

ANNEX VIII

PUBLIC

From: [REDACTED]
Sent: 24 March 2017 12:26
To: [REDACTED] Trial Chamber IX Communications
Cc: [REDACTED]
Subject: RE: Request for formal submission of one item for OTP Witness P-330

Dear Trial Chamber IX,

I am writing on behalf of Counsels for Mr Ongwen to reply to the response of the OPCV. The first two objections of the OPCV are procedural. Other than noting that the Prosecution exceptionally does not object to the delay in the submission, the Defence has nothing to add.

However, the OPCV's third objection raises several substantive legal issues concerning disclosure, the submission and assessment of evidence, and the interaction of these rules in the context of dual-status witnesses. As such, the OPCV should be required to set out the arguments in a formal filing, or in the alternative, the Trial Chamber should disregard the arguments since a response fully argued by the Defence in the present email could cover 10 pages.

Moreover, the OPCV did not object when notified that the item might be used in its examination and when in fact they were used.

Though in no way conceding its right to respond to an eventual formal filing and the issues contained therein, the Defence firstly notes that the OPCV's rehearsal of the Kenyan jurisprudence omits the critical last phrase of the cited paragraph which states that the limitation on disclosure of applications is "*for the purposes of the confirmation of charges hearing*" (ICC-01/09-01/11-169, para. 9). This same formulation was also repeated in the Kenyatta proceedings (ICC-01/09-02/11-164, para. 8).

Regarding the OPCV's insistence that the applications cannot be evidence, it is worth noting that at the time the victim's applications were filled out, the individuals knew that representations made would form part of an eventual case record and in many circumstances were made in the context of ongoing legal proceedings against Mr Ongwen. These elements may even come close to bringing the applications within the definition of statements articulated by Trial Chamber VII (ICC-01/05-01/13-1227, para. 9).

In any case, such information is certainly potentially relevant to assessing the Prosecution's charges and/or assessing the credibility of witnesses. There is no evidential exclusion for these materials in the Statute or Rules, and the Defence vehemently objects to the proposition that the victim's applications cannot be considered evidence in some circumstances.

Very best regards,

[REDACTED]

From: [REDACTED]
Sent: 23 March 2017 11:49
To: Trial Chamber IX Communications
Cc: [REDACTED]

Subject: RE: Request for formal submission of one item for OTP Witness P-330

Dear Trial Chamber IX,

In accordance with para. 28 (ii) of the Initial Direction on the Conduct of the proceedings, the Common Legal Representative opposes the Defence's request for the following reasons.

Firstly, the deadline for requesting formal submission of evidence expired on Monday, 20 March 2017 in accordance with para. 28(i) of the Initial Directions on the Conduct of the Proceedings. This direction clearly states that "*[w]hen the tendering participant wishes to formally submit items used during a hearing, it is to send an email clearly identifying these items in copy to all other participants, the Chamber and the Court Officer. These emails must be sent no later than one working day after the conclusion of the examination of the relevant witness by all participants.*"

Secondly, while the Defence is presently seeking an extension of the time limit, it fails to show any "*good cause*". Nor does the Defence demonstrate that it was unable to file the request within the time limit for reasons outside its control, pursuant to Regulation 35(2) of the Regulations of the Court.

Thirdly, even if the Chamber is minded to grant an extension of time limit for filing the request, the document UGA-D26-0012-0102 (an application form for victim participation) is not technically an evidence according to the established jurisprudence of the Court. For example, in both Kenyan cases, Pre-Trial Chamber II stressed the fact that victims' applications could "*under no circumstances be considered evidence subject to disclosure within the legal framework of the Court [...]* [S]uch information has been provided by the applicants to the Chamber only for the purposes of substantiating an application for participation but not to give evidence on either points of fact or law in the present case." It was added that the information contained therein "*was not collected by the Prosecutor during his investigation and cannot therefore be defined as 'evidence'*". See the "Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case" (Pre-Trial Chamber II), No. ICC-01/09-01/11-169, 8 July 2011, para. 9 and the "Decision on the Defence Request in Relation to the Victims' Applications for Participation in the Present Case, 8 July 2011 (Pre-Trial Chamber II), No. ICC-01/09-02/11-164, para. 8. See also 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, 9 February 2012, paras. 100-101.

Moreover, the Common Legal Representative recalls that in the Bemba Article 74 Judgment the majority of the Chamber, relying, *inter alia*, on the nature of the document and on the fact that the application can be used by the Defence for the questioning of the relevant witness, indicated that "*the victims' application forms themselves are not part of the evidence of this case and, in line with Article 74(2), have not been relied upon as evidence in the present Judgment*" (See the [Judgment pursuant to Article 74 of the Statute](#) (Trial Chamber III), No. ICC-01/05-01/08-3343, 21 March 2016, para. 272.

Kind regards,
Paolina Massidda

From: [REDACTED]
Sent: 22 March 2017 09:46
To: [REDACTED]; Trial Chamber IX Communications
Cc: [REDACTED]
[REDACTED]

Subject: RE: Request for formal submission of one item for OTP Witness P-330

Dear Trial Chamber IX,

with testimony of P-0330 concluding on Thursday, 16 March 2017, the deadline for requesting formal submission of evidence, in accordance with para. 28 of Decision #497, expired on Monday, 20 March 2017.

Despite the request being out of time, and thus having nothing to do with an abundance of caution, the Prosecution does not oppose it.

Best regards,

[REDACTED]

[REDACTED]

Associate Trial Lawyer
International Criminal Court
Office of the Prosecutor

[REDACTED]

[REDACTED]

[REDACTED]

Dévouement - Intégrité - Respect
Dedication - Integrity - Respect

From: [REDACTED]
Sent: 21 March 2017 21:53
To: Trial Chamber IX Communications
Cc: [REDACTED]

Subject: Request for formal submission of one item for OTP Witness P-330

Dear Trial Chamber,

On behalf of the Ongwen Defence, I am writing in the abundance of caution to request the formal submission of one document raised in the cross examination of P-330 during his testimony. It is UGA-D26-0012-0102.

The Defence is mindful of the fact that relevant portions of the document were read into the record during testimony but seeks the exceptional indulgence of the Chamber in this regard.

Best,

[REDACTED]

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From: [REDACTED]
Sent: 17 March 2017 17:37
To: Trial Chamber IX Communications; [REDACTED]
Cc: [REDACTED]
Subject: P-0330: Prosecution's submission of items used during the hearing

Dear Trial Chamber IX,

in accordance with the Trial Chamber's Decision #497, the Prosecution formally submits the following items of evidence used during the hearing of the evidence of Witness P-0330 [REDACTED] whose testimony concluded on 16 March 2017:

Tab (in OTP hardcopy binder unless otherwise indicated)	ERN (E-Court)	Description	Pages
2.1.	UGA-OTP-0256-0097	P-0330's National ID card	All
2.2.	UGA-OTP-0269-0697	P-0330's National ID card	All
3	UGA-OTP-0269-0696	P-0330's Birth Certificate	All
4	UGA-OTP-0124-0358	P-0330's Rachele Rehabilitation Centre Intake Form	All
5 (Defence Hardcopy Binder)	UGA-OTP-0269-0806-R01	Investigation Report, dated 4.08.2016	All

Best regards,

[REDACTED]

[REDACTED]
Associate Trial Lawyer
International Criminal Court
Office of the Prosecutor
[REDACTED]
[REDACTED]
[REDACTED]

From: Trial Chamber IX Communications
Sent: 29 March 2017 10:59
To: [REDACTED]
Cc: Trial Chamber IX Communications; [REDACTED]
Subject: Decision on Submitted Materials for P-330
Attachments: P-0330: Prosecution's submission of items used during the hearing; Request for formal submission of one item for OTP Witness P-330; RE: Request for formal submission of one item for OTP Witness P-330; RE: Request for formal submission of one item for OTP Witness P-330; RE: Request for formal submission of one item for OTP Witness P-330

Dear Counsel:

For P-330, the Chamber recognises as formally submitted all items submitted by the Prosecution (Email from the Prosecution, 17 March 2017 at 17:37).

The Defence also submitted item UGA-D26-0012-0102, which is P-330's victim participation application (Email from the Defence, 21 March 2017 at 21:53). The Prosecution did not oppose this submission (Email from the Prosecution, 22 March 2017 at 09:46). The Common Legal Representative for victims objected to the submission on three grounds: (i) that the deadline for submitting the item pursuant to the email submission procedure expired; (ii) that the Defence fails to demonstrate good cause for any extension and (iii) victim applications are not evidence 'according to the established jurisprudence of the Court' (Email from the CLR, 23 March 2017 at 11:49, *objections disputed in* Email from the Defence, 24 March 2017 at 12:26).

As for the first two objections, and noting that the Prosecution did not oppose the late submission, the Defence's late submission will be entertained on this occasion. The Defence is reminded that the deadlines set for the email submission procedure must be respected going forward.

As for the third objection, the CLR's arguments are not persuasive. Victim applications are not evidence in the case solely because they are filed in the case record, but in the present instance the Defence takes the extra step of formally submitting P-330's application. There is no procedural bar in the statutory scheme for considering a submitted application as evidence.

The authorities relied upon by the CLR are all inapposite. The cited reasoning of Pre-Trial Chamber II (ICC-01/09-01/11-169, para. 9; ICC-01/09-02/11-164, para. 8) was made in the context of whether to provide unredacted victim applications to the Prosecution for a disclosure assessment – that Chamber was not confronted with the issue of attempting to use a victim application as evidence at trial. The cited Trial Chamber III decision (ICC-01/05-01/08-2012-Red, paras 100-03) is a majority ruling that submitted victim applications' probative value was outweighed by potential prejudice. As has been said on previous occasions, this Chamber defers such considerations until the end of the trial (ICC-02/04-01/15-497, para. 24). The Trial Chamber III majority never said that victim applications were always inadmissible, and in fact expressly acknowledged that it may be appropriate to admit victim applications in certain contexts (ICC-01/05-01/08-2012-Red, para. 99).

Noting the above, the Chamber therefore recognises the formal submission of UGA-D26-0012-0102.

The Registry is accordingly directed to proceed in accordance with paragraph 28(v) of the ‘Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497.

Best,

Trial Chamber IX