the submission of these materials until the correct procedural steps have been followed by the Prosecution.²⁰

9. The Chamber first notes that several of the items the Defence points to can be understood in English.²¹ As to the rest of the materials, the Chamber notes that Regulation 39 of the Regulations of the Court requires that '[a]ll documents and materials filed with the Registry be in English or French, unless otherwise [...] authorised by the Chamber'. The purpose of this Regulation is to ensure that the relevant materials can be understood in a working language of the Court.²² The Chamber notes that much of the material the Defence points to, and which cannot be understood in English, are only partially not in a working language of the Court. In many cases, only minor intelligible portions of the materials are not translated. However, the Chamber, and the participants, must be in a position to thoroughly understand the evidence. Thus, the Chamber deems it appropriate to recognise the un-translated materials objected to by the Defence as submitted conditional on the provision of translation into a working language of the Court.

formally submitted. Defence Response, ICC-02/04-01/15-701, para. 11 and footnote 55. The Chamber considers this point moot as the relevant items are either not recognised as submitted on other grounds or are outside the purview of Rule 76(3) of the Rules.

²⁰ Defence Response, ICC-02/04-01/15-701, para. 11.

²¹ The Chamber notes that UGA-OTP-0023-0011 (row 5 of ICC-02/05-01/15-701-Conf-AnxA) is an English translation of UGA-OTP-0023-0002 (row 4 of ICC-02/05-01/15-701-Conf-AnxA). UGA-OTP-0026-0442 and UGA-OTP-0026-0444 appear to be in English (rows 944-945 of ICC-02/05-01/15-701-Conf-AnxA). The Chamber also notes that, apart for unintelligible mutterings or background sounds, in UGA-OTP-0032-0005, UGA-OTP-0032-0007, UGA-OTP-0032-0009, UGA-OTP-0032-0011, UGA-OTP-0032-0013, UGA-OTP-0032-0015, UGA-OTP-0032-0017, UGA-OTP-0032-0019, UGA-OTP-0032-0021, UGA-OTP-0032-0023, UGA-OTP-0032-0027, UGA-OTP-0032-0029 (rows 7-18 of ICC-02/05-01/15-701-Conf-AnxA) translators provide translations into English within the video and the intelligible portions of the videos can be understood in English. While UGA-OTP-0248-0001-R01 (row 38 of ICC-02/05-01/15-701-Conf-AnxA) is a partial translation of UGA-OTP-0181-0034 (row 24 of ICC-02/05-01/15-701-Conf-AnxA), it appears that a substantial portion of the tape is untranslated and the Prosecution provides no explanation as to why it provides only a partial translation.

²² See Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the 'Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)', 27 July 2009, ICC-01/04-01/07-1336, para. 12.

The Chamber notes the provision of Rule 64 of the Rules should a new issue related to the relevance or admissibility of the items become known after the provision of translations.

3. Submission through live testimony or Rule 68(2)(b) or 68(3) of the Rules

10. The Defence argues that certain documents should be submitted through Rules 68(2)(b) or 68(3) of the Rules or through live testimony rather than through the present Request.²³ The Defence's objections in this regard relate to: (i) materials associated with witnesses²⁴ and (ii) materials the Defence allege are testimonial in nature.²⁵

Materials associated with witnesses

11. In relation to materials associated with witnesses on the Prosecution's list of witnesses, the Defence generally argues that severing the submission of materials from the witness's in-court testimony or Rules 68(2)(b) or 68(3) statement is outside of the proper procedure for submitting evidence²⁶ and is

²³ Defence Response, ICC-02/04-01/15-701, paras 16-17, 19, 30, 33-35, 42-44, 46, 64 and 68.

²⁴ See Defence Response, ICC-02/04-01/15-701, paras 16-17, 19, 30, 33, 42-44, 46, 64 and 68 and, ICC-02/04-01/15-701-Conf-AnxA, row 1006. The Defence objects to items related to witnesses on the Prosecution's witness list, specifically (i) certain items in the Prosecution's category 2 (certificates and personal data); (ii) certain materials in the Prosecution's category 4 (dossiers and police crime files) that the Prosecution argues could have been submitted as joined to several Rule 68(2)(b) statements previously recognised as submitted; (iii) certain items in the Prosecution's category 5 (forensic records and reports) related to Prosecution witnesses P-17, P-36, P-414 or P-256 (P-17 and P-36's testimony have been introduced via Rule 68(2)(b) and P-414 and P-256 are scheduled to testify via Rule 68(3) of the Rules); (iv) the majority of the items in Prosecution's category 6 (photographs) are associated with Prosecution witnesses P-9, P-17, P-38 and P-256 (P-9, P-38 and P-256 are scheduled to testify in-court and P-17 statement has been introduced via Rule 68(2)(b) of the Rules); (v) items in Prosecution's category 8 (calendar/diary) associated with P-38, who is scheduled to testify in-court via Rule 68(3) of the Rules and (vi) certain items in the Prosecution's category 9 (intelligence materials), almost all of which are associated with P-126 whose testimony has been introduced via Rule 68(2)(b) of the Rules. The Defence also objects to items related to witnesses not on the Prosecution's witness list, specifically (i) certain items, such as UGA-OTP-0233-0986, from the Prosecution's category 2 (certificates and personal data); (ii) UGA-OTP-0025-0352, from the Prosecution's category 3 (correspondence), arguing that it should be introduced by a witness either through live testimony or via a Rule 68(2)(b) application and (iii) 35 photographs in the Prosecution's category 6 (photographs) collected from a 'UPDF Liaison officer'.

²⁵ Defence Response, ICC-02/04-01/15-701, paras 35 and 43.

²⁶ See Defence Response, ICC-02/04-01/15-701, paras 16, 33, 42-44, 46, 64 and 68.

prejudicial to the Defence.²⁷ In relation to materials associated with witnesses not on the Prosecution's list of witnesses, the Defence contends that by submitting materials related to individuals who will not testify and for whom no statement is provided, the Prosecution deprives the Defence of the opportunity to comprehensively test the evidence through these witnesses.²⁸

12. Specifically, as to witnesses scheduled to testify in-court, the Defence argues that it is prejudicial to the Defence to comment on the associated material before the live testimony as new information 'will almost undoubtedly be revealed which should – under a procedurally correct process – be included in the present response'.²⁹ Similarly, the Defence submits that the evidence establishing the age of child soldiers must be submitted when these categories of witnesses are called to testify and considered on a case-by-case basis.³⁰
13. The Chamber does not consider there to be a procedural bar impeding the submission of these materials associated with witnesses. The Chamber's instructions on the procedure for the submission of items do not set the limits the Defence alleges.³¹ Nor does the formal submission of materials severable from a witness's Rule 68(2)(b) or 68(3) of the Rules statement or in-court testimony prejudices the Defence.
14. As the Chamber previously noted, the exact mechanism through which attendant materials are submitted is immaterial 'because [the manner of submission] does not lead to the materials being considered any differently by

²⁷ See Defence Response, ICC-02/04-01/15-701, paras 16 and 68.

²⁸ Defence Response, ICC-02/04-01/15-701, para. 17. *See also, e.g.* Defence Response, ICC-02/04-01/15-701, para. 30 and ICC-02/04-01/15-701-Conf-AnxA, row 1006.

²⁹ Defence Response, ICC-02/04-01/15-701, para. 16.

³⁰ Defence Response, ICC-02/04-01/15-701, para. 19.

³¹ See Initial Directions, ICC-02/04-01/15-497, paras 27-31.

the Chamber in its deliberations’.³² Documentary evidence introduced through an in-court witness or as materials associated with a Rules 68(2)(b) or 68(3) statement remains documentary evidence; the manner of introduction does not transform it into testimonial evidence. The material issue is that the Prosecution clearly submits the materials to the Chamber in such a manner that the Defence can raise any issues under Rule 64 of the Rules.³³

15. The submission of these materials via the ‘bar table’ as opposed to through Rule 68(2)(b) or 68(3) of the Rules or in-court testimony does not in any way preclude the Defence from challenging, *inter alia*, their probative value or relevance, which it does in its submissions.³⁴ Nor does it preclude the Defence from challenging the evidence by calling witnesses as appropriate and/or submitting any evidence in support of its challenge.³⁵ This remains the case, even when the material relates to individuals who will not testify and for whom no statement is provided. There is no requirement that evidence be tested with a witness in order for it to be submitted. In this regard, the Chamber recalls that it formally recognised items submitted by the Defence over the Prosecution’s objection that the witness was not shown the documents in the witness box and did not comment on them in any way.³⁶

16. The Chamber also notes that the Prosecution indicates that it intends to question the relevant witnesses on related materials submitted through this procedure, but will limit its examination of these items to establishing their general

³² See Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-02/04-01/15-596-Red, para. 110 (‘Rule 68(2)(b) Decision’).

³³ See Rule 68(2)(b) Decision, ICC-02/04-01/15-596, para. 110.

³⁴ See generally Defence Response, ICC-02/04-01/15-701 and ICC-02/04-01/15-701-Conf-AnxA.

³⁵ See Rule 68(2)(b) Decision, ICC-02/04-01/15-596, para. 36.

³⁶ See email from the Chamber to the participants on 27 January 2017 at 9.52 (regarding the formal submission of items submitted by the participants following P-422’s testimony).

provenance.³⁷ Rule 64 of the Rules permits the Defence to exceptionally raise an issue relating to the relevance and admissibility of an item when the issue is not known at the time the evidence is submitted. Thus, should the in-court testimony of any witness raise an unknown issue as to the relevance or admissibility of an item, the Defence is not precluded from exceptionally raising the issue.

17. In light of the above, the Chamber concludes that there are no procedural bars that preclude the submission of these items.

Materials that are testimonial in nature

18. The Prosecution seeks to submit statements from alleged victims of the LRA taken by the Ugandan police.³⁸ The Defence contends that these materials should be submitted through Rule 68 of the Rules.³⁹ The Defence also argues that certain items⁴⁰ are medical reports generated during an official police investigation and should be treated as witness statements of the medical examiner and as items of a forensic nature.⁴¹ The Defence submits that these ‘medical reports’ should be properly submitted through live testimony or Rule 68(3) of the Rules.⁴²

19. The Chamber recalls its jurisprudence regarding prior recorded statements:

Equally settled in the Court’s case-law is that 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

³⁷ Request, ICC-02/04-01/15-654, para. 19.

³⁸ See Request, ICC-02/04-01/15-654, para. 32. See also ICC-02/04-01/15-654-Conf-AnxA, rows 148-194 and ICC-02/04-01/15-701-Conf-AnxA, rows 148-194.

³⁹ Defence Response, ICC-02/04-01/15-701, paras 34-35.

⁴⁰ The Chamber notes that the Defence points to material listed in rows 210-234 of Annex A to the Request. Defence Response, ICC-02/04-01/15-701, para. 43. However the documents in those rows are exclusively the Ugandan police’s requests for post-mortem examination. A larger category of material, listed in rows 210-427, contains both the police’s requests for post-mortem examinations and the actual examination reports, produced by a medical examiner. See, e.g., ICC-02/04-01/15-654-Conf-AnxA, row 427 (UGA-OTP-0146-0565).

⁴¹ Defence Response, ICC-02/04-01/15-701, para. 43.

⁴² Defence Response, ICC-02/04-01/15-701, para. 43.

she is questioned in the capacity as a witness in the context of or in anticipation of legal proceedings.⁴³

20. As the Prosecution concedes, the statements from alleged victims, 47 items in all,⁴⁴ were purportedly taken by the Ugandan police during their investigation into the alleged LRA attack at Pajule IDP camp on 10 October 2003.⁴⁵ These documents appear to have been transcribed by a police officer and are each a first person account of a victim alleging that they had been criminally harmed by the LRA.⁴⁶ The victim's signature or thumb print is affixed to their statement.⁴⁷ The Chamber considers that these victims' accounts, alleging wrong-doing by the LRA, taken in the course of a police investigation, must be viewed as fitting within the definition of a prior recorded statement. Such materials are indeed testimonial in nature and they cannot be recognised as submitted through the 'bar table'.
21. Regarding the reports from a medical examiner that the Defence argues should be treated as witness statements, the Chamber is satisfied that these items are documentary evidence and are not testimonial in nature. The reports primarily seek to determine how a person died. They are not the result of a formal dialogue similar to an interrogation or questioning, and the medical examiner cannot be considered as having been 'questioned in the capacity as a witness' when providing his reports. Rather, the post-mortem reports are records memorialising objective data made in the ordinary course of business of a medical examiner. Further, the information contained within the reports is routine, descriptive and non-analytical, in short, not testimonial in nature. The

⁴³ Rule 68(2)(b) Decision, ICC-02/04-01/15-596, para. 9 (internal citations omitted). *See also* Trial Chamber VII, *The Prosecutor v. Bemba et al*, Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, ICC-01/05-01/13-1478-Red-Corr, para. 32.

⁴⁴ *See* ICC-02/04-01/15-654-Conf-AnxA, rows 148-194.

⁴⁵ Request, ICC-02/04-01/15-654, para. 32.

⁴⁶ *See* documents listed in ICC-02/04-01/15-654-Conf-AnxA, rows 148-194.

⁴⁷ *See* documents listed in ICC-02/04-01/15-654-Conf-AnxA, rows 148-194.

Chamber is, therefore, satisfied that there is no procedural bar to their submission.⁴⁸

B. General objections

1. Rule on the admission of certain items

22. Outside of its objections addressed above, the Defence also requests that the Chamber ‘rule on several items up-front so as to enable the Defence to prepare for the cross-examination of witnesses’.⁴⁹ Thus, the Defence requests that the Chamber ‘rule on the admission’ of several items in advance of the witness’s testimony, submitting generally that (i) these items are irrelevant and (b) a decision on these items impact upon the preparation of its examination.⁵⁰ The Chamber will address these arguments below.⁵¹

2. Redactions

23. The Defence notes that some materials the Prosecution submits⁵² contain redactions of names and argues that the redacted names are crucial to evaluating whether certain submitted Rule 68(2)(b) statements corroborate the materials.⁵³

24. The Chamber recalls the ‘Decision on issues related to disclosure and exceptions thereto’ (‘Redaction Decision’).⁵⁴ In the Redaction Decision, the Single Judge of the Pre-Trial Chamber established a redaction protocol which permitted the Prosecution to disclose evidence with redactions of information falling into

⁴⁸ As the items are not witness statements, the provision of Rule 76(3) of the Rules does not apply.

⁴⁹ Defence Response, ICC-02/04-01/15-701, para. 9.

⁵⁰ Defence Response, ICC-02/04-01/15-701, paras 9 and 71(b).

⁵¹ See pages 21-22 below.

⁵² Certain materials in the Prosecution’s category 4 (dossiers and police crime files) and category 9 (intelligence documents).

⁵³ Defence Response, ICC-02/04-01/15-701, para. 33 and ICC-02/04-01/15-701-Conf-AnxA, rows 142-145 and 859.

⁵⁴ 23 April 2015, ICC-02/04-01/15-224.

certain standard categories.⁵⁵ For each redaction applied, the Prosecution was instructed to indicate the category of redaction.⁵⁶ The Prosecution and the Defence were also instructed to conduct *inter partes* communication, upon any request by the Defence for information concerning specific redactions, or any requests to lift certain redactions.⁵⁷ If necessary, the Defence may then challenge specific redactions by raising the issue with the Chamber.⁵⁸ In such a case, the Prosecutor shall retain the burden of proof to justify the challenged redaction.

25. The Prosecution indicates that its redactions were to a category of documents permitted by the Redaction Decision, i.e. '[i]dentifying and contact information of "other persons at risk as a result of the activities of the Court"'.⁵⁹ As it appears that the parties have not conducted *inter partes* communication in relation to these redactions,⁶⁰ the parties are instructed to follow the protocol set forth in paragraph 6 of the Redaction Decision and seize the Chamber if a disagreement persists.
26. The Chamber considers the documents suitable to be recognised as submitted. The Chamber recalls that any subsequent un-redacted or lesser redacted version of this material is automatically to be considered submitted, subject to any further objections.⁶¹

C. Objections related to categories⁶²

⁵⁵ Redaction Decision, ICC-02/04-01/15-224, para. 3. See Order Scheduling First Status Conference and Other Matters, ICC-02/04-01/15-432, para. 4, holding that unless otherwise indicated, the procedures adopted by the Pre-Trial Chamber remain in place as regards, *inter alia*, redactions.

⁵⁶ Redaction Decision, ICC-02/04-01/15-224, para. 5.

⁵⁷ Redaction Decision, ICC-02/04-01/15-224, para. 6.

⁵⁸ Redaction Decision, ICC-02/04-01/15-224, para. 6.

⁵⁹ See the documents listed in Annex A to the Request, ICC-02/04-01/15-654-Conf-AnxA, rows 142-145 and 859 and Redaction Decision, ICC-02/04-01/15-224, para. 4.

⁶⁰ See Defence Response, ICC-02/04-01/15-701, para. 33; ICC-02/04-01/15-701-Conf-AnxA, rows 142-145 and 859.

⁶¹ Initial Directions, ICC-02/04-01/15-497, para. 31.

⁶² Here, the Chamber discusses Defence objections not already addressed above.

*1. Category I: audio/video material and media/press articles*⁶³

27. The Defence submits that the Prosecution's descriptions of some of the contents of the videos and audios do not match the actual content.⁶⁴ Thus, the Defence argues that it cannot properly respond to the relevance and probative value where the material does not reflect what is proposed and that this prejudices the Defence.⁶⁵ Further, the Defence submits that news reports should be approached with caution as the standard of proof for journalism are not on the same as for criminal trials and the reports were created in the context of a conflict, which affects the probative value of the materials.⁶⁶

*2. Category II: certificates and personal data*⁶⁷

28. The Defence argues that the 'prejudice of admission' of materials related to individuals who will not testify and for whom no statement is provided 'clearly' outweigh the probative value of these materials.⁶⁸

29. Further, the Defence argues that the materials in this category relate to the guilt or innocence of Mr Ongwen and are not mere background material.⁶⁹ The Defence contends that if submitted the materials may be used to establish crimes and forms of criminal liabilities alleged against Mr Ongwen, this relieves the Prosecution of its burden of proof and denies the Defence an opportunity to challenge evidence related to forms of criminal liability against Mr Ongwen.⁷⁰

⁶³ Request, ICC-02/04-01/15-654, paras 20-23; ICC-02/04-01/15-654-Conf-AnxA, rows 1-59.

⁶⁴ Defence Response, ICC-02/04-01/15-701, para. 12. This objection is raised in relation to two items. See ICC-02/04-01/15-701-Conf-AnxA, rows 4 and 9.

⁶⁵ Defence Response, ICC-02/04-01/15-701, para. 12.

⁶⁶ Defence Response, ICC-02/04-01/15-701, para. 13.

⁶⁷ Request, ICC-02/04-01/15-654, paras 24-26; ICC-02/04-01/15-654-Conf-AnxA, rows 60-121.

⁶⁸ Defence Response, ICC-02/04-01/15-701, para. 17.

⁶⁹ Defence Response, ICC-02/04-01/15-701, para. 15.

⁷⁰ Defence Response, ICC-02/04-01/15-701, para. 18.

30. In relation to material purporting to establish the age of individuals, the Defence states that 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 an abductee reception centre.⁷¹ The Defence submits that these items have limited probative value, as there is no indication that there is any form of verification done by the issuing entities.⁷²
31. The Defence also argues that the submitted birth certificates issued prior to 1 January 2016 are likely to be unreliable due to deficiencies in the administrative regime in place at the time of their creation and the information contained within imprecise.⁷³ It submits that the Chamber should approach the information contained therein with caution.⁷⁴ Additionally, the Defence argues that evidence that indicates that an individual is close to the age of 15 in the period for which Mr Ongwen is charged 'is not clearly and definitively probative'.⁷⁵ Given cultural practices, there could be at least a year of imprecision.⁷⁶

3. Category III: correspondence – letters⁷⁷

32. For one item,⁷⁸ the Defence does not generally object to the submission but requests that the Chamber carefully judge the item's credibility, reliability, relevance and probative value.⁷⁹ For the other materials, the Defence points out alleged deficiencies and argues that they are not reliable or credible and have

⁷¹ Defence Response, ICC-02/04-01/15-701, para. 19.

⁷² Defence Response, ICC-02/04-01/15-701, para. 19.

⁷³ Defence Response, ICC-02/04-01/15-701, paras 21-25. See ICC-02/04-01/15-701-AnxB and ICC-02/04-01/15-701-AnxC.

⁷⁴ Defence Response, ICC-02/04-01/15-701, paras 20-25. See ICC-02/04-01/15-701-AnxB and ICC-02/04-01/15-701-AnxC.

⁷⁵ Defence Response, ICC-02/04-01/15-701, para. 25.

⁷⁶ Defence Response, ICC-02/04-01/15-701, para. 25.

⁷⁷ Request, ICC-02/04-01/15-654, paras 27-30; ICC-02/04-01/15-654-Conf-AnxA, rows 122-135.

⁷⁸ See ICC-02/04-01/15-654-Conf-AnxA, row 122 (UGA-OTP-0015-0101).

⁷⁹ Defence Response, ICC-02/04-01/15-701, para. 26.

low or no probative value.⁸⁰ The Defence also submits that one item falls outside the jurisdiction of the Court and lacks contextual information that would allow it to be assessed properly.⁸¹ Additionally, regarding materials in this category tendered for the purpose of demonstrating that the LRA was a structured and organised group,⁸² the Defence submits that since the evidence goes to support a critical element of the charges, it would be prejudicial to submit it under this procedure.⁸³

4. Category IV: dossiers and police crime files⁸⁴

33. The Defence submits that certain evidence within this category purports to show widespread and systematic attacks on a civilian population.⁸⁵ The Defence states that since this evidence purports to support a legal element of the charges, submitting material in this category through the 'bar table' relieves the Prosecution of its burden of proof.⁸⁶ The Defence further submits that the relevance and probative value of these documents is limited.⁸⁷

5. Category V: forensic, scientific and medical records or reports⁸⁸

34. The Defence alleges that post-mortem examination reports of civilians killed in attacks at camps serve no legal purpose and have little relevance to Article 7 of the Statute.⁸⁹ The Defence further notes that these materials are not referenced in the Prosecution's Document Containing the Charges or in the Prosecution's Pre-

⁸⁰ Defence Response, ICC-02/04-01/15-701, paras 27-32.

⁸¹ Defence Response, ICC-02/04-01/15-701, para. 30, referring to UGA-OTP-0025-0352.

⁸² See Request, ICC-02/04-01/15-654, para. 29.

⁸³ Defence Response, ICC-02/04-01/15-701, para. 27.

⁸⁴ Request, ICC-02/04-01/15-654, paras 31-34; ICC-02/04-01/15-654-Conf-AnnexA, row 136-194.

⁸⁵ Defence Response, ICC-02/04-01/15-701, para. 36.

⁸⁶ Defence Response, ICC-02/04-01/15-701, para. 36.

⁸⁷ Defence Response, ICC-02/04-01/15-701, paras 36-37.

⁸⁸ Request, ICC-02/04-01/15-654, paras 35-37; ICC-02/04-01/15-654-Conf-AnxA, rows 195-443.

⁸⁹ Defence Response, ICC-02/04-01/15-701, para. 39.

Trial Brief or in the Confirmation of Charges Decision.⁹⁰ The Defence states that the prejudicial effect of these items far outweighs their relevance and probative value and submits that the items should be excluded.⁹¹ The Defence also argues that the submission of these items would impermissibly expand the scope of the charges against Mr Ongwen to include charges for which he was neither charged nor provided notice.⁹² In relation to the Barlonyo IDP Camp specifically, the Defence states that given the evidence, this attack would fall outside the purview of Article 7 of the Statute.⁹³

35. The Defence states that the alleged sketch of Pagak IDP Camp by Prosecution witness P-36 lacks relevance and probative value as the camp is not one of the alleged crime sites in the Confirmation of Charges Decision.⁹⁴ Additionally, the Defence alleges that panoramic videos of the four alleged crime bases, created in late 2015, have no probative value and are of little relevance.⁹⁵

6. Category VI: photographs⁹⁶

36. The Defence argues that (i) certain items are ‘outside the jurisdiction’ of the case and thus are irrelevant and lack probative value;⁹⁷ (ii) certain photographs are of an unknown location and thus their prejudicial effect outweighs their probative value and relevance;⁹⁸ (iii) without further information, photographs of monuments in Lukodi and Odek which purport to list persons who died during attacks have no probative value, little to no relevance and amount to hearsay

⁹⁰ Defence Response, ICC-02/04-01/15-701, paras 38.

⁹¹ Defence Response, ICC-02/04-01/15-701, para. 39.

⁹² Defence Response, ICC-02/04-01/15-701, para. 40.

⁹³ Defence Response, ICC-02/04-01/15-701, para. 41.

⁹⁴ Defence Response, ICC-02/04-01/15-701, para. 42.

⁹⁵ Defence Response, ICC-02/04-01/15-701, para. 44.

⁹⁶ Request, ICC-02/04-01/15-654, paras 38-40; ICC-02/04-01/15-584-Conf-AnxA, rows 444-770.

⁹⁷ Defence Response, ICC-02/04-01/15-701, para. 47. The Defence also argues that rebuttal of a duress defence cannot be submitted through this procedure.

⁹⁸ Defence Response, ICC-02/04-01/15-701, para. 48.

evidence which is highly prejudicial;⁹⁹ and (iv) photographs of Pagak IDP Camp are irrelevant and the prejudicial effect of these items far outweighs the relevance and probative value.¹⁰⁰

*7. Category VII: reports*¹⁰¹

37. The Defence does not object to the submission of two reports.¹⁰² The Defence also does not specifically object to the submission of another report¹⁰³ but argues that ‘its methodology is lacking’ and the Chamber should give less weight to its probative value and relevance.¹⁰⁴
38. The Defence submits that certain reports¹⁰⁵ are ‘journalist articles void of the standards and practices found in criminal trials’.¹⁰⁶ The Defence argues that the reliability and probative value of these articles is low and outweighed by the prejudicial effect.¹⁰⁷
39. The Defence states that a report from the Uganda Human Rights Commission¹⁰⁸ is a partial report and without the full report, neither the Chamber nor the Defence can properly judge its reliability, credibility and relevance.¹⁰⁹ The Defence also questions the ‘methodology of the report’ and its reference to anonymous sources.¹¹⁰ The Defence challenges the reliability and probative value

⁹⁹ Defence Response, ICC-02/04-01/15-701, para. 49.

¹⁰⁰ Defence Response, ICC-02/04-01/15-701, para. 50.

¹⁰¹ Request, ICC-02/04-01/15-654, paras 41-42; ICC-02/04-01/15-654-Conf-AnxA, rows 771-793.

¹⁰² Defence Response, ICC-02/04-01/15-701, para. 52. See ICC-02/04-01/15-654-Conf-AnxA, rows 786 and 792 (UGA-OTP-0231-0383 and UGA-OTP-0263-2130).

¹⁰³ Defence Response, ICC-02/04-01/15-701, para. 59. See ICC-02/04-01/15-654-Conf-AnxA, row 779 (UGA-OTP-0223-1076).

¹⁰⁴ Defence Response, ICC-02/04-01/15-701, para. 59.

¹⁰⁵ See ICC-02/04-01/15-654-Conf-AnxA, rows 772, 781, 782, 784, 789, 790 and 793 (UGA-OTP-0132-0514, UGA-OTP-0231-0148, UGA-OTP-0231-0150, UGA-OTP-0231-0265, UGA-OTP-0231-0662, UGA-OTP-0231-0672 and UGA-OTP-0273-0041).

¹⁰⁶ Defence Response, ICC-02/04-01/15-701, para. 53.

¹⁰⁷ Defence Response, ICC-02/04-01/15-701, para. 53.

¹⁰⁸ See ICC-02/04-01/15-654-Conf-AnxA, row 771 (UGA-OTP-0044-0044).

¹⁰⁹ Defence Response, ICC-02/04-01/15-701, para. 54.

¹¹⁰ Defence Response, ICC-02/04-01/15-701, para. 54.

of another report from the Uganda Human Rights Commission,¹¹¹ arguing that it was commissioned by one of the many alleged belligerents in the conflict and is ‘littered with biased conclusions’.¹¹²

40. In relation to reports by certain non-governmental organisations,¹¹³ the Defence argues that reports authored by employees or written on contract should be treated with caution by the Chamber and challenges the ‘methodology’ and the use of anonymous statements.¹¹⁴ It submits that the probative value of these items is low and they should be rejected for submission.¹¹⁵ Similarly, with regard to a report by the Acholi Religious Leaders Peace Initiative,¹¹⁶ the Defence submits that the item has low probative value as it does not contain a section outlining its methodology and its specific authors are unknown.¹¹⁷

41. The Defence alleges that United Nations related documents¹¹⁸ have little relevance and low probative value.¹¹⁹ Similarly, in relation to a report submitted to the United States Embassy,¹²⁰ the Defence argues that the United States was a belligerent to the conflict and thus any report commissioned by the United States should be given a lower probative value.¹²¹ The Defence also challenges the relevance of the report.¹²²

¹¹¹ Defence Response, ICC-02/04-01/15-701, para. 55. *See* ICC-02/04-01/15-654-Conf-AnxA, row 773 (UGA-OTP-0132-0678).

¹¹² Defence Response, ICC-02/04-01/15-701, para. 55.

¹¹³ *See* ICC-02/04-01/15-654-Conf-AnxA, rows 774, 778, 783 and 787 (UGA-OTP-0133-0059, UGA-OTP-0207-0629, UGA-OTP-0231-0188 and UGA-OTP-0231-0438).

¹¹⁴ Defence Response, ICC-02/04-01/15-701, para. 56.

¹¹⁵ Defence Response, ICC-02/04-01/15-701, para. 56.

¹¹⁶ *See* ICC-02/04-01/15-654-Conf-AnxA, row 777 (UGA-OTP-0195-0105).

¹¹⁷ Defence Response, ICC-02/04-01/15-701, para. 58.

¹¹⁸ *See* ICC-02/04-01/15-654-Conf-AnxA, rows 775, 776, 780 and 781 (UGA-OTP-0159-0063-R01, UGA-OTP-0159-0111, UGA-OTP-0224-0004 and UGA-OTP-0231-0148).

¹¹⁹ Defence Response, ICC-02/04-01/15-701, para. 57.

¹²⁰ *See* ICC-02/04-01/15-654-Conf-AnxA, row 785 (UGA-OTP-0231-0271).

¹²¹ Defence Response, ICC-02/04-01/15-701, para. 60.

¹²² Defence Response, ICC-02/04-01/15-701, para. 60.

42. Lastly, the Defence challenges the methodology of a report received from a current Member of the Ugandan parliament¹²³ and argues that the report is highly prejudicial, is anonymous hearsay evidence and lacks reliability and credibility.¹²⁴

8. Category VIII: calendar/diary¹²⁵

43. The Defence submits that the excerpts from the diary of Sam Kolo¹²⁶ should not be submitted in their entirety.¹²⁷ The Defence argues that the Prosecution misrepresents the contents of the diary.¹²⁸ Further, the Defence argues that the evidence is insufficient to prove that Mr Kolo was the author of the diary, challenges the veracity of the diary and argues that ‘the prejudice of admission clearly outweighs any probative value’.¹²⁹

9. Category IX: intelligence material - lists / tables, notebooks, notes, organisational diagrams, intelligence reports and technical manuals¹³⁰

44. The Defence submits that the materials lack probative value, relevance and indicia of reliability or authenticity.¹³¹ The Defence further submits that the contents of the material are at odds with the Prosecution’s characterisation of the LRA.¹³²

10. Category X: Maps and sketches¹³³

¹²³ Defence Response, ICC-02/04-01/15-701, para. 61. See ICC-02/04-01/15-654-Conf-AnxA, row 791 (UGA-OTP-0231-0890).

¹²⁴ Defence Response, ICC-02/04-01/15-701, para. 61.

¹²⁵ Request, ICC-02/04-01/15-654, paras 43-44; ICC-02/04-01/15-654-Conf-AnxA, rows 794-846.

¹²⁶ See ICC-02/04-01/15-654-Conf-AnxA, rows 794-846.

¹²⁷ Defence Response, ICC-02/04-01/15-701, para. 65.

¹²⁸ Defence Response, ICC-02/04-01/15-701, para. 62.

¹²⁹ Defence Response, ICC-02/04-01/15-701, para. 63-65.

¹³⁰ Request, ICC-02/04-01/15-654, paras 45-46; ICC-02/04-01/15-654-Conf-AnxA, rows 847-1003.

¹³¹ Defence Response, ICC-02/04-01/15-701, para. 66.

¹³² Defence Response, ICC-02/04-01/15-701, para. 67.

¹³³ Request, ICC-02/04-01/15-654, paras 47-48; ICC-02/04-01/15-654-Conf-AnxA, rows 1004-1006.

45. The Defence asserts that the maps and sketches are either not probative of what they are used to prove or are not reliable.¹³⁴ The Defence also argues that two of the items fall outside of the facts and circumstances of the case.¹³⁵

III. Conclusion

46. The Defence's objections relate to the relevance, probative value and potential prejudice of the evidence concerned.¹³⁶ Consistent with its general approach,¹³⁷ the Chamber sees no reason to exceptionally consider these objections at this point in time.

47. The Chamber will not make a determination concerning the relevance and probative value of items related to witnesses who are set to testify. The Chamber sees no reason why the Defence cannot adequately prepare to examine the relevant witnesses in the absence of any such determination by the Chamber. Indeed, knowing that an item is recognised as submitted prior to the testimony of a witness adequately aids the Defence's preparation and allows the Defence to prepare to question the witness in relation to the document, if it wishes.

48. With a few documents, the Defence asserts that the contents do not match the Prosecution's description in its Annex, and thus it is unable to properly respond to the relevance and probative value of the material.¹³⁸ The Defence posits that this prejudices the Defence. The Chamber is unconvinced by the Defence's argument. The Defence's comments as to the contents of the materials are in themselves comments on the relevance and probative value of the materials. The

¹³⁴ ICC-02/04-01/15-701-Conf-AnxA, rows 1004-1006.

¹³⁵ ICC-02/04-01/15-701-Conf-AnxA, rows 1005-1006.

¹³⁶ Apart from the procedural objections discussed above.

¹³⁷ See, *inter alia*, Decision on Prosecution Request to Submit Interception Related Evidence, 1 December 2016, ICC-02/04-01/15-615 and Initial Directions, ICC-02/04-01/15-497.

¹³⁸ See Defence Response, ICC-02/04-01/15-701, para. 12

Defence also has access to the documents and is able to comment on their relevance and probative value in relation to what the Prosecution purports to utilise them for. Additionally, the Prosecution's Pre-Trial Brief¹³⁹ and the factual details of the confirmed charges¹⁴⁰ provide the Defence with ample detail which allows it to make the relevant arguments.

49. As to the Defence's arguments on the submission other than through a witness of evidence that goes to critical elements of the charges, the Chamber notes that there is nothing prejudicial about submitting such evidence through this procedure. Nor does such submission relieve the Prosecution of its burden of proof or shift that burden to the Defence. As discussed above, the method of submission of documentary evidence has no bearing on how the Chamber will eventually evaluate the evidence. Further, the Chamber has previously indicated that it will not set limits on how it will consider any submitted evidence.¹⁴¹

50. For these reasons, and in accordance with its general approach, the Chamber recognises the submission of certain items identified by the Prosecution. The Chamber will defer consideration of the Defence's various objections until the judgment and in the light of the entirety of the evidence brought before it.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the submission of the documents of the following items as witness statements of alleged victims of the LRA:

- UGA-OTP-0137-0197; UGA-OTP-0137-0199; UGA-OTP-0137-0201; UGA-OTP-0137-0204; UGA-OTP-0137-0205; UGA-OTP-0137-0207; UGA-OTP-0137-0209;

¹³⁹ Prosecution's Pre-Trial Brief, 6 September 2016, ICC-02/04-01/15-533.

¹⁴⁰ Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, ICC-02/04-01/15-422-Red, pages 71-104 (confidential version registered same day).

¹⁴¹ See Initial Directions, ICC-02/04-01/15-497, para. 29.

UGA-OTP-0137-0211; UGA-OTP-0137-0213; UGA-OTP-0137-0214; UGA-OTP-0137-0218; UGA-OTP-0137-0222; UGA-OTP-0137-0225; UGA-OTP-0137-0228; UGA-OTP-0137-0229; UGA-OTP-0137-0231; UGA-OTP-0137-0241; UGA-OTP-0137-0244; UGA-OTP-0137-0247; UGA-OTP-0137-0250; UGA-OTP-0137-0254; UGA-OTP-0137-0256; UGA-OTP-0137-0259; UGA-OTP-0137-0262; UGA-OTP-0137-0265; UGA-OTP-0137-0266; UGA-OTP-0137-0268; UGA-OTP-0137-0275; UGA-OTP-0137-0279; UGA-OTP-0137-0282; UGA-OTP-0137-0284; UGA-OTP-0137-0286; UGA-OTP-0137-0288; UGA-OTP-0137-0290; UGA-OTP-0137-0292; UGA-OTP-0137-0295; UGA-OTP-0137-0297; UGA-OTP-0137-0301; UGA-OTP-0137-0307; UGA-OTP-0137-0309; UGA-OTP-0137-0310; UGA-OTP-0137-0311; UGA-OTP-0137-0315; UGA-OTP-0137-0318; UGA-OTP-0137-0319; UGA-OTP-0137-0320 and UGA-OTP-0137-0322;

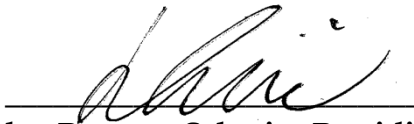
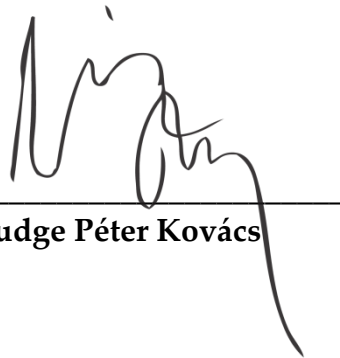
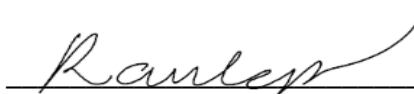
RECOGNISES the following documents as ‘submitted’ conditional on the provision of translation of the sections currently not in a working language of the Court into a working language:

- UGA-OTP-0021-0006; UGA-OTP-0021-0010; UGA-OTP-0032-0003; UGA-OTP-0181-0034; UGA-OTP-0195-0033; UGA-OTP-0208-0504; UGA-OTP-0146-0146; UGA-OTP-0162-0178; UGA-OTP-0162-0215; UGA-OTP-0014-0142; UGA-OTP-0014-0150; UGA-OTP-0014-0193; UGA-OTP-0025-0210; UGA-OTP-0026-0440; UGA-OTP-0014-0542; UGA-OTP-0026-0369; UGA-OTP-0014-0112 and UGA-OTP-0014-0195;

RECOGNISES the other items identified in Annex A of the Request as ‘submitted’; and

ORDERS the Registry to reflect that these items have been so recognised in the e-court metadata.

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


Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

Dated 28 March 2017

At The Hague, The Netherlands