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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul Cano Pangalangan

SITUATION IN UGANDA

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

Confidential

CLRV Response to "Defence Bar Table Motion"

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The Common Legal Representative of the Victims¹ (the "CLR") submits her response to the "Defence Bar Table Motion" (the "Motion")² only in relation to documents intimately affecting the personal interests of her clients. In particular, she opposes the Motion in relation to documents No. UGA-D26-0012-0284, No. UGA-D26-0012-0295, No. UGA-D26-0012-0313, No. UGA-D26-0012-0328 and No. UGA-D26-0012-0382 (the "Applications for Participation" or the "Applications") of Victims P-0061, P-0008, P-0099, P-0007 and P-0001 (the "Concerned Victims").

2. In this regard, the CLR posits that the Applications for Participation cannot be introduced via a bar table motion due to procedural bars stipulated in rule 68 of the Rules of Procedure and Evidence (the "Rules"). Moreover, the circumstances at hand are different from the ones in which the Chamber allowed the introduction into evidence of applications for participation of victims in the past. Additionally, allowing the Defence to submit into evidence said Applications would be unduly prejudicial to the Concerned Victims and inconsistent with the fair and expeditious conduct of the proceedings.

¹ See the "Decision on contested victims' applications for participation, legal representation of victims and their procedural rights" (Pre-Trial Chamber II, Single Judge), No. [ICC-02/04-01/15-350](#), 27 November 2015, p.19; the "Decision on issues concerning victims' participation" (Pre-Trial Chamber II, Single Judge), No. [ICC-02/04-01/15-369](#), 15 December 2015, pp. 10-11; the "Second decision on contested victims' applications for participation and legal representation of victims" (Pre-Trial Chamber II, Single Judge), No. [ICC-02/04-01/05-384](#), 24 December 2015, pp. 20-22; and the "Decision on the 'Request for a determination concerning legal aid' submitted by the legal representatives of victims" (Trial Chamber IX, Single Judge), No. [ICC-02/04-01/15-445](#), 26 May 2016, para. 13.

² See the "Defence Bar Table Motion", with Confidential [Annex A](#), No. [ICC-02/04-01/15-1637](#), 15 October 2019 (the "Motion").

II. PROCEDURAL BACKGROUND

3. On 13 July 2016, Trial Chamber IX (the "Chamber") issued the "Initial Directions on the Conduct of the Proceedings".³

4. On 21 August 2019, the Single Judge of the Chamber issued the "Order Setting a Deadline for Evidence Related Requests" instructing the parties and participants to file any further request related to evidence by 30 September 2019.⁴ On 29 August 2019, the Defence sought authorisation to file additional requests regarding new evidence and a variation of the deadline of 30 September 2019.⁵ On 10 September 2019, the Single Judge issued the "Decision on Defence Request for Variation of the 30 September Deadline" extending, *inter alia*, the deadline for the Defence to submit evidence via a bar table motion by 15 October 2019.⁶

5. On 15 October 2019, the Defence filed the Motion.⁷ On 25 October 2019, the Prosecution filed its response (the "Prosecution's Response").⁸

III. LEVEL OF CLASSIFICATION

6. The present submission is filed confidential in accordance with regulation 23bis (2) of the Regulations of the Court, following the classification chosen by the Defence of the Annex to its Motion mentioning the relevant documents. However,

³ See the "Initial Directions on the Conduct of the Proceedings" (Trial Chamber IX, Presiding Judge), No. [ICC-02/04-01/15-497](#), 13 July 2016.

⁴ See the "Order Setting a Deadline for Evidence Related Requests" (Trial Chamber IX), No. [ICC-02/04-01/15-1570](#), 21 August 2019.

⁵ See the "Defence Request for Variation of the 30 September Deadline", No. [ICC-02/04-01/15-1576](#), 30 August 2019.

⁶ See the "Decision on Defence Request for Variation of the 30 September Deadline" (Trial Chamber IX, Single Judge), No. [ICC-02/04-01/15-1591](#), 10 September 2019.

⁷ See the Motion, *supra* note 2.

⁸ See "Prosecution Response to the Defence Bar Table Motion", No. [ICC-02/04-01/15-1646-Conf](#), 25 October 2019 (the "Prosecution's Response").

the CLRV indicates that this document does not contain any confidential information and thus can be reclassified as public.

IV. SUBMISSIONS

7. In the Motion, the Defence seeks to submit into evidence 470 items, including the Applications for Participation of the Concerned Victims.⁹ The CLRV opines that, according to the jurisprudence of the Chamber, these documents fall under the definition of a prior recorded statement, pursuant to rule 68 of the Rules. Indeed, in the “Decision on Prosecution’s Request to Submit 1006 Items of Evidence” (the “Decision on the OTP’s Bar Table Motion”),¹⁰ the Chamber already found that the statements from alleged victims taken by the Ugandan police during its investigation into the LRA attack at Pajule IDP camp must be considered as prior recorded statements since they: (i) were transcribed by third persons; (ii) contained each a first person accounts of the victims, alleging wrong-doing by the LRA; and (iii) showed the signatures of the victims, affixed to their statements.¹¹ Largely, the Applications are of the same character. As a result, they must be considered as testimonial in nature and thus cannot be submitted through a bar table motion.¹²

8. Moreover, the Defence is seeking to submit into evidence the Applications for Participation for the truth of their contents in support of its overall case. For example, the Defence contends that one of the Applications allegedly shows the good nature and character of Mr Ongwen towards his wives.¹³ In this regard, the CLRV stresses that, in contrast with the specific instances where the Chamber allowed the submission of applications for participation into evidence mentioned *infra*, the Applications of the Concerned Victims are not introduced to challenge a specific

⁹ See the Motion, *supra* note 2.

¹⁰ See the “Decision on Prosecution’s Request to Submit 1006 Items of Evidence” (Trial Chamber IX), No. [ICC-02/04-01/15-795](#), 28 March 2017 (the “Decision on the OTP’s Bar Table Motion”).

¹¹ *Idem*, para. 20.

¹² *Ibidem*. See also the Prosecution’s Response agreeing on the nature of the Applications for Participation, Prosecution’s Response, *supra* note 8, para. 9.

¹³ See the Annex to the Motion, *supra* note 2, p. 3.

testimony of other witnesses or to complete the case record and illustrate the differences between the accounts appearing therein and the evidence led by the parties and participants. Therefore, the CLRV submits that the Prosecution's argument for not formally objecting to the introduction of these documents by virtue of previous rulings of the Chamber fails to differentiate between such specific instances where the Chamber allowed the submissions of applications and the relief requested in the Motion which, in the opinion of the CLRV, justifies a different ruling.¹⁴

9. Previously, the Chamber allowed the introduction into evidence of two applications for participation by victims (UGA-D26-0012-0147 and UGA-D26-0012-0155) on the condition that they were not submitted for the truth of their contents *per se* but rather to challenge the credibility of P-24's evidence.¹⁵ The Chamber ruled that *"even assuming that victim applications fall under Rule 68 of the Rules, as long as these items are submitted on the basis provided it is not necessary to satisfy the Rule 68 criteria. This is distinguishable from the finding made [in the Decision on the OTP's Bar Table Motion] where the Chamber did not recognise 47 victim statements purportedly taken by Ugandan police which were offered for the truth of their contents."*¹⁶

10. Indeed, the Chamber previously recalled that rule 68 of the Rules is applicable in cases where the tendering party wishes to adduce a prior recorded statement for the truth of its content and thus the determining factor is the intention of the tendering party.¹⁷ Moreover, the Chamber has to conduct a case-by-case assessment as to how the information at issue shall be actually used.¹⁸ From the global content of the Motion, it is apparent that the Defence seeks to submit into evidence the

¹⁴ See the Prosecution's Response, *supra* note 8, para. 9.

¹⁵ See the email sent by the Chamber on 14 June 2017 at 09:13.

¹⁶ *Idem* (emphasis added).

¹⁷ *Ibidem*, citing the "Corrigendum of public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests" (Trial Chamber VII), No. [ICC-01/05-01/13-1478-Red-Corr](#), 12 November 2015, para. 34.

¹⁸ See the email sent by the Chamber on 08 February 2018 at 10:18.

Applications for Participation for the truth of their contents or as proof of the assertions implicit therein in support of its overall case. Based on the above mentioned jurisprudence of the Chamber, the CLRV contends that the Defence is legally proscribed to introduce the Applications via a bar table motion. The Chamber is also procedurally barred from considering said Applications in deliberating its judgment since the Defence has not met the procedural pre-requisites required by rule 68 of the Rules.¹⁹ On this ground alone, the Motion in relation to the mentioned documents should be dismissed.

11. Even if the Chamber considers that said provision is not applicable, allowing the Defence to submit into evidence the Applications for Participation would be unduly prejudicial to the Concerned Victims and inconsistent with the fair and expeditious conduct of the trial proceedings. Indeed, the Defence makes various allegations in the Annex to the Motion, mostly refuting the accounts provided by the Concerned Victims in the Applications.²⁰ Some of these assertions straightforwardly accuse them of being dishonest and thus lying against the Accused for the simple benefit of receiving reparations in the future.²¹ However, none of these individuals were confronted by the Defence about these serious allegations. Neither were they afforded with any opportunity to give their side of the story.

12. The CLRV is aware of the fact that the Chamber also previously allowed the introduction into evidence of the application for participation (UGA-D26-0012-0102) of P-0330.²² However, this instance is distinguishable from the current one since P-0330 was extensively questioned by the Defence and thus was given an opportunity to clarify disputed facts appearing in his application during his testimony in court.²³

¹⁹ See the email sent by the Chamber on 12 October 2017 at 14:25.

²⁰ See the Annex to the Motion, *supra* note 2, pp. 2-4.

²¹ *Idem*.

²² See the email sent by the Chamber on 29 March 2017 at 10:59.

²³ See, *inter alia*, the transcripts of the hearings No. [ICC-02/04-01/15-T-53-Red-ENG WT](#) p. 63 line 9 – p. 65 – line 11 and No. [ICC-02/04-01/15-T-54-Red-ENG WT](#) p. 36 line 19 – 38 line 7.

Given that none of the Concerned Victims was questioned about the content of their Applications for Participation by the Defence, if the introduction of said documents into evidence is permitted, an irreparable prejudice will be caused to the fair evaluation of the accounts of the Concerned Victims provided in their Applications.

13. In this regard, the CLRV stresses that the information provided by victims in the applications for participation is only for the purpose of substantiating their request to participate in the criminal proceedings before the Court but not to give evidence on either points of fact or law in the case.²⁴ As such, applications for participation cannot be assimilated to evidence. Thus, admitting said documents as evidence may be perceived by the Concerned Victims as an unfair use of documentation that was provided to the Court for a discrete purpose.²⁵ Therefore, the Defence's attempt to pervert this discrete purpose by using the Applications in favour of the Accused will again be unduly prejudicial *vis-à-vis* the Concerned Victims and may harm their future prospects of receiving reparations.

14. Finally, the CLRV recalls that the Chamber had already indicated that it will not rule on the relevance, probative value and potential prejudice at the point of submission of the evidence.²⁶ However, the Chamber also clarified that undue prejudice determinations at the point of submission of the evidence can be done reliably for items where it is immediately apparent that they cannot be fairly relied upon for any purpose.²⁷ Certainly, the Applications for Participation cannot be in any way relied on by the Chamber for the purpose of rendering its judgment on the guilt or innocence of Mr Ongwen. This is especially true where the Concerned Victims

²⁴ See the "Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case (Pre-Trial Chamber II, Single Judge)", No. [ICC-01/09-01/11-169](#), 08 July 2011, para. 9.

²⁵ See the "Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011" (Trial Chamber III), No. [ICC-01/05-01/08-2012-Red](#), 09 February 2012, para. 102.

²⁶ See the Initial Directions on the Conduct of the Proceedings, *supra* note 3, para. 24.

²⁷ See the "Decision on Prosecution Request to Submit Interception Related Evidence" (Trial Chamber IX), No. [ICC-02/04-01/15-615](#), 1 December 2016, para. 11.

were not given, as indicated *supra*, a fair opportunity to explain the content of their Applications in court.

15. Indeed, as the Motion currently stands, said Applications for Participation are presented in a stand-alone fashion, not tied to the evaluation of any specific piece of incriminating or exonerating evidence given in court. If allowed, this approach by the Defence will lead to the submission into evidence of thousands of similar applications. Considering such untested and unhelpful information in the determination of the judgement pursuant to article 74 of the Rome Statute will also be contrary to the Chamber's duty to ensure the fair and expeditious conduct of the proceedings.

V. CONCLUSION

16. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Chamber to reject the Motion with regards to documents No. UGA-D26-0012-0284, No. UGA-D26-0012-0295, No. UGA-D26-0012-0313, No. UGA-D26-0012-0328 and No. UGA-D26-0012-0382.



Paolina Massidda
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Dated this 28th day of October 2019

At The Hague, The Netherlands