

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-02/04-01/15**  
Date: **14 November 2019**

**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**

**Decision on Defence Request to Submit 470 Items of Evidence**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

**The Office of the Prosecutor**

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**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the Defence**

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Trial Chamber IX** of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64(2) and (9), 69 and 74(2) of the Rome Statute (the ‘Statute’), Rules 63, 64 and 68 of the Rules of Procedure and Evidence (the ‘Rules’) and Regulation 39 of the Regulations of the Court (the ‘Regulations’), issues the following ‘Decision on Defence Request to Submit 470 Items of Evidence’.

## **I. Procedural history and submissions**

1. On 15 October 2019, the Defence filed a request to submit 470 items into evidence (the ‘Request’).<sup>1</sup> It makes submissions as to the relevance of certain categories of items<sup>2</sup> and explains that the Annex contains notes on the relevance of each item submitted.<sup>3</sup>
2. On 25 October 2019, the Office of the Prosecutor (the ‘Prosecution’) filed its response (the ‘Prosecution Response’).<sup>4</sup> It opposes the submission of 52 items on the ground that they are testimonial in nature<sup>5</sup> and presents arguments related to the admissibility of a number of items.<sup>6</sup> It further objects to the request of the Defence to admit one item only partially.<sup>7</sup>
3. On 28 October 2019, the Common Legal Representative of the Victims (the ‘CLR V’) submitted its response (the ‘CLR V Response’).<sup>8</sup> It opposes the admission of five applications for victim participation arguing that they fall under Rule 68 of the Rules.<sup>9</sup>

## **II. Analysis**

4. As a preliminary matter, the Chamber notes the statement of the CLR V on the classification of its response.<sup>10</sup> Accordingly, it directs the Registry to reclassify the CLR V Response as ‘public’. With regard to the Prosecution Response, the Chamber orders the Prosecution to file a public-redacted version of its submission within five days of the reception of this decision.

<sup>1</sup> Defence Bar Table Motion, ICC-02/04-01/15-1637, with confidential annex A, containing an overview of the items (the ‘Annex’), ICC-02/04-01/15-1637-Conf-AnxA.

<sup>2</sup> Request, ICC-02/04-01/15-1637, paras 13-18.

<sup>3</sup> Request, ICC-02/04-01/15-1637, para. 12.

<sup>4</sup> Prosecution Response to the Defence Bar Table Motion, ICC-02/04-01/15-1646-Conf.

<sup>5</sup> Prosecution Response, ICC-02/04-01/15-1646-Conf, para. 8.

<sup>6</sup> Prosecution Response, ICC-02/04-01/15-1646-Conf, para. 15.

<sup>7</sup> Prosecution Response, ICC-02/04-01/15-1646-Conf, para. 16.

<sup>8</sup> CLR V Response to “Defence Bar Table Motion”, ICC-02/04-01/15-1647-Conf.

<sup>9</sup> CLR V Response, ICC-02/04-01/15-1647-Conf, paras 1-2, 7-13.

<sup>10</sup> CLR V Response, ICC-02/04-01/15-1647-Conf, para. 6.

5. The Chamber recalls its general approach to the submission of evidence,<sup>11</sup> as well as its prior decisions on submissions of evidence other than through a witness.<sup>12</sup>
6. Accordingly, all the Chamber will do at this point in the proceedings is to recognise items as formally submitted or rule on the existence of procedural bars or other issues which prevent such recognition. It will not pronounce itself on the relevance, probative value and potential prejudice of the items. The arguments on the relevance of the items made by the Defence,<sup>13</sup> Prosecution<sup>14</sup> and CLRV<sup>15</sup> are noted and their consideration is deferred until the Chamber's deliberation of the judgement pursuant to Article 74(2) of the Statute.
7. Regarding the substance of the Request, Chamber will first address the objections against the formal recognition of items raised by the Prosecution and the CLRV which are based on Rule 68 of the Rules, then discuss issues related to Regulation 39(1) of the Regulations and lastly address other matters.

*1. Objections to formal submission based on Rule 68 of the Rules*

8. The Chamber recalls its prior decision stating what constitutes prior recorded testimony under Rules 68 of the Rules.<sup>16</sup> The Chamber also notes that the Defence requests the submission of all items discussed below for the truth of their contents.
9. The Prosecution argues that 38 items, which are files from the Uganda Human Rights Commission, must be submitted pursuant to Rule 68 of the Rules.<sup>17</sup> The Chamber notes

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<sup>11</sup> Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497, paras 24-26. *See also* Decision on Prosecution Request to Submit Interception Related Evidence, 1 December 2016, ICC-02/04-01/15-615, para. 4.

<sup>12</sup> Decision on Prosecution Request to Submit Interception Related Evidence, 1 December 2016, ICC-02/04-01/15-615; Decision on Prosecution's Request to Submit 1006 Items of Evidence, 28 March 2017, ICC-02/04-01/15-795.

<sup>13</sup> Request, ICC-02/04-01/15-1637, paras 14, 16, 18.

<sup>14</sup> Prosecution Response, ICC-02/04-01/15-1646-Conf, para. 15.

<sup>15</sup> CLRV Response, ICC-02/04-01/15-1647-Conf, paras 11, 13-15.

<sup>16</sup> Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-02/04-01/15-596-Red, para. 9.

<sup>17</sup> Prosecution Response, ICC-02/04-01/15-1646-Conf, para. 8 a. Items: 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-0140-1375; UGA-OTP-0140-1432; UGA-OTP-0140-1471; UGA-OTP-0140-1563; UGA-OTP-0140-1618; UGA-OTP-0140-1752; UGA-OTP-0140-1852; UGA-OTP-0140-1992; UGA-OTP-0140-2065; UGA-OTP-0140-2144; UGA-OTP-0140-2173; UGA-OTP-

that the items in question all contain statements made by witnesses to alleged crimes or offences which were made in order to further the claim of a complainant. Some also include some sort of affirmation that the information provided has been given to the best of the person's knowledge.<sup>18</sup>

10. The Chamber therefore finds that these items constitute prior recorded testimony that may only be introduced pursuant to Rule 68 of the Rules. Consequently, the Chamber will not recognise these items as formally submitted.
11. In relation to item 270 of the Annex,<sup>19</sup> the Chamber notes that the item is a witness statement provided to investigators of the Prosecution. Accordingly, it falls under Rule 68 of the Rules and the Chamber will not recognise it as formally submitted.
12. The Prosecution further argues that nine items in the Annex constitute statements given to the Ugandan police and fall therefore also under Rule 68 of the Rules.<sup>20</sup> The Chamber notes that all items in question contain statements of persons reporting on what they themselves have observed with regard to alleged incidents. These statements were all provided to the police or are part of a police file and they were either signed by the person who gave the statement or contain their thumbprint. Lastly, the statements contain some sort of formulation assuring that the content is truthful and provided to the best of the knowledge of the person.
13. Considering the above, the Chamber finds that the items in question constitute prior recorded testimony under Rule 68 of the Rules and can therefore not be recognised as formally submitted outside of this framework.
14. The Prosecution further submits that item 402 of the Annex, a document produced by the Prosecution itself, falls under Rule 68 of the Rules.<sup>21</sup> The document is entitled 'screening note' and is the summary of a one-hour interview of members of the Prosecution with a

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0140-2198; UGA-OTP-0140-2277; UGA-OTP-0140-2299; UGA-OTP-0140-2376; UGA-OTP-0140-2444; UGA-OTP-0140-2517; UGA-OTP-0140-2540; UGA-OTP-0140-2565; UGA-OTP-0140-2583 and UGA-OTP-0140-2604.

<sup>18</sup> See for example UGA-OTP-0140-0078, at 0087; UGA-OTP-0140-2198, at 2262, 2266, 2267.

<sup>19</sup> Prosecution Response, ICC-02/04-01/15-1646-Conf, para. 8 b, UGA-OTP-0196-0028-R01.

<sup>20</sup> Prosecution Response, ICC-02/04-01/15-1646-Conf, para. 8 c, UGA-OTP-0145-0065; UGA-OTP-0208-0459; UGA-OTP-0249-1839; UGA-OTP-0249-1847; UGA-OTP-0249-1855; UGA-OTP-0249-1857; UGA-OTP-0249-1864; UGA-OTP-0249-1873 and UGA-OTP-0249-1878.

<sup>21</sup> Prosecution Response, ICC-02/04-01/15-1646-Conf, para. 8 d, UGA-OTP-0258-0534-R01.

prospective witness. In the document, a summary of the information provided by the person is given.

15. The Chamber finds that even though the item is entitled ‘screening note’, it constitutes prior recorded testimony pursuant to Rule 68. First, the person is questioned in his capacity as a witness. The fact that the Prosecution conducts the interview in order to decide whether to further question the person does not change this fact. Further, even at this point in the procedure, the witness was informed that the information he provides may be shared with the parties to the proceedings or the judges. Accordingly, it is clear that the provided information may be relied upon in future legal proceedings. Consequently, the item falls under Rule 68 of the Rules and cannot be submitted outside of the framework of this Rule.
16. Lastly, the Prosecution submits that three further items fall under Rule 68 of the Rules.<sup>22</sup> They are reports prepared by a psychiatrist after an in-court examination of certain Prosecution witnesses. The Prosecution argues that the psychiatrist provides his opinions and assessment in these documents, which makes them analytical in nature.
17. The Chamber does not consider that the items in question fall under Rule 68 of the Rules. The reports were produced on request of the Prosecution and the reason for their commission – except providing a psychiatric evaluation of the person in question – cannot be determined from the documents alone. The fact that they are at least in part analytical in nature does not make them automatically fall under Rule 68 of the Rules.
18. There is no apparent indication that this doctor provides his opinions as a - even prospective – witness. The connection to the legal proceedings is too attenuated to justify a consideration of the reports as a prior recorded statement. This is particularly the case since the subject of the reports (the psychiatric state of the previously examined persons) has not been identified as a live issue in this case by any of the parties and the persons in question had already provided evidence to the Court at the time of the examination.
19. Accordingly, the Chamber finds that the items in question do not constitute prior recorded statements and can be submitted as documentary evidence.

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<sup>22</sup> Prosecution Response, ICC-02/04-01/15-1646-Conf, para. 8 e, UGA-OTP-0269-0537; UGA-OTP-0269-0561 and UGA-OTP-0269-0569.

20. The CLRV objects to the submission of five victim applications (the ‘Victim Applications’)<sup>23</sup> of victims she represents.<sup>24</sup> The CLRV argues that the Victim Applications are similar to statements of victims taken by the Ugandan police, which the Chamber considers to be falling under Rule 68 of the Rules.<sup>25</sup> Further, the CLRV claims that the case at hand can be differentiated from prior decisions of the Chamber, where it allowed the submission of victim applications, since the current Request intends to admit them for the truth of their content.<sup>26</sup> Further, it is argued that none of the items in question are submitted to complement the case record of persons having previously testified before the Chamber and that it would be unduly prejudicial to victims who made the applications to allow their submissions, since they did not have an opportunity ‘to give their side of the story.’<sup>27</sup>
21. The Chamber does not consider that the Victims Applications fall under Rule 68 of the Rules, even if they are admitted for the truth of their contents. This is due to the specific procedural purpose of the documents within the system of the International Criminal Court. As correctly identified by the CLRV, victims submit an application ‘only for the purpose of substantiating their request to participate in the criminal proceedings before the Court but not to give evidence on either points of fact or law in the case.’<sup>28</sup> Upon this purpose described by the CLRV, the person is not questioned in his or her capacity as a witness, but the application is submitted in order to fulfil a requisite to obtain the procedural status as a victim.
22. The Chamber also agrees with the CLRV that the person did not intend that the document is subsequently used as evidence.<sup>29</sup> However, this is only dispositive for the determination whether the document falls under Rule 68 of the Rules, it does not bar a party from submitting it into evidence.
23. Accordingly, the Chamber finds that the Victim Applications can be submitted into evidence. Since the CLRV invokes undue prejudice considerations for the submission of

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<sup>23</sup> UGA-D26-0012-0284; UGA-D26-0012-0295; UGA-D26-0012-0313; UGA-D26-0012-0328 and UGA-D26-0012-0382.

<sup>24</sup> CLRV Response, ICC-02/04-01/15-1647-Conf, paras 1-2.

<sup>25</sup> CLRV Response, ICC-02/04-01/15-1647-Conf, para. 7.

<sup>26</sup> CLRV Response, ICC-02/04-01/15-1647-Conf, paras 9-10.

<sup>27</sup> CLRV Response, ICC-02/04-01/15-1647-Conf, paras 8, 11-12.

<sup>28</sup> CLRV Response, ICC-02/04-01/15-1647-Conf, para. 13.

<sup>29</sup> CLRV Response, ICC-02/04-01/15-1647-Conf, para. 13.

Victims Applications, the Chamber will, exceptionally,<sup>30</sup> consider these submissions at this point in the proceedings.

24. The CLRV argues that the persons concerned were not given the possibility to explain the content of their applications<sup>31</sup> and were not in a position to reply to the conclusion the Defence drew from their Victim Applications,<sup>32</sup> which prevents them being relied upon for any purpose.<sup>33</sup>
25. The Chamber does not agree that these reasons constitute an undue prejudice. First, the interpretation of the Defence is merely a submission by a party on how to assess the evidence. The Chamber will assess all evidence submitted before it independently at the end of the trial, as previously announced. The allegation that a victim made a certain statement in order to receive reparations is not, in and of itself, so grave that the submission of the concerned item of evidence must be barred.
26. Additionally, the Chamber notes the claimants of the applications in questions are all persons whose prior recorded statements or testimony have been submitted into evidence, either via Rule 68 of the Rules or via Article 56 of the Statute.<sup>34</sup> Accordingly, the argument of the CLRV that the submission of these items ‘will lead to the submission into evidence of thousands of similar applications’<sup>35</sup> is unfounded. Consequently, the Chamber does not consider that admitting the Victim Applications would cause undue prejudice which bars such admission.

## *2. Issues related to Regulation 39 of the Regulations*

27. The Chamber notes Regulation 39(1) of the Regulations, which states that all documents and materials should be filed in English or French unless otherwise provided by the Statute, the Regulations or authorised by the Chamber or the Presidency. Accordingly, if

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<sup>30</sup> See Initial Directions on the Conduct of the Proceedings, ICC-02/04-01/15-497, para. 26 and Decision on Prosecution Request to Submit Interception Related Evidence, ICC-02/04-01/15-615, para. 11.

<sup>31</sup> CLRV Response, ICC-02/04-01/15-1647-Conf, para. 14.

<sup>32</sup> CLRV Response, ICC-02/04-01/15-1647-Conf, para. 11.

<sup>33</sup> CLRV Response, ICC-02/04-01/15-1647-Conf, para. 14.

<sup>34</sup> See further Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute, 10 August 2016, ICC-02/04-01/15-520, which recognised the evidence elicited via Article 56 of the Statute as formally submitted for purposes of the trial.

<sup>35</sup> CLRV Response, ICC-02/04-01/15-1647-Conf, para. 15.



the original item is not in one of the allowed languages, the submitting party must generally provide a translation in English or French.

28. Item 15 of the Annex<sup>36</sup> is a document about DSM-5 criteria for PTSD. The document is entirely in Dutch, no translation in English or French is provided.
29. Item 30 of the Annex<sup>37</sup> is an article from the International Journal of Clinical and Health Psychology about forensic psychological and clinical evaluation. The article is entirely in Spanish, no translation in English or French is provided.
30. Item 112 of the Annex<sup>38</sup> is a book chapter in Portuguese, no translation in English or French is provided.
31. Item 175 of the Annex<sup>39</sup> is an item to whose submission the Defence previously objected, due to lack of a full translation.<sup>40</sup> The item was previously admitted, on condition that a translation in a working language is provided, and then withdrawn since no such translation was done. There is no indication that a translation in English or French is available now.
32. Item 190 of the Annex<sup>41</sup> is an item which is in large parts in Acholi, no translation in English or French is provided.
33. Considering Regulation 39 of the Regulations, and noting the very advanced stage of the Defence evidence presentation, the Chamber does not recognise the five items in question as formally submitted. Should the Defence wish, it can provide a translation in one of the working languages and re-submit a request for any of these items,<sup>42</sup> under the condition that it does not cause a delay in the proceedings or affect the closure of the evidence.

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<sup>36</sup> UGA-D26-0015-0323.

<sup>37</sup> UGA-D26-0015-0622.

<sup>38</sup> UGA-D26-0018-2767.

<sup>39</sup> UGA-OTP-0014-0542.

<sup>40</sup> Annex A to Defence Response to “Prosecution’s request to submit 1006 items of evidence from the ‘bar table’” (ICC-02/04-01/15-654), 7 February 2017, ICC-02/04-01/15-701-Conf-AnxA, p. 122.

<sup>41</sup> UGA-OTP-0026-0090.

<sup>42</sup> For instance, the Chamber notes, that the Defence provided a translation for items 185 and 186 of the Annex, which are both in Acholi, on 8 November 2019 (ICC-02/04-01/15-1658-Conf-AnxA).

### 3. *Other issues*

34. The Prosecution does not object to the submission of item 457 of the Annex,<sup>43</sup> but submits that it should be recognised as formally submitted in its entirety, without the exclusion of parts of it, as proposed by the Defence.<sup>44</sup> The Defence argues that the item concerns information about a person who is a Rule 68(2)(b) witness. According to the Defence, part of the item needs to be excluded since it would otherwise be inconsistent with Rule 68(2)(b) of the Rules.<sup>45</sup>
35. The Chamber notes that item 457 does not fall under Rule 68(2)(b) of the Rules, since it is not a prior recorded statement. The Defence seems to indicate that items which are related to witnesses whose testimony was introduced pursuant to Rule 68 of the Rules need to also comply with the same requirements. The Chamber notes that there is no such condition.<sup>46</sup> Accordingly, the Chamber orders that the item in question is submitted in its entirety.
36. Further, the Chamber notes that items 164, 205, 206, 258 and 438 of the Annex are already recognised as formally submitted.<sup>47</sup> Accordingly,<sup>48</sup> this part of the Request is moot.
37. Lastly, the Chamber notes that items 443 and 444 of the Annex<sup>49</sup> are translations of already submitted items. Whilst the submission of the translation is not necessary,<sup>50</sup> since the items are already recognised as formally submitted, the Chamber instructs the Registry to reflect their status as submitted in the metadata of the items in e-court.

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<sup>43</sup> UGA-OTP-0284-0715.

<sup>44</sup> Prosecution Response, ICC-02/04-01/15-1646-Conf, para. 16.

<sup>45</sup> See Annex, ICC-02/04-01/15-1637-Conf-AnxA, remarks on probative value and relevance for item 457.

<sup>46</sup> See *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Public Redacted Version of Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, ICC-01/09-01/11-1938-Red-Corr para. 33. Therein, the Chamber stated that exhibits which are used or explained by the witness in the prior recorded statement need also to be introduced pursuant to Rule 68.

<sup>47</sup> UGA-OTP-0011-0520; UGA-OTP-0138-0277-R01; UGA-OTP-0138-0279-R01; UGA-OTP-0192-0823 and UGA-OTP-0281-0018.

<sup>48</sup> See Directions on the Conduct of the Proceedings, ICC-02/04-01/15-497, para. 28, n. 20.

<sup>49</sup> UGA-OTP-0283-1470 and UGA-OTP-0283-1473.

<sup>50</sup> See Decision on Defence Request to Add 14 Items to its List of Evidence, 24 July 2018, ICC-02/04-01/15-1314, para. 8.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**INSTRUCTS** the Registry to re-classify the CLRV Response as ‘public’;

**INSTRUCTS** the Prosecution to file a public-redacted version of its response within five days of the notification of this decision;

**INSTRUCTS** the Registry to reflect in the e-court metadata of UGA-OTP-0283-1470 and UGA-OTP-0283-1473 that they are already recognised as formally submitted;

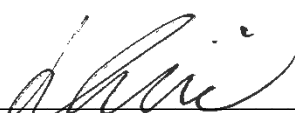
**REJECTS** the Request with regard to the items cited in footnotes 17; 19-21; 36-39; 41 and 47;

**DECIDES** that UGA-OTP-0284-0715 will be recognised as formally submitted in its entirety;

**RECOGNISES** the remaining items identified in the Annex as formally submitted; and

**ORDERS** the Registry to reflect in the e-court metadata that these items have been recognised as such.

Done in both English and French, the English version being authoritative.

  
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**Judge Bertram Schmitt, Presiding Judge**

  
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**Judge Péter Kovács**

  
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**Judge Raul C. Pangalangan**

Dated 14 November 2019

At The Hague, The Netherlands