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**International
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Court**

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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN*

Public

**Public Lesser Redacted Version of ‘Corrected Version of
“Defence Response to the Prosecution Application to Admit Testimony Pursuant
to Rule 68(2)(b) of the Rules of Procedure and Evidence”
(ICC-02/04-01/15-509-Corr-Red2), filed on 26 July 2016’**

Source: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby responds to the Prosecution's 'Corrected version of "Prosecution's request for introduction of previously recorded testimony pursuant to rule 68(2)(b) of the Rules"' ('Application').¹ The Defence requests Trial Chamber IX ('Chamber') to dismiss the Prosecution Application on the grounds that:
 - a. It violates Article 74 of the Rome Statute;
 - b. It violates Articles 51(4) and 67(1)(e) of the Rome Statute as being applied retroactively to the detriment of a person who was being investigated; and
 - c. It violates Articles 64(2), 67(1)(b) and 67(2) of the Rome Statute and Rules 76(3) and 77 of the Rules of Procedure and Evidence ('RPE')
2. In the alternative, should the Chamber decide that Rule 68(2)(b) is applicable to this case, the Defence maintains that the Chamber should adopt a cautious approach and evaluate each proposed witness on a case-by-case basis.

II. CONFIDENTIALITY LEVEL

3. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court, the Defence files this response as confidential *ex parte* Defence only. Issues discussed within the Response deal with an upcoming submission by the Defence and are not disclosable at this time..

¹ ICC-02/04-01/15-465-Conf-Corr and Confidential Annexes.

4. Pursuant to Regulation 23bis(1) of the Regulations of the Court, the Defence files the confidential redacted version because some of the information within this response could lead to the identification of a Prosecution witnesses/intermediaries. An unredacted confidential version shall be filed on 10 August 2016. Public redacted versions shall be filed on 27 July 2016 and 10 August 2016.

III. SUBMISSIONS

5. At the outset, the Defence denies that certain “material facts” are not in dispute.² The Defence refreshes the Chamber’s memory as to the Prosecution’s arguments contained within the Pre-Confirmation Brief, *to wit*, “Several Chambers have observed that the confirmation hearing is not a mini-trial or a “trial before the trial”; instead, the confirmation process is designed to protect Dominic Ongwen from wrongful and unfounded charges and to distinguish between those cases that should go to trial and those that should not.”³ (external footnotes in quote omitted)
6. The Defence is not required to dispute every issue which the Prosecution proffers during the confirmation process, and following the guidance of several Pre-Trial Chambers, the Defence should not to dispute every issue. Were these issue not disputed, the Defence would have agreed to these issues during the *inter partes* discussions on agreed facts, which it did not. The Defence attaches as

² See ICC-02/04-01/15-465-Conf-Corr, paras 17, 20, 25, 30, 34, 38, 42, 45, 49, 52, 57, 62, 67 69, 72, 76, 81, 85, 89, 94, 99, 104, 107, 110, 114, 118, 122 and 125.

³ ICC-02/04-01/15-375-Conf-AnxC, para. 3 (citing to fn is 2 ICC-01/04-01/07-412, para. 4; ICC-01/04-01/07-428-Corr, paras. 5-6; ICC-01/04-01/07-621, para. 66; ICC-01/04-01/07-717, para. 64; ICC-01/09-01/11-221, para. 9; ICC-01/09-02/11-321, para. 8; ICC-01/04-01/07-475, para. 68; ICC-02/11-01/11-T-11-Red-FRA, pg. 3; ICC-01/05-01/13-T-3-Red-ENG, p. 9.) (citing to fn 3 is ICC-01/04-01/06-803-tEN, para. 37; ICC-01/04-01/07-717, para. 63; ICC-01/04-01/07-428-Corr, para. 5; ICC-01/05-01/08-424, para. 28; ICC-02/05-02/09-243-Red, para. 39; ICC-02/05-03/09-121-CORR-RED, para. 31.).

Confidential Annex A its final email attachment with the original full list of proposed agreed facts.⁴

7. Secondly, the Prosecution conflates and misinterprets use and acceptance of the alleged radio intercept material by the Defence. Whilst the Defence discussed said material, it also challenged its reliability.⁵ Furthermore, P-0242's witness statement, **dated 12 May 2016**, states that the audio recordings the witness enhanced are not originals. This is a post-confirmation statement which the Defence must be allowed to question the witness to test the authenticity of the tapes.
8. The Defence requests the Chamber to disregard the statements of the Prosecution Application which are contrary to the agreed facts jointly submitted on 1 July 2016⁶ and accepted as proven by the Chamber on 19 July 2016.⁷

A. THE PROSECUTION APPLICATION IS PREMATURE AND VIOLATES THE ROME STATUTE

- i) *The Prosecution Application violates Article 74 of the Statute*

9. Article 74(2) of the Statute states:

The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on the evidence submitted and discussed before it at the trial.

10. In the first sentence, Article 74(2) requires the Chamber to base its decision on the evidence and the entire proceedings. The third sentence qualifies the first, stating

⁴ Email from Defence to Prosecution on 30 June 2016 at 14h49.

⁵ See ICC-02/04-01/15-T-23-Conf, pg. 32, lns 2-13.

⁶ ICC-02/04-01/15-487-Conf-AnxA.

⁷ ICC-02/04-01/15-500.

that the Chamber “may base its decision only on the evidence submitted and discussed before it **at the trial.**”⁸ (emphasis added)

11. The Chamber should adopt a cautious approach when interpreting Rule 68(2)(b) of the RPE in light of Article 74(2). The Chamber should take a narrow approach when interpreting the scope of the “entire proceedings”. This is evidenced by the second sentence of Article 74(2), where the Chamber is limited in its decision to the facts and circumstances of the charges. This also comports with Rule 69 of the RPE, which allow the Parties to agree on alleged facts before the trial, but not on the evidence.
12. Furthermore, Article 74(1) requires all judges of the Chamber “be present at each stage of the trial and throughout their deliberations.” As the Application pertains to “central...factual issues in the case,”⁹ all of the judges of the Chamber must rule upon the Application. If a judge of the Chamber is replaced before the opening statements, the new judge shall be deprived of deliberating and rendering a decision on the Application.
13. Finally, as elucidated in section III(A)(iii) below, the Prosecution has not finished its disclosure.¹⁰ The Defence cannot be informed as to the true state of the Prosecution’s evidence until such time that everything is disclosed.¹¹ The Prosecution disclosed on 15 July 2016 pertinent information about [REDACTED], which raises serious concerns about possible contamination of witnesses.¹² Three (3) of the ten (10) PEXO documents disclosed on 15 July 2016 were collected

⁸ Cf. ICC-01/04-01/06-2842, para. 98 and ICC-01/04-02/12-3-tENG, para. 44.

⁹ Rule 132bis(6) of the RPE. The Defence does not argue that this creates a detriment to the Accused.

¹⁰ The Prosecution’s final disclosure date is 6 September 2016.

¹¹ See ICC-01/09-02/11-622, paras 20-41 and ICC-01/09-02/11-628-Red, paras 13-31. The Defence claimed that the Prosecution withheld highly exculpatory information from the defence for nearly two years. Because of these submissions and disclosures, Prosecutor Bensouda withdrew the charges, with permission of Trial Chamber V, against Ambassador Muthaura. Trial Chamber V also ordered the Prosecution to review all of its materials to ensure that no other PEXO material was missed, ICC-01/09-02/11-728, para. 97.

¹² See UGA-OTP-0263-2689-R01. The Defence notes that the alleged issues arise in relation to P-0078, but P-0028 is also included on the list of witnesses facilitated by P-0078, found at pages 2689 and 2690. The Defence highlights that this documents was produced on 14 June 2016 (estimated date).

before Mr Ongwen surrendered,¹³ and two of those documents are related to P-0126.¹⁴ What else is left to be disclosed?

14. The Defence requests the Chamber to dismiss the Prosecution's premature Application as violating Article 74.

ii) *The Prosecution Application violates Articles 51(4) and 67(1)(e) of the Statute*

15. Article 67(1)(e) of the Statute grants the right to the Accused to examine witnesses against him and "the right to equality in manners concerning witnesses between the prosecution and the defence."¹⁵

16. Article 51(4) states that "[a]mendments to the Rules of Procedure and Evidence...shall not be applied retroactively to the detriment of the person who is being **investigated**." (emphasis added)

17. In relation to Article 51(4) of the Statute, the Appeals Chamber stated that:

'[D]etriment' within the meaning of article 51 (4) of the Statute is disadvantage, loss, damage or harm to the accused including, but not limited to, the rights of that person. In that regard, the Appeals Chamber stipulates that it is not any disadvantage caused by the amendment of a rule that is sufficient for a finding of detriment under article 51 (4) of the Statute. Detriment in the sense of article 51 (4) of the Statute needs to meet a certain threshold, which is that the overall position of the accused in the proceedings be negatively affected by the disadvantage.¹⁶

18. In its judgment, the Appeals Chamber limited its decision as to the definition of "retroactivity" to the case-at-hand, meaning the *Ruto and Sang* case.¹⁷ As the

¹³ UGA-OTP-0191-0217, UGA-OTP-0229-0600 and UGA-OTP-0263-1668. The final document does not have a complete chain of custody, but the document dates from late 2005 and the missing collection date is indicative of the pre-surrender material collected by the Office of the Prosecutor.

¹⁴ See UGA-OTP-0256-0232 and UGA-OTP-0256-0333.

¹⁵ See ICC CMN for Article 67(1)(e), written by Juan Pablo Pérez-León Acevedo and Björn Elberling, found at: <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-6/#c2138>, last accessed on 20 July 2016.

¹⁶ ICC-01/09-01/11-2024, para. 78.

¹⁷ ICC-01/09-01/11-2024, paras 80-81.

Appeals Chamber stated, “[I]n order to determine whether a procedural rule has been applied retroactively to the detriment of the accused, it is necessary to determine the point in time at which the procedural **regime** governing the **proceedings** became applicable to the parties, and in particular to the accused.”¹⁸

19. Article 51(4) specifically extends the element of detriment to persons being investigated. As noted by Judge Pangalangan’s dissent in the *Bemba et al* case, “[Article 51(4) is] not concerned about the Prosecution at all. [It is] indifferent to whether the Prosecution may bear the same burden, and [is] concerned solely on whether an impermissible burden had been shifted to the defence.”¹⁹

20. The investigation into Mr Ongwen began in 2004 with the opening of the investigation, or at the least, on 8 July 2005 with the issuance of the arrest warrant for Mr Ongwen.²⁰ This is the date which the Office of the Prosecutor began to prosecute Mr Ongwen.

21. In the alternative, should the Chamber disagree that retroactivity applies to Mr Ongwen at the instance the arrest warrant was issued, the Defence argues that retroactivity applied on 21 October 2008 when Pre-Trial Chamber II appointed counsel for the Defence to represent the rights of the Accused persons before the Court for the purpose of an Article 19 proceedings.²¹

22. On 21 October 2008, Pre-Trial Chamber II appointed Mr Jens Dieckmann as counsel for the remaining four (4) Accused persons for the purpose of a court-initiated Article 19 proceedings on jurisdiction.²² At that moment in time, the RPE applied to Mr Ongwen, even if only for a discrete issue. All suspects had a vested

¹⁸ ICC-01/09-01/11-2024, para. 80. [emphasis added]

¹⁹ ICC-01/05-01/13-1478-Anx, para. 11.

²⁰ ICC-02/04-01/15-5.

²¹ ICC-02/04-01/15-115, pg. 8.

²² ICC-02/04-01/15-115.

interest in the rights prescribed in the RPE at that time. Every subsequent change to procedure and substance of the law after this date is subject to Article 51(4).²³

23. The Defence must stress that the beginning of trial, *i.e.* the opening statements, cannot be used as a strict rule for the determination of retroactivity to the RPE. Following similar logic of the Appeals Chamber when determining the applicability of Article 24(2) to the RPE,²⁴ using the start of trial as a strict rule would negate the restriction of retroactively applying new amendments “to the detriment of the person who is being investigated or prosecuted.”²⁵

24. Turning to the second element of Article 51(4), detriment, the Chamber should follow the guidance outlined by the Appeals Chamber in paragraph 17 above.

25. Following the expansive approach, Mr Ongwen would be deprived of his rights to: 1) examine, or have examine, Prosecution witnesses pursuant to Article 67(1)(e) and the prior Rule 68(2), 2) have adequate time to prepare his defence (described in section III(A)(iii) below), 3) examine witnesses for the purpose of an Article 31(1)(d) defence²⁶ and 4) examine witnesses for the purpose of a Rule 79(1)(a) defence.²⁷

a) Article 67(1)(e)

26. Article 67(1)(e) grants Mr Ongwen the right to examine, or have examined, witnesses against him. Article 67(1)(e) is not conditioned by the RPE like Article 69(2). Article 69(2) requires personal attendance at trial, or by video/audio technology. At the minimum, Article 67(1)(e) grants the Defence the right to interview **all** witnesses after full disclosure before the testimony is admitted into evidence.

²³ The Defence notes that the Appeals Chamber decided in *Ruto and Sang* that Article 24(2) is applicable to changes in the substance of the law, see ICC-01/09-01/11-2024, paras 66-73.

²⁴ See generally ICC-01/09-01/11-2024, paras 66-73.

²⁵ Article 51(4).

²⁶ An Article 31(1)(d) defence is a right granted by the last sentence of Article 67(1)(e) of the Statute..

²⁷ A Rule 79(1)(a) defence is a right granted by the last sentence of Article 67(1)(e) of the Statute.

27. Furthermore, the prior Rule 68 required the minimum guarantees that both the Prosecution and Defence had the opportunity to examine the witness during the recorded testimony²⁸ or that the witness, present before the Chamber, does not object to the introduction of the testimony and the Parties and Chamber have the **opportunity** to examine the witness.²⁹ In both instances, the Defence has the right to examine the witness. Rule 68, as amended by the Assembly of State Parties, no longer contains the absolute right to examine the witness, and causes a detriment not unlike that of the right to examine witnesses pursuant to Article 67(1)(e).
28. As an example, P-0015 states she was present at [REDACTED] when Otti Vincent gave the orders to attack Pajule, but knows nothing of Mr Ongwen. As explained in paragraph 39 below, if she is not examined, valuable information will not be heard by the Chamber.
29. The right to a fair trial must be understood to involve a right to elicit exculpatory oral evidence where there is a reasonable expectation that a witness can do so. A failure to explore those issues is a denial of the right under Article 67(1)(e) to examine witnesses against the Accused.
30. Finally, the ICTY Appeals Chamber recognised that the right to cross-examination needed to be weighed against the fair trial right of the Accused. In its judgment in *Haraqija & Morina*, the ICTY Appeals Chamber stated:

The right to cross-examination is not absolute. The Appeals Chamber has held that ‘as a matter of principle nothing bars the admission of evidence that is not tested or might not be tested through cross-examination.’ Nevertheless, the Appeals Chamber has recognized that ‘[u]nacceptable infringements of the rights of the defence [...] occur when a conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at

²⁸ See prior Rule 68(a). The Defence notes that interviews conducted pursuant to ICC-02/04-01/15-339-Anx, paras 26-37 do not meet the criteria set out in prior Rule 68(a) because when the calling party attends the interview, the calling party is present as an observer, not an interviewer.

²⁹ See prior Rule 68(b). [emphasis added]

trial.’ Therefore, ‘[i]t would run counter to the principles of fairness [...] to allow a conviction based on evidence of this kind without sufficient corroboration.’³⁰

31. The Defence avers that the sheer volume of witness which the Prosecution seeks to introduce, 38 (or 1/3 of all “testifying” witnesses), would amount to a decision based heavily upon testimony given by witnesses who were never tested by the Defence, and would thus violate the Accused’s right to examine Prosecution witnesses.

32. Failure to grant the Defence the right to interview these witnesses violates Mr Ongwen’s right to examine these witnesses.

b) Article 67(1)(b)

33. For the Defence’s argument on Mr Ongwen’s right to adequate time to prepare his defence, see section III(A)(iii) below.

c) Article 31(1)(d)

34. Pursuant to Article 31(1)(d) and through Article 67(1)(d), Mr Ongwen has the right to present the affirmative defence of duress.

35. Several of these witnesses are “insider” witnesses, most notably P-0015, P-0028, P-0040 and P-0130. They would have valuable information as to the inner workings and practices of the LRA for the purpose of duress (among other issues). The Defence must be able to examine these, and other similar, witnesses.

36. All but one of the intercept witnesses alleged to have worked in some capacity with the alleged radio intercept material. These persons would have in-depth knowledge as to the alleged general operations of the LRA, especially to the

³⁰ ICTY: *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4-A, Judgement, 23 July 2009, para. 61, available at: http://www.icty.org/x/cases/contempt_haraqija_morina/acjug/en/090723_judgement.pdf.

beliefs and practices of the LRA in dealing with escapees, *i.e.* duress. Their knowledge will, more likely than not, bolster the Defence's duress claims.

37. Failure to grant the Defence the right to interview these witnesses violates Mr Ongwen's right to raise adequately the defence of duress.

d) Rule 79(1)(a)

38. Pursuant to Rule 79(1)(a) of the RPE and through Article 67(1)(e), the Defence is contemplating the defence of alibi for the attack on Pajule.³¹

39. Witness P-0015 alleges that she stayed with Otti Vincent during her time with the LRA, and specifically at the time of Pajule.³² The Prosecution discussed with her about Mr Ongwen by name and alleged pseudonyms.³³ If Mr Ongwen was attached to Control Altar at this time, and P-0015 travelled with Otti Vincent at this time, she might still be aware if someone was travelling with Control Altar and under arrest. She might not know Mr Ongwen by name, but she might remember someone under arrest at the time of the Pajule attack.

40. The alleged radio intercept material sheds further light on this topic. The Prosecution presented material during the Confirmation Hearing alleging that Mr Ongwen was sent to the Catholic Mission in Pajule.³⁴ The Defence countered this accusation with the ISO records of the alleged radio communication.³⁵ As discussed by P-0032,³⁶ [REDACTED]. Examining all personnel which touched and concern the creation of the log books is vital to Mr Ongwen's alibi defence for Pajule.

³¹ The Defence notes that it is still considering other locations for alibi, but it is confident for the attacks on Pajule..

³² UGA-OTP-0191-0254-R01, para. 38.

³³ UGA-OTP-0191-0254-R01, para. 40.

³⁴ ICC-02/04-01/15-T-20-Conf-ENG, pg. 75:7-8.

³⁵ ICC-02/04-01/15-T-23-Red2-ENG, pg. 32:2-8.

³⁶ UGA-OTP-0246-0003-R01, paras 40-43.

41. The Defence requests the Chamber to find that Article 51(4) disallows the application of Rule 68 as amended by the Assembly of State Parties on 27 November 2013.³⁷

iii) *The Prosecution Application violates Articles 64(2), 67(1)(b) and 67(2) of the Statute and Rules 76(3) and 77 of the RPE*

42. Article 64(2) requires the Chamber to “ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused.”

43. Article 67(1)(b) of the Statute guarantees the accused the right “[t]o have adequate time...for the preparation of the defence.” Article 67(2) requires the Prosecution to disclose potentially exculpatory or mitigating evidence.

44. Rule 76(3) of the RPE requires the Prosecution to make available all statements of testifying witnesses to the accused in a language which he fully understands and speaks. Furthermore, “as a general rule and notwithstanding Regulation 35 of the Regulations of the Court, the Single Judge direct[ed] the Prosecution to disclose all Acholi translations of statements falling under its Rule 76(3) obligations no later than three months prior to the testimony of the witness concerned.”³⁸

45. Rule 77 of the RPE imposes disclosure obligations on the Prosecution. The Chamber gave the Prosecution a disclosure deadline of 6 September 2016.³⁹

46. First, the Accused has the right to adequate time to prepare his defence.⁴⁰ The Chamber has decided that in order to fulfil this requirement, the Prosecution is to have completely reviewed the case and disclosed its evidence no later than 6 September 2016. This allots the Accused and Defence three (3) months before the start of trial to finish reviewing the disclosure and prepare for the Prosecution’s

³⁷ ICC-ASP/12/Res.7, found at, https://www.legal-tools.org/uploads/tx_ltpdb/ICC-ASP-12-Res7-ENG_01.pdf.

³⁸ ICC-02/04-01/15-457, para. 10.

³⁹ ICC-02/04-01/15-449, paras 7-8. The Defence notes that the Chamber listed some exceptions to the 6 September 2016 date, but leave of Court is required by the Prosecution after this date to rely on any such material.

⁴⁰ Article 67(1)(b) of the Statute.

case-in-chief. Thirteen (13) of the statements belonging to the Rule 68(2)(b) witnesses were disclosed between 16 May and 15 July 2016.⁴¹ These statements do not abide by the disclosure regime given by the Chamber and violates Article 67(1)(b) of the Statute for failure to allow Mr Ongwen and the Defence adequate time to prepare for these witnesses.

47. Likewise, the Prosecution has not finished its disclosure. It is wholly inappropriate at this time, before the disclosure deadline, for the Prosecution to request the introduction into evidence thirty-eight (38) witnesses' testimonies and accompanying material. The Defence noted the issue of having a complete record during the 23 May 2016 status conference and requested the Prosecution to submit the request at a later time,⁴² but the Prosecution chose not to comment on the request.⁴³ Twenty-eight (28) documents which relate to or touch and concern witnesses in the Prosecution Application were disclosed as recently as 15 July 2016.⁴⁴

48. Second, Rule 76(3) grants the right to the Accused, who only speaks and fully understands Acholi, to have the statements of the Prosecution witnesses in Acholi. The Chamber decided that translations of the statements were to be disclosed to Mr Ongwen three (3) months in advance of a witness's testimony.⁴⁵ As shown in Confidential Annex B, twenty-five (25) of the Rule 68(2)(b) witnesses do not adhere to Rule 76(3) of the RPE, and one (1) additional witness does not

⁴¹ UGA-OTP-0253-0746-R01, UGA-OTP-0264-0002-R01, UGA-OTP-0261-0333-R01, UGA-OTP-0258-0478-R01, UGA-OTP-0261-0246-R01, UGA-OTP-0261-0268-R01, UGA-OTP-0258-0723-R01, UGA-OTP-0264-0242-R01, UGA-OTP-0258-0687-R01, UGA-OTP-0260-0491-R01, UGA-OTP-0260-0498-R01, UGA-OTP-0260-0508-R01 and UGA-OTP-0264-0015-R01.

⁴² ICC-02/04-01/15-25-ENG, pg. 38:25 to pg. 39:7.

⁴³ ICC-02/04-01/15-25-ENG, pg. 39:9-10.

⁴⁴ The Defence notes UGA-OTP-0256-0232 and UGA-OTP-0256-0333 (PEXO) ; UGA-OTP-0012-0250, UGA-OTP-0018-0012, UGA-OTP-0151-0131, UGA-OTP-0207-0136, UGA-OTP-0236-0356, UGA-OTP-0244-1616, UGA-OTP-0255-0098, UGA-OTP-0255-0191, UGA-OTP-0258-0430, UGA-OTP-0261-0275, UGA-OTP-0261-0275-R01, UGA-OTP-0261-0330, UGA-OTP-0261-0331, UGA-OTP-0263-0054-R01, UGA-OTP-0263-0159, UGA-OTP-0263-0194-R01, UGA-OTP-0263-1591, UGA-OTP-0263-2289, UGA-OTP-0263-2685, UGA-OTP-0263-2689-R01, UGA-OTP-0263-2697 and UGA-OTP-0263-2727 (Rule 77); and UGA-OTP-0069-0355, UGA-OTP-0242-6808, UGA-OTP-0242-7500 and UGA-OTP-0262-0116 (Incrim). The Defence notes that these documents range from acknowledgements of receipt, to non-ICC statements, media reports, ICC statements and ICC investigation reports.

⁴⁵ ICC-02/04-01/15-457, para. 10.

adhere to the Chamber's decision. Article 64(2) requires the Chamber to conduct the trial "with full respect for the rights of the accused," and granting the Prosecution Application would violate Mr Ongwen's right pursuant to Rule 76(3).

49. Third, the Defence highlights that the statements within Confidential Annex B do not include statements given to security forces of Government of Uganda, supranational security forces (*i.e.* the AU Forces) and [REDACTED]. Whilst these statements might not have been given by the witness with the express purpose of the eventual use for an ICC case, the questioning of these persons were done with the knowledge that the statements would eventually be given to the Prosecution, and thus should be translated.⁴⁶ The disclosure procedures by these external bodies can easily be inferred by the vast amount of statements disclosed by the Prosecution which were generated after Pre-Trial Chamber II authorised the investigation into the Situation of Uganda.⁴⁷ [REDACTED],⁴⁸ [REDACTED].⁴⁹ Whether or not a MoU exists, the eventual disclosure to the Prosecution and possible use in ICC proceedings are self-evident, and thus must be translated in a language which Mr Ongwen speaks and fully understands.

50. The Defence respectfully requests the Chamber to reject the Prosecution Application because it violates Mr Ongwen's fair trial right to have adequate time for the preparation of the Defence on the grounds that the Prosecution is still disclosing incriminatory, Article 67(2) and Rule 77 material relating to the witnesses within the Application and the Prosecution has failed to comply with Rule 76(3) of the RPE for two-thirds the witnesses within the Application.

Conclusions for Section III(A)

⁴⁶ See ICC-01/05-01/13-1227, para. 9 (citing ICC-01/04-01/06-718, pg. 4).

⁴⁷ See eCourt levels 0073 through 0127.

⁴⁸ [REDACTED]

⁴⁹ [REDACTED].

51. The Defence respectfully request the Chamber to reject the Prosecution Application on the grounds that:

- a. It violates Article 74 of the Statute;
- b. It violates Articles 51(4) and 67(1)(e) of the Statute as being applied retroactively to the detriment of a person who was being investigated and would place Mr Ongwen at a serious overall disadvantage during the trial proceedings; and
- c. It violates Articles 64(2), 67(1)(b) and 67(2) of the Statute and Rules 76(3) and 77 of the RPE.

B. IN THE ALTERNATIVE, THE CHAMBER SHOULD EVALUATE EACH WITNESS ON A CASE-BY-BASE BASIS

52. If the Chamber decides that Rule 68(2)(b), as amended by the Assembly of State Parties, applies to the case-at-bar, the Defence urges the Chamber to take a cautious approach, remembering that the burden of proof for the introduction of each piece of proposed testimony is solely upon the Prosecution,⁵⁰ and evaluate each piece of proposed testimony on a case-by-case basis.⁵¹

53. Rule 68(2)(b) requires the submitting Party to demonstrate to the Chamber, *inter alia*, whether the proposed testimony:

- a. Relates to issues that are not materially in dispute;
- b. Is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts;
- c. Relates to background information;
- d. Is such that the interests of justice are best served by its introduction; and

⁵⁰ Article 67(1)(i) of the Statute.

⁵¹ ICC-01/05-01/08-1386 (OA5 OA6), para. 81.

e. Has sufficient indicia of reliability.

i) The issues are not materially in dispute

54. The Defence refers to its arguments in paragraphs 5-8 above.

ii) The proposed testimony is of cumulative or corroborative nature

55. The Defence refers to the Chamber's order of 30 May 2016 where it ordered the Prosecution to submit its final list of witnesses no later than 6 September 2016.⁵² Until such time that the Prosecution's list of witnesses becomes final, the Parties, Participants and Chamber cannot be sure that the testimonies will be of a cumulative or corroborative nature.

56. The Defence avers that the Chamber should not only take into account what the witnesses have testified to, but what issues have not been addressed within their respective testimonies. As elaborated below in paragraphs 97-103 below, government personnel working with P-0003 were not apparently questioned as to the acts and conducts of P-0003 in relation to obvious violations of security and protocol at the alleged intercept location. Questions like this, and like the one mentioned about P-0015 above, need to be asked and explained before the Chamber. Interviews of witnesses should have been broad. The Prosecution failed to conduct thorough interviews and sometimes limited the scope of interviews beyond what can be considered acceptable at the Court.⁵³

57. The Defence maintains that the Chamber should approach each testimony with caution, and question whether each witness was interviewed comprehensively or if it appears overly focused, which would result in a violation of the Prosecution's duties under Article 54(1)(a). Merely because a witness's testimony appears

⁵² ICC-02/04-01/15-449, para. 8.

⁵³ The Defence specifically notes the interview of P-0209. The interview of this witness dealt almost completely with [REDACTED].

cumulative and/or corroborative does not necessarily mean that is all the witness has to offer.

iii) The information relates to background information only

58. The Defence notes that statements which contain background information only could be admitted as prior recorded testimony under the amended Rule 68, but as the Defence has repeatedly stated in this response, the Chamber should be cautious when determining whether a testimony relates to background information only.

59. Witnesses generally respond to questions asked.⁵⁴ Some people need to be coaxed to answer a question.⁵⁵ If proper questions are not put to a witness, information other than background information could be obtained. The Chamber must question whether or not the Prosecution has asked every necessary question, especially if the proposed testimonies are those taken before Mr Ongwen surrendered. One need only read the transcripts of P-0028. He was interviewed over a decade ago. How can the Prosecution reasonably assert that his prior recorded testimony is background information only, especially since he discusses issues central to the affirmative defence of duress?⁵⁶ Only by employing a cautious approach, one which questions how the testimony was taken, will the Chamber be able to determine that each individual proposed testimony relates to background information only.

iv) Interests of justice

60. Regardless of the amended Rule 68, the interests of justice are best served by each witness testifying publicly before the Court. The Defence responds to parts of the Prosecution's list in paragraphs 14 and 15 of the Application.

⁵⁴ See UGA-OTP-0241-0546-R01.

⁵⁵ For example see UGA-OTP-0228-4513, lines 341-432 and UGA-OTP-0228-4583, lines 462-1115.

⁵⁶ See *inter alia* UGA-OTP-0217-0100, lines 93-94 and UGA-OTP-0217-0287-R01.

61. Firstly, the Chamber should proceed with caution and circumspect if applying “good trial management” in relation to the expeditiousness of the trial proceedings as a criterion pursuant to Rule 68(2)(b). The Prosecution submitted its Application on 14 June 2016, and since this date, Trial Chamber I certified an appeal pursuant to Article 82(1)(d) as to the use of “good trial management” as a criterion for admitting prior recorded statements pursuant to Rule 68(3).⁵⁷ Secondly, reducing the financial costs to the Court should never be an overriding factor when an Accused’s fair trial rights are at risk of being violated. Thirdly, issues involving witnesses missing work can be largely obviated by *viva voce* testimony *via* a video-link in Uganda, as used during the Article 56 proceedings.
62. The Chamber, when determining what the “interests of justice” represents, must keep the rights of the accused at the forefront, even when determining **appropriate** measures to protect witnesses and victims.⁵⁸

v) *The proposed testimony has sufficient indicia of reliability*

63. In paragraph 16 of the Application, the Prosecution proposes the use of the simplistic approach adopted by Trial Chamber I in the *Gbagbo and Blé Goudé* case. The Defence agrees that the approach authenticates the testimonies, but challenges the assertion that it verifies its reliability. Moreover, the standards used by Trial Chamber I in the *Gbagbo and Blé Goudé* case for the sufficient indicia of reliability are also pending before the Appeals Chamber.⁵⁹ The Defence need not go any further than the testimony given by witness P-0198 under the same conditions, yet the Prosecution admitted that material facts alleged by the witness

⁵⁷ ICC-02/11-01/15-612, para. 15.

⁵⁸ See Articles 67 and 68(1) of the Statute. The last sentence of Article 68(1) states, “[t]hese measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

⁵⁹ ICC-02/110/1-15-612, para. 24.

in her testimonies were false.⁶⁰ Further to this argument, the Defence notes P-0004⁶¹ and P-0012⁶² in the *Kenyatta* case, P-0625 of the *Gbagbo and Blé Goudé* case⁶³ and P-0159 of the *Katanga and Ngudjolo* case.⁶⁴

64. The Defence asserts that reliability is intrinsically linked to witness credibility and to the facts of the case, whether said facts are alleged by the Prosecution or Defence. Until such time the Prosecution submits its Pre-Trial Brief outlining the extent of its case, the Defence and Chamber cannot determine the reliability of the proposed testimonies.

vi) *The evaluation of whether a statement can be admitted under Rule 68 must be based upon a consideration of the whole statement*

65. The Prosecution states that it

does not seek to rely on the rule 68(2)(b) documents to prove any fact relating to the acts and conduct of the accused. Nor does the Prosecution seek to rely on the rule 68(2)(b) documents to prove a “core, and disputed” or “critical and” live” issue, or a matter that is “proximate to the accused” in the case.⁶⁵

66. The Common Legal Representative for Victims (“CLRV”) picks up this argument and seeks to bolster it through reference to a Trial Chamber VII decision.⁶⁶ Like the Prosecution, the representative submits that the Chamber should – for the purpose of its assessment of the “acts and conduct” criteria of Rule 68(2) of the Accused – disregard the full contents of the statements and only focus upon those elements for which the Prosecution puts them forward. These arguments should be disregarded as flawed for two reasons.

⁶⁰ ICC-02/04-01/15-413-Conf.

⁶¹ ICC-01/09-02/11-622, paras 23-31.

⁶² ICC-01/09-02/11-875, paras 6-10.

⁶³ ICC-02/11-01/15-T-26-ENG-Red (8 March 2016) – ICC-02/11-01/15-T-33-ENG (18 March 2016). The witness recanted a significant majority of his prior recorded statement.

⁶⁴ ICC-01/04-01/07-3223, paras 1-2.

⁶⁵ ICC-02/04-01/15-465-Conf-Corr, para. 13.

⁶⁶ ICC-02/04-01/15-505-Conf, paras 12-15, citing ICC-01/05-01/13-1430, para. 8.

67. Firstly, statements cannot be submitted piecemeal. Such an approach would lead to an artificial exercise whereby the Chamber would consider the reliability of particular sections of a statement while closing its eyes to other greater *indicia* of unreliability or interest of justice issues also contained therein for which the Prosecution did not tender the statements. The Defence notes that the witnesses signed their respective statement(s) verifying that the **entire** statement was true to the best of their knowledge, not that it was true if you removed a few paragraphs. Their verification is akin to Rule 66(1) of the RPE.
68. The legal status of the un-tendered parts would lead to absurdity and re-litigation of the Rule 68 admission. Without precise citations to precise paragraphs, the Prosecution could always claim that certain sections of the statement were accepted under Rule 68(2). For example, does the Prosecution include discussions of the LRA command and control and Mr Ongwen's position⁶⁷ as part of the "process by which his team intercepted and recorded LRA communications?"⁶⁸
69. Moreover, in the absence of calling the Witness, the Defence might need to rely upon un-tendered sections of the statements, but would presumably have a right to disavow relying upon those "acts and conduct" sections that would be prohibited under Rule 68(2)(b).
70. Secondly, the CLRV is inverting the reasoning described in the Trial Chamber VII decision. In that circumstance, a statement was ambiguous as to the transferor of money, but the Prosecution was using the statement to implicate the actions of the Accused. The admission was rejected because an ambiguous statement was being used to *prove* a less ambiguous act. Conversely, the CLRV takes this decision to mean that where statements implicate the acts and conduct of the Accused, but the Prosecution only intends the material for peripheral purposes,

⁶⁷ UGA-OTP-0150-0030-R01, paras 4-12.

⁶⁸ ICC-02/04-01/15-465-Conf-Corr, para. 135.

the Trial Chamber should only focus on the Prosecution's reasons for tendering the material and not whether the material itself directly implicates the Accused.

OBJECTIONS TO ADMISSION APPLICABLE TO ALL INTERCEPT WITNESSES

71. The Prosecution seeks to introduce the statements of 12 witnesses from Ugandan government organisations and one (1) expert witness through Rule 68(2)(b) ('Intercept Witnesses').⁶⁹ These witnesses are, broadly speaking, variously connected to the interception, processing and dissemination of processing of radio transmissions by the LRA. From disclosed evidence, interceptions were made by various arms of the Ugandan government. This includes the UPDF, local police units, the Internal Security Organisation ('ISO'), and External Security Organisation ('ESO'). For both reasons general to all witnesses, but also reasons specific to particular statements, the Defence objects to the introduction of the statements and requests the Chamber to order the attendance of the various witnesses.

i) The statements go to the acts and conduct of the Accused

72. The threshold condition of Rule 68(2)(b) of the RPE that "[t]he prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused" is not met and this alone should bar admission of these statements.

73. It is submitted, that the Intercept Witness statements are tightly connected to the underlying intercepts and supporting documentary evidence. Seeking to sever the statements from the intercepts by characterising the statements as

⁶⁹ P-0027, P-0032, P-0126, P-0291, P-0301, P-0303, P-0370, P-0384, P-0385, P-0386, P-0400, P-0242 and P-0038.

“background information”⁷⁰ downplays the fact that the statements are directed at authenticating evidence⁷¹ which the Prosecution will subsequently tender.⁷²

74. The completeness, reliability, and authenticity of that underlying evidence is directly related to these witnesses as they – after all – created it. Moreover, given that many of the intercepts were coded, and these witnesses undertook the code breaking, the relevance and probative value of that evidence is directly dependent upon the skill, knowledge, and methodology of these witnesses.

75. When the Prosecution states: “the intercept evidence in the rule 68(2)(b) documents is not directly related to the charges. The latter merely provides the background of how the intercept evidence was intercepted, recorded, reported to superiors, stored and collected by the Prosecution,”⁷³ it is misrepresenting its request. Putting aside for a moment that the statements and underlying evidence are tightly connected, as discussed further below, both the statements and some of the annexes attached to the statements contain claims that go beyond the interception process. They concern such matters as attacks on Lukodi and Odek⁷⁴ and the internal structure and command structure of the LRA.⁷⁵

76. The Prosecution pleaded that the radio intercepts provide evidence of nothing less than the defining characteristic of international crimes, namely acts committed within the context of a nexus to an armed conflict or attacks committed as part of a widespread and systematic attack on a civilian population. The Prosecution variously argued that the intercepts demonstrate individual

⁷⁰ ICC-02/04-01/15-465-Conf-Corr, paras 130-131.

⁷¹ See, for example P-303: UGA- OTP- 0258- 0723- R01, paras 38- 43; P370: UGA-OTP-0258-0687-R01, paras 30 and 55; P-384: UGA-OTP-0260-0491-R0, para. 28; P286: UGA-OTP-0260-0508-R01, paras 29-34; P-27: authenticates the Pre-Registration forms listing logbooks which are annexed to the statement; P-32: UGA-OTP-02460003-R01, paras 34 and 55 (a-k); P-303: UGA- OTP- 0258- 0723- R01, paras 38; and most of P-126’s statement is an authentication of evidence.

⁷² ICC-02/04-01/15-465-Conf-Corr, para. 131.

⁷³ ICC-02/04-01/15-465-Conf-Corr, para. 130.

⁷⁴ See para. 115 below.

⁷⁵ See para. 106, 108 and 115 below.

knowledge of the context of an armed conflict,⁷⁶ demonstrate the existence of an organisational policy,⁷⁷ the widespread and systematic nature of the attack,⁷⁸ and knowledge of that attack.⁷⁹ In addition it can be presumed that the Prosecution will seek to use the radio intercepts to establish many of the modes of liability.⁸⁰

77. The Prosecution's own words in its submissions regarding the radio intercepts on the confirmation of charges are telling, stating that, "[t][his body of intercepted communications is too voluminous and its sources too diverse to be anything other than genuine and highly probative evidence of the LRA's *words and conduct at relevant times.*"⁸¹

78. The Prosecution goes on to add that:

[The radio intercepts] offer a unique insight into the thoughts and actions of LRA commanders at a time before the threat of ICC prosecution. For example, *the Chamber can hear Dominic Ongwen's voice, recorded over 15 years ago, when he claims responsibility for the Odek, Lukodi, and Abok IDP camp attacks.*⁸²

79. It can be added that Pre-Trial Chamber II relied heavily⁸³ on this evidence to establish contextual elements of international crimes;⁸⁴ responsibility for the Pajule, Lukodi, Odek, and Abok attacks;⁸⁵ and as some of the evidential basis for the alleged gender based crimes⁸⁶ and charges related to child-soldiers.⁸⁷

80. The underlying intercept material is the institutional memory of large organisations. Through playing their part, the Intercept Witnesses acted as the

⁷⁶ ICC-02/04-01/15-375-AnxC-Red, para. 36.

⁷⁷ ICC-02/04-01/15-375-AnxC-Red, para. 42.

⁷⁸ ICC-02/04-01/15-375-AnxC-Red, para. 51.

⁷⁹ ICC-02/04-01/15-375-AnxC-Red, para. 57.

⁸⁰ ICC-02/04-01/15-375-AnxC-Red, para. 27 ("The section on intercepted LRA radio communications, [...], addresses in detail a key indicator of its organisation, its means of communicating and transmitting orders, and by inference its effective internal hierarchy, command structure, and rules.").

⁸¹ ICC-02/04-01/15-375-AnxC-Red, para. 59 (emphasis added).

⁸² ICC-02/04-01/15-375-AnxC-Red, para. 71.

⁸³ ICC-02/04-01/15-422-Conf, paras 47(iii) and 50.

⁸⁴ ICC-02/04-01/15-422-Conf, para. 60.

⁸⁵ ICC-02/04-01/15-422-Conf, paras 65, 71, 78, and 83 respectively.

⁸⁶ ICC-02/04-01/15-422-Conf, para. 136.

⁸⁷ ICC-02/04-01/15-422-Conf, para. 141.

ears and nerve pathways. It is only through their cross-examination by the Defence that the Chamber, in its pursuit of the truth, can be sure that the underlying memories have any accuracy.

ii) Consideration of the factors listed in Rule 68(2)(b) should lead to rejection of the statements

81. When set against the requirement that admission of prior recorded testimony must not be “inconsistent with the rights of the accused,” all the factors in Rule 68(2)(b)(i) RPE militate against admission of the Intercept Witness statements in varying ways.

The interest of justice

82. There are at least four reasons that consideration of the interests of justice should lead to the rejection of the admission of the Intercept Witnesses statements.

83. Firstly, the denial of a meaningful opportunity to challenge the underlying evidence. The Prosecution has declared its intention to introduce the 1819 combined audio recordings and log-books through the live witnesses it intends to call from the various Uganda government organisations or through a bar-table motion.⁸⁸

84. The Defence will seek to challenge the admission and interpretation of this evidence through reference to systematic errors⁸⁹ inherent in its collection, as well as human error. Without being able to elaborate these issues through argumentation supported by cross-examination of the witnesses, the Defence will be severely disadvantaged and thus prejudiced in its ability to substantiate its claims. Foreclosing the ability of the Defence to meaningfully challenge the underlying evidence **will not** serve the interests of justice.

⁸⁸ ICC-02/04-01/15-465-Conf-Corr, para. 131.

⁸⁹ Such as technical limitations in the interception process and gaps in the evidence as a consequent of alternative forms of communication.

85. Secondly, in its review of the statements being tendered for the purpose of responding to this motion, the Defence has identified instances which appear to indicate that material related to the statements has not been disclosed.⁹⁰ The Defence is pursuing this material *inter partes*, but should the material identified exist, it would be unfair to ask the Defence to respond to the request for admission absent full knowledge of the circumstances of the taking of the statements.

86. Thirdly, the Defence has still not been provided the RFAs which lead to the collection of the statements and underlying evidence.⁹¹ This denies the Defence an opportunity to challenge the reliability and legality of its collection.

87. Finally, there are also no compelling interests of justice not to call these witnesses. They are not victims, and coming from organisations in positions of power, they are not vulnerable. They are important and their testimony will not unduly prolong the trial, the Defence seeks to cross-examine them on focused and defined issues. Based on its current review of the evidence, the Defence envisions that cross-examination would likely take no longer than a day per witness – not gruelling cross-examinations – and perhaps less.

88. For many of the Intercept Witnesses, the Defence seeks short and focused cross-examination on a few key points. Moreover, the Defence might not oppose video-link testimony were it requested by the Prosecution; however, the fact remains that certain essential issues bare presenting as live testimony.

Cumulative and corroborative evidence

⁹⁰ The list referred to in UGA-OTP-0207-0256, para. 21; any meeting notes from the itinerary contained in UGA-OTP-0232-0938; confirmation that the faxes described at UGA-OTP-0246-0003-R01, para. 20(d) has been disclosed; disclosure of the correspondence that lead to the change in statement between UGA-OTP-0261-0353-R01 and UGA-OTP-0261-0333-R01; any meeting minutes of 15 October 2015 meeting indicated in UGA-OTP-0246-0096; and notes from any meeting associated with UGA-OTP-0249-0468. Moreover, the Defence does not appear to have access to documents that P-0303 authenticates in UGA-OTP-0249-0723-R01, paras 31-32 which raises questions as to whether the Defence has all material authenticated by the Rule 68(2)(b) witness statements.

⁹¹ The Defence notes that it is still review the last two disclosure packages from the Prosecution. The RFAs that have been seen and reviewed thus far have not been related to the material discussed within this section.

89. As outlined below,⁹² each specific statement or statements that the Prosecution seeks to admit raises novel and important exculpatory leads that the Defence must test through cross-examination. Being distinct, each of the issues described are neither cumulative nor corroborative.
90. While the obligation concerning exculpatory evidence in Article 67(2) textually relates to disclosure by the Prosecution, the right to a fair trial must be understood to involve a right to elicit exculpatory oral evidence where there is a reasonable expectation that a witness can do so. A failure to explore those issues is a denial of the right under Article 67(1)(e) to examine witnesses against the Accused.
91. If anything, cumulative and corroborative considerations also militate towards these witnesses testifying rather than the admission of their statements. Where, for example, multiple witnesses describe how weather and geography would impact upon the capacity to intercept radio signals, this naturally leads to the question of how many potentially exculpatory communications were missed.
92. Simply asking one witness for their recollection will not lead to an accurate answer as to how broad the gaps in the intercepted evidence are. Without answers from multiple witnesses, given that the events in question were over a decade ago, it will be impossible to determine an average estimated amount of missing information.
93. An example of where the statements diverge, and which calls for an explanation through cross-examination, is the times of LRA transmission. The times described vary significantly between witnesses⁹³ and a satisfactory answer is necessary to

⁹² See section 'A fair trial demands that each of the Intercept witnesses should testify to clarify and elaborate on specific elements of their statements,' below at paras 104-129.

⁹³ At 0900, 1100, and 1300h and only at other times at Kony's request according to P-303 (UGA-OTP-0258-0723-R01, para. 25); at 700, 0900, 1100, and 1300 according to P-370 (UGA-OTP-0258-0687-R01, para. 47); at 0900, 1100, 1300, and 1600 according to P-386 (UGA-OTP-0260-0508-R01, at 0511, para. 21); and at 0900, 1100, 1300, and 1830 according to P-32 (UGA-OTP-0069-0796-R01, para. 11).

consider the intercept evidence reliable since if entire transmissions were not being recorded than exculpatory transmissions could have been missed.

Reliability of evidence

94. Though the Defence does not dispute that the statements come from the individuals indicated, and in that sense the statements are authentic, the issues briefly touched upon by the witnesses raises huge questions about the reliability of the underlying evidence and thus, it is submitted, the reliability of the underlying material cannot be severed from the reliability of the statements.

95. Though there are additional issues which the Defence seeks to explore with these witnesses, again, the admission of their statements is really an issue concerning the admission of the underlying evidence. This is clear because parts of the statements of most of these witnesses concern the authentication of the evidence – where for example they say ‘that is my hand-writing on the log-book’ – or the laying of a foundation of reliability under the evidence – as for example where they say ‘yes that is a picture of where we worked and produced the evidence’.

The evidence is disputed and not merely of a background nature

96. For the reasons above,⁹⁴ it should be clear that the Intercept Witness statements do not relate “to issues that are not materially in dispute” and do not “relate to background information”. On the contrary, their statements are aimed at supporting a central component of the Prosecution’s case – the responsibility of Mr Ongwen – and touch upon evidence that is directly connected to Mr Ongwen. The Defence cannot fairly challenge the underlying evidence without eliciting testimony from these witnesses.

⁹⁴ See paras 72-80 above.

All witnesses working at the 4th Division Intercept house during P-0003's tenure should testify

97. There is a letter that was disclosed to the Defence that appears to come from P-0032 and P-0059. According to this letter, which appears to be a complaint, According to this letter, which appears to be a complaint, P-0003 does not seem to have been a good colleague to work with.⁹⁵ [REDACTED].⁹⁶ However, this behaviour does not necessarily call into question the integrity of the intercept evidence. However, this behaviour does not necessarily call into question the integrity of the intercept evidence. Inviting the public and family into a secured facility and tearing pages out of log-books does.⁹⁷

98. In the context of a non-international armed conflict,⁹⁸ inviting potential collaborators of the LRA into an important facility could lead to either the loss of evidence through simple theft, or alternatively, the mere identification of the interceptions by LRA collaborators could lead to classic military deception whereby false information is supplied to the enemy in the hopes that they will act upon it and thereby give the supplier of information a strategic advantage. The witnesses present in Gulu at that time need to account for the frequency of non-authorised individuals within the interception house.

99. Either or both P-0032 and P-0059 wrote:

11. Worst of all when [P-3] is alone in his office he tears some documents from the files. We actually do not know whether documents which are put in the record in the file become useless when the i/c of that office is either transferred or is outside on duty.⁹⁹

100. This calls into question the integrity of all of the documentary evidence from when P-0003 was working in the 4th Division intercept house. If the documents

⁹⁵ UGA-OTP-0242-0219.

⁹⁶ UGA-OTP-0242-0219.

⁹⁷ UGA-OTP-0242-0219, indicated at handwritten para. 3.

⁹⁸ ICC-02/04-01/15-422-Conf, para. 61.

⁹⁹ ICC-02/04-01/15-422-Conf, para. 61.

were torn apart and removed by P-0003 before they were faxed, then there is no redundant copy that could be present in Kampala. If documentation were destroyed while in rough note form, it would never have been entered in the log-books. A military individual who tears documents from records likely would not have any scruples about destroying rough notes. This reported bizarre behaviour on the part of P-0003 calls for an elaboration.

101. Until the Prosecution finally identifies which material from the thousands of pages of log-books and hundreds of hours of recordings it intends to rely upon, it is simply beyond the capacity of a defence team to undertake a comparison of the materials so as to identify gaps that could have been introduced by P-0003.

102. P-0032 and P-0059's letter is not dated and e-court provides no further indication of this. According to P-0386, P-0003 [REDACTED] – a critical period for the charges – [REDACTED].¹⁰⁰ According to P-0003, he refers to he refers to recording conversations in Gulu and moved into the intercept house in [REDACTED].¹⁰¹ P-0027's statement lists the personnel present in the Gulu intercept house in [REDACTED].¹⁰² Of the Intercept Witnesses whom the Prosecution seeks to tender through Rule 68(2)(b), five – P-0291, P-0301, P-0303, P-0385 and P-0386 – were supposedly present during P-0003's tenure.

103. These five witnesses should testify so to further elucidate P-0003's erratic and destructive behaviour to identify whether it could have impacted upon the reliability of the evidence.

iii) *A fair trial demands that each of the Intercept Witnesses should testify to clarify and elaborate on specific elements of their statements*

P-0027 – [REDACTED]

¹⁰⁰ UGA-OTP-260-0508, para. 20.

¹⁰¹ UGA-OTP-0246-0077-R01, paras 22 and 58.

¹⁰² UGA-OTP-0249-0444-R01, para. 18.

104. Fairness dictates that P-0027 should testify as he can provide unique insights into at least several aspects of the interception and the LRA more generally.

105. Firstly, P-0027 notes that the LRA used satellite phones, but that ISO was not able to intercept them.¹⁰³ P-0027 does not explain how he knows this. If there were extensive LRA communications that escaped interception, this limits the extent of inferences that can be drawn from the intercept evidence because it reduces the context of any given incriminatory transmission. Other ISO witnesses discuss this LRA capability, but P-0027 being in a higher position of authority can offer a more informed position.

106. Secondly, P-0027 also refers to greater informality of command structure of the LRA post-1995¹⁰⁴ and that the LRA commanders also inflated casualty counts.¹⁰⁵ If P-0027 knows this for reliable reasons, then the information is both important because the informality undermines the notion of a chain of command – which is essential to several charges and because, if LRA commanders were exaggerating and lying about their ‘successes’, this is exculpatory as may show that any alleged claims of responsibility for attacks may not in fact be accurate.

107. Thirdly, P-0027 notes that P-0386 [REDACTED].¹⁰⁶ It would be surprising to mention this if it was only minor. P-0386 was involved in the interceptions for several years and P-0386 claimed that it never impacted upon his work,¹⁰⁷ and thus the reliability of the evidence; however, given that P-0027 notes this, the Defence sees it necessary to briefly question P-0027 about how he knew this and the circumstances.

P-0032 – [REDACTED]

¹⁰³ UGA- OTP- 0249- 0444- R01, paras 15 and 29.

¹⁰⁴ UGA- OTP- 0207- 0256- R01, para. 6.

¹⁰⁵ UGA- OTP- 0207- 0256- R01, para. 16.

¹⁰⁶ UGA-OTP-0249-0444-R01, para. 18(h).

¹⁰⁷ UGA-OTP-0260-0508-R01, paras 35-36.

108. P-0032 should testify as his statements discusses substantive matters. In his second statement he outlines patterns of attacks,¹⁰⁸ the LRA command structure,¹⁰⁹ and command and control within the LRA.¹¹⁰ P-0032 also makes claims about Mr Ongwen's actions¹¹¹ making incriminatory claims that should not go unexamined.

109. He also outlines how commanders sometimes would only claim responsibility for attacks months later.¹¹² This later point is relevant to whether attack claims were accurate and is related to the question of whether commanders would take responsibility for attacks that they thought would impress Joseph Kony. These also need to be discussed to establish to what degree they impact upon the evidence.

110. P-0032 also discusses numerous indications of technical problems in the interception process¹¹³ and also human errors. In 2005, P-0032 uniquely describes how they would not record "unimportant conversations".¹¹⁴ Which is later clarified as a mistake born of a lack of orders.¹¹⁵ The Defence clearly needs to discuss with P-0032 the scope of material that was not recorded or noted in the counter-books.

111. P-0032 also uniquely describes how the LRA use letters¹¹⁶ and elaborates on the use of cell-phones¹¹⁷ to communicate. For the reasons about satellite phones described above,¹¹⁸ how P-0032 knows this and how reliable it is, is extremely important for the Defence.

¹⁰⁸ UGA-OTP-0150-0030-R01, para. 3.

¹⁰⁹ UGA-OTP-0150-0030-R01, paras 4-8.

¹¹⁰ UGA-OTP-0150-0030-R01, paras 9-12.

¹¹¹ UGA-OTP-0150-0030-R01, paras 7 and 10.

¹¹² UGA-OTP-0150-0030-R01, para. 20.

¹¹³ UGA-OTP-0246-0003-R01, para. 37.

¹¹⁴ UGA-OTP-0069-0796-R01, para. 15.

¹¹⁵ UGA-OTP-0246-0003-R01, para. 20(b).

¹¹⁶ UGA-OTP-0150-0030-R01, para. 20.

¹¹⁷ UGA-OTP-0150-0030-R01, para. 21.

¹¹⁸ See para. 105 above.

112. Finally, in his 2005 statement, P-0032 describes collective punishment¹¹⁹ and information that could be important to a duress defence such as Joseph Kony taking an interest in any defections¹²⁰ and making threats to storm a jail to collect a defecting collaborator.¹²¹ Developing these elements of P-0032's statement merit P-0032 testifying as he clearly can testify to many exculpatory matters.

P-0126 – [REDACTED]

113. P-0126 worked with the Special Branch of the Ugandan police. Though the Prosecution claims that "P-0126, P-0125 and P0370 provide similar and detailed testimony about the interception process",¹²² it fails to mention that P-0126 has extensive experience in gathering information from human sources, and at relevant times, the LRA.¹²³ If his statement is admitted, fairness dictates that this should not preclude the Defence from calling this witness on other matters.

P-0291 – [REDACTED]

114. Unique to the Intercept Witnesses, P-0291 says in his statement that between LRA transmissions, the radio was left on stand-by mode whereby it did not receive signals or make noise.¹²⁴ P-0291 also describes manually operating the Sony recorder¹²⁵ as does P-301.¹²⁶ Yet, P-0027 claims that the recorder was voice operated.¹²⁷ The image of the recorder¹²⁸ is not of a high enough quality to be able to identify the model number and confirm P-0027's claim which appears to contradict that of his staff. Not only does P-0291's statement call into question the reliability of P-0027's statements, but it calls into the reliability of what was

¹¹⁹ UGA-OTP-0150-0030-R01, para. 27.

¹²⁰ UGA-OTP-0150-0030-R01, para. 28.

¹²¹ UGA-OTP-0150-0030-R01, paras 21-22.

¹²² ICC-02/04-01/15-465-Conf-Corr, para. 128.

¹²³ UGA-OTP-0253-0764-R01, para. 28.

¹²⁴ UGA- OTP- 246- 006 para. 36.

¹²⁵ UGA- OTP- 246- 006 para. 38.

¹²⁶ UGA- OTP- 0249- 0423- R01 para. 42.

¹²⁷ UGA-OTP-0207-0256-R01, para. 10.

¹²⁸ UGA-OTP-0244-3324

collected – in particular whether the interception was continuous or human operated and thus prone to human error is extremely important for testing the reliability of the underlying material.

P-0301 – [REDACTED]

115. The Prosecution also seeks to tender an annex to P-0301's statement that contains a report on the attack on Odek.¹²⁹ This annex allegedly lists the names of the killed and abducted. Additionally it attributes Mr Ongwen as the commander responsible. P-0301's statement also attributes Mr Ongwen as the person responsible for the Lukodi attack.¹³⁰ This conclusion is arrived at through P-0301's discussions with a witness just after the attack.

P-0303 – [REDACTED]

116. P-0303 worked both in the intercept house and later in Kampala. Of particular interest to the Defence is the fact that P-0303 was asked by P-0027 to seek out tapes from the time-period of 2002-2005.¹³¹ P-0303 was only able to find 53 tapes. That is 53 tapes for approximately 1460 days of interceptions. This is despite the fact that other witnesses have claimed that often a tape was filled per day¹³² and on busy days¹³³ sometimes three tapes would be produced. This raises questions about why, if P-0303 made a thorough search, the Defence has been subsequently disclosed 178 recordings originating from P-0027, but still furthermore, why only 46 tapes are attributed to P-0303 in e-court and where the other roughly minimum 1200 recordings are.

117. Such a simple set of unexplained contradictions raises enough questions about the storage, transmission, possible political interference, and processes

¹²⁹ OTP-UGA-0249-0438.

¹³⁰ UGA- OTP- 0249- 0423- R01, para. 60.

¹³¹ UGA- OTP- 0258- 0723- R01, para. 40.

¹³² UGA-OTP-0264-0015-R01, para. 39.

¹³³ UGA- OTP- 0249- 0423- R01, para. 41.

concerning the recorded material to merit examining all the Intercept Witnesses, and particularly P-0303.

P-0370 – [REDACTED]

118. P-0370 was a police officer who directly monitored LRA communications. Firstly, P-0370 explains that the radio they used was also used for police communications¹³⁴ which means that transmissions may regularly have been missed. Secondly, P-0370 makes no mention of TONFA codes, only that the LRA used “parables” to communicate.¹³⁵ The absence of mention of this is conspicuous given the mention throughout the rest of the evidence. Finally, P-0370 is the only witness who mentions a 0700 in the morning transmission time. Establishing the accuracy of this statement – especially given that his superior claims that the radios were only monitored from 0900 to 1700¹³⁶ – is a very important exculpatory fact for the Defence as it would prove a potentially tremendous gap in collection.

P-0384 – [REDACTED]

119. P-0384 was familiar with direction finding, but also worked in but also worked in ISO radio interception.¹³⁷ He is thus a witness who can provide insight into both bodies of evidence. He authenticates material. He is able to speak about the process of disseminating the intercepts from both the Gulu and Kampala perspective.¹³⁸

P-0385 – [REDACTED]

120. P-0385 should testify because may be able to add clarity to the issue concerning P-0003 above.

¹³⁴ UGA-OTP-0258-0687-R01, at 0692, para. 31.

¹³⁵ UGA-OTP-0258-0687-R01, para. 50.

¹³⁶ UGA-OTP-0253-0764-R01, para. 43.

¹³⁷ UGA-OTP-0260-0491-R01, para. 20.

¹³⁸ UGA-OTP-0260-0491-R01, para. 21.

P-0386 – [REDACTED]

121. P-0386 authenticates a record found in UGA-OTP-0242-5078 at 5095. That evidence is important to the defence as it claims to indicate Mr Ongwen's movements around important dates. It also possibly mentions another Prosecution, witness P-0040, for which it is trying to tender Rule 68 evidence.

P-0400 – [REDACTED]

122. P-0400 was a UPDF soldier who worked in the the intercept house in Gulu between 2003-2004.¹³⁹ P-0400 is the only witness to describe the 0800 in the morning unit report of the LRA.¹⁴⁰ According to him this was "08:00 hours was a report from units of the LRA to the KONY about each unit's activities for the past 24 hours."¹⁴¹ Such information is potentially highly material or exculpatory for the Defence. Not being able to establish the frequency of this transmission would prejudice the Defence.

123. Moreover, he worked under witness P-0003, thus he should be called as a live witness to testify about P-0003 alleged actions.

P-0038 – [REDACTED]

124. P-0038 worked in the legal section of the [REDACTED] during the temporal jurisdiction. He is and was the liaison with the ICC Prosecution in 2004. He was involved in an assessment of relevance of evidence prior to its transmission to the ICC.¹⁴²

125. P-0038 estimates that about 5% of intercepts were not transmitted or were lost.¹⁴³ He identifies this through missing dates in the evidence and attributes it to

¹³⁹ UGA-OTP-0264-0015-R01, paras 26-34

¹⁴⁰ UGA-OTP-0264-0015-R01, para. 42.

¹⁴¹ UGA-OTP-0264-0015-R01, para. 43.

¹⁴² UGA-OTP-0069-0784-R01, para. 11.

¹⁴³ UGA-OTP-0069-0784-R01, para. 15.

technical problems or detection by the LRA. While at the time he attributed it to technical errors and the LRA attempting to avoid interception, in the time since 2005, he may have come to a better appreciation of why this gap exists in the interception evidence which is a reason for him to testify.

126. P-0038 describes a search for audio tapes involving “six key incidents involving the LRA that are currently be investigated by the ICC.”¹⁴⁴ He claims that the study was undertaken to identify both incriminatory and exculpatory information. It is, however, unclear which incidents he was concerning himself with and moreover this was prior to the increase in charges against Mr Ongwen in 2015.

127. P-0038 was also involved in the sifting of documentary evidence transferred to him after found in the aftermath of victories over the LRA.¹⁴⁵ Once again, P-0038 claims that he used common sense, however, the Defence should be permitted to examine him as his understanding of relevance may differ from the Defence strategy. This is a particularly acute issue as there is no indication that P-0038 has any particular training in criminal defence and indeed it was not until 2014¹⁴⁶ that he appears to have received training in public international law – let alone international criminal defence.

128. P-0038 states that he would not permit “radio Message Books” to be released in their entirety and insisted that they be reviewed for relevancy.¹⁴⁷ These were reviewed by a member of the Prosecution; however, this was before additional charges were added for Mr Ongwen. Given this, the Defence should at least be entitled to ask P-0038 about the content of these message books.

¹⁴⁴ UGA-OTP-0069-0784-R01, para. 22.

¹⁴⁵ UGA-OTP-0069-0784-R01, paras 23-45.

¹⁴⁶ UGA-OTP-0244-0912-R01, para. 16.

¹⁴⁷ UGA-OTP-0244-0912-R01, para. 46.

129. P-0038 searched for lists of material he provided to the Prosecution, but was unable to find one.¹⁴⁸ Until all evidence is disclosed, the Defence will not be able to be sure whether there are any further issued which need to be challenged.

OBJECTIONS TO THE ADMISSION OF INSIDER WITNESSES

P-0028 – [REDACTED]

130. The Defence asserts that in the interest of justice, P-0028's statements cannot be introduced through Rule 68(2)(b). Firstly, P-0028 states he was a close advisor to Joseph Kony [REDACTED].¹⁴⁹ His knowledge of Joseph Kony's spiritual powers, which P-0028 states that he believes Kony was endowed with the Holy Spirit,¹⁵⁰ and the type of punishment that Kony meted out for disobedience would be well-known to him. In fact, P-0028 noted that several cases of collective punishment occurred during his tenure with the LRA¹⁵¹ and that Kony killed people for questioning his ability to talk to the Holy Spirit.¹⁵² This type of punishment and belief system, where an entire village would be destroyed because someone refused to follow orders and fled from the LRA, is central to the development of the defence of duress.

131. In terms of background information and cumulative/corroborative testimony, the Defence agrees that P-0028's testimony is important.¹⁵³ As a matter of fact, P-0028 would be the best first-hand person to question on these topics. P-0028 is [REDACTED]. He was a senior advisor to Joseph Kony.¹⁵⁴ He does not corroborate other's testimony, the testimony of others corroborates his.

¹⁴⁸ UGA-OTP-0244-0912-R01, para. 18.

¹⁴⁹ UGA-OTP-0217-0075-R01, lines 650-694.

¹⁵⁰ UGA-OTP-0217-0125-R01, lines 194-205.

¹⁵¹ UGA-OTP-0217-0287-R01, lines 508-538.

¹⁵² UGA-OTP-0217-0125-R01, lines 226-249. In relation to this statement, P-0028 states that he witnessed such acts of punishment "thousands of times".

¹⁵³ ICC-02/04-01/15-465-Conf-Corr, para. 165.

¹⁵⁴ UGA-OTP-0217-0075-R01, lines 638-646.

[REDACTED].¹⁵⁵ It is completely unthinkable that the Prosecution does not want him to come and testify considering that until his capture, [REDACTED].

132. Finally, P-0028's testimony goes further than the alleged crime of persecution, it goes to the heart of the entire case. His testimony relates to material issues which are in dispute. As written above, P-0028's statement goes directly to the material elements of the Defence's case of duress. He has direct knowledge of Joseph Kony and the fear he propagated throughout the LRA.

P-0040 – [REDACTED]

133. Witness P-0040's testimony should not be allowed under 68(2)(b) as his statement goes directly to the acts and conducts of the accused, alleging that Mr Ongwen was ordered to participate in the attack on Lukodi.¹⁵⁶ P-0040's testimony addresses issues that are materially in dispute, namely whether Mr Ongwen was involved in the attack at Lukodi.¹⁵⁷ P-0040 also strongly believes, as is seen in his testimony, that no one was allowed to abduct women or distribute them besides Kony and that neither the man nor the woman could dispute Kony's decision without risking death, meaning that Mr Ongwen would not have had the authority to either choose to abduct women, distribute them or avoid a forced marriage.¹⁵⁸

134. P-0040's evidence is not merely cumulative and corroborative. As someone who stood up to Kony multiple times,¹⁵⁹ he has a very unique and individualised perspective. Thus far, he is the only person that the Defence has found that has alleged to dispute Kony's edicts routinely who was not an advisor to Kony.

¹⁵⁵ [REDACTED].

¹⁵⁶ UGA-OTP-0209-0569, lines 692-732.

¹⁵⁷ UGA-OTP-0209-0569, lines 692-732.

¹⁵⁸ UGA-OTP-0209-0762, lines 571-828.

¹⁵⁹ UGA-OTP-0209-0436, lines 173-178.

135. P-0040 does not simply provide background information. Since his statement concerns crucial aspects of the Prosecution case, he should testify *viva voce*. In the over 600 pages of testimony, while P-0040 provides background on LRA customs, from forced marriages¹⁶⁰ to the abduction of children¹⁶¹ and the chain-of-command,¹⁶² he also provides key details as to the orders given for Mr Ongwen to lead the attack on Lukodi¹⁶³ and that the LRA did not have a real chain-of-command.

136. The introduction of P-0040's statements are not in the interests of justice because he often repeats things he heard, even since leaving the bush, to the effect that the interviewers needed to consistently verify how he knew information,¹⁶⁴ which makes it impossible to surmise for things that were not clarified how P-0040 knew them without the opportunity to ask.

137. Finally, P-0040's testimony is unreliable. P-0040 claims [REDACTED]¹⁶⁵ and was subsequently demoted for his outspoken condemnation of Kony.¹⁶⁶ [REDACTED].¹⁶⁷ He also often has issues recalling dates to the point where even the investigators question the accuracy of the timeline.¹⁶⁸ Further, he brought notes to the interview at which his statement was taken that had dates already noted down.¹⁶⁹

138. Following this logic, it is clear that P-0040's testimony does not meet the standards required to be admitted under 68(2)(b).

P-0015 – [REDACTED]

¹⁶⁰ UGA-OTP-0209-0762, lines 571-828.

¹⁶¹ UGA-OTP-0209-0436, lines 337-372.

¹⁶² UGA-OTP-0209-0461, lines 643-903.

¹⁶³ UGA-OTP-0209-0569, lines 692-732.

¹⁶⁴ UGA-OTP-0209-0461, lines 632-635.

¹⁶⁵ UGA-OTP-0209-0877, line 102.

¹⁶⁶ UGA-OTP-0209-0436, line 187.

¹⁶⁷ UGA-OTP-0209-0406, lines 482-485.

¹⁶⁸ UGA-OTP-0220-0678, lines 467-500.

¹⁶⁹ UGA-OTP-0209-0436, lines 687-714.

139. P-0015's testimony relates to issues which are materially in dispute. P-0015 states that Otti Vincent "sent people from Control Altar to attack Pajule, with Raska Lukwiya leading the group."¹⁷⁰ She states that this happened at 19h00 hours on 9 October 2003, and was sure of the time because P-0015 looked at her watch.¹⁷¹ She also allegedly heard that Otti Vincent called someone and informed them that the people sent with Raska Lukwiya would be at the barracks around 20h00 that evening.¹⁷² Her account of when material issues happened does not comport with the Prosecution's case theory that Pajule was attacked around 05h00 or 06h00.

140. Furthermore, as the Prosecution has failed to point out, there is an inconsistency between P-0015's two statements. P-0015 stated that she had not heard of Dominic Ongwen in her first statement,¹⁷³ but states otherwise in her second statement to the Prosecution, saying "I have heard of Dominic Ongwen, but I never saw him. I have heard of Odomi and even saw him but I cannot remember where this was."¹⁷⁴ Considering that Mr Ongwen and Odomi are one in the same person, why was this not discussed further in the second witness statement, or at the least, an explanation as to why her second statement differed from the first?

141. Finally, P-0015 should be required to testify because the interest of justice is best served by allowing the Defence to examine her about Mr Ongwen's alibi defence. P-0015 travelled with Otti Vincent during the time before and after Pajule. The Prosecution alleges that Mr Ongwen travelled with Control Altar at this time. The Defence asserts that Mr Ongwen was arrested at this time, and P-0015 might have noticed this, even though she might not have known Mr Ongwen. Arrestees travelled with the group, but were kept under close

¹⁷⁰ UGA-OTP-0043-0131-R01, para. 87.

¹⁷¹ UGA-OTP-0043-0131-R01, para. 87.

¹⁷² UGA-OTP-0043-0131-R01, para. 89.

¹⁷³ UGA-OTP-0043-0131-R01, para. 101.

¹⁷⁴ UGA-OTP-0191-0254-R01, para. 40.

supervision. People generally knew when someone was arrested, for it was one mechanism to strike fear in others to ensure compliance and curtail escapes.

P-0130 – [REDACTED]

142. P-0130 was abducted on [REDACTED].¹⁷⁵ He was within the LRA for [REDACTED].

143. P-0130 was allegedly at the RV point before the attack. His alleged assignment was to [REDACTED].¹⁷⁶ The witness testimony states that, “[a]ll of use there, **and all of the fighters who went to Pajule camp**, were from Trinkle.”¹⁷⁷ This is a strong statement, especially since the Prosecution alleges during the Confirmation hearing that people from other brigades participated in the attack.

144. Furthermore, just as P-0015, witness P-0130 does not appear to have been questioned about whether anyone was arrested by Otti Vincent at the time. This potential information goes to the heart of the Defence’s alibi defence.

145. Admitting this statement without granting the Defence the right to examine the witness would lead to a serious miscarriage of justice by denying Mr Ongwen his right to the defence of alibi. Furthermore, unlike as the Prosecution has written, P-0130’s testimony does not actually corroborate the testimonies of others as he alleges only one brigade participated in the attack.

OBJECTIONS TO THE ADMISSION OF NON-INSIDER PAJULE WITNESSES

P-0007 – [REDACTED] & P-0008 – [REDACTED]

¹⁷⁵ UGA-OTP-0191-0272, paras 12-15.

¹⁷⁶ UGA-OTP-0191-0272, paras 44-45.

¹⁷⁷ UGA-OTP-0191-0272, para. 45.

146. P-0007 [REDACTED]¹⁷⁸ and P-0008 [REDACTED].¹⁷⁹ These persons [REDACTED].¹⁸⁰

147. P-0007 and P-0008 [REDACTED]. [REDACTED], hence these are the only records about several different charges alleged against Mr Ongwen¹⁸¹ Accepting these testimonies and records, without allowing the Defence the right to examine the witnesses, would be a grave injustice.

148. Furthermore, the testimonies and records do not relate to background information, the testimonies and records are primary sources of information.

149. Finally, pertaining to P-0007 only, the proposed witness states that the records [REDACTED] about the Pajule attack were not created until late June 2004.¹⁸² Further questioning as to the methodology and why P-0007 waited until after the ICC-OTP investigation [REDACTED].

P-0047 – [REDACTED]

150. P-0047 appears to be the only UPDF soldier which the Prosecution intends to call as a witnesses in relation to the attack on Pajule, and not the aftermath. As a trained soldier, his assessment of the attack contains more detailed than lay witnesses.

151. P-0047 also discussed issues related to P-0009 and his alleged collaboration with the LRA,¹⁸³ which the Defence argued that P-0009 was a collaborator at the Confirmation Hearing.¹⁸⁴

¹⁷⁸ UGA-OTP-0147-0214-R01, para. 29.

¹⁷⁹ UGA-OTP-0137-0002-R01, para. 7.

¹⁸⁰ UGA-OTP-0137-0002-R01, para. 9 and UGA-OTP-0147-0214-R01, para.

¹⁸¹ P-0047 also mentions that the LC3 should have made records, but these records appear to be absent from the Prosecution's proposed evidence. See UGA-OTP-0027-0177-R01, para. 123 for P-0047's statement about the recordkeeping.

¹⁸² UGA-OTP-0147-0214-R01, para. 34.

¹⁸³ UGA-OTP-0027-0177-R01, paras 119-121.

¹⁸⁴ ICC-02/04-01/15-T-223-Red2-ENG, pg. 30:6-20.

P-0061 – [REDACTED]

152. P-0061's statement is only partly corroborative. He speaks about hearing that Charles Tabuley was present at Latanya Hill, even though not being directly told this "fact".¹⁸⁵ The other two commanders he remembered had grey hair.¹⁸⁶

153. P-0061's reliability also comes into question. He speaks of one of the leaders being Otti Lagony.¹⁸⁷ Otti Lagony died in the late 1990s and obviously could not give orders.

P-0084 – [REDACTED]

154. The Prosecution requests P-0084's statement be admitted without information related to Mr Ongwen in paragraph 71 of his statement and one page of his report created after the Pajule attack.¹⁸⁸ To disallow this information is a severe miscarriage of justice.

155. P-0084 collected and wrote [REDACTED].¹⁸⁹ His testimony [REDACTED] leaves open the possibility that Mr Ongwen did not participate in the attack. Mr Ongwen is only mentioned in one (1) paragraph of his testimony, which states that Mr Ongwen was at the RV point.¹⁹⁰ P-0084 later lists names of persons involved in the attack, and Mr Ongwen's name is missing [REDACTED].¹⁹¹ This information came from P-0009. Further questioning is required about the full extent of his investigation.

156. Further questioning of the witness is needed to verify specifics about the information in found in paragraphs 71 and 128. This also calls into question the

¹⁸⁵ UGA-OTP-0144-0043-R01, para. 29.

¹⁸⁶ UGA-OTP-0144-0043-R01, para. 31.

¹⁸⁷ UGA-OTP-0144-0443-R01, para. 71.

¹⁸⁸ ICC-02/04-01/15-465-Conf-Corr, para. 40.

¹⁸⁹ See UGA-OTP-0069-0416.

¹⁹⁰ UGA-OTP-0144-0443-R01, para. 71.

¹⁹¹ UGA-OTP-0144-0443-R01, para. 128..

credibility and veracity of P-0009, who is alleged to have been a collaborator of the LRA and who gave conflicting statements in 2005 and 2015 [REDACTED].¹⁹²

157. Failure to allow the Defence to examine P-0084 to confirm or deny issues about his investigation, and about the location of Mr Ongwen during the attack, would result in a miscarriage of justice because it would deny Mr Ongwen the opportunity to present an alibi defence for Pajule and test the credibility of a key Prosecution *viva voce* witness.

OBJECTIONS TO THE ADMISSION OF LUKODI WITNESSES

P-0017 – [REDACTED]

158. P-0017 is precluded from admission under Rule 68(2)(b) because his evidence relates to the acts and conduct of Mr Ongwen. The jurisprudence from this Court and the *ad hoc* tribunals clearly indicates that exhibits associated with the prior recorded statements are also admissible so long as the witness uses or explains them in the prior recorded testimony, and particularly when these are necessary to read and understand the prior recorded testimony being introduced.¹⁹³ Such exhibits accompanying transcripts form an inseparable and indispensable part of the testimony and can be admitted.¹⁹⁴ In the present case, the Prosecution has disclosed over 400 documents relating to P-0017, mostly witness statements and other evidence collected during the investigation of the attack on Lukodi.

¹⁹² P-0009's [REDACTED].

¹⁹³ ICC-01/09-01/11-1938-Corr-Red2, para. 33.

¹⁹⁴ *Prosecutor v Delic*, No. IT-04-83-PT, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter (9 July 2007), pg. 4, available at: <http://www.icty.org/x/cases/delic/tdec/en/070709c.pdf>; *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 bis (22 August 2008), para. 21, available at: http://www.icty.org/x/cases/milan_lukic_sredoje_lukic/tdec/en/080822a.pdf; *Prosecutor v Dordjevic*, No. IT-05-87/1-T, Decision on Prosecution's Motions for Admission of Evidence Pursuant to Rule 92 ter (10 February 2009), para. 5, available at: <http://www.icty.org/x/cases/djordjevic/tdec/en/090210.pdf>; *Prosecutor v Karadzic*, No. IT-95-5/18-T, Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 quater (20 August 2009), para. 7, available at: <http://www.icty.org/x/cases/karadzic/tdec/en/090820a.pdf>. See also *Prosecutor v Popovic et al*, No. IT-05-88-T, Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis (12 September 2006), para. 25, where the Court held that documents attached to Rule 92 bis written statements will be admitted to allow full evaluation of the statement, available at: <http://www.icty.org/x/cases/popovic/tdec/en/060912.pdf>.

159. Some of these statements link Mr Ongwen to the attack.¹⁹⁵ His statement and the investigation report cannot be read in isolation without the accompanying statements. As an example, paragraph 215 of his statement states that he was able to identify the attackers as LRA rebels from among others, an interview with a witness who identified them as such and even provided names of some of their commanders. P-0017 therefore talks about critical and live issues whose proof must be admitted using viva voce testimony and do not fall within the purview of Rule 68(2)(b).

160. In addition, the interests of justice are better served if P-0017 testifies in person. His report speaks to various issues which are key to understanding the dynamics of this conflict. As an example, one of the documents which was used as a template to other investigations appears to suggest that initially, the Barlonyo attack was not committed by the LRA but by other forces.¹⁹⁶ If this is indeed the case, the witness is therefore important in explaining the role played by the UPDF in the investigations since he mentions their presence in his statement at paragraph 16.

161. Further, as the Prosecution acknowledges, P-0017 is a police detective who investigated the attack on the Lukodi Camp. What the Prosecution omits to add is that he was in charge of this investigation, as well as the investigations on the attacks on [REDACTED] where he drafted the “Investigation Plan” and “Operation Order”.¹⁹⁷ These documents formed the template used for all the investigations, including Lukodi. For a complete picture on the investigations, the Defence will seek to elicit further information about the methodology used, the chain of custody of the evidence collected, the role of the UPDF in the investigations, and other critical and live issues in the case. This therefore makes admission of his testimony under Rule 68(2)(b) against the interests of justice.

¹⁹⁵ See UGA-OTP-0023-0183.

¹⁹⁶ See UGA-OTP-0024-0002.

¹⁹⁷ See UGA-OTP-0036-0007-R01, paras 17, 36, 47, 50, 51 and 52.

P-0026 – [REDACTED]

162. The Defence seeks a short interview with P-0026 in the presence of the Prosecution before P-0026's statement is admitted into evidence. Whilst the Defence challenges the applicability of Rule 68(2)(b) to these proceedings, this statement almost meets the requirements of the new rule. The Defence wishes to discuss with P-0026 about possible government investigations, or lack thereof of as is statement in the testimony,¹⁹⁸ at the hospital after the attack.

P-0035 – [REDACTED]

163. P-0035 was a member of the UPDF during the Lukodi attack. He states that the Lukodi attack happened some time from 20-22 May 2004,¹⁹⁹ which is different than that alleged by a vast majority of the witnesses, and is not corroborative of the date of the attack. He stated the date range even though the Prosecution questioned him [REDACTED].²⁰⁰ In the face of an obvious error, P-0035 suggests that the attack could have happened on the same date which [REDACTED].

164. Additionally, the Chamber must not allow the Prosecution to remove pertinent information from the case file by not allowing the introduction into evidence piecemeal testimonies. P-0035 stated that he heard Raska Lukwiya commanded the attack,²⁰¹ and that Mr Ongwen "was around".²⁰² He does not know what role, if any, Mr Ongwen might have played in the attack.

165. P-0035 does give background information, but the information is not necessarily corroborative of others. Furthermore, the interests of justice require that the witness is examined by the Defence to determine the apparent change-in-

¹⁹⁸ UGA-OTP-0069-0018-R01, para. 51.

¹⁹⁹ UGA-OTP-0036-0082-R01, para. 34.

²⁰⁰ See UGA-OTP-0023-0137-R01.

²⁰¹ UGA-OTP-0036-0082-R01, para. 67.

²⁰² UGA-OTP-0036-0082-R01, para. 68.

heart of the abductees and why Mr Ongwen is now being blamed for an attack which he did not order or command.

P-0036 – [REDACTED]

166. Simply put, P-0036 performed autopsies on bodies at Lukodi [REDACTED]. P-0036's information is not corroborative, it is original material. He was part of the official investigation and the Defence has the right to question the witness on the material which he collected, which the Prosecution seeks to admit. The Defence notes that the Prosecution attempts to admit 102 documents through this witness, which includes approximately 69 photographs and 25 post-mortem reports.²⁰³ The admission of such evidence, without granting the Defence the right to examine the witness, is highly prejudicial and against the interests of justice.

P-0060 – [REDACTED]

167. P-0060's was [REDACTED]. He understands the layout of the camp. No other Prosecution witness which is provisionally intended to be a *viva voce* witness has information as to the camp administration system,²⁰⁴ camp registration system²⁰⁵ and the operations of the individual zones in the camp.²⁰⁶

168. His evidence also states that the attack took place on 20 May 2004,²⁰⁷ which is in contrast to the fact and circumstances of the case as defined by the Confirmation Decision.

169. Finally, the Prosecution seeks to introduce official camp records through P-0060.²⁰⁸ There is no mention of the procedures and protocols used to create these

²⁰³ See ICC-02/04-01/15-465-AnxA-Corr, pgs 10-15.

²⁰⁴ UGA-OTP-0069-0034-R01, paras 28-35.

²⁰⁵ UGA-OTP-0069-0034-R01, paras 36-41.

²⁰⁶ UGA-OTP-0069-0034-R01, paras 42-45.

²⁰⁷ UGA-OTP-0069-0034-R01, para. 52.

²⁰⁸ ICC-02/04-01/15-465-AnxA-Corr, pg. 18.

reports,²⁰⁹ and states that some of the books are missing.²¹⁰ The Defence requests to examine this witness, among other things, as to the protocols and procedures to create, authenticate and store the materials as it appears that standard procedures for the creation and storage of government or government-like documents were not followed.

170. Failure to allow the Defence to examine the witness on these records is highly prejudicial and against the interests of justice. Furthermore, since the witnesses testimony as to the date of the attack is in contrast to the facts and circumstances of the case, the Defence must be able to test the knowledge of the witness himself.

P-0185 – [REDACTED] & P-0196 – [REDACTED]

171. There are several troubling discordances between P-0185's statement [REDACTED]²¹¹, his statement [REACTED]²¹², the PROSECUTION screening notes about P-0185 from [REACTED]²¹³, and the witness statement²¹⁴ and PROSECUTION screening note²¹⁵ of his wife, P-0195.

172. Firstly, P-0185's first statement²¹⁶ occasionally conflicts with his second.²¹⁷ Even though he states he only gave the highlights of the attack in the first statement, which was given right after the attack, it seems very unlikely that he would have omitted so many details. For instance, he stated that he had first tried to escape, but had been locked in the house [REDACTED], and had finally managed to escape a bit later whilst the LRA rebels were looting food in the house.²¹⁸ Nevertheless, in the second statement, he said he tried to escape, was

²⁰⁹ UGA-OTP-0069-0034-R01, paras 70-84.

²¹⁰ UGA-OTP-0069-0034-R01, para. 84.

²¹¹ UGA-OTP-0023-0143.

²¹² UGA-OTP-0233-1020-R01.

²¹³ UGA-OTP-0233-1119-R01.

²¹⁴ UGA-OTP-0233-1046-R01.

²¹⁵ UGA-OTP-0233-1309-R01.

²¹⁶ UGA-OTP-0023-0143.

²¹⁷ UGA-OTP-0233-1020-R01.

²¹⁸ UGA-OTP-0023-0143, pg. 0143.

caught by the LRA during his second attempt, and was about to get killed when he fought his way out of the house and escaped.²¹⁹ The second statement also says he was shot at by the LRA,²²⁰ and that he was injured [REDACTED].²²¹ None of this appears in his first statement. The gap between the two versions is too important for anyone to rely upon these statements alone.

173. In spite of these discordances between P-0185 statements, his second statement perfectly corresponds to his wife's, P-0195, statement. One can notice that P-0185 gave his interview on [REDACTED],²²² while P-0195 gave [REDACTED].²²³ This interval could have given them the time to collude and agree on a similar statement. P-0185's statement modifications and questionable reliability allows us to wonder whether this happened or not, and should also allow us to hear them both talk and be questioned about these events, which will not be possible if their statements are admitted pursuant to Rule 68(2)(b).

174. P-0185 also states that he was told by [REDACTED], a former LRA soldier, that Lukodi was attacked by the LRA groups named "Stockio", Gilva and "Codoum".²²⁴ Condoom is the former name of the Sinia brigade, but the use of this name stopped around 1990/1991. If ever Condoom, or Sinia brigade, was around Lukodi for the attack of May 2004, it is a line-of-questioning which must be explored by the Defence. Yet, the Common Legal Representative submits that the documents admitted under rule 68(2)(b) go to "proof of a matter other than acts and conduct of the accused" and "the Prosecution does not intend to rely on said documents to prove the alleged conduct of Mr Ongwen."²²⁵ Consequently, P-0185 should not be admitted as a witness pursuant to Rule 68(2)(b), but should instead be heard during trial.

²¹⁹ UGA-OTP-0233-1020-R01, paras 16-17.

²²⁰ UGA-OTP-0233-1020-R01, para .17.

²²¹ UGA-OTP-0233-1020-R01, paras 17-18.

²²² UGA-OTP-0233-1020-R01, pg. 1020.

²²³ UGA-OTP-0233-1046-R01, pg. 1046.

²²⁴ UGA-OTP-0233-1020-R01, para. 27.

²²⁵ ICC-02/04-01/15-505-Conf, para. 3.

175. Finally, Mr Ongwen is not mentioned once in any of P-0185's statements,²²⁶ P-0195's statement²²⁷ and Prosecution screening note²²⁸. However, the Prosecution screening note about P-0185²²⁹ says he was at the rebels resting place in ABUCWINYE, GWENDIA, where P-0195 went as an abductee²³⁰. According to P-0185, P-0195 was told by people that Dominic Ongwen told the abductees they were lucky because everyone should have been killed.²³¹ This was confirmed to P-0185 later by LRA returnees who knew Mr Ongwen.²³² P-0195 did not know the name of the place where the resting camp was, but P-0185, who never went there, did.²³³ Also, the fact that this note holds this information, while the concerned witness, who clearly mentions the presence of two (2) commanders at this resting place,²³⁴ has not once talked about encountering Mr Ongwen, raises an issue about the credibility and reliability of P-0185's and P-0195's witness statements. And again, since the documents admitted under Rule 68(2)(b) should go to "proof of a matter other than acts and conduct of the accused" and "the Prosecution does not intend to rely on said documents to prove the alleged conduct of Mr Ongwen²³⁵, P-0185 and P-0195 should not only be admitted as a witness pursuant to Rule 68(2)(b) but should instead be heard during trial.

P-0196 – [REDACTED]

176. The Defence argues against the introduction of P-0196's testimony without being able to examine or interview him first.

²²⁶ UGA-OTP-0023-0143.

²²⁷ UGA-OTP-0233-1046-R01.

²²⁸ UGA-OTP-0233-1309-R01.

²²⁹ UGA-OTP-0233-1119-R01.

²³⁰ UGA-OTP-0233-1119-R01, pg. 1124.

²³¹ UGA-OTP-0233-1119-R01, pg. 1125.

²³² UGA-OTP-0233-1119-R01, pg. 1124.

²³³ UGA-OTP-0233-1046-R01, paras 30-31.

²³⁴ UGA-OTP-0233-1046-R01, paras 37, 39, 41 and 42.

²³⁵ ICC-02/04-01/15-505-Conf, para. 3.

177. P-0196 is unsure of the attackers, and only “knows” who allegedly attacked Lukodi IDP Camp because of hearsay evidence.²³⁶ P-0196 also adds very little to the substance of what happens. He was seven (7) years old at the time,²³⁷ and there is very little in the statement to determine if the witness is testifying to what he saw, or if his memory is based on hearsay evidence.

OBJECTIONS TO THE ADMISSION OF ODEK WITNESSES

P-0268 – [REDACTED] & P-0274 – [REDACTED]

178. The Prosecution again seeks to admit statements from husband and wife through Rule 68(2)(b).

179. P-0274 was the Odek IDP Camp Commandant.²³⁸ As with other camp commandants, the Defence argues that it must be allowed to examine P-0274. As it appears, P-0274 performance as commandant was lacking. He could not state with reasonable accuracy the population of the camp²³⁹ and did not compile lists of abducted people after the attack.²⁴⁰ It appears that the only “records” P-0274 took were entries into a **personal** journal/diary.²⁴¹ As these “records” are far from official and not created in the normal course of business, the Defence must be allowed to examine P-0274 on the content of the journal/diary and challenge its admission as a “record” since he was Odek IDP Camp Commandant. P-0274 should be called to testify before the Court.

180. P-0268’s screening note states that her child was killed during the attack,²⁴² but states in her testimony that her child died about two (2) weeks later.²⁴³ The Defence feels that for the purpose of this witness, it would be satisfactory to

²³⁶ UGA-OTP-0233-1061-R01, para. 18.

²³⁷ UGA-OTP-0233-1061-R01, 0233 (date of birth).

²³⁸ UGA-OTP-0248-0013-R01, para. 19 and UGA-OTP-0244-3375-R01, para. 15.

²³⁹ UGA-OTP-0244-3375-R01, para. 16.

²⁴⁰ UGA-OTP-0244-3375-R01, para. 45.

²⁴¹ UGA-OTP-0244-3375-R01, para. 46.

²⁴² UGA-OTP-0241-0200-R01, pg. 0202.

²⁴³ UGA-OTP-0248-0013-R01, paras 56-57.

conduct an interview with the witness and the Prosecution before admitting her testimony.

P-0270 – [REDACTED]

181. P-0270 speaks to her “knowledge” of the attack being carried out, stating she heard people crying that ‘Ongwen today has finished the people of Odek. Ongwen has killed us today.’²⁴⁴ Additionally, P-0270 recanted the date of the attack from when she had her screening interview and her interview for a statement. The Defence feels that for the purpose of this witness, it would be satisfactory to conduct an interview with the witness and the Prosecution before admitting her testimony.

P-0325 – [REDACTED]

182. P-0325 was [REDACTED].²⁴⁵ As the Prosecution has consistently done, it seeks to introduce [REDACTED] through Rule 68(2)(b). [REDACTED]? These types of focused questions need to be asked by the Defence. Defence feels that for the purpose of this witness, it would be satisfactory to conduct an interview with the witness and the Prosecution before admitting his testimony.

OBJECTIONS TO THE ADMISSION OF ABOK WITNESSES

P-0287 – [REDACTED]

183. The Defence argues that P-0287’s testimony should not be admitted. The Defence has serious doubt as to the witness’s ability to recall the event with such specificity. P-0287 was [REDACTED] old during the alleged attack at Abok IDP Camp. Even though the substance of the statement consisted of only three (3)

²⁴⁴ UGA-OTP-0241-0168-R01, para. 33.

²⁴⁵ UGA-OTP-0264-0242-R01, para. 16.

pages, one can easily reason why there is great circumspect as to whether the witness truly remembers the incidents at hand, or if it is a story made of hearsay.

P-0279 – [REDACTED]

184. Once the Defence receives an Acholi translation of the testimony, the Prosecution Pre-Trial Brief, its final List of Witnesses, and Mr Ongwen has had proper time to review the statement to advise Counsel, the Defence feels that for the purpose of this witness, it would be satisfactory to conduct an interview with the witness and the Prosecution before admitting her testimony.

P-0282 – [REDACTED]

185. Once the Defence receives an Acholi translation of the testimony, the Prosecution Pre-Trial Brief, its final List of Witnesses, and Mr Ongwen has had proper time to review the statement to advise Counsel, the Defence feels that for the purpose of this witness, it would be satisfactory to conduct an interview with the witness and the Prosecution before admitting his testimony.

P-284 – [REDACTED]

186. Once the Defence receives an Acholi translation of the testimony, the Prosecution Pre-Trial Brief, its final List of Witnesses, and Mr Ongwen has had proper time to review the statement to advise Counsel, the Defence feels that for the purpose of this witness, it would be satisfactory to conduct an interview with the witness and the Prosecution before admitting his testimony. The Defence specifically would like to question the witness about his discussion with

[REDACTED], considering only the name Okello Kalalang was mentioned about this attack, and not Mr Ongwen's.²⁴⁶

IV. RELIEF

187. For the reasons described above, the Defence respectfully requests Trial Chamber IX to:

- 1) to dismiss the Prosecution Application on the grounds that:
 - a) It violates Article 74 of the Rome Statute;
 - b) It violates Articles 51(4) and 67(1)(e) of the Rome Statute as being applied retroactively to the detriment of a person who was being investigated; and
 - c) It violates Articles 64(2), 67(1)(b) and 67(2) of the Rome Statute and Rules 76(3) and 77 of the Rules of Procedure and Evidence ('RPE')
- 2) In the alternative, should the Chamber decide that Rule 68(2)(b) is applicable to this case, the Defence requests the Chamber to reject the admission each of the tendered statements for the varied and particular reasons outlined above.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 2nd day of December, 2016

At Kampala, Uganda

²⁴⁶ UGA-OTP-0244-1180-R01, para. 45.