

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/04-01/15
Date: 1 December 2016

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 Prosecution Request to Submit Interception Related Evidence

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Benjamin Gumpert

Counsel for the Defence

Krispus Ayena Odongo

Legal Representatives of Victims

Joseph Akwenyu Manoba
Francisco Cox
Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**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

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IX ('Chamber') of the International Criminal Court ('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 ('Statute') and Rules 63-64 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Prosecution Request to Submit Interception Related Evidence'.

I. Procedural History

1. On 28 October 2016, the Office of the Prosecutor ('Prosecution') requested the Chamber to recognise the formal submission of 2,507 items related to the interception of Lord's Resistance Army ('LRA') radio communications by the Ugandan government ('Request').¹
2. On 21 November 2016, the common legal representative of victims supported granting the Request ('CLR Response').²
3. The same day, the defence for Mr Ongwen responded ('Defence Response'),³ opposing the Request in its entirety.

II. Submissions, analysis and conclusions

A. Chamber's approach to consideration of relevance and admissibility of evidence

4. In its 'Initial Directions on the Conduct of the Proceedings' ('Rule 140 Decision'),⁴ the Presiding Judge set out the Chamber's approach to the consideration of

¹ Prosecution's formal submission of intercept evidence via the 'bar table', ICC-02/04-01/15-580 (with six confidential annexes). The Prosecution was granted a page limit extension of up to 35 pages for the Request. Email from Trial Chamber IX Communications to the participants, 24 October 2016 at 10:12.

² Common Legal Representative's Response to the Prosecution's formal submission of intercept evidence via the "bar table", ICC-02/04-01/15-598.

³ Defence Response to "Prosecution's formal submission of intercept evidence via the 'bar table'" (ICC-02/04-01/15-580), ICC-02/04-01/15-599.

⁴ Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497.

relevance and admissibility of evidence. The salient aspects of this approach are as follows:

- (i) The Appeals Chamber has previously determined that:

[T]he Trial Chamber may rule on the relevance and/or admissibility of each item of evidence when it is submitted, and then determine the weight to be attached to the evidence at the end of the trial [...] Alternatively, the Chamber may defer its consideration of these criteria until the end of the proceedings, making it part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person.⁵

- (ii) Following this Appeals Chamber determination, and as a general rule, the Chamber will not rule on the relevance, probative value and potential prejudice ('standard evidentiary criteria') at the point of submission. These considerations will be deferred until the point when the Chamber is deliberating its judgment pursuant to Article 74(2) of the Statute. The Chamber will consider all the standard evidentiary criteria for each item of evidence submitted during its deliberations, though it may not necessarily discuss these aspects for every item submitted in the judgment itself.⁶
- (iii) Accordingly, when the participants formally submit evidence during trial, all the Chamber will generally do is recognise their formal submission.⁷
- (iv) This said, the Chamber will rule upfront on certain issues related to the admissibility of evidence when this is deemed appropriate, particularly when procedural bars are raised which may foreclose consideration of the standard evidentiary criteria.⁸
- (v) In the exercise of its discretion, the Chamber may also exceptionally consider standard evidentiary criteria at the point of the submission of the evidence.⁹

- 5. The Chamber has already issued three decisions which recognise the submission or introduction of evidence while only examining whether any procedural bars

⁵ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, ICC-01/05-01/08-1386, OA 5 OA 6 ('Bemba OA 5 OA 6 Judgment'), para. 37.

⁶ Rule 140 Decision, ICC-02/04-01/15-497, para. 24.

⁷ Rule 140 Decision, ICC-02/04-01/15-497, para. 24.

⁸ Rule 140 Decision, ICC-02/04-01/15-497, para. 26.

⁹ See Rule 140 Decision, ICC-02/04-01/15-497, para. 26.

rendered them inadmissible.¹⁰ Broader consideration of the standard evidentiary criteria, and relevance and probative value in particular, was deferred for all the evidence recognised thus far.

6. At the outset, the Chamber must address certain general arguments of the participants concerning the submission of evidence other than through a witness, as they demonstrate some fundamental misunderstandings about the Chamber's relevance and admissibility approach in this case.
7. The Chamber emphasises that its 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.¹¹ As set out in the Rule 140 Decision, such assessments are not required by the Court's statutory scheme and are considered to be unhelpful and unwarranted.¹² Article 74(2) of the Statute stipulates that the Chamber's final judgment can be based only on evidence 'submitted and discussed' before it at the trial. Nowhere does this provision – or any other in the Court's applicable law – mandate that the evidence to be considered for the final judgment must have also been previously declared 'admitted' or that a formal procedural step of 'admission' of each item of evidence is otherwise required. Indeed, Article 69(4) of the Statute gives the Chamber discretionary power to rule on the relevance or admissibility of pieces

¹⁰ Decision on Prosecution Request to Add Items to its List of Evidence, to include a Witness on its List of Witnesses and to Submit Two Prior Recorded Testimonies under Rule 68(2)(b) and (c), 22 November 2016, ICC-02/04-01/15-600; 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. 7; Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute, 10 August 2016, ICC-02/04-01/15-520, para. 7.

¹¹ As stated in paragraph 4(iv) above, the Chamber's general approach changes when procedural bars are raised, such as objections raised under Article 69(7) of the Statute or the procedural pre-requisites contained in Rule 68 of the Rules.

¹² Rule 140 Decision, ICC-02/04-01/15-497, paras 24-25. *See also* Bemba OA 5 OA 6 Judgment, ICC-01/05-01/08-1386, para. 37; Trial Chamber VII, 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), 24 September 2015, ICC-01/05-01/13-1285, paras 9-13.

of evidence upon submission, but not the obligation to do so.¹³ Moreover, as already stated in the Rule 140 Decision, the Chamber is able to more accurately assess the relevance and probative value of a given item of evidence after having received all of the evidence presented at trial.¹⁴ Submissions proposing to condition the reception or admissibility of materials on the *prima facie* satisfaction of the standard evidentiary criteria¹⁵ are therefore inapposite.

8. Relatedly, this Chamber is not going to apply the jurisprudential requirements set out by chambers electing to do *prima facie* assessments of documentary materials prior to their 'admission'.¹⁶ These cases are only relevant to the extent they apply to the approach adopted by this Chamber, and the participants rely on these authorities for purposes irrelevant to this Chamber's approach.
9. In addition to all participants relying on cases for propositions related to *prima facie* admissibility assessments,¹⁷ the Defence cites to ICTY cases which refer to motions like the Request as a 'supplementary method of introducing evidence' to be used 'sparingly' and on an 'exceptional basis'.¹⁸
10. The Chamber highlights that the Court's statutory scheme sets no such limits on the submission of evidence other than through a witness, only providing that the

¹³ Article 69(4) of the Statute reads: 'The Court may rule on the relevance and admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence' (emphasis added).

¹⁴ Rule 140 Decision, ICC-02/04-01/15-497, para. 25.

¹⁵ Request, ICC-02/04-01/15-580, para. 9; CLR Response, ICC-02/04-01/15-598, para. 6; Defence Response, ICC-02/04-01/15-599, para. 10.

¹⁶ For examples of chambers applying such a *prima facie* assessment, see Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution's first request for the admission of documentary evidence, 19 February 2016, ICC-01/04-02/06-1181; Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Prosecution's Request for Admission of Documentary Evidence, 10 June 2014, ICC-01/09-01/11-1353.

¹⁷ Request, ICC-02/04-01/15-580, para. 9 (and corresponding footnotes); CLR Response, ICC-02/04-01/15-598, para. 6 (and corresponding footnotes); Defence Response, ICC-02/04-01/15-599, paras 10, 14-15, 26, 45-47, 50-51 (and corresponding footnotes).

¹⁸ Defence Response, ICC-02/04-01/15-599, para. 11, *citing to* ICTY, Trial Chamber, *The Prosecutor v. Radovan Karadžić*, Decision on Prosecution's First Bar Table Motion, 13 April 2010, IT-95-5/18-T, paras 9, 15; ICTY, Trial Chamber, *The Prosecutor v. Jadranko Prlić et al.*, Decision on Admission of Evidence, 13 July 2006, IT-04-74-T, page 6.

parties ‘may submit evidence relevant to the case in accordance with article 64’ and that the Chamber ‘may rule’ on its relevance or admissibility.¹⁹ The Chamber understands the ICTY jurisprudence cited, along with the Defence’s corresponding arguments,²⁰ as requiring caution when items are submitted without any corresponding witness to comment on them. Even though it must be emphasised that the statutory scheme does not require that evidence be submitted only through a witness, the Chamber is aware of the potentially prejudicial effect submitting items in this manner can have on the Defence. This is due to the Defence not necessarily having an opportunity to examine their author or source during trial. However, the Chamber is not able to assess this kind of prejudice at the outset of the trial. The ultimate prejudice which the Defence may suffer depends on the nature of the material, how the material is discussed during trial, whether the Chamber relies on it in its judgment and - if so - how it relies on it.

11. Undue prejudice determinations at the point of submission can only be done reliably for items where it is immediately apparent that they cannot be fairly relied upon for any purpose. This Chamber can always exclude such items as an exception to its general approach, and professional judges do not even need to declare such self-evidently problematic items ‘inadmissible’ in order to refrain from relying on them. The Defence always has a safeguard against any undue reliance through the requirement that the Chamber’s judgment must provide a

¹⁹ Article 69(3) and 69(4) of the Statute. Article 64 of the Statute governs the ‘[f]unctions and powers of the Trial Chamber’. See also 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. 36 (‘the Chamber emphasises that the Court’s applicable law does not require that documents be introduced only “through” a witness’); Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3), 9 June 2016, ICC-02/11-01/15-573-Red, para. 9 (‘First, it must be stated, in general, that a rule that documents can only be submitted “through a witness” has no basis in the Statute or the Rules and does not form part of the Court’s applicable law’), *decision upheld on other grounds by Appeals Chamber*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, 1 November 2016, ICC-02/11-01/15-744, OA 8.

²⁰ Defence Response, ICC-02/04-01/15-599, paras 9-13.

full and reasoned statement of how it relies upon the evidence to support its conclusions.²¹ In this context, the Chamber also reiterates that the Defence has the opportunity to advance any objections or observations on any of the evidentiary items submitted, which the Chamber will take into account in its final assessment of the evidence.

12. Finally, the Defence misapprehends the Chamber's approach when arguing that granting the Request without first considering the standard evidentiary criteria somehow contradicts the notion of giving an item-by-item assessment of the evidence.²² On the contrary, the Chamber emphasises that its approach requires an item-by-item assessment, consistent with the Appeals Chamber jurisprudence cited by the Defence.²³ The Appeals Chamber is indeed clear on this point: 'irrespective of the approach the Trial Chamber chooses, it will have to consider the relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings - when evidence is submitted, during the trial, or at the end of the trial.'²⁴ Consistent with the Appeals Chamber's jurisprudence, consideration of these criteria will be part of the Chamber's assessment of evidence when evaluating the guilt or innocence of the accused.²⁵
13. The Chamber nevertheless emphasises that, though each and every item will be considered when deliberating its judgment, the Chamber may not necessarily discuss every item in the judgment itself. Examples of when items may not be discussed in the judgment could include items which, upon consideration during deliberations, end up being assessed as: (i) going solely to points ultimately having no impact on the Chamber's essential findings or (ii) needlessly cumulative in relation to other evidence supporting these findings.

²¹ Article 74(4) of the Statute.

²² Defence Response, ICC-02/04-01/15-599, paras 6-7, 15.

²³ See paragraph 4(i) above; Bemba OA 5 OA 6 Judgment, ICC-01/05-01/08-1386, para. 53.

²⁴ Bemba OA 5 OA 6 Judgment, ICC-01/05-01/08-1386, para. 37.

²⁵ Bemba OA 5 OA 6 Judgment, ICC-01/05-01/08-1386, para. 37.

Reasoning a judgment in this manner is fully consistent with conducting an item-by-item assessment. Such reasoning is also not unique to chambers applying the same approach adopted in this case – even chambers conducting *prima facie* admissibility assessments upon submission cannot reasonably be required to explicitly articulate their ultimate relevance and probative value assessments for every submitted item in their judgments. This Chamber has adopted a general approach of not conducting *prima facie* assessments of items at the point of submission, but the Defence concerns that dispensing with such assessments means dispensing with item-by-item assessments altogether are misplaced.

B. Objections to submitted items

14. The Prosecution submits six categories of items related to the interception of LRA radio communications by the Ugandan government, indicating the relevance and probative value of each individual item in the six annexes of the Request. Each of these categories is specified below, along with the corresponding Defence objections.
15. The Defence makes the following general objections with respect to all six categories:
 - (i) Questions related to reliability and authenticity of intercepted material have not yet been answered through witness testimony.²⁶
 - (ii) Several technical and/or human factors could have introduced major gaps and errors into the intercept collection process.²⁷
 - (iii) Radio transmissions were not the only form of communications used, meaning that these materials are not a complete record of LRA communications.²⁸

²⁶ Defence Response, ICC-02/04-01/15-599, para. 17.

²⁷ Defence Response, ICC-02/04-01/15-599, paras 18-22.

²⁸ Defence Response, ICC-02/04-01/15-599, paras 23-24.

- (iv) The Prosecution's 'assertion that there is secure chain of custody is misleading and inadequate'. The Defence argues it is premature to submit the log-books, faxes and radio-recordings until the witnesses from the Gulu 4th Division intercept house testify.²⁹
- (v) Documents emanating from persons or entities involved in the events that contain opinion evidence without qualifying their authors as experts should be 'admitted with caution'. Arguing that the intercepted material does not come from a neutral and independent source, the Defence argues that these documents are not 'self-authenticating', have no extrinsic indication in them to show their origin and author and, as such, the Chamber should require that they be tendered through a witness.³⁰

1. *Category I: short-hand rough notes of LRA radio communications*³¹

16. Beyond the above, the Defence does not isolate any further specific objections to the rough notes of LRA radio communications.

2. *Category II: logbooks containing summaries of LRA radio communications*³²

17. The Defence challenges the submitted logbooks on grounds that: (i) these books do not reflect the order in which conversations occurred; (ii) these books are submitted in translation from Luo and concern extensive use of codes and proverbs; (iii) it is impossible to verify 'whether the code-breakers accurately interpreted the proverbs and broke the codes as only the end product is available to the Trial Chamber'.³³ The Defence also challenges the accuracy of these logbooks in relation to systemic issues inherent in collecting the audio recordings.³⁴

²⁹ Defence Response, ICC-02/04-01/15-599, para. 25.

³⁰ Defence Response, ICC-02/04-01/15-599, paras 26-29.

³¹ Request, ICC-02/04-01/15-580, paras 36-38; Annex A of the Request, ICC-02/04-01/15-580-Conf-AnxA.

³² Request, ICC-02/04-01/15-580, paras 39-40; Annex B of the Request, ICC-02/04-01/15-580-Conf-AnxB.

³³ Defence Response, ICC-02/04-01/15-599, paras 30-32.

³⁴ See paragraph 20 below.

3. *Category III: faxed copies of logbook entries*³⁵

18. The Defence challenges the faxed copies of logbook entries on grounds that they are 'repetitive' and could be 'cumbersome on the Trial Chamber' to work with.³⁶

4. *Category IV: intelligence reports*³⁷

19. Noting the degree of anonymous hearsay appearing in the submitted intelligence reports, the Defence argues that the probative value of these documents is outweighed by their prejudicial effect.³⁸

5. *Category V: sound recordings of LRA radio communications*³⁹

20. The Defence challenges the sound recordings of LRA radio communications on grounds that: (i) these sound recordings do not reflect entire communications, making them impossible to contextualise; (ii) the recordings submitted are incomplete, with gaps being created through 'operational limitations of the [Uganda People's Defence Force] or political decisions' or 'systemic issues' of a technical nature (including weather induced interference, power outages which prevent recording and the number of radio channels which could be simultaneously monitored).⁴⁰

6. *Category VI: miscellaneous intercept evidence*⁴¹

21. The Defence challenges these miscellaneous items on grounds that they are repetitive, have not had their relevance properly demonstrated by the Prosecution and will create an extra burden for the Defence 'while waiting for the Prosecution to identify the important portions therein'. The Defence also

³⁵ Request, ICC-02/04-01/15-580, paras 41-42; Annex C of the Request, ICC-02/04-01/15-580-Conf-AnxC.

³⁶ Defence Response, ICC-02/04-01/15-599, para. 33.

³⁷ Request, ICC-02/04-01/15-580, paras 43-45; Annex D of the Request, ICC-02/04-01/15-580-Conf-AnxD.

³⁸ Defence Response, ICC-02/04-01/15-599, paras 50-51.

³⁹ Request, ICC-02/04-01/15-580, paras 46-51; Annex E of the Request, ICC-02/04-01/15-580-Conf-AnxE.

⁴⁰ Defence Response, ICC-02/04-01/15-599, paras 35-44.

⁴¹ Request, ICC-02/04-01/15-580, paras 52-55; Annex F of the Request, ICC-02/04-01/15-580-Conf-AnxF.

argues that certain items in this batch should be denied on grounds that they could be introduced through P-256.⁴²

C. Conclusion

22. The objections raised by the Defence primarily relate to the relevance and probative value of the evidence concerned. Consistent with its general approach, the Chamber sees no reason for exceptionally considering these objections at this point in time.
23. The Defence argues that accepting these items deprives the accused of an opportunity to challenge the evidence against him.⁴³ The Chamber emphasises that deferring considerations of the standard evidentiary criteria does not deprive the Defence of this opportunity. As apparent from Section B above, the Defence is in a position to formulate challenges to the evidence submitted. The Defence also has the entirety of the trial to examine Prosecution witnesses on interception related materials, call witnesses of its own and submit evidence itself.
24. The Defence also submits that the volume of the material submitted by the Prosecution and its 'reluctance to tender specific items or even indicate the relevance of material within the sea of material it readily admits is irrelevant is prejudicial to notice and fairness'.⁴⁴ The Chamber considers these concerns to be overstated. Not only does the Prosecution give an itemised assessment of relevance and probative value, but the Prosecution's pre-trial brief⁴⁵ provides more than an adequate amount of notice as to which parts of the interception related materials are of particular importance to the Prosecution's allegations.

⁴² Defence Response, ICC-02/04-01/15-599, para. 34.

⁴³ Defence Response, ICC-02/04-01/15-599, paras 45-46.

⁴⁴ Defence Response, ICC-02/04-01/15-599, para. 48.

⁴⁵ Prosecution's Pre-Trial Brief, 6 September 2016, ICC-02/04-01/15-533.

The factual details of the confirmed charges⁴⁶ also permit the Defence to identify the portions of these materials that are the most relevant to the present case.

25. The Chamber considers that the Request can be granted in full conformity with the accused's rights related to notice and trial preparations,⁴⁷ despite the volume of items submitted. Moreover, the Chamber considers that *prima facie* rulings on the standard evidentiary criteria would not provide the Defence with any meaningful additional clarity on how the Prosecution or Chamber will ultimately rely upon the submitted evidence. Should the Prosecution seek to rely upon any submitted evidence in a manner which the Defence could not reasonably anticipate, this can be addressed by either affording the Defence an opportunity to raise further evidentiary objections⁴⁸ or in the Chamber's ultimate assessment of the potentially prejudicial effect of relying upon the evidence.
26. For these reasons, and in accordance with its general approach, the Chamber recognises the submission, not 'admission', of all items identified by the Prosecution. The Chamber will defer consideration of the Defence's various objections until the judgment and in the light of the entirety of the evidence brought before it.

⁴⁶ Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, ICC-02/04-01/15-422-Red (confidential version registered same day), pages 71-101.

⁴⁷ Article 67(1)(a)-(b) of the Statute.

⁴⁸ Rule 64(1) of the Rules provides, in relevant part (emphasis added): 'An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known'.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

RECOGNISES the items identified in Annexes A-F of the Request as 'submitted';
and

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

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



Judge Bertram Schmitt, Presiding Judge

Judge Péter Kovács

Judge Raul C. Pangalangan

Dated 1 December 2016

At The Hague, The Netherlands