

ANNEX IV

PUBLIC

From: [REDACTED]
Sent: 28 February 2019 18:03
To: Trial Chamber IX Communications; [REDACTED]
Cc: [REDACTED]
Subject: D-0133: Prosecution's formal submission of evidence

Dear Trial Chamber IX,

in accordance with Trial Chamber's Decision #497, the Prosecution formally submits the following items of evidence, used during examination of Witness D-0133, whose testimony concluded earlier today:

Tabulation	ERN	Description	Confidentiality
Prosecution Binder Tab 3	UGA-OTP-0286-0332*	Email from the Defence to the Trial Chamber, prosecution and LRV Counsel of 12 February 2019 at 18:34 hrs	Confidential
Prosecution Binder Tab 6	UGA-OTP-0285-0439**	Chris Dolan, "Social Torture: the case of Northern Uganda", Berghahn Books 2009, pp. 78-83	Public

* The Prosecution counsel acknowledges that she omitted to read the ERN number of the item into the record; however the evidence has been unambiguously identified on the record during examination not only by tabulation number but by content (see ICC-02/04-01/15-T-204-ENG ET p. 41 lns 9-25)

** The item included in the Prosecution Binder, Tab 6 and referenced during examination of D-0133, has now been formally registered and allocated an ERN number, as anticipated in Prosecution's email of 27.02.2019 at 13:23 hrs. It will be formally disclosed first thing tomorrow (Friday 1.03.2019) morning.

The Prosecution notes that item UGA-OTP-0272-0002 at 0146-0169 (Prosecution Binder Tab 5) has already been formally recognized as submitted into evidence on 27.01.2017 (in relation to Witness P-0422).

Best regards,
[REDACTED]

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From: [REDACTED]
Sent: 04 March 2019 12:07
To: Trial Chamber IX Communications
Cc: [REDACTED]
Subject: RE: Defence submission of items for expert witness D-0133

Dear Trial Chamber IX,

The Defence responds to the arguments in the Prosecution e-mail of 1 March 2019, made pursuant to paragraph 28 (iii) of ICC-02/04-01/15-497.

A) Under paragraph 28 (i) of ICC-02/04-01/15-497, the Defence understands that the items it submits into evidence should reflect materials used in examination of its witness. In light of this and since there were specific and relevant questions about both the Convention and the Optional Protocol (T-204, pp. 5-10), and D-0133's role in their implementation (T-203, p. 12, ll. 8-25), the Defence requested the Trial Chamber to recognise items UGA-D26-0018-4006 and UGA-D26-0018-4021 as formally submitted into evidence.

B) The Prosecution's argument that the Trial Chamber should not rely on evidence in the expert report or testimony under the conditions of i) and ii) (Prosecution e-mail, point B, at 13:12) should be rejected because it is a) late, and b) has already been decided. Further, there is no support for the Prosecution's assertion that D-0133's evidence is irrelevant and potentially prejudicial.

- a) Rule 64(1) states that "an issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber." The expert report was accepted and formally submitted into evidence by the Trial Chamber on 26 February (T-203, p. 17, ll. 3-6). At the time of submission, there were no objections from the Prosecution. Therefore, the Prosecution's submission is late.
- b) Notwithstanding the Trial Chamber's statement on 18 January that the Prosecution may raise or repeat any objections it has in accordance with Rule 64(1) (Trial Chamber e-mail, at 15:10), it is the Defence position that the Prosecution's argument has been decided. The ruling of the Trial Chamber confirming the submission of D-0133's expert report into evidence (T-203, p. 17, ll. 3-6) is not inconsistent with the directions that the Trial Chamber gave in its e-mail on 18 January. The Presiding Judge ruled that the expert witness fulfils the requirements of Rule 68(3) (T-203, p. 17, l. 6), which was followed by the Presiding Judge's cautions in regard to the parameters of questioning which would be allowed (T-203, p. 17, ll. 7-19). In addition, the Presiding Judge agreed that the Trial Chamber's approach to questions would be on a case-by-case basis, as it always has been (T-203, p. 18, ll. 1-3). The Presiding Judge also decided that pieces of an expert report will not be struck out due to reasons he provided in T-203, p. 18, ll. 3-16. Thus, the Prosecution's argument is an impermissible re-litigation of its prior 'expungement' request from 18 January (Prosecution e-mail, at 13:11) which was decided by the Trial Chamber on 18 January and then on 26 February (T-203, p. 17, ll. 5-14).

For the reasons stated above, the Defence requests that the Trial Chamber reject the Prosecution's objections on submission and admissibility of evidence in its entirety.

Kind regards,
 [REDACTED] on behalf of Co-Counsel

From: [REDACTED]
 Sent: 01 March 2019 13:12
 To: Trial Chamber IX Communications
 Cc: [REDACTED]
 [REDACTED]

Subject: RE: Defence submission of items for expert witness D-0133

Dear Trial Chamber IX,

The Prosecution takes note of the Defence's request to submit UGA-D26-0015-1154 (CV of D-0133) into evidence, despite it not being included in the Defence's LOE. The Prosecution does not object to the submission of this item into evidence.

In accordance with Rule 64(1) of the RPE and Decision 497, paragraph 28, the Prosecution:

- A) **Objects to the *submission* of UGA-D26-0018-4006 and UGA-D26-0018-4021 into evidence**
- B) **Objects to the *admissibility* of D-0133's evidence insofar it discusses applicability and interpretation of the law or the propriety of ICC proceedings against Dominic Ongwen.**

Reasoning:

A)

Item UGA-D26-0018-4006 is a copy of the *Convention on the Rights of the Child* and item UGA-D26-0018-4021 is a copy of the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*. As such they do not constitute *evidence*. The two items are *texts of law* that the Trial Chamber may apply in accordance with Article 21(3) of the Rome Statute, they do not prove the existence or nonexistence of any fact. Submitting these two items into evidence would be equivalent to submitting a copy of the Rome Statute itself or of the Geneva Conventions into evidence.

B)

The Trial Chamber should not, when deliberating its judgement, rely on D-0133's evidence, contained in his Report (UGA-D26-0015-1022) and/or his live testimony where D-0133

- i) opines on the applicability and/or interpretation of the law or
- ii) opines on the propriety of proceedings before the ICC or propriety of prosecuting former child soldiers for crimes they committed as adults in general.

As the Prosecution argued in its email of 18 January 2019 at 13:11 hrs, the purpose of expert testimony is to provide specialized knowledge that will help the trier of fact to understand the evidence or to determine a fact in issue, and not to opine on matters of law which, if they arise at all, must be determined by the Chamber. Similarly, witnesses also cannot be called to opine on ICC proceedings and preferences for different justice systems. The Prosecution submits that such evidence is irrelevant and potentially prejudicial.

During the examination of D-0133, the Trial Chamber has already disallowed questions about the interpretation of the law and the appropriateness or justification of the ICC proceedings, including "via the back door" (See e.g. ICC-02/04-01/15-T-203 ET p. 17, ICC-02/04-01/15-T-204 ET p. 17). This approach has been consistent with the Trial Chamber's earlier rulings (e.g. ICC-02/04-01/15-T-197-ENG ET, 19.11.2018 (D-0060), p. 14 Ins. 3-5, ICC-02/04-01/15-T-181-ENG, 2.10.2018 (D-0028), p. 57 ln. 12 - p. 58 ln. 3, ICC-02/04-01/15-T-168-ENG ET, 28.03.2018 (P-0445), p. 26 ln. 14 - p. 27 ln. 5; ICC-02/04-01/15-T-117-CONF-ENG ET, 3.10.2017 (P-0038), p. 8 ln. 3 – p.11. ln. 23).

The Prosecution raises these arguments in accordance with Rule 64(1) of the RPE, recognizing that the Trial Chamber will rule on them in accordance with the procedure adopted and set out in paragraph 24 of Decision 497.

Best regards,

[REDACTED]

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From: [REDACTED]
 Sent: 28 February 2019 15:55
 To: Trial Chamber IX Communications
 Cc: [REDACTED]
 [REDACTED]

Subject: Defence submission of items for expert witness D-0133

Dear Trial Chamber IX,
 Dear parties,

Pursuant to paragraph 28 of ICC-02/04-01/15-497, the Defence requests the submission into evidence of the following items used during its examination of expert witness D-0133:

Tab	ERN	Title/Type
2*	UGA-D26-0015-1154	CV (Curriculum Vitae)
3	UGA-D26-0015-1022	The Enduring Impact of Being a Child Soldier
4	UGA-OTP-0261-0380	WHERE IS JUSTICE IN THE CASE OF DOMINIC ONGWEN, WHO IS BEING TRIED, BY ICC, IN THE HAGUE, IN THE NETHERLANDS. THE FORMERLY ABDUCTED UNFORTUNATE CHILDREN FROM NORTHERN UGANDA
5	UGA-PCV-0001-0095	The Psychological Impact of Child Soldiering
6	UGA-OTP-0132-0423	RIGHTS OF THE CHILD / E/CN.4/2002/86
7*	UGA-D26-0018-4006	Convention on the Rights of the Child
8*	UGA-D26-0018-4021	Optional Protocol To The Convention On the Rights Of The Child On The Involvement Of Children In Armed Conflict
9	UGA-D26-0018-2775	Northern Uganda: Profile of a Genocide

*Three items UGA-D26-0015-1154 (Tab 2), UGA-D26-0018-4006 (Tab 7), and UGA-D26-0018-4021 (Tab 8) are not on the Defence list of evidence. However, the Defence notes that it a) duly notified the Trial Chamber and parties about this circumstance before the start of D-0133's examination (see the list of materials attached to the email from 20 February, at 14:44); b) the items were disclosed to the parties on 12 December 2018 (Tab 2) and 24 January 2019 (Tabs 7-8); and c) the items were used and discussed in the examination of the expert witness D-0133 on 26 and 28 February 2019. Therefore, the Defence respectfully requests that the Trial Chamber permit to add the items on the Defence list of evidence and recognise them as formally submitted.

Kind regards,
 [REDACTED], on behalf of Co-Counsel

[REDACTED]

From: Trial Chamber IX Communications
Sent: 22 March 2019 19:11
To: [REDACTED]
Cc: [REDACTED] Trial Chamber IX Communications; [REDACTED]
Subject: Decision on Submitted Materials for D-133
Attachments: Defence submission of items for expert witness D-0133; D-0133: Prosecution's formal submission of evidence; RE: Defence submission of items for expert witness D-0133; RE: Defence submission of items for expert witness D-0133

Dear Counsel and Registry,

For D-133 the Chamber recognises as formally submitted all items submitted by the Prosecution (Email from the Prosecution, 28 February 2019, at 18:03).

The Defence submitted 8 items for formal recognition (Email from the Defence, 28 February 2019, at 15:55). The Prosecution objects to the formal recognition of tab 7 (UGA-D26-0018-4006) and 8 (UGA-D26-0018-4021), as well as to the admissibility of parts of tab 2 (UGA-D26-0015-1022). The Defence provided its response via email (Email from the Defence, 4 March 2019, at 12:07).

In respect of items UGA-D26-0018-4006 and UGA-D26-0018-4021, the Chamber notes that it is not necessary to recognise openly accessible texts of legal conventions as formally submitted. The Defence misunderstands paragraph 28 i) of decision -497: the parties must only mention items it wishes to formally submit, not every item being used during the questioning of the witness. Further, the Chamber can always take notice of this type of documents.

With regard to UGA-D26-0015-1022, the Prosecution objects to the parts of the report in which D-133 comments on the applicability and interpretation of the law and expresses himself on the propriety of proceedings before this Court or about proceedings against former child soldiers in general.

The Defence responds that the objection is belated and that it should be rejected since the Chamber stated that it would admit the report as a whole.

First, the Chamber does not consider the objection to be belated. The Prosecution does not object to the fulfilment of the conditions of Rule 68 of the Rules but that part of the report is inadmissible due to its content.

The report is submitted according to the procedure installed by decision -497, para. 28 and not during the court session where it was merely stated that the requirements of Rule 68(3) of the Rules were fulfilled (T-203, p. 17, lines 5-6). The Defence seems to operate on the same premise, since it put this item in the email requesting formal submission (again, in accordance with decision -497, para.28). Accordingly, Rule 64(1) of the Rules does not exclude the Prosecution with its objection.

Second, the Chamber stated during the testimony of D-133 that it will allow the report as a whole to be admitted, due to practicality considerations (T-203, p. 18, lines 2-13). The Chamber has already expressed itself on the propriety of the two points raised by the Prosecution (T-203, p. 17, line 7-14 and T-204, p. 17, lines 6-9).

The objections raised by the Prosecution are noted and according to its general approach, the Chamber defers the discussion and weighing of every part of item UGA-D26-0015-1022 until the deliberation of its judgment.

Accordingly, all items submitted by the Defence with the exception of tab 7 (UGA-D26-0018-4006) and 8 (UGA-D26-0018-4021) and all items submitted by the Prosecution are recognised as formally submitted

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

Kind regards,
Trial Chamber IX