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**International
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Date: **07 February 2017**

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 Document

**Joint Response
to the “Prosecution’s request to submit 1006 items of evidence from the ‘bar table’”**

Source: Office of Public Counsel for Victims
Legal Representatives of Victims

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

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I. INTRODUCTION

1. Counsel representing the victims participating in the proceedings¹ submit that the Prosecution's request to formally submit 1006 items of evidence from the "bar table" (the "Request")² should be granted.

2. Indeed, this course of event is in line with the Chamber's decision on the conduct of the proceedings and will ensure the expeditiousness of the proceedings with full respect for the rights of the accused, pursuant to article 64(2) and 69(4) of the Rome Statute.

II. PROCEDURAL HISTORY

3. On 13 July 2016, the Single Judge of Trial Chamber IX (the "Chamber") issued the Initial Directions on the Conduct of the Proceedings, addressing, *inter alia*, the possibility for the participants to submit evidence through a "bar table" application.³

4. On 16 January 2016, the Prosecution filed the Request, seeking to formally submit 1006 items of evidence, comprised of ten categories, including: (i) Audio/Video Material and Media/Press Articles; (ii) Certificates and Personal Data; (iii) Correspondence–Letters; (iv) Dossiers and Police Crime Files; (v) Forensic

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-02/04-01/15-384, 24 December 2015, pp. 20-22, "Decision concerning 300 Victim Applications and the Deadline for Submitting Further Applications", (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-543, 26 September 2016, para. 8 and p. 5, and the "Decision Concerning 610 Victim Applications (Registry Report ICC-02/04-01/15-544) and 1183 Victim Applications (Registry Report ICC-02/04-01/15-556)", No. ICC-02/04-01/15-586, 04 November 2016, p. 8, paras. 9, 15 and 16.

² See the "Prosecution's request to submit 1006 items of evidence from the 'bar table'", No. ICC-02/04-01/15-654, 16 January 2017, with Confidential Annex A (the "Request").

³ See the "Initial Directions on the Conduct of the Proceedings" (Trial Chamber IX), No. ICC-02/04-01/15-497, para. 27.

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 (the “Bar Table Items”).⁴

5. On 17 January 2017, the Defence requested an extension of the time limit to file its response.⁵ The Legal Representatives joined this request.⁶

6. On the same day, the Chamber extended the time limit for filing any responses until 7 February 2017.⁷

III. SUBMISSIONS

7. In the Initial Directions on the Conduct of the Proceedings, the Chamber stated that *“Article 69(4) of the Statute gives the Chamber discretion on whether to rule on the admissibility of each piece of evidence upon its submission. 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 relevance, probative value and potential prejudice of each item of evidence submitted when deliberating the judgment.”*⁸

8. In its “Decision on Prosecution Request to Submit Interception Related Evidence” (the “First Bar Table Decision”), the Chamber further clarified its approach to the consideration of relevance and admissibility of evidence, by stating that: (a) when the participants formally submit evidence during trial, the Chamber will generally recognise the formal submission of said evidence; however, (b), the

⁴ See the Request, *supra* note 2, para. 11.

⁵ See the email from the Defence sent on 17 January 2017 at 17:49.

⁶ See the email sent by the Legal Representatives on 17 January 2017 at 18:19.

⁷ See the email from the Chamber sent on 17 January 2017 at 18:28.

⁸ See the “Initial Directions on the Conduct of the Proceedings”, *supra* note 3, para. 24.

Chamber will rule on certain issues related to the admissibility of evidence, particularly when procedural bars are raised which may foreclose consideration of the standard evidentiary criteria; (c) in the exercise of its discretion, the Chamber may also exceptionally consider standard evidentiary criteria at the point of the submission of the evidence; (d) broader consideration of the standard evidentiary criteria, and relevance and probative value, in particular, is deferred for all the evidence recognised thus far; (e) this general approach does not involve making any relevance, probative value or potential prejudice assessments at the point of submission – not even on a *prima facie* basis.⁹

9. Having comprehensively reviewed the content of the Request and the details provided in its Annex, Counsel consider that the submission of Bar Table Items does not raise any procedural bars that are enshrined in the Rome Statute or in the Rules of Procedure and Evidence. Nor does it create any obligation for the Chamber to exceptionally consider standard evidentiary criteria at this point of the submission of the evidence.

10. On the other hand, Counsel recall that the Chamber did also hold that the formal submission of “bar table” evidence may have prejudicial effect to the Defence.¹⁰ In particular, the Chamber clarified that: (i) the ultimate prejudice which the Defence may suffer depends on the nature of the material and how the material is discussed during trial etc.; and (ii) undue prejudice determinations at the point of submission can only be done reliably for items for which it is immediately apparent that they cannot be fairly relied upon for any purpose.¹¹

⁹ See the “Decision on Prosecution Request to Submit Interception Related Evidence” (Trial Chamber IX), No. ICC-02/04-01/15-615, 01 December 2016, (the “First Bar Table Decision”), para. 4. See also the “Decision on Defence Request for Leave to Appeal the Decision Recognising Interception Related Evidence as Submitted” (Trial Chamber IX), No. ICC-02/04-01/15-641, 20 December 2016, para. 8.

¹⁰ See the “First Bar Table Decision”, *supra* note 9, para. 10.

¹¹ *Idem*, paras. 10-11.

11. Having conducted a detailed review of the Request and its Annex, Counsel submit that the nature of Bar Table Items warrants the conclusion at this juncture that the Chamber indeed can fairly rely upon them for its determination of the truth.

12. Furthermore, Counsel contend that the Defence will not be unduly prejudiced because: (i) the Bar Table Items have been timely disclosed by the Prosecution, thus ensuring the Accused's rights related to notice and trial preparation¹²; (ii) in the Request and its Annex, the Prosecution did provide a comprehensive description and itemised assessment of relevance and probative value of each piece of evidence, together with the indication of the types of alleged crimes and their incriminatory character¹³; (iii) the Defence has at present the opportunity to advance any objections or observations on any of the Bar Table Items, which the Chamber will take into account in its final assessment of the evidence¹⁴; and (iv) the Defence also has the right to examine the Prosecution witnesses or, in its turn, call witnesses and submit evidence throughout the trial.¹⁵

13. In addition, Counsel submit that granting the Request will be in line with the Chamber's duty to ensure the expeditiousness of the proceedings pursuant to article 64(2) of the Rome Statute. Indeed, the recognition of the Bar Table Items as "submitted" will allow the Prosecution to better streamline its presentation of evidence by obviating the need to call more witnesses to attest to the authenticity of the Bar Table Items and shortening the overall length of the examinations of witnesses at trial. This is especially true for dual status individuals.¹⁶

¹² See the "First Bar Table Decision", *supra* note 9, para. 25.

¹³ *Idem*, para. 24.

¹⁴ *Ibid.*, para. 11.

¹⁵ *Ibid.*, para. 23.

¹⁶ See the "Request", *supra* note 2, Confidential Annex A. For dual status individuals represented by the Common Legal Representative: UGA-OTP-0209-0918 at No. 147 related to Witness P-0001, UGA-OTP-0273-0056 at No. 58, UGA-OTP-0275-0003 at No. 59, and UGA-OTP-0273-0041 at No. 793 related to Witness P-0006, UGA-OTP-0150-0109 at No. 140, UGA-OTP-0150-0118 at No. 141, UGA-OTP-0175-0085-R01 at No. 142, UGA-OTP-0175-0137-R01 at No. 143, UGA-OTP-0175-0187-R01 at No. 144, UGA-OTP-0175-0238-R01 at No. 145 and UGA-OTP-0191-0547 at No. 146 related to Witness P-0007, UGA-OTP-0175-0085-R01 at No. 142, UGA-OTP-0175-0137-R01 at No. 143, UGA-OTP-0175-0187-R01 at No.

14. This course of events also allows for the reduction of time needed for the trial to be conducted, therefore responding to the interest of victims to expeditious proceedings.

III. CONCLUSION

For the foregoing reasons, Counsel respectfully request the Chamber to grant the Request.



Paolina Massidda



Francisco Cox



Joseph Manoba Akwenyu

Dated this 7th day of February 2017

At The Hague (The Netherlands), at Kampala (Uganda) and at Santiago (Chile)

144, UGA-OTP-0175-0238-R01 at No. 145, and UGA-OTP-0209-0918 at No. 147 related to Witness P-0008, UGAOTP-0258-0509 at No. 62, UGA-OTP-0269-0733 at No. 79, UGA-OTP-0269-0737 at No. 80, UGA-OTP-0269-0739 at No. 81, UGA-OTP-0272-0939 at No. 84 and UGA-OTP-0244-2354 at No. 114 related to Witness P-0097, UGA-OTP-0114-0211 at No. 97 related to Witness P-0099, UGA-OTP-0237-0004-R01 at No. 892 related to Witness P-0214, UGA-OTP-0255-0109 at No. 972 related to Witness P-0250, UGA-OTP-0269-0710 at No. 71, UGA-OTP-0269-0711 at No. 72, UGA-OTP-0269-0712 at No. 73, UGA-OTP-0269-0714 at No. 74, UGA-OTP-0269-0719 at No. 75, UGA-OTP-0269-0720 at No. 76, and UGA-OTP-0097-0452 at No. 95 related to Witness P-0275, UGA-OTP-0249-0321 at No. 61, UGA-OTP-0269-0699 at No. 68, UGA-OTP-0269-0701 at No. 69, UGA-OTP-0269-0708 at No. 70, UGA-OTP-0248-0992 at No. 116, and UGA-OTP-0249-0322 at No. 119 related to Witness P-0314, UGA-OTP-0269-0696 at No. 67 and UGA-OTP-0124-0358 at No. 101 related to Witness P-0330, UGA-OTP-0249-0293 at No. 60, UGA-OTP-0248-1009 at No. 117 and UGA-OTP-0254-1477 at No. 120 related to Witness P-0352, UGA-OTP-0244-1958 at No. 111 related to Witness 0366, UGA-OTP-0263-0050 at No. 64 related to Witness 0374, UGA-OTP-0272-0947 at No. 85 and UGA-OTP-0244-2280 at No. 112 related to Witness P-0396. For dual status witnesses represented by Legal Representatives of Victims: UGA-OTP-0069-0355 at No. 198 related to Witness P-0026, UGA-OTP-0069-0387 at No. 205 related to Witness P-0196, UGA-OTP-0269-0722 at No. 77, UGA-OTP-0269-0732 at No. 78, UGA-OTP-0272-1018 at No. 87 and UGA-OTP-0269-0728 at No. 121 related to Witness P-0252.