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**International
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Date: **29 March 2018**

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

With Confidential Annexes A, B and C

**Common Legal Representative's Request to Introduce
One Item of Evidence through 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:*****The Office of the Prosecutor**

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I. INTRODUCTION

1. The Common Legal Representative¹ requests authorisation to file the Expert Report of Professor Theresa Betancourt (the “Report”) in the record of the case and to consider it as formally submitted.

2. In her application to present evidence,² the Common Legal Representative requested the appearance of two experts on issues related to children and youth (and in particular former child soldiers), indicating that the expertise of the two experts is complementary.³

3. In its “Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests” (the “Decision Authorising Presentation of Evidence”),⁴ the Chamber found that the proposed expertise on issues related to children and youth (and in particular former child soldiers) affects the personal interests of the victims as well as the issues of the case and thus is necessary for the determination of the truth.⁵ However, the Chamber only authorised the appearance of one of the experts, leaving it to the judgment of the Common Legal

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; 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 the “Common Legal Representative’s submission of Final List of Witnesses and Request for Leave to Present Evidence”, No. ICC-02/04-01/15-1165-Conf + Conf-Anxs, 2 February 2018. A public redacted version of the Request was filed on 5 February 2018. See No. ICC-02/04-01/15-1165-Red.

³ *Idem*, para. 20.

⁴ See the “Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests (Trial Chamber IX), No. ICC-02/04-01/15-1199-Conf, 06 March 2018 (the “Decision Authorising Presentation of Evidence”). A public redacted version of the decision was filed on the same day. See ICC-02/04-01/15-1199-Red.

⁵ *Idem*, paras. 27 - 29.

Representative to decide which of the two experts to call.⁶ Following consultation with the experts, Professor Wessells will appear in court.

4. Consequently, the Common Legal Representative posits that the submission of the Report of Prof. Betancourt - who will not appear in court - will assist the Chamber in its determination of the issues at stake in this trial because of its complementary nature to the Report produced by Prof. Wessells. The submission of the Report into evidence (i) affects the personal interests of victims and the issues in the case; (ii) is necessary for the determination of the truth; (iii) is appropriate and consistent with the rights of the Accused; and (iv) the item is relevant, has probative value and it is authentic. In addition, there are no procedural bars to the proposed evidence being formally submitted through a "Bar Table" motion.

II. PROCEDURAL BACKGROUND

5. On 13 December 2017, the Common Legal Representative filed her preliminary list of witnesses,⁷ in accordance with the "Preliminary Directions for any LRV or Defence Evidence Presentation" issued by the Single Judge on 13 October 2017.⁸

6. On 14 December 2017, the Legal Representatives filed their preliminary list of witnesses.⁹

7. On 22 December 2017, Trial Chamber IX (the "Chamber") partially granted a Defence's request,¹⁰ seeking, *inter alia*, the full disclosure of the names of the

⁶ *Ibidem*, paras. 30 -31.

⁷ See the "Common Legal Representative Preliminary List of Witnesses Provided Pursuant to the 'Preliminary Directions for any LRV or Defence Evidence Presentation'", No. ICC-02/04-01/15-1105-Conf, 13 December 2017. A public redacted version of the document was filed on 19 December 2017. See No. ICC-02/04-01/15-1105-Red.

⁸ See the "Preliminary Directions for any LRV or Defence Evidence Presentation" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1021, 13 October 2017, paras. 3-4.

⁹ See the "Victims' preliminary list of witnesses", No. ICC-02/04-01/15-1106, 14 December 2017.

witnesses that the Legal Representatives wish to call, and instructed the Common Legal Representative to disclose the names of its four proposed expert witnesses.¹¹ Accordingly, the Common Legal Representative disclosed the names of the four proposed experts on 22 and 29 December 2017.¹²

8. On 2 February 2018, the Common Legal Representative submitted her Final List of Witnesses and her Request for Leave to Present Evidence.¹³ On the same day, the Legal Representatives filed their request for leave to present evidence and to present victims' views and concerns in person.¹⁴ On 15 February 2018, the Defence filed its Response to both Legal Representatives of Victims' requests to present evidence.¹⁵

9. On 6 March 2018, the Chamber rendered its Decision Authorising Presentation of Evidence, partially granting the requests to present evidence by both teams of Legal Representatives of Victims.¹⁶

III. CONFIDENTIALITY

10. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, Annexes A, B and C are filed confidential since it comprises the Report and related material

¹⁰ See the "Defence Request for Orders Regarding ICC-02/04-01/15-1105-Conf, ICC-02/04-01/15-1106 and ICC-02/04-01/15-1106-Conf-Anx", No. ICC-02/04-01/15-1109-Conf, 15 December 2017 (Pursuant to Trial Chamber IX's Decision, dated 22 December 2017, this document was reclassified as "Public").

¹¹ See the "Decision on Defence Request for the Identities of Potential Witnesses on the Legal Representatives of Victims' Preliminary Lists of Witnesses" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1117, 22 December 2017.

¹² See the email sent to the Chamber, parties and participants by the Common Legal Representative on 22 December 2017 at 11:41; and the "List of Experts Provided Pursuant to the 'Decision on Defence Request for the Identities of Potential Witnesses on the Legal Representatives of Victims' Preliminary Lists of Witnesses'", with Confidential Annex A, No. ICC-02/04-01/15-1125, 29 December 2017.

¹³ See *supra* note 2.

¹⁴ See the "Victims' requests for leave to present evidence and to present victims' views and concerns in person", No. ICC-02/04-01/15-1166 + Conf-Anx, 2 February 2018.

¹⁵ See the "Defence Response to the LRV and CLRV Requests to Present Evidence and the Views and Concerns of Registered Victims", No. ICC-02/04-01/15-1182-Conf, 15 February 2018. A public redacted version of the document was filed on 23 February 2018. See No. ICC-02/04-01/15-1182-Red.

¹⁶ See the Decision Authorising Presentation of Evidence, *supra* note 4, paras. 15 - 84.

containing information not to be known by the public at this stage of the proceedings, as well as personal data of the Expert.

IV. SUBMISSIONS

11. The Chamber ruled in its “Initial Directions on the Conduct of the Proceedings” that participants may submit evidence “*in writing through a ‘bar table’ application*”.¹⁷ The Chamber also ruled that, in the absence of any procedural bars, “*as a general rule, [it] 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, though it may not necessarily discuss these aspects for every item submitted in the judgment itself.*”¹⁸

12. In the Decision Authorising Presentation of Evidence, the Chamber further ruled that, pursuant to articles 68(3) and 69(3) of the Rome Statute, when their personal interests are affected, victims may present previously undisclosed evidence.¹⁹ Based on the established jurisprudence of the Court, the Chamber further held that, in order to determine if leave to present evidence should be granted, it will assess whether the presentation of evidence: (i) affects the personal interests of victims and the issues in the case; (ii) is necessary for the determination of the truth; and (iii) is appropriate and consistent with the rights of the accused.²⁰

¹⁷ See the “Initial Directions on the Conduct of the Proceedings” (Single Judge, Trial Chamber IX), No. ICC-02/04-01/15-497, 13 July 2016, para. 27.

¹⁸ *Idem.*, paras. 24 and 26. See also the “Decision on Prosecution Request to Submit Interception Related Evidence” (Trial Chamber IX), No. ICC-02/04-01/15-615, 01 December 2016, paras. 4 - 7 and 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, paras. 17 and 46.

¹⁹ See the Decision Authorising Presentation of Evidence, *supra* note 4, para. 15.

²⁰ *Idem.*, para. 17.

13. In relation to the expertise on children and youth (and in particular former child soldiers), the Chamber, in its Decision Authorising Presentation of Evidence, indicated that it would not object to the submission of a joint report by the two experts should the Common Legal Representative judge it to be beneficial.²¹ In light of the specific expertise of both experts, the Common Legal Representative considers both contributions particularly relevant for the interests of victims namely because of the distinct activities in the area of former child soldiers in which both experts are engaged and which cover – separately – all the issues she would like to explore during her questioning. The Common Legal Representative has therefore consulted with the experts to assess whether it was feasible to file a joint report. However, considering the fact that the experts took approximately four months to produce their individual reports, it was not possible for them to produce a joint report within the relevant deadlines for disclosure set out in the Decision Authorising Presentation of Evidence. Considering the impossibility to produce a joint report, the Common Legal Representative requests the admission of Prof. Betancourt's Report.

14. In relation to the relevance of the Report, the Common Legal Representative submits that it is complementary to the one produced by Prof. Wessells who will testify in court. Indeed, Prof. Wessells has extensive experience in supporting programmes for children affected by war and developing guidelines on health protection of children and youth; while Prof. Betancourt has been involved in the adaptation and testing of several mental health interventions for children and families facing adversity due to violence. Therefore, the Common Legal Representative posits that their respective field of expertise adequately complement each other and the submission of the Report will allow the Chamber to have a comprehensive overview of the issues related to former child soldiers.

15. The Common Legal Representative further indicates that the submission of the present application at this point in time is made at the earliest opportunity, and is

²¹ *Ibidem*, para. 31.

justified by the fact that she received the final reports of both experts very recently and that consultation with them on the possibility of submitting a joint report were finalised last week.

16. In its “Decision on Prosecution Request to Submit Interception Related Evidence”, the Chamber 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 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.²²

17. As far as the formal requirements for the introduction of evidence via the Bar Table Motion are concerned, the Common Legal Representative submits that the Report is relevant,²³ has probative value²⁴ and it is authentic.

²² See the “Decision on Prosecution Request to Submit Interception Related Evidence” (Trial Chamber IX), No. ICC-02/04-01/15-615, 01 December 2016, 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.

²³ See for instance the “Decision on Prosecutor's Bar Table Motions” (Trial Chamber II), No. ICC-01/04-01/07-2635, 17 December 2010, paras. 16, 17 and 20; and the “Decision on the Prosecution's Request for Admission of Documentary Evidence” (Trial Chamber V(A)), No. ICC-01/09-01/11-1353, 10 June 2014, para. 15.

²⁴ See for instance the “Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf)” (Trial Chamber VII), No. ICC-01/05-01/13-1285, 24 September 2015, para. 11; see also the “Decision on Prosecutor's Bar Table Motions” (Trial Chamber II), No. ICC-01/04-01/07-2635, 17 December 2010, para. 20.

18. Concerning relevance and probative value, in the present instance, the Chamber already found that *“the proposed evidence is not repetitive, as it aims to focus on the psychological, social developmental and behavioural well-being of children under the age of 15 who were participating in hostilities from an expert’s point of view.”*²⁵ The Chamber further found that *“the proposed evidence also affects the issues in the case and is necessary for the determination of the truth, since two of the confirmed charges concern the conscription of children under the age of 15 and their use to participate actively in hostilities. The personal interests of the victims are affected, since many of them were enlisted, conscripted or used to participate actively in hostilities while being under the age of 15.”*²⁶

19. In addition, the Chamber noted that the proposed evidence does not aim to prove the elements of the crimes charged or Mr Ongwen’s role in their commission.²⁷ Rather, it generally relates to children and youth – in particular former child soldiers and explores the nature and extent of the harms the victims have personally suffered.²⁸

20. As far as the authenticity is concerned, the Report is signed and dated by the author.

21. Moreover, the introduction of the Report is not prejudicial to or inconsistent with the rights of the Accused. The Report, which is composed of 29 pages only, is attached to the present submission in Annex A, together with the relevant material (*Curriculum Vitae* of the expert contained in Annex B; and Letter or Instruction contained in Annex C).

22. In this regard, as already indicated by the Chamber, the submission of material via the ‘Bar Table’ as opposed to through rule 68(2)(b) or 68(3) of the Rules or in-court testimony, *“does not in any way preclude the Defence from challenging, inter*

²⁵ See the Decision Authorising Presentation of Evidence, *supra* note 4, para. 28.

²⁶ *Idem*, para. 29.

²⁷ *Ibidem*, para. 23.

²⁸ *Ibid.*, paras. 23 and 27.

alia, their probative value or relevance. Nor does it preclude the Defence from challenging the evidence by calling witnesses as appropriate and/or submitting any evidence in support of its challenge. This remains the case, even when the material relates to individuals who will not testify and for whom no statement is provided. There is no requirement that evidence be tested with a witness in order for it to be submitted".²⁹

23. Finally, there are no procedural bars to the proposed evidence being formally submitted through this "Bar Table" motion.

V. CONCLUSION

24. For the foregoing reasons, the Common Legal Representative respectfully requests the Chamber to authorise the submission in the record of the case of the Expert Report produced by Professor Betancourt attached in Annex A, and to recognise it as formally submitted.



Paolina Massidda
Principal Counsel

Dated this 29th day of March 2018

At The Hague (The Netherlands)

²⁹ See the "Decision on Prosecution's Request to Submit 1006 Items of Evidence", *supra* note 18, para. 15