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**International
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Date: **27 June 2018**

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

**Public Redacted Version of "Prosecution's Response to the
Defence Request to Introduce Previously Recorded Testimony Pursuant to Rule
68(2)(b)" 13 June 2018 (ICC-02/04-01/15-1282-Conf)**

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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Other

Introduction

1. The Defence has requested the introduction into evidence of the prior recorded statements and associated documents of nine witnesses.¹

2. The Prosecution requests the Chamber to:
 - a. grant the Defence requests to introduce into evidence the statements and associated documents of Witnesses D-0008, D-0012, D-0020, D-0034, D-0077 and P-0028; and
 - b. reject the Defence requests to introduce into evidence the statements and associated documents of Witnesses D-0019, D-0049 and D-0050.

Confidentiality

3. This document is classified as confidential pursuant to regulation 23*bis* of the Regulations of the Court ("RoC"). The Prosecution files a public redacted version concurrently.

Submissions

A. Preliminary observations

4. In this response, the Prosecution agrees to the introduction of a number of witness statements and associated documents pursuant to rule 68(2)(b). While the Prosecution accepts that rule 68(2)(b) is the correct avenue of introduction for these

¹ ICC-02/04-01/15-1271-Conf, supplemented by ICC-02/04-01/15-1277 ("Defence Request").

statements and documents, it does not concede the reliability and credibility of their contents. The Prosecution reserves its right to contest the same in future submissions.

5. Additionally, a number of witnesses cited in the Defence Request refer to the acts and conduct of Dominic Ongwen in their statements.² However, the Prosecution has not objected to the introduction of the statements of every such witness. The Prosecution has only objected to the introduction of a statement under rule 68(2)(b) where it relates to Dominic Ongwen's "actions [...] which are described in the charges brought against him [...] or which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged".³

B. Witnesses regarding whom the Prosecution does not oppose the Defence Request

6. The Prosecution does not object to the introduction, as per the Defence Request, of the statements and associated documents of D-0008, D-0012, D-0020, D-0034, D-0077 and P-0028⁴ into evidence via rule 68(2)(b).

C. Witnesses regarding whom the Prosecution opposes the Defence Request

D-0019 [REDACTED]

7. Witness D-0019 is a [REDACTED]. In statement UGA-D26-0010-0352, Witness D-0019 states that "[a]fter Tabuley was killed in Teso in 2003, I met [REDACTED] and they said that Dominic Ongwen was in sick bay".⁵ The witness adds "Ongwen

² See, for example, D-0008 at UGA-D26-0010-0307 paras. 1,4,5; D-0012 at UGA-D26-0010-0336, paras. 6,8. D-0020 at UGA-D26-0010-0382, para. 33; D-0034 at UGA-D26-0022-0385, paras. 53, 55.

³ ICC-02/04-01/15-596-Red, para. 12.

⁴ The Prosecution notes, for the sake of completeness, that the Chamber decided in a previous decision regarding rule 68(2)(b) that P-0028 should testify *viva voce* (See ICC-02/04-01/15-596-Red at para. 215).

⁵ UGA-D26-0010-0352, para. 29.

was not very active because he was in the sick bay most of the time. When a commander is in sick bay, he was left with only one escort and he had to surrender his handsets and radios”.⁶

8. These statements, *firstly*, relate to “personal actions and omissions of the accused”.⁷ They are about the operational status and capacity of Dominic Ongwen during the period of the charges, and hence his “actions [...] which are described in the charges brought against him [...] or which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged”.⁸ Hence, these statements fall afoul of the “acts and conduct” prohibition in rule 68(2)(b).

9. *Secondly*, they are directly related to the position of authority of Dominic Ongwen during the period of the charges, which is relevant for determining his criminal responsibility under articles 25 and 28 of the Rome Statute.⁹ This is an issue that is “soundly and conceivably disputed”¹⁰ between the Parties, and is of “sufficient significance for the Chamber’s eventual determination of the charges”.¹¹

10. The witness also states, regarding the Accused, that “even if he had wanted to, he never had the chance to escape”.¹² This statement is potentially relevant to an assessment under article 31(1)(d), which too is an issue that is soundly and conceivably disputed between the Parties, and is of sufficient significance for the Chamber’s eventual determination of the charges.

⁶ UGA-D26-0010-0352, para. 31.

⁷ ICC-02/04-01/15-596-Red, para. 11.

⁸ ICC-02/04-01/15-596-Red, para. 12.

⁹ See, for example, paras. 108-111 of ICC-02/04-01/15-533.

¹⁰ ICC-02/04-01/15-596-Red, para. 15.

¹¹ ICC-02/04-01/15-596-Red, para. 15.

¹² UGA-D26-0010-0352, para. 34.

11. In light of the above, and in the absence of any indication¹³ from the Defence that it does not intend to rely on these disputed aspects of D-0019's prior recorded testimony, the credibility and reliability of the witness's evidence requires testing through oral examination. Therefore the Prosecution opposes the Defence Request in the context of D-0019.

12. As a corollary, the Prosecution opposes the Defence Request in the context of UGA-D26-0010-0367, which appears to be a document bearing the signature of D-0019. It can be tendered as per standard procedure if used during the course of the witness's oral testimony.

D-0049 [REDACTED]

13. D-0049 is a [REDACTED]. The Defence has not provided the statement of D-0049 for assessment by the Parties, participants and the Chamber. Therefore the Prosecution is not in a position to respond. The Defence request pertaining to D-0049 should be rejected as premature and unsubstantiated.

D-0050 [REDACTED]

14. D-0050 is a [REDACTED]. The Defence requests the introduction of statements UGA-D26-0025-0097 and UGA-OTP-0131-0002-R01 of D-0050 into evidence. There is an additional interview of D-0050,¹⁴ the records of which were disclosed to the Defence. The Defence has not sought the introduction of this additional interview.¹⁵

¹³ See, in this context, ICC-02/04-01/15-596-Red, para. 13 (“...the presence of a limited reference to the accused in a prior recorded testimony does not entail, in and of itself, that the testimony cannot be introduced under Rule 68(2)(b) of the Rules when (i) the calling party indicates that it does not intend to rely on that reference...”).

¹⁴ See interview transcripts UGA-OTP-0228-1469-R01, UGA-OTP-0228-1506-R01, UGA-OTP-0228-1528-R01, UGA-OTP-0228-2452-R01, UGA-OTP-0228-2509-R01, UGA-OTP-0228-2545-R01, UGA-OTP-0228-2585-R01, UGA-OTP-0228-2623-R01, UGA-OTP-0228-2660-R01, UGA-OTP-0228-2720-R01, UGA-OTP-0228-2783-R01, UGA-OTP-0229-0230-R01, UGA-OTP-0229-0263-R01.

¹⁵ ICC-02/04-01/15-1277, para. 10.

15. There is a clear contradiction between the statement UGA-D26-0025-0097¹⁶ of D-0050 and the additional interview cited above,¹⁷ as to whether D-0050 has ever encountered Dominic Ongwen. The use of rule 68(2) (b) to introduce some, or even all, of D-0050's statements and transcribed interviews would leave this contradiction unresolved. By contrast, thorough testing of the witness's evidence through oral examination will allow the Chamber better to establish the truth. Accordingly, the Prosecution opposes the Defence Request in the context of D-0050.

¹⁶ Statement UGA-D26-0025-0097 of P-0050 at para. 18 ("I remember seeing Dominic one time when he was around for two days. I knew it was him because I kept hearing about him; he was not well kempt, not fat and not too dark. Dominic walked as if one of his legs was shorter than the other. [REDACTED].")

¹⁷ UGA-OTP-0228-1469-R01 at -1475, lines 186-193: ("[...] And Dominic ONGWEN? [...] Interpreter: That one I don't know. [...] Do you know somebody called ODOMI? [...] Interpreter: I only hear the name but I never saw him.")

Conclusion

16. For the reasons set out above, the Prosecution requests the Chamber to:
- a. grant the Defence requests to introduce into evidence the statements and associated documents identified by the Defence regarding Witnesses D-0008, D-0012, D-0020, D-0034, D-0077 and P-0028; and
 - b. reject the Defence requests to introduce into evidence the statements and associated documents identified by the Defence regarding Witnesses D-0019, D-0049 and D-0050.



Fatou Bensouda, Prosecutor

Dated this 27th day of June 2018

At The Hague, The Netherlands