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**International
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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

Public Redacted Version of “Prosecution Response to the Defence Bar Table Motion” 25 October 2019, ICC-02/04-01/15-1646-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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Introduction

1. The Prosecution objects to the formal submission of certain items listed in Confidential Annex A to the Defence Bar Table Motion,¹ on the grounds that they contain testimonial material.
2. Moreover, for the purpose of the Trial Chamber's final deliberations, the Prosecution opposes any consideration of a number of items, under rule 64(3), as they are either irrelevant to any issue in these proceedings or lack probative value.

Confidentiality

3. This document is filed confidentially pursuant to Regulation 23*Bis*, because it refers to certain submissions contained in the confidential annex to the Defence Bar Table Motion. The Prosecution will file the public redacted version of this response shortly.

Submissions

4. Article 69(4) of the Rome Statute ("Statute") grants the Chamber discretion to rule on the admissibility of evidence, either at the time of its submission or when deliberating judgment.²

5. In its Initial Directions on the Conduct of the Proceedings, the Chamber set out a general rule for formal submission and assessment of admissibility:

As a general rule, this Chamber will defer its assessment of the admissibility of the evidence until deliberating its judgment pursuant to Article 74(2) of the Statute. When the participants formally submit evidence during trial, all the Chamber will generally do is recognise their formal submission. The Chamber will consider the

¹ ICC-02/04-01/15-1637-Conf-AnxA.

² See ICC-01/05-01/13-2275-Red, paras. 585-587; ICC-01/05-01/08-1386, para.37.

relevance, probative value and potential prejudice of each item of evidence submitted when deliberating the judgment.³

Objections to formal submission

6. The Prosecution opposes the submission of several items in Annex A from the bar table, because they contain prior recorded testimony. Testimonial material from individuals who do not give sworn evidence must be submitted in accordance with the provisions of rule 68 of the Rules of Procedure and Evidence (“Rules”).⁴

7. In an earlier decision, the Chamber defined prior recorded testimony as follows:

[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.⁵

8. Annex A lists the following items that are testimonial in nature:

a. Items 207-223;⁶ 225-230;⁷ 232-233;⁸ 235-240;⁹ 242-248;¹⁰ These items are Uganda Human Rights Commission files. They contain witness statements concerning alleged human rights violations committed by the UPDF, and records of testimony given by witnesses in proceeding related to those allegations. These records were created in the course of investigations into

³ ICC-02/04-01/15-497, para.24.

⁴ See ICC-01/04-01/07-1665-Corr, para.98-100. See further, ICC-02/04-01/15-795, para. 20.

⁵ ICC-02/04-01/15-596, para. 9; see also ICC-01/05-01/13-1478-Red-Corr, para. 32.

⁶ UGA-OTP-0140-0078; UGA-OTP-0140-0110; UGA-OTP-0140-0219; UGA-OTP-0140-0339; UGA-OTP-0140-0372; UGA-OTP-0140-0469; UGA-OTP-0140-0592; UGA-OTP-0140-0622; UGA-OTP-0140-0681; UGA-OTP-0140-0758; UGA-OTP-0140-0802; UGA-OTP-0140-0930; UGA-OTP-0140-0971; UGA-OTP-0140-0981; UGA-OTP-0140-1107; UGA-OTP-0140-1138; UGA-OTP-0140-1297.

⁷ UGA-OTP-0140-1375; UGA-OTP-0140-1432; UGA-OTP-0140-1471; UGA-OTP-0140-1563; UGA-OTP-0140-1618; UGA-OTP-0140-1752.

⁸ UGA-OTP-0140-1852; UGA-OTP-0140-1992.

⁹ UGA-OTP-0140-2065; UGA-OTP-0140-2144; UGA-OTP-0140-2173; UGA-OTP-0140-2198; UGA-OTP-0140-2277; UGA-OTP-0140-2299.

¹⁰ UGA-OTP-0140-2376; UGA-OTP-0140-2444; UGA-OTP-0140-2517; UGA-OTP-0140-2540; UGA-OTP-0140-2565; UGA-OTP-0140-2583; UGA-OTP-0140-2604.

alleged wrongdoing, for use in legal proceedings. They have been signed and dated by each witness, and the Defence seeks their submission to establish the truth of their contents.¹¹

b. Item 270.¹² This witness statement was taken by ICC personnel. It was created in anticipation of legal proceedings, and was signed and dated by the witness for potential use in an ICC trial. The witness did not ultimately give evidence.

c. Items 249;¹³ 305;¹⁴ 336-342.¹⁵ These files contain witness statements taken by the Ugandan Police in the course of their investigations into criminal offences. In an earlier decision, the Chamber confirmed that statements taken by the Ugandan Police “must be viewed as fitting within the definition of a prior recorded statement,” and held that they could not be submitted via a bar table motion.¹⁶

d. Item 402.¹⁷ This witness screening note was created by an ICC investigator, and records topics and information that the witness might have discussed if formally interviewed. Although preliminary in nature, it reflects information received in a criminal investigation. The witness did not give evidence.

e. Items 410-412.¹⁸ These reports were prepared by a psychiatrist. They are the result of responses to questioning and provide the psychiatrist’s opinions and assessment. They are, at least in part, analytical in nature.

¹¹ ICC-02/04-01/15-1637-Conf-AnxA, explanation of probative value and relevance for items 207-248. Further, in ICC-01/09-01/11-1353, similar files relating to investigations conducted in the course of separate proceedings were held to contain testimonial material that could not be submitted over the bar table (see paras. 85-86).

¹² UGA-OTP-0196-0028-R01.

¹³ UGA-OTP-0145-0065.

¹⁴ UGA-OTP-0208-0459.

¹⁵ UGA-OTP-0249-1839; UGA-OTP-0249-1847; UGA-OTP-0249-1855; UGA-OTP-0249-1857; UGA-OTP-0249-1864; UGA-OTP-0249-1873; UGA-OTP-0249-1878.

¹⁶ ICC-02/04-01/15-795, paras. 18-20.

¹⁷ UGA-OTP-0258-0534-R01.

¹⁸ UGA-OTP-0269-0537; UGA-OTP-0269-0561; UGA-OTP-0269-0569.

Hence, they can be distinguished from other types of medical reports that were successfully tendered via bar table motions in this case.¹⁹

9. The Prosecution notes that items 4-8,²⁰ Victims' Application Forms, are also testimonial in nature. They contain personalized allegations about facts concerning the offences alleged against Mr Ongwen, in contemplation of legal proceedings. However, considering the Trial Chamber's previous rulings in this case, the Prosecution does not formally object to their submission from the bar table on this occasion.²¹

10. The testimonial nature of the items listed at paragraph 8 prevents their submission from the bar table.²²

Objections to admissibility

11. Article 69(4) of the Statute provides:

The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

12. Rule 64(3) provides:

Evidence ruled irrelevant or inadmissible shall not be considered by the Chamber.

¹⁹ See, for example, ICC-02/04-01/15-795, para. 21. (Here the Chamber held that certain post-mortem reports were "records memorialising objective data made in the ordinary course of business of a medical examiner" and that "the information contained within the reports is routine, descriptive and non-analytical, in short, not testimonial in nature".).

²⁰ UGA-D26-0012-0284; UGA-D26-0012-0295; UGA-D26-0012-0313; UGA-D26-0012-0328; UGA-D26-0012-0382.

²¹ The Prosecution notes in this context this Chamber's decision regarding the submission of victim's applications for purposes other than reliance on the truth of their contents (Email from Trial Chamber IX Communications, Sent: 14 June 2017 09:13). See further, ICC-01/05-01/08-2012, para.101.

²² ICC-02/04-01/15-795, para.20; ICC-01/04-01/07-1665-Corr, para.98-100.

13. Relevance requires a nexus between a specific piece of evidence and a charge or fact to be proven.²³ If evidence tendered makes the existence of a fact in issue more or less probable, it is relevant.²⁴ The relevance of evidence will therefore depend on the purpose for which it is adduced.²⁵

14. The determination of probative value requires a qualitative assessment of the evidence.²⁶ Probative value incorporates evaluation of the reliability of the evidence, and consideration of the degree to which it is likely to influence the determination of a particular issue in the case.²⁷

15. The Prosecution does not oppose the formal submission of the items not listed in paragraph 8 above. However, in the Chamber's eventual assessment of admissibility,²⁸ it should find the following documents listed in Annex A to be inadmissible and therefore not consider them further, in accordance with rule 64(3):

- a. Items 66 – 107:²⁹ These are copies of the Hansard of the Ugandan Parliament. The Defence claims that these items “relate to the establishment of the IPD [*sic*] camps, the relevance of the camps, the thoughts of the elected government officials on the camps throughout the years thereof.”³⁰ This is insufficient justification. How and why the IDP camps were established is not an issue in this trial. The Defence does not indicate how any of these items are relevant to any contested issue in this trial.

²³ ICC-01/09-02/11-382-Red, para. 79.

²⁴ ICC-01/04-01/07-2635, para.16.

²⁵ *Ibid.*

²⁶ ICC-01/09-02/11-382-Red., para 80.

²⁷ ICC-01/04-01/07-2635, para.20.

²⁸ ICC-02/04-01/15-497, para 24 (“As a general rule, this Chamber will defer its assessment of the admissibility of the evidence until deliberating its judgment pursuant to Article 74(2) of the Statute”).

²⁹ UGA-D26-0018-0636; UGA-D26-0018-0672; UGA-D26-0018-0695; UGA-D26-0018-0737; UGA-D26-0018-0814; UGA-D26-0018-0840; UGA-D26-0018-0870; UGA-D26-0018-0897; UGA-D26-0018-0941; UGA-D26-0018-1013; UGA-D26-0018-1057; UGA-D26-0018-1105; UGA-D26-0018-1149; UGA-D26-0018-1213; UGA-D26-0018-1225; UGA-D26-0018-1261; UGA-D26-0018-1277; UGA-D26-0018-1343; UGA-D26-0018-1373; UGA-D26-0018-1401; UGA-D26-0018-1438; UGA-D26-0018-1470; UGA-D26-0018-1502; UGA-D26-0018-1540; UGA-D26-0018-1592; UGA-D26-0018-1614; UGA-D26-0018-1630; UGA-D26-0018-1667; UGA-D26-0018-1711; UGA-D26-0018-1733; UGA-D26-0018-1821; UGA-D26-0018-1834; UGA-D26-0018-1876; UGA-D26-0018-1904; UGA-D26-0018-1942; UGA-D26-0018-1982; UGA-D26-0018-2004; UGA-D26-0018-2078; UGA-D26-0018-2097; UGA-D26-0018-2119; UGA-D26-0018-2120; UGA-D26-0018-2121.

³⁰ See ICC-02/04-01/15-1637, para.16.

b. Item 112.³¹ The Defence claims that [REDACTED].³² The document is in Portuguese. The Defence has not articulated what [REDACTED], or explained how [REDACTED] is relevant to the contested issues in the case. Nor has the Defence provided any indication of probative value, in the sense of how this report could ever reliably support the inference the Defence wishes to draw from it.

c. Items 121-145.³³ These documents pertain in general to the [REDACTED]. The Defence claims these items "are relevant to the problems which [Mr Ongwen] has faced to exercise his fundamental right to a family life".³⁴ The Defence has not articulated how any of these items relate to any contested issue in this case.

d. Items 196 to 198;³⁵ 207 to 248;³⁶ 252 to 255.³⁷ These are documents relating to the work of the Uganda Human Rights Commission. The Prosecution has objected to the submission of most of these documents.³⁸ In addition to the procedural bars to submission, the Prosecution notes that these items have no connection whatsoever to contested issues in this case.

³¹ UGA-D26-0018-2767.

³² ICC-02/04-01/15-1637-Conf-AnxA, item 112.

³³ UGA-D26-0018-3406; UGA-D26-0018-3407; UGA-D26-0018-3410; UGA-D26-0018-3414; UGA-D26-0018-3418; UGA-D26-0018-3421; UGA-D26-0018-3423; UGA-D26-0018-3426; UGA-D26-0018-3428; UGA-D26-0018-3438; UGA-D26-0018-3440; UGA-D26-0018-3441; UGA-D26-0018-3442; UGA-D26-0018-3444; UGA-D26-0018-3445; UGA-D26-0018-3446; UGA-D26-0018-3448; UGA-D26-0018-3449; UGA-D26-0018-3451; UGA-D26-0018-3453; UGA-D26-0018-3455; UGA-D26-0018-3458; UGA-D26-0018-3460; UGA-D26-0018-3581; UGA-D26-0018-3999.

³⁴ ICC-02/04-01/15-1637, para 18.

³⁵ UGA-OTP-0044-0002; UGA-OTP-0044-0003; UGA-OTP-0044-0038.

³⁶ UGA-OTP-0140-0078; UGA-OTP-0140-0110; UGA-OTP-0140-0219; UGA-OTP-0140-0339; UGA-OTP-0140-0372; UGA-OTP-0140-0469; UGA-OTP-0140-0592; UGA-OTP-0140-0622; UGA-OTP-0140-0681; UGA-OTP-0140-0758; UGA-OTP-0140-0802; UGA-OTP-0140-0930; UGA-OTP-0140-0971; UGA-OTP-0140-0981; UGA-OTP-0140-1107; UGA-OTP-0140-1138; UGA-OTP-0140-1297; UGA-OTP-0140-1366; UGA-OTP-0140-1375; UGA-OTP-0140-1432; UGA-OTP-0140-1471; UGA-OTP-0140-1563; UGA-OTP-0140-1618; UGA-OTP-0140-1752; UGA-OTP-0140-1815; UGA-OTP-0140-1852; UGA-OTP-0140-1992; UGA-OTP-0140-2014; UGA-OTP-0140-2065; UGA-OTP-0140-2144; UGA-OTP-0140-2173; UGA-OTP-0140-2198; UGA-OTP-0140-2277; UGA-OTP-0140-2299; UGA-OTP-0140-2346; UGA-OTP-0140-2376; UGA-OTP-0140-2444; UGA-OTP-0140-2517; UGA-OTP-0140-2540; UGA-OTP-0140-2565; UGA-OTP-0140-2583; UGA-OTP-0140-2604.

³⁷ UGA-OTP-0192-0280; UGA-OTP-0192-0281; UGA-OTP-0192-0282; UGA-OTP-0192-0284.

³⁸ See paragraph 8 above.

The Defence claims that each item “[REDACTED].”³⁹ [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

e. Item 414.⁴⁰ [REDACTED]. [REDACTED]. [REDACTED].⁴¹ This is insufficient in terms of a justification. The mere reference to a case-relevant issue (e.g. duress), without articulating a nexus between the issue and the item of evidence, cannot be sufficient to obtain admission. Neither has the Defence adequately explained the probative value of the item, in the context of the issue for which it is allegedly presented.

f. Item 257.⁴² This document, [REDACTED], may be tangentially relevant. However, in light of the lack of any precision as to the identity of the persons featured in the document, and the lack of any intrinsic indicators of reliability, the document is of minimal probative value.

g. Items 343 - 392,⁴³ 416 - 436.⁴⁴ These items are photographs. [REDACTED].⁴⁵ In essence, the Defence places no reliance on the actual contents of these photographs. There is no discussion of relevance, probative value, or any other relevant consideration. This cannot be a sufficient basis for these to be received into evidence. If the Defence wishes to raise any point

³⁹ ICC-02/04-01/15-1637-Conf-AnxA.

⁴⁰ UGA-OTP-0271-3101-R01.

⁴¹ ICC-02/04-01/15-1637-Conf-AnxA, item 414.

⁴² UGA-OTP-0192-0391.

⁴³ UGA-OTP-0250-0181; UGA-OTP-0250-0182; UGA-OTP-0250-0183; UGA-OTP-0250-0184; UGA-OTP-0250-0185; UGA-OTP-0250-0186; UGA-OTP-0250-0187; UGA-OTP-0250-0188; UGA-OTP-0250-0189; UGA-OTP-0250-0190; UGA-OTP-0250-0191; UGA-OTP-0250-0192; UGA-OTP-0250-0193; UGA-OTP-0250-0194; UGA-OTP-0250-0195; UGA-OTP-0250-0196; UGA-OTP-0250-0197; UGA-OTP-0250-0198; UGA-OTP-0250-0199; UGA-OTP-0250-0200; UGA-OTP-0250-0201; UGA-OTP-0250-0202; UGA-OTP-0250-0203; UGA-OTP-0250-0204; UGA-OTP-0250-0205; UGA-OTP-0250-0207; UGA-OTP-0250-0208; UGA-OTP-0250-0209; UGA-OTP-0250-0210; UGA-OTP-0250-0211; UGA-OTP-0250-0212; UGA-OTP-0250-0213; UGA-OTP-0250-0214; UGA-OTP-0250-0216; UGA-OTP-0250-0217; UGA-OTP-0250-0218; UGA-OTP-0250-0229; UGA-OTP-0250-0230; UGA-OTP-0250-0231; UGA-OTP-0250-0232; UGA-OTP-0250-0233; UGA-OTP-0250-0234; UGA-OTP-0250-0235; UGA-OTP-0250-0237; UGA-OTP-0250-0238; UGA-OTP-0250-0239; UGA-OTP-0250-0240; UGA-OTP-0250-0241; UGA-OTP-0250-0242; UGA-OTP-0250-1811.

⁴⁴ UGA-OTP-0276-0196; UGA-OTP-0276-0231; UGA-OTP-0276-0232; UGA-OTP-0276-0233; UGA-OTP-0276-0235; UGA-OTP-0276-0236; UGA-OTP-0276-0237; UGA-OTP-0276-0238; UGA-OTP-0276-0239; UGA-OTP-0276-0242; UGA-OTP-0276-0243; UGA-OTP-0276-0244; UGA-OTP-0276-0245; UGA-OTP-0276-0899; UGA-OTP-0276-0900; UGA-OTP-0276-0901; UGA-OTP-0276-2094; UGA-OTP-0276-2095; UGA-OTP-0276-2096; UGA-OTP-0276-2100; UGA-OTP-0276-2101.

⁴⁵ See, for example, the Defence explanation of the probative value and relevance of item 343 of ICC-02/04-01/15-1637-Conf-AnxA.

regarding late disclosure by the Prosecution, it can do so in its closing brief and support the same by referring to the relevant notifications of disclosure filed on the record without adding 69 photographs to the record for no substantive purpose.

h. Item 310:⁴⁶ This document lists [REDACTED] The Defence has not articulated any link between this document and any contested issue in this case. Nor has the Defence provided any indication of probative value.

Objection to selective exclusion of part of a document

16. Item 457⁴⁷ is [REDACTED]. The Prosecution does not object to the submission or admission of this document. However, the Defence states regarding this document that “the second paragraph should be excluded as it discusses Mr Ongwen, which would be consistent with the Witness's inclusion as a Rule 68(2) (b) witness.”⁴⁸ This is an invalid argument, which inappropriately conflates the admission of testimonial evidence via rule 68(2) (b) of the Rules, and the admission of non-testimonial evidence via a bar table motion. The “acts and conduct” prohibition in rule 68(2) (b) has no relevance to the present context. Hence, the Prosecution objects to the exclusion of the second paragraph.

⁴⁶ UGA-OTP-0231-0876.

⁴⁷ UGA-OTP-0284-0715.

⁴⁸ ICC-02/04-01/15-1637-Conf-AnxA, item 457.

Conclusion

17. For the reasons stated above, the Prosecution:

- Objects to the formal submission of the items that contain material of a testimonial nature, listed at paragraph 8 above.
- Objects to the consideration of the items listed at paragraph 15 above in the Trial Chamber's final deliberations, under rule 64(3), on the grounds of their irrelevance and lack of probative value.
- Objects to the selective exclusion of part of Item 457.



Fatou Bensouda, Prosecutor

Dated this 19th day of November 2019

At The Hague, the Netherlands