

**Cour
Pénale
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**International
Criminal
Court**

Original: English

No.: **ICC-02/04-01/15**

Date: **8 November 2019**

TRIAL CHAMBER IX

Before:

**Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul C. Pangalangan**

SITUATION IN UGANDA

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

Public

Public Redacted Version of ‘Defence Requests to Add Eleven Items to its List of Evidence and Submission of Prior Recorded Testimony of UGA-D26-P-0036 pursuant to Rule 68(2)(a) of the Rules of Procedure and Evidence’, filed 28 October 2019

Source: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby requests from Trial Chamber IX ('Chamber'):
 - a. The addition of UGA-OTP-0244-0007-R01, UGA-OTP-0244-0018-R01, UGA-OTP-0244-0040-R01, UGA-OTP-0244-0059-R01, UGA-OTP-0244-0075-R01, UGA-OTP-0244-0094-R01, UGA-OTP-0244-0103-R01, UGA-OTP-0244-0122-R01, UGA-OTP-0244-0142-R01, UGA-OTP-0244-0161-R01 and UGA-OTP-0244-0181-R01 ('OTP Transcripts') to the Defence's List of Evidence ('LoE'); and
 - b. The submission into evidence the prior recorded testimony of UGA-D26-P-0036 ('D-0036' or 'Witness') pursuant to Article 69(2) of the Rome Statute and Rule 68(2)(a) of the Rules of Procedure and Evidence ('RPE').
2. The Defence requests the submission into evidence the prior recorded testimony listed in Confidential Annex A ('Witness Testimony'). The Defence notes that all documents listed in Confidential Annex A have been available to the Office of the Prosecutor ('Prosecution') on or before 4 June 2018.¹
3. Witness D-0036's evidence is highly relevant, probative and will greatly assist the Court to establish the truth. As the Defence seeks the introduction of the prior recorded testimony pursuant to Rule 68(2)(a), the Defence argues that it is immaterial that the Witness speaks about the alleged acts and conduct of Mr Ongwen. What is material is the fact that the evidence provided by the Witness relates to and impacts temporal time frame of the case from 2002-2005.

II. CONFIDENTIALITY

4. Pursuant to Regulation 23 *bis*(1) of the Regulations of the Court ('RoC'), the Defence files this request and its annex as confidential as it contains information about a witness who has not yet testified. A public redacted version shall be filed in due course.

¹ The Defence notes that UGA-OTP-0284-0703 was disclosed on 9 August 2018, and that it was created by the Office of the Prosecutor on 28 June 2018 (not by D-0036), but the original document from which this investigation report came was date 9 July 2015.

III. BACKGROUND

5. On 22 November 2016, the Chamber delivered a decision allowing the Prosecution to add 407 items to its list of evidence and two witnesses to its list of witnesses.² The Chamber stated that Regulation 35 of the RoC was not applicable to the addition of items and witnesses to the Prosecution's lists.³ It wrote that, "any request to add further items to the List of Evidence is not a request pursuant to Regulation 35 of the Regulations but a request for leave from the Chamber to add items, in accordance with the 30 May Decision."⁴ The Chamber confirmed later that "the terms of the 30 May Decision and the Chamber's legal application of it above apply equally to the context of adding witnesses."⁵
6. On 2 December 2016, the Chamber further delineated the standard applied on 22 November 2016 after a request from the Prosecution.⁶ The Chamber noted that it would determine whether the additional items (and/or witnesses) would "cause[] an undue prejudice to the procedural rights to the Defence."⁷ Relevant factors include "the extent to which the requested addition is opposed by the Defence, the time when the addition is sought, the nature and amount of the material concerned, the intended purpose for the Prosecution's requested reliance on such material as well as its prospective significance in light of the charges brought against the accused and the rest of the available evidence."⁸
7. On 13 October 2017, the Chamber issued its 'Preliminary Directions for any LRV or Defence Evidence Presentation' whereby it indicated that "[w]ithin three weeks from notification of the Prosecution's notice" of closing its case, the Defence must provide (i) its final lists of evidence and witnesses; (ii) certify that all necessary witness information forms have been completed and given to the VWU; (iii) provide anticipated testimony summaries for all witnesses; (iv) complete disclosure of all items it intends to use during its evidence presentation (to the extent not already disclosed); and (v) request any protective measures or relief under Rule 68 of the Rules.⁹

² ICC-02/04-01/15-600.

³ *Ibid.*, paras 14 and 22.

⁴ *Ibid.*, para. 1.

⁵ *Ibid.*, para. 22.

⁶ ICC-02/04-01/15-619, para. 5.

⁷ *Ibid.*, para. 10.

⁸ *Ibid.*

⁹ ICC-02/04-01/15-449, para. 7.

8. On 6 March 2018, following Defence submissions relating to time and resources, the Chamber modified the 13 October Schedule noting “[i]n order to protect the rights of the accused to a fair trial and adequate time and facilities to prepare its defence, the Chamber hereby modifies the deadline provided for in paragraph 7 of the Preliminary Directions and orders the Defence to provide the required information by 31 May 2018.”¹⁰
9. On 24 May 2018, the Chamber granted a Defence email request to modify the 31 May deadline. The request was made pursuant to Regulation 35 of the RoC and founded upon delays caused by computer service problems. The Chamber noted “that the requested extension is minimal and that the request is unopposed.”¹¹ In granting the two day extension, it noted that “[d]ue to the fact that 2 June 2018 is a Saturday, this pushes the due date for the information required by directions -1021, para. 6 to Monday, 4 June 2018.”¹²
10. On 4 June 2018, the Defence notified the Chamber of its List of Witnesses (‘LoW’) and LoE.¹³ The Witness appears at number 18 on the LoW.¹⁴ Eight of the twenty Witness’s prior recorded testimony appears at numbers 43-48 and 301-302.¹⁵ The Defence did not deem it necessary to include the OTP Transcripts as the Witness agreed to testify orally [REDACTED].
11. On 21 August 2019, the Chamber ordered, “[t]o the extent possible, the parties and participants are hereby ordered to file any requests related to evidence at this stage of the proceedings by 30 September 2019.”¹⁶
12. On 10 September 2019, after a request from the Defence for reconsideration of the 21 August 2019 order related to evidentiary matters,¹⁷ the Chamber confirmed its previous order, stating “that the Order Setting Deadline clearly sets out that the 30 September 2019 date should be respected ‘[t]o the extent possible’.”¹⁸

¹⁰ ICC-02/04-01/15-1199-Red, para. 81.

¹¹ Email from Trial Chamber IX, ‘RE: Defence Request for a Two Day Extension for the 31 May 2018 Deadline,’ received 24 May 2018.

¹² *Ibid.*

¹³ This was in compliance with ICC-02/04-01/15-1021.

¹⁴ ICC-02/04-01/15-1272-Conf-AnxA.

¹⁵ ICC-02/04-01/15-1272-Conf-AnxB.

¹⁶ ICC-02/04-01/15-1570, para. 7.

¹⁷ ICC-02/04-01/15-1576.

¹⁸ ICC-02/04-01/15-1591, para. 5. [Citation omitted] [Emphasis added]

13. On 15 October 2019, D-0036 informed the Defence [REDACTED] that he no longer wished to testify, but that the Defence could use his prior recorded testimony as evidence if it desired to do so.

IV. SUBMISSIONS

A. Request to Add the OTP Transcripts to the Defence's List of Evidence

14. The standard outlined by the Chamber applicable on whether to allow the addition of evidence to a party's or participant's list of evidence is noted above in paragraph 6.

i. The time at which the addition is sought

15. The present request comes after the expiry of the deadline set by the Chamber for the submission of material to the LoE. As the Defence thought that the witness would testify *via* video-link before the Chamber, the inclusion of the OTP Transcripts were unnecessary on 4 June 2018.
16. The Defence has exercised all due diligence in getting the Witness to testify. The Defence notes that it is making this request almost immediately following the notification from the Witness that he would not testify live, but that the Defence could use his prior recorded testimony if it desired. Had this been notified to the Defence on 5 June 2018, the Defence would have made this request at that time. With the utmost respect, the Defence avers that the time at which the addition is sought should be interpreted relative to when the Witness notified the Defence of his changed intentions and not the 4 June 2018 deadline.

ii. The nature of the material concerned

17. The OTP Transcripts are prior recorded testimony of the Prosecution's interview with the Witness from [REDACTED]. The OTP Transcripts were conducted under Rule 112 conditions.¹⁹ While the Witness's waiver pursuant to Rule 112(1)(b) does not appear in the material disclosed by the Prosecution, the waiver was read to the Witness and signed as read

¹⁹ See UGA-OTP-0244-0007-R01 and UGA-OTP-0244-0018-R01. The Defence notes that while the waiver of the Witness's rights does not appear within the material disclosed by the Prosecution, the Rule 112(1)(b) waiver was read to the Witness and it is clear from UGA-OTP-0224-0018-R01 that he signed it.

in UGA-OTP-0244-0018-R01.²⁰ The Witness was also given a chance to clarify anything which he spoke about to the Prosecution Investigation Team at the end of his interview.²¹

18. The OTP Transcripts are prior recorded testimony of the Witness's time in the LRA. Notably, the prior recorded testimony of the OTP Transcripts was recorded before the Defence's interviews with the Witness. As such, the Prosecution interviewed the Witness in July 2015, the Defence interviewed the Witness in March 2016, the Prosecution invariably conducted a debriefing meeting with the witness in March 2016 and the Defence conducted a final interview of the Witness in December 2017.²²
19. Finally, the Defence notes that the Witness [REDACTED].
20. The Defence argues that the OTP Transcripts are an integral part of the Witness's prior recorded testimony. As such, the Defence requests the OTP Transcripts to be added to its LoE.

iii. The amount of material concerned

21. The OTP Transcripts consists of 11 transcripts amounting to 192 pages, 181 pages which are prior recorded testimony.²³ The amount of material concerned is minimal, especially when one considers that the Prosecution's bar table motions contained 3513 items (not pages).²⁴ The amount is minimal and has been in the possession of the Prosecution since July 2015. As the Prosecution took the prior recorded testimony, and until 15 October 2019 he was supposed to testify, the amount of material is negligible and does not prejudice the Prosecution.

iv. The intended purpose and prospective significance in light of the charges brought against the accused and the rest of the available evidence

22. The OTP Transcripts allow the Chamber to have a full picture of the Witness's prior recorded testimony. As noted above and below, the Defence seeks to submit into evidence all prior recorded testimony of the Witness, not merely the Defence prior recorded testimony. The

²⁰ UGA-OTP-0244-0018-R01, p. 0020, ln. 47 to p. 0021 ln. 88.

²¹ Rule 112(1)(d) of the RPE. See UGA-OTP-0244-0184-R01, p. 0186, lns 66-68 and p. 0195, lns 354-357.

²² UGA-D26-0022-0153 and UGA-D26-0022-0165.

²³ The Defence notes that the first page of every transcript of prior recorded testimony is a cover-page.

²⁴ See ICC-02/04-01/15-580 (with annexes) and ICC-02/04-01/15-654 (with annex).

Defence states that as such, it would be in the interest of justice to allow the addition of the OTP Transcripts to the Defence's LoE.

23. The Defence notes that the Witness is [REDACTED].²⁵ The Witness starting [REDACTED].²⁶ The Witness discussed with the Defence about Mr Ongwen during his prior recorded testimony in March 2016. What the Defence did not ask, as the Prosecution already had in July 2015, related to Mr Ongwen's alleged involvement in the Lukodi attack. The Prosecution questioned the Witness about Lukodi, and the Witness stated:

I personally went and questioned Dominic whether he went to Lukodi. He told me he never reached Lukodi. He said the preparation; the order to go to Lukodi came from Kony. Not from him. And even him, he never went, he was not there personally. I asked him many times whether he was near Lukodi. He told me he was very far, he was far from Lukodi. That is what he kept replying. [REDACTED]. And he kept replying he was not present in Lukodi, he did not organise going to Lukodi but this was Kony's plan. This is the reply he kept giving me. I was...this is the reply. The reply would come from his mouth directly, not that I overheard it from somebody.²⁷

24. The Defence notes that this is not the only conversation the Witness has with Mr Ongwen. [REDACTED].²⁸ Furthermore, while also explored in the Defence's interview, the OTP Transcripts contain highly relevant material related to the duress emplaced upon the Witness.²⁹
25. [REDACTED]. The Witness gives significant detail into the LRA structure, but as with other witnesses, also stated that:

If Kony makes a decision to send an order to a commander who is far away from him he would use his authority and communicate directly to that command. Even to send information to a battalion commander, you would exclude all of the channels and communicate directly to the battalion commander.³⁰

[REDACTED].³¹

²⁵ UGA-D26-0011-0555, p. 0563-0564.

²⁶ UGA-D26-0011-0555, p. 0563, ln. 275.

²⁷ UGA-OTP-0244-0018-R01, p. 0036, lns 588-611.

²⁸ UGA-OTP-0244-0018-R01, pp 0037-0038, lns 634-661.

²⁹ UGA-OTP-0244-0018-R01, p. 0024, lns 177-186.

³⁰ UGA-OTP-0244-0059-R01, p. 0073, lns 458-462.

³¹ UGA-OTP-0244-0040-R01, pp 0051-0052, lns 352-398. The Defence notes that the Witness did not say that Matata died, but that he was replaced. Other evidence on record shows Matata died. See ICC-02/04-01/15-T-72-CONF-ENG,

26. The Witness also noted in his prior recorded testimony the deaths of senior LRA persons proximate to and within the jurisdiction of the Court. While some of these persons have been discussed by many people, the Defences notes that the Witness recalls the following:

- a. Charles Tabuley – Division Commander – died in October/November 2003.³²
- b. John Bokelo (aka Bukello) Matata – Deputy to Kony – replaced by Otti Vincent.³³
- c. Nyeko Tolbert Yardin (aka Yadin) – Chief of General Staff – died in 2004.³⁴
- d. Matiya Owor Lakati – Deputy CGS – died in 2004/05.³⁵
- e. Opoka Jacob – Director of Intelligence – died in 2004/05.³⁶
- f. Ociti Jimmy – Chief of Personal Administration – died at the end of 2003 or beginning of 2004.³⁷

These names are in addition to those discussed during the Witness's prior recorded testimony with the Defence, *to wit*, Otti Lagony, Okello Can-Odonga, Otti Vincent, Ben Acellam, Adjumani and Otim Alfred.³⁸

27. The examples noted above are only a few examples of the plethora of information contained within the prior recorded testimony in the OTP Transcripts. While a small amount of the information is repetitive, much of it is not. [REDACTED]. The OTP Transcripts complete the circle of the LRA and Mr Ongwen, and will greatly assist the Chamber in determining the truth.

v. *Requested relief*

28. The Defence respectfully requests the Chamber to allow the Defence to add the OTP Transcripts to its list of evidence.

p. 62, lns 15-23; ICC-02/04-01/15-T-240-CONF-ENG, p. 43, lns 8-10; ICC-02/04-01/15-T-121-CONF-ENG, p. 50, lns 7-16; and ICC-02/04-01/15-T-199-CONF-ENG, p. 12, lns 7-17.

³² UGA-OTP-0244-0040-R01, pp 0050-0051, lns 307-318.

³³ UGA-OTP-0244-0040-R01, pp 0050-0051, lns 366-383.

³⁴ UGA-OTP-0244-0040-R01, p. 0055, lns 484-501.

³⁵ UGA-OTP-0244-0040-R01, pp 0055-0056, lns 511-535.

³⁶ UGA-OTP-0244-0059-R01, pp 0061-0062, lns 40-81.

³⁷ UGA-OTP-0244-0059-R01, p. 0067, lns 242-263.

³⁸ UGA-D26-0011-0579, pp 0588-0591, lns 272-378.

B. Request to Submit the Witness Testimony Pursuant to Rule 68(2)(a) of the Rules of Procedure and Evidence

29. Pursuant to Rule 68(2)(a) of the RPE, the Defence requests that the Witness Testimony be submitted into evidence. As the Witness Testimony meets the criteria outlined by the Chamber as prior recorded testimony,³⁹ there exists no procedural bar to its submission into evidence.

30. Rule 68(1) states:

When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraphs 2 and 4, and after hearing the parties, allow the introduction of previously recorded audio or video testimony of a witness, *or the transcript or other documented evidence of such testimony*, provided that this would not be prejudicial to or inconsistent with the rights of the accused and that the requirements of one or more of the following sub-rules are met. [Emphasis added.]

31. Rule 68(2)(a) states:

If the witness who gave the previously recorded testimony is not present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony in any one of the following instance: (a) Both the Prosecutor and the defence has the opportunity to examine the witness during the recording.

32. Article 69(2) of the Rome Statute states:

The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, *as well as the introduction of documents or written transcripts*, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused. [Emphasis added.]

33. The Defence advises that the Chamber take a liberal approach in its interpretation of Rule 68(2)(a)'s requirements. The Chamber should consider, *inter alia*, whether:

- a. Both Parties had a chance to examine/interview the Witness;
- b. The submission into evidence of the Witness Testimony is consistent with the Chamber's obligation to conduct a fair and expeditious trial;
- c. The Accused received Acholi versions of the prior recorded testimony; and

³⁹ ICC-02/04-01/15-596-Red, para. 9.

d. A declaration before a certifying officer is required.

34. The Witness Testimony meets the criteria outlined in Rule 68(2)(a) for submission into evidence, as explained below, and thus should be submitted into evidence.

i. *The submission into evidence of the Witness Testimony does not prejudice the rights of the accused to examine the Witness*

35. Article 69(2) and Rule 68(1) use the exact same language when referring to prejudice, that the introduction of the transcripts or other documented evidence is “*not be prejudicial to or inconsistent with the rights of the accused.*”⁴⁰

36. Article 68(1)(e) of the Rome Statute grants Mr Ongwen the right, in full equality:

To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of the witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute.

37. While the Defence admits that the Prosecution did not submit testimony from other witnesses pursuant to Rule 68(2)(a), the Prosecution did submit transcripts *via* Rule 68(2)(b) and (c) of the RPE.⁴¹ The Defence did not get to examine these witnesses. This is not the case for D-0036.

38. The Prosecution conducted an extensive interview from [REDACTED] July 2015.⁴² During this interview, the Witness was advised of his rights and understood that the OTP Transcripts may be used in the case of *The Prosecutor vs Dominic Ongwen* at the International Criminal Court.⁴³

39. In reaction to the information contained within the prior recorded testimony of the OTP Transcripts, the Defence requested an interview pursuant to ICC-02/04-01/15-339-Anx.⁴⁴ The Witness consented to the interview and the interview took place [REDACTED] March

⁴⁰ The Defence notes that this was done intentionally. See [ICC-ASP/12/37/Add.1](#), pp 21-22.

⁴¹ ICC-02/04-01/15-465-Conf-Corr (with annexes) and ICC-02/04-01/15-579-Conf (with annexes).

⁴² See OTP Transcripts.

⁴³ See para. 17 above. See also UGA-OTP-0244-0007-R01 and UGA-OTP-0244-0018-R01.

⁴⁴ See UGA-OTP-0259-0221-R01.

2016.⁴⁵ During this interview, two representatives from the Defence, one Prosecution representative and a Registry interpreter were present.⁴⁶

40. On the first day of the Defence's interview, the Defence advised the Witness of his rights under the Rome Statute, even though this is not required of the Defence.⁴⁷ On the second day of the interview, the Defence reminded the Witness of his rights from the day before, even though not required under the Rome Statute.⁴⁸
41. The audio of the prior recorded testimony from [REDACTED] March 2016 was disclosed to the Prosecution on 20 May 2016. The transcripts of the prior recorded testimony were disclosed to the Chamber, Parties and Participants on 16 November 2017.
42. In relation to the final two transcripts of the Witness Testimony,⁴⁹ the first session in which it advised the Witness of the procedural issues was inadvertently erased on 8 December 2017, hence the reason why session one was not disclosed to the Chamber, Parties and Participants.
43. Both Parties have spent multiple sessions with the Witness and have examined the Witness after informing the Witness of his rights and responsibilities. The Defence had the chance to examine the Witness under the same conditions as the Prosecution. The Prosecution had proverbial "free reign" to interview the Witness after the Defence interview until the Defence submitted its provisional list of witnesses on 12 December 2017. Considering that the Witness remained in Kampala for four (4) days after the culmination of his interview with the Defence in March 2016,⁵⁰ it is highly probable that the Prosecution, at the least, conducted a debriefing session with the Witness. One does not wait for four (4) days in Kampala after an interview while receiving an attendance allowance after the interview has finished.⁵¹
44. Finally, the Defence avers that Rule 68(2)(a) does not require that the Participants need to have had a chance to examine the Witness. The Working Group on Lessons Learnt ('WGLL') note that the word 'participants' originally appeared in Rule 68(1), but that the word was

⁴⁵ See UGA-D26-0011-0529, UGA-D26-0011-0548, UGA-D26-0011-0555, UGA-D26-0011-0569, UGA-D26-0011-0579 and UGA-D26-0011-0593.

⁴⁶ *Id.* The Defence notes that while the Prosecution was present, ICC-02/04-01/15-339-Anx, para. 36, did not allow the Prosecution to question the Witness.

⁴⁷ UGA-D26-0011-0529, pp 0530-0536, lns 2-211.

⁴⁸ UGA-D26-0011-0579, pp 0580-0581, lns 2-35.

⁴⁹ UGA-D26-0022-0153 and UGA-D26-0022-0165.

⁵⁰ See UGA-OTP-0261-0146. The Defence notes that all receipts connected to this report show that the bill was sent to [REDACTED]. Had the witness moved from Kampala to Gulu at any time, the likelihood of the type of receipts being the same and with the same room number is infinitesimal.

⁵¹ The Witness [REDACTED].

replaced by ‘parties’.⁵² This conscious change demonstrates that Rule 68(2)(a) does not extend the requirement of examining the Witness during the recording of the prior recorded testimony to the Participants, only the Parties.

45. As evidenced above, both Parties met the Witness twice, just as it would have been in Court, but with the Prosecution beginning instead of the Defence. As such, the Defence argues that Mr Ongwen’s rights under Article 68(1)(e) of the Rome Statute, and to a lesser extent the spirit of Rule 140(2)(d) of the RPE, to examine the Witness under the same conditions as the Prosecution have been respected.

ii. The submission into evidence of the Witness Testimony is consistent with the Chamber’s obligation to conduct a fair and expeditious trial

46. Article 67(1) entitles Mr Ongwen to a fair hearing conducted impartially and Article 67(1)(c) entitles Mr Ongwen to be tried without undue delay. These obligations are also enumerated under the functions of the Chamber in Article 64(2) of the Rome Statute and noted by the WGLL.⁵³ The Defence contends that allowing the submission into evidence of the Witness Testimony does not violate Mr Ongwen’s right to a fair trial or the Chamber’s obligation to ensure the trial is fair and expeditious.
47. Both Parties interviewed the Witness that produced the prior recorded testimony of the Witness Testimony. In terms of fairness, the Parties have had relatively equal amounts of time to examine the witness during interviews. Neither Party has had a significant advantage or access to the Witness that the other Party did not have. As the Parties are relatively equal, the Defence avers that the process and manner in which the Witness Testimony was taken is fair to both the Defence and Prosecution.
48. The Defence is currently scheduling a Rule 68(2)(b) certification with the Registry. While the Defence shall argue below that certification is not required by Rule 68(2)(a), the Defence is at the Chamber’s disposal to conduct a certification with the Registry at the same time as D-0157, should it so desire. As such, the Defence contends that the submission into evidence of the Witness Testimony will not delay the trial, and the Defence declares that the Witness Testimony shall be finalised along the same schedule as required with D-0157.⁵⁴

⁵² [ICC-ASP/12/37/Add.1](#), p. 21, fn 10 and p. 22, para. 12.

⁵³ [ICC-ASP/12/37/Add.1](#), pp. 21-22.

⁵⁴ ICC-02/04-01/15-1639, paras 14-15.

iii. *Mr Ongwen has Acholi versions of the OTP Transcripts and the audio of the prior recorded testimony with the Defence*

49. Article 67(1)(f) of the Rome Statute states:

In the determination of any charge, the accused shall be entitled to a public hearing [...] and to the following minimum guarantees, in full equality: (f) To have, free of any cost, [...] such translations as are necessary to meet the requirements of fairness, in any of the [...] documents presented to the Court are not in a language which the accused fully understands and speaks.

50. After a request from the Defence, the Prosecution disclosed the Acholi version of the OTP Transcripts on 19 June 2019. In relation to the Defence's prior recorded testimony, Mr Ongwen has access to the audio file on his Ringtail. Mr Ongwen's right to have the Witness Testimony in a language which he understands has been respected.

iv. *Rule 68(2)(a) does not require a declaration before a certifying officer*

51. Rule 68(2)(a) of the RPE is a clear linear rule; there are no subsections/subparagraphs delineating or outlining exceptions like Rules 68(2)(b), (c) or (d). If both parties had the opportunity to examine the witness during the prior recorded testimony, the Chamber has the power to submit the prior recorded testimony into evidence.

52. The Defence notes that Rule 68(2)(b) requires a declaration by the witness whose prior recorded testimony is being submitted into evidence⁵⁵ and the declaration must be witnessed by a person authorised by the Chamber.⁵⁶ The Defence avers that these additional stipulations to Rule 68(2)(b) are instructive to the interpretation of Rule 68(2)(a).

53. With the addition of Rule 68(2)(b) of the RPE on 27 November 2013, the Assembly of State Parties took a conscious effort to include the provisions in Rule 68(2)(b) of having a certifying officer witness the declaration by a witness.⁵⁷ No such amendment was made for the new Rule 68(2)(a).⁵⁸ Had the Assembly of State Parties deemed it necessary to have a certifying officer witness a declaration made by a Rule 68(2)(a) witness, it would have included it in the amendment in November 2013.

⁵⁵ Rule 68(2)(b)(ii) of the RPE.

⁵⁶ Rule 68(2)(b)(iii) of the RPE.

⁵⁷ [ICC-ASP/12/Res.7](#).

⁵⁸ The Defence notes that the new Rule 68(2)(a) is the old Rule 68(a) of the RPE.

54. Furthermore, the Defence argues that even though Trial Chamber I arranged a deposition like setting in November 2010,⁵⁹ Rule 68(2)(a) does not require such stringent procedures. The recording of the Witness Testimony, as described above, respected the rights of the Witness with the Witness's affirmation that he would only speak the truth.

55. With respect, the Defence asserts that the Witness Testimony may be submitted into evidence without a declaration from the Witness before a certifying officer of the Court. No such requirement exists in Rule 68(2)(a) of the RPE.

v. *It is immaterial that the Witness speaks of the alleged acts and conducts of the accused in the prior recorded testimony*

56. No bar exists to the submission of prior recorded testimony through Rule 68(2)(a) of the RPE where the prior recorded testimony goes to the alleged acts and conducts of the accused. Similar to the arguments above in paragraphs 52-54, the WGLL recommended the caveats in Rules 68(2)(b),⁶⁰ 68(2)(c)(ii)⁶¹ and 68(2)(d)(iv).⁶² No such caveat was added to Rule 68(2)(a).

57. Had the Assembly of State Parties intended to restrict the introduction of prior recorded testimony which goes to the alleged acts and conduct of an accused pursuant to Rule 68(2)(a), it would have added the stipulation. Furthermore, had the Assembly of State Parties intended for the Chamber to use this as a factor when determining the prior recorded testimony's introduction into evidence, it would have done so. The Assembly of State Parties did not.

58. For the abovementioned reasons, the Defence asserts that it is immaterial that the Witness Testimony discusses alleged acts and conducts of the accused.

vi. *Rule 68(2)(a) does not explicitly require that the prior recorded testimony is given on the same date or linear dates*

59. The Defence asserts that Rule 68(2)(a) does not explicitly require that the recording in which the Prosecution and Defence examine the witness, which is the prior recorded testimony, is on the same or linear dates.

⁵⁹ See [ICC-01/04-01/06-T-333-Red2](#), pp 19-21.

⁶⁰ ICC-ASP/12/37/Add.1, p. 23.

⁶¹ ICC-ASP/12/37/Add.1, p. 26.

⁶² ICC-ASP/12/37/Add.1, p. 27.

60. Firstly, the Defence reminds the Chamber that Rule 68 of the RPE was amended on 27 November 2013.⁶³ At that time, the International Criminal Court did not have the capacity to record continuous audio sessions past two (2) hours. The technology at the former ICC premises simply could not do this. As such, it is implicit that the recording would have regular breaks.
61. Secondly, Rule 68(1) does not condition Rule 68(2)(a) in such a manner that the previously recorded testimony be on the same or linear dates. There is no mention of such conditions either in the WGLL.⁶⁴ The WGLL recommended additions to Rule 68(1) and Rule 68(2), which were adopted by the Assembly of State Parties.⁶⁵ The WGLL, while recognising the limited use of the old Rule 68(a),⁶⁶ did not recommend any interpretation or alteration as to what it meant “to examine the witness during the recording.”
62. The Chamber has latitude when interpreting the RPE. In the instant case, while the examinations of the Witness during the interviews happened eight (8) months apart, and then 21 months later, that does not affect the quality of the prior recorded testimony or the veracity of the Witness. Both Parties had ample time and chances to test the Witness’s memory, veracity and credibility.
63. The Defence asserts that Rule 68(2)(a) does not require the prior recorded testimony, *to wit*, the Witness Testimony, to have been recorded on the same or linear dates. As such, the Chamber should allow the submission into evidence of the Witness Testimony.

vii. Requested relief

64. The Defence asserts that no bar exists to the submission into evidence the Witness Testimony. The Defence respectfully requests the Chamber to submit into evidence the Witness Testimony.

⁶³ See ICC-ASP/12/Res.7.

⁶⁴ ICC-ASP/12/37/Add.1.

⁶⁵ Compare ICC-ASP/12/37/Add.1, pp 22-23 with ICC-ASP/12/Res.7.

⁶⁶ ICC-ASP/12/37/Add.1, pp. 19-22.

V. RELIEF

65. For the reasons described above, the Defence respectfully requests Trial Chamber IX to:
- a. Allow the Defence to add the OTP Transcripts to its List of Evidence; and
 - b. Accept the submission into evidence the Witness Testimony as prior recorded testimony pursuant to Rule 68(2)(a).

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 8th day of November, 2019
At Schiphol Airport, Netherlands