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**International  
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**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 Redacted**

**Decision on the Prosecution's Applications for Introduction of Prior Recorded  
Testimony under Rule 68(2)(b) of the Rules**

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**Trial Chamber IX** ('Chamber') of the International Criminal Court ('Court') in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64(2), 67(1) and 69(2) of the Rome Statute ('Statute') and Rule 68 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony Under Rule 68(2)(b) of the Rules'.

1. On 14 June 2016, the Office of the Prosecutor ('Prosecution') filed an application for the introduction pursuant to Rule 68(2)(b) of the Rules of the prior recorded testimony of 38 witnesses ('First Application').<sup>1</sup> The common legal representative of victims appointed by the Court responded to the First Application on 22 July 2016,<sup>2</sup> while the Defence<sup>3</sup> and the legal representatives of the other victims participating in the present case<sup>4</sup> filed their respective responses on 26 July 2016.<sup>5</sup>
2. On 21 September 2016, the Prosecution filed a second application under Rule 68(2)(b) of the Rules seeking the introduction of the prior recorded testimony of further five witnesses, as well as of the additional statement of Witness P-270, whose previous witness statement was already subject to the First Application ('Second Application').<sup>6</sup> On 5 October 2016,<sup>7</sup> the Chamber received the responses

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<sup>1</sup> Prosecution's request for introduction of previously recorded testimony pursuant to rule 68(2)(b) of the Rules, ICC-02/04-01/15-465-Conf. A corrigendum was filed on 17 June 2016 (ICC-02/04-01/15-465-Conf-Corr) and a public redacted version was made available on 21 June 2016 (ICC-02/04-01/15-465-Corr-Red).

<sup>2</sup> Common Legal Representative's response to the "Prosecution's request for introduction of previously recorded testimony pursuant to rule 68(2)(b) of the Rules", ICC-02/04-01/15-505.

<sup>3</sup> 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-Conf. A corrigendum was filed on 27 July 2016 (ICC-02/04-01/15-509-Conf-Corr) and, the day after, a public redacted version thereof (ICC-02/04-01/15-509-Corr-Red2) ('Defence Response to the First Application').

<sup>4</sup> Response of the Legal Representatives of Victims to the "Prosecution's request for introduction of previously recorded testimony pursuant to rule 68(2)(b) of the Rules", ICC-02/04-01/15-508-Conf.

<sup>5</sup> The participants were granted an extension of time limit for their responses to the First Application by the Decision on the 'Defence Request for Variation of the Time Limit for its Response to the Prosecution's Request Pursuant to Rule 68(2)(b) of the Rules', 17 June 2016, ICC-02/04-01/15-475.

<sup>6</sup> Prosecution's second request for introduction of prior recorded testimony pursuant to rule 68(2)(b) of the Rules, ICC-02/04-01/15-538-Conf, also available to the public in redacted form (ICC-02/04-01/15-538-Red), filed on 10 October 2016.

<sup>7</sup> By email dated 21 September 2016, the Chamber set at 5 October 2016 the time limit for any response to the Second Application.

to this Second Application by the Defence<sup>8</sup> and by the common legal representative of the participating victims.<sup>9</sup>

3. In the present decision, the Chamber disposes of both the First and the Second Application (collectively, 'Applications').

## I. APPLICABLE LAW

### A. General remarks

4. The Applications are brought by the Prosecution pursuant to Rule 68(2)(b) of the Rules, which was adopted on 27 November 2013.<sup>10</sup> Contrary to the arguments of the Defence,<sup>11</sup> the applicability of this provision to the present case is not excluded by virtue of Article 51(4) of the Statute, according to which amendments to the Rules must not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted. Indeed, the Chamber notes that the Appeals Chamber, confronted with the same issue, held that with respect to Rule 68(2)(b) of the Rules it is the date of the commencement of the trial which is the appropriate point at which to determine 'retroactivity'.<sup>12</sup> While the decision of the Appeals Chamber was rendered in a different case, the Chamber finds that there are no substantial differences with

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<sup>8</sup> Defence Response to Prosecution's second Request pursuant to Rule 68(2)(b), ICC-02/04-15/15-555-Conf. A public redacted version, filed on 6 October 2016 is also available (ICC-02/04-01/15-555-Red) ('Defence Response to the Second Application').

<sup>9</sup> Response to the "Prosecution's second request for introduction of prior recorded testimony pursuant to rule 68(2)(b) of the Rules", ICC-02/04-01/15-554-Conf.

<sup>10</sup> Resolution ICC-ASP/12/Res.7 of the Assembly of States Parties.

<sup>11</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, paras. 15-41. These arguments are also incorporated by reference also with respect to the Second Application (Defence Response to the Second Application, ICC-02/04-01/15-555-Red2, para. 9).

<sup>12</sup> Appeals Chamber, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled 'Decision on Prosecution Request for Admission of Prior Recorded Testimony', 12 February 2016, ICC-01/09-01/11-2024, para. 81.

the current case which justify a different conclusion.<sup>13</sup> Accordingly, the Chamber finds that Rule 68(2)(b) of the Rules is applicable to the present case.<sup>14</sup>

5. According to this provision, the Chamber may allow the introduction of the previously recorded testimony of a witness who is not present before the Chamber when that prior recorded testimony: (i) goes to proof of 'a matter other than the acts and conduct of the accused'; and (ii) is accompanied by a declaration by the testifying person, witnessed by a person authorised by the Chamber or in accordance with the law and procedure of a State, as detailed in Rule 68(2)(b)(ii) and (iii) of the Rules. As generally required in all instances of introduction of prior recorded testimony under Rule 68 of the Rules, this introduction must also not be prejudicial to or inconsistent with the rights of the accused.
6. As manifest in the relevant provision and observed in the jurisprudence of the Court,<sup>15</sup> the decision of whether to introduce a prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, when the relevant requirements are met, is discretionary in nature. Rule 68(2)(b)(i) provides a non-exhaustive list of factors that the Chamber shall bear in mind in the exercise of such discretion.<sup>16</sup>

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<sup>13</sup> In this respect, the Chamber also observes that, contrary to the argument of the Defence, the Appeals Chamber, in its judgment, did not limit its decision to the particular case before it or held that its conclusions were determined in the light of the circumstances of that case, but used the expression 'case at hand' to describe precisely a situation 'which involves the application of a rule concerning the introduction of the evidence at trial' (Appeals Chamber, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled 'Decision on Prosecution Request for Admission of Prior Recorded Testimony', 12 February 2016, ICC-01/09-01/11-2024, para. 81).

<sup>14</sup> As the Chamber considers that the application of Rule 68(2)(b) of the Rules to the present case is not retroactive within the meaning of Article 51(4) of the Statute, it is not necessary to address the Defence arguments that the application of this provision is to Mr Ongwen's detriment (Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, paras 25-41).

<sup>15</sup> See, for example, Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, ICC-01/05-01/13-1478-Red-Corr, para. 95 ('*Bemba et al.* Rule 68 Decision').

<sup>16</sup> *Bemba et al.* Rule 68 Decision, ICC-01/05-01/13-1478-Red-Corr, para. 95. See also, Working Group of Lessons Learnt: Second report of the Court to the Assembly of States Parties, ICC-ASP/12/37/Add.1, Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), Annex II.A, para. 22 ('[t]he list of factors under rule 68(2)(b)(i) is not exhaustive and was developed to guide the Trial Chamber's exercise of its discretion under rule 68(2)(b)').

Importantly, while the Chamber shall take into consideration these factors in the determination of whether to allow the introduction of prior recorded testimony under Rule 68(2)(b) of the Rules, they are not mandatory pre-conditions for the applicability of Rule 68(2)(b) of the Rules, but factors guiding the Chamber's exercise of its discretion.

7. As summarised by Trial Chamber VII, '[t]he entire purpose of Rule 68(2)(b) of the Rules is to identify certain situations where it is not necessary to examine witnesses while preserving the fair and expeditious conduct of the proceedings'.<sup>17</sup> The crucial question under consideration is whether a testimony which was previously recorded may, in light of its content and significance to the case, be introduced without the need that the provided information be 'tested' through oral examination of the witness at trial.<sup>18</sup> When the Chamber, in light of the applicable requirements and the relevant factors, answers this question in the affirmative, the prior recorded testimony could be introduced within the meaning of Rule 68(2)(b) of the Rules. If so, full consideration of the standard evidentiary criteria for such prior recorded testimony, in particular in terms of its relevance and probative value, will be deferred to the Chamber's eventual deliberation of its judgment.<sup>19</sup>

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<sup>17</sup> *Bemba et al.* Rule 68 Decision, ICC-01/05-01/13-1478-Red-Corr, para. 106.

<sup>18</sup> Indeed, the Chamber's determination under Rule 68(2)(b) of the Rules does not concern, in and of itself, whether a certain individual shall testify at trial. In fact, if the Chamber were to decide not to allow the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of a certain witness requested by the Prosecution, this would not result in an obligation on the part of the Prosecution to call that witness at trial, but only that the prior recorded testimony of that witness could not be relied upon in the proceedings. At the same time, the fact that the parties are entitled to a degree of deference in the selection and presentation of evidence, their discretion is not unlimited and is without prejudice to the Chamber's exercise of its general management powers, including recourse to Rule 68(2)(b) as a method to streamline the proceedings and avoid calling witnesses to testify live at trial when their prospective evidence appears of marginal significance or of limited relative importance (see, for example, Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses, 4 February 2016, ICC-01/05-01/13-1600).

<sup>19</sup> See the Chamber's general approach as already announced in the Initial Directions on the Conduct of Proceedings, 13 July 2016, ICC-02/04-01/15-497, para. 24.



8. In the following sections, the Chamber will lay out its interpretation of the relevant aspects of Rule 68(2)(b) of the Rules. In particular, taking into account the arguments made and the objections raised by the Defence in its responses to the Applications, the Chamber will address: (i) the meaning of ‘prior recorded testimony’ in the context of Rule 68 of the Rules; (ii) the requirement that the prior recorded testimony ‘goes to proof of a matter other than the acts and conduct of the accused’; and (iii) the factors guiding the Chamber’s discretion under Rule 68(2)(b) of the Rules. Thereafter, the Chamber will address the Defence arguments that the Applications must be rejected in their entirety on the grounds that they violate several statutory provisions.

**B. The meaning of ‘prior recorded testimony’ in the context of Rule 68 of the Rules**

9. Other chambers of this Court have repeatedly interpreted the notion of ‘prior recorded testimony’ of Rule 68 of the Rules to include audio- or video-taped testimony, transcripts of a testimony of a witness and written statements taken under Rules 111 and 112 of the Rules.<sup>20</sup> The Chamber sees no reason to depart from this reading. Equally settled in the Court’s case-law is that a statement can be considered a prior recorded testimony if the person when providing the statement understands that ‘he or she is providing information which may be relied upon in the context of legal proceedings’,<sup>21</sup> namely when he or she is ‘questioned in the capacity as [a] witness[] in the context of or in anticipation of legal proceedings’.<sup>22</sup>

<sup>20</sup> See e.g. Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, ICC-01/09-01/11-1938-Corr-Red2 (‘*Ruto and Sang* Decision on Prior Recorded Testimony’), para. 32; *Bemba et al.* Rule 68 Decision, ICC-01/05-01/13-1478-Red-Corr, para. 31; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103, 20 November 2015, ICC-01/04-02/06-1029, para. 25.

<sup>21</sup> Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Bar Table Motions, 17 December 2010, ICC-01/04-01/07-2635, para. 49.

<sup>22</sup> *Bemba et al.* Rule 68 Decision, ICC-01/05-01/13-1478-Red-Corr, para. 32.

10. Furthermore, in accordance with the jurisprudence of the Court, the Chamber considers that the ‘prior recorded testimony’ which may be introduced under Rule 68 of the Rules also includes any annex to the witness’s statement, or document otherwise associated with it, that is used or explained by the witness and which, as such, is an integral part of the testimony itself.<sup>23</sup>

**C. The requirement that the prior recorded testimony ‘goes to proof of a matter other than the acts and conduct of the accused’**

11. A prior recorded testimony can only be introduced pursuant to Rule 68(2)(b) of the Rules when it ‘goes to proof of a matter other than the acts and conduct of the accused’. The expression ‘acts and conduct of the accused’ – which is not further qualified in Rule 68(2)(b) of the Rules – must be interpreted in its plain natural meaning, referring to the personal actions and omissions of the accused, rather than a broader normative meaning, extended to the actions and omissions of others which are attributable to the accused under the modes of liability charged by the Prosecution.<sup>24</sup>

<sup>23</sup> See *e.g. Ruto and Sang* Decision on Prior Recorded Testimony, ICC-01/09-01/11-1938-Corr-Red2, paras 33 and 134; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103, 20 November 2015, ICC-01/04-02/06-1029, paras 23 and 35; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103, 11 March 2016, ICC-01/04-02/06-1205, para. 7; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3), 9 June 2016, ICC-02/11-01/15-573-Red, (‘*Gbagbo and Blé Goudé* Rule 68 Decision’), para. 9.

<sup>24</sup> The Chamber notes that this is also the interpretation that the expression ‘acts and conduct of the accused’ was given by the ICTY for essentially the same purpose (*i.e.* Rule 92bis of the ICTY Rules of Procedure and Evidence): see, for example, ICTY, Trial Chamber, *Prosecutor v. Slobodan Milošević*, Decision on Prosecution’s Request to have Written Statements Admitted under rule 92bis, IT-02-54-T, 21 March 2002, para. 22 (‘The phrase “acts and conduct of the accused” in Rule 92bis is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused. It should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or, indeed, of anybody else. Had the rule been intended to extend to acts and conduct of alleged co-perpetrators or subordinates it would have said so’); Appeals Chamber, *Prosecutor v. Stanislav Galić*, Decision on Interlocutory Appeal Concerning rule 92bis(C), IT-98-29-AR73.2, 7 June 2002, para. 10 (There is a ‘clear distinction drawn in the jurisprudence of the Tribunal between (a) the acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible, and (b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of those others. It is only a written statement which goes to proof of the latter acts and conduct which Rule 92bis(A) excludes from the procedure laid down in that Rule’). See also ICTY, Trial Chamber, *Prosecutor v. Milan Lukić and Sredoje Lukić*, Decision

12. Indeed, the Chamber understands the limitation of Rule 68(2)(b) of the Rules to have the purpose of ensuring the accused's right to confront and examine in court a person making direct allegations against him or her. The expression 'acts and conduct of the accused' need not be extended beyond its plain meaning to give effect to this principle. Accordingly, the Chamber will not exclude the application of Rule 68(2)(b) of the Rules when the prior recorded testimony contains evidence with respect to the acts and conduct of other persons, whether alleged co-perpetrators, subordinates or otherwise, which are attributed to the accused in the charges by reason of the mode of liability alleged. Furthermore, the Chamber considers that the expression 'acts and conduct of the accused' within the meaning of Rule 68(2)(b) of the Rules must be understood as referring exclusively to those actions of the accused which are described in the charges brought against him or her or which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged.<sup>25</sup>
13. In this regard, the Chamber observes that, in certain circumstances, the party's intended purpose in relying on a prior recorded testimony may be of relevance

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on Prosecution Motion for Admission of Evidence Pursuant to rule 92 *bis*, IT-98-32/1-T, 22 August 2008, para. 17; Trial Chamber, *Prosecutor v. Radovan Karadžić*, Decision on Prosecution's Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to rule 92*bis* (Witnesses for Sarajevo Municipality), IT-955/18-PT, 15 October 2009, para. 5; Trial Chamber, *Prosecutor v. Goran Hadžić*, Decision on Prosecution Omnibus Motion to Admit GH-139's Evidence Pursuant to Rule 92*bis*, IT-04-74-75-T, 24 January 2013, para. 15. For the sake of clarity, the Chamber emphasises that the expression 'acts and conduct' does not extend to conduct normatively attributable to the accused even when the accused is charged under Article 25(3)(a) of the Statute and the acts and conduct of others (*i.e.* alleged co-perpetrators and/or individuals 'through' whom a crime is committed) are normatively attributed to the accused as if they were his or her own. Conversely, the question does not even arise with respect to the modes of criminal responsibility envisaged in Article 25(3)(b), (c) or (d), or Article 28 of the Statute, as in these cases the acts and conduct of direct perpetrators are plainly not to be seen, not even normatively, as acts and conduct of the accused. In other words, any basis to extend the meaning of 'acts and conduct of the accused' to the direct perpetrators is in these situations manifestly absent regardless of the interpretation given to such concept.

<sup>25</sup> See also, for the relevant drafting history of Rule 68(2)(b), Working Group of Lessons Learnt: Second report of the Court to the Assembly of States Parties, ICC-ASP/12/37/Add.1, Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), Annex II.A, para.21 ('Rule 68(2)(b) applies to the acts and conduct of the accused as confirmed in accordance with article 61 of the Statute, which addresses the confirmation of charges before the trial. In the text of the corresponding ICTY Rule 92*bis*, an additional statement is included which reads "as charged in the indictment". It was decided not to include this additional statement, as the concept of an "indictment" does not appear in the Court's statutory instruments, and it is sufficiently clear that rule 68(2)(b) has no application beyond the charges confirmed in accordance with article 61 of the Statute.')

to the determination of whether such testimony goes to proof of the accused's acts and conduct or not. In particular, the Chamber considers that the presence of a limited reference to the accused in a prior recorded testimony does not entail, in and of itself, that the testimony cannot be introduced under Rule 68(2)(b) of the Rules when (i) the calling party indicates that it does not intend to rely on that reference and (ii) this reference is not of significance to the case or is, in any event, of limited importance and does not constitute the core of the testimony.<sup>26</sup> Any such reference would in any case not be considered by the Chamber to establish the acts and conduct of the accused for the purposes of its final judgment. With this limited exception concerning peripheral discrete references to the accused – which must be evaluated on a case-by-case basis – the Chamber otherwise agrees with the Defence that 'statements cannot be submitted piecemeal' as this approach 'would lead to an artificial exercise' and possibly 'absurdity and re-litigation of the Rule 68 admission'.<sup>27</sup> In other words, as submitted by the Defence, the Chamber must conduct its determination of whether a prior recorded testimony can be introduced under Rule 68(2)(b) of the Rules upon consideration of the whole testimony and, in turn, the whole testimony would be introduced under that provision.

#### **D. The factors guiding the Chamber's exercise of discretion under Rule 68(2)(b)(i) of the Rules**

14. As already noted, Rule 68(2)(b)(i) of the Rules indicates that the Chamber, for the purposes of the exercise of its discretion under this provision, shall consider a number of factors. The Chamber will lay out below its understanding of those

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<sup>26</sup> The Chamber emphasises that this situation is remarkably different from – and arguably the contrary of – situations in which the prior recorded testimony does not explicitly mention the accused but attributes certain acts and conduct to an unidentified person who is alleged by the Prosecution to be the accused and is, on this ground, relied upon precisely for the purpose of establishing acts and conduct of the accused (See Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Prosecution Request to Add P-242 to its Witness List and Admit Prior recorded Testimony of P-242 Pursuant to Rule 68(2)(b) of the Rules, 29 October 2015, ICC-01/05-01/13-1430, para. 8).

<sup>27</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, paras 66-67.

factors under Rule 68(2)(b)(i) of the Rules about which there exists a dispute between the parties or which are otherwise of particular importance for the purposes of the present decision.<sup>28</sup>

15. The first factor stipulated by Rule 68(2)(b)(i) of the Rules is whether the testimony 'relates to issues that are not materially in dispute'. While this factor is indeed significant for the Chamber's exercise of its discretion, it must be stressed that such a criterion cannot be understood as providing either party with a veto power over the introduction of prior recorded testimony simply by indicating that issues addressed in the testimony are 'materially in dispute'. A reading of this provision in a way that either party could prevent the introduction of a prior recorded testimony under rule 68(2)(b) of the Rules by unilaterally qualifying as 'materially in dispute' any issues addressed in such testimony would be untenable.<sup>29</sup> Rather, the Chamber shall consider whether the prior recorded testimony relates to matters which are soundly and conceivably disputed between the parties,<sup>30</sup> and are crucial, or of at least sufficient significance for the Chamber's eventual determination of the charges against the accused in its judgment under Article 74 of the Statute. In doing so, the Chamber will objectively assess – irrespective of the parties' own assertions – the degree to which a prior recorded testimony potentially impacts on material matters

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<sup>28</sup> In particular, the Chamber does not consider it necessary to address in this part of the decision the factors of whether the prior recorded testimony 'is of cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts' and 'relates to background information'. These factors are self-explanatory and no dispute has arisen between the participants either on their abstract meaning or in respect to their application to individual witnesses.

<sup>29</sup> The Chamber emphasises in this regard that, contrary to the Defence apparent submission (Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para.6), there is a fundamental difference between agreeing on facts or evidence within the meaning of Rule 69 of the Rules so that they may be considered as proven by the Chamber and not materially disputing certain matters at trial. In other words, not every fact which the parties do not agree not to contest within the meaning of Rule 69 of the Rules is, for this reason alone, 'in dispute' within the meaning of Rule 68(2)(b) of the Rules.

<sup>30</sup> For the purposes of the present decision, which is taken before the opening of the trial, the Chamber considers that the Defence responses to the Applications are the primary point of reference in the identification of the matters which the Defence disputes in the present case.

actually contested in the proceedings. In this sense, it is ultimately the Chamber, not the parties, which determines what is materially in dispute in the case.

16. Rule 68(2)(b)(i) of the Rules requires the Chamber to also consider whether the prior recorded testimony is such that ‘the interests of justice are better served by its introduction’. While the concept of ‘interests of justice’ cannot be defined in the abstract, the Chamber considers that, within the context of Rule 68(2)(b) of the Rules, ‘interests of justice’ are better served by the introduction in writing of a prior recorded testimony when such introduction allows, *inter alia*, to safeguard the expeditiousness of the proceedings – which is a recognised right of the accused, as well as one of the primary goals of any judicial institution – streamline the presentation of evidence, focus live testimony on those topics of greatest relevance to the proceedings, minimise cumulative in-court testimony on aspects which are expected to also be addressed by other witnesses, save resources of the institution which may rather be utilised for other purposes and/or avoid witnesses having to travel in order to appear in court.<sup>31</sup> At the same, the Chamber recalls that the introduction of a prior recorded testimony is not permitted if it is prejudicial to or inconsistent with the rights of the accused as mandated by Rule 68(1) of the Rules. In this sense, the Chamber agrees with the Defence that, in any case, the Chamber ‘must keep the rights of the accused at the forefront’,<sup>32</sup> and that under no circumstances can prior recorded

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<sup>31</sup> The Chamber finds support in its understanding of the notion of ‘interests of justice’ within the meaning of Rule 68(2)(b) also in the drafting history of this provision and the declared purposes of its adoption. The Working Group on Amendments established by the Assembly of State Parties explained in its report concerning the proposed amendment to Rule 68 of the Rules, that ‘[t]he proposed new Rule 68 of the Rules of Procedure and Evidence would allow the judges of the Court to reduce the length of Court proceedings and streamline evidence presentation’ (Report of the Working Group on Amendments, ICC-ASP/12/44, para 8). Similarly, the relevant report of the Working Group on Lessons Learnt states: ‘[t]he addition of this provision [*i.e.* Rule 68(2)(b) of the Rules] is primarily intended to expedite proceedings by allowing the introduction of a limited class of evidence without the need to arrange for a witness to travel in order to appear in Court. Allowing such testimony to be admitted in the witness’ absence, provided that certain procedural steps are met, would expedite proceedings and have additional budgetary benefits.’ (Working Group of Lessons Learnt: Second report of the Court to the Assembly of States Parties, ICC-ASP/12/37/Add.1, Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), Annex II.A, para. 18).

<sup>32</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 62.



testimonies be introduced when this is prejudicial to the fairness of the proceedings and, more specifically, the rights of the accused.

17. Rule 68(2)(b)(i) of the Rules requires the Chamber to also consider whether the prior recorded testimony has ‘sufficient indicia of reliability’. The relevant standard is not that the Chamber must be satisfied that the prior recorded testimony is in fact reliable – which is a determination that shall only be made at the end of the trial – but requires the Chamber to only ‘consider’, conducting an assessment which can be more cursory in nature,<sup>33</sup> whether there are sufficient ‘indicia’ of such reliability. As clarified by the Appeals Chamber, ‘[i]n assessing whether a statement bears “sufficient indicia of reliability”, Trial Chambers retain discretion to consider those factors that may be relevant to its determination on a case-by-case basis’.<sup>34</sup>
18. In the Court’s relevant case-law,<sup>35</sup> ‘indicia of reliability’ have been understood to include formal aspects concerning the prior recorded testimony and, in this sense, relevant indicia have been found to be, for instance, that a prior recorded testimony was obtained by the Prosecution in the ordinary course of its investigations, was signed by the witness and the investigator(s) conducting the interview, was given voluntarily, was obtained in the presence of a qualified interpreter, was declared to be accurate by the witness at the time of giving it and includes information that the witness was given an explanation of the procedure and was informed of the significance of providing the statement

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<sup>33</sup> Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, 1 November 2016, ICC-02/11-01/15-744 (‘*Gbagbo and Blé Goudé* OA 8’), para. 3.

<sup>34</sup> *Gbagbo and Blé Goudé* OA 8, ICC-02/11-01/15-744, para. 103.

<sup>35</sup> For this purpose, the Chamber considers determinations under Rule 68(2)(b), but also under Rule 68(2)(c) and (d) of the Rules, given that a determination of the ‘sufficient indicia of reliability’ is required for both purposes, even if the existence of such indicia is a non-mandatory factor to ‘consider’ under Rule 68(2)(b) while it is a mandatory requirement of which the Chamber shall be ‘satisfied’ under Rule 68(2)(c) and (d) of the Rules.

concerned to the Prosecution.<sup>36</sup> The Chamber clarifies, consistent with previous decisions of other Chambers,<sup>37</sup> that no single indicator is, in and of itself, conclusive or mandatory to establish the presence of ‘sufficient indicia of reliability’, but their presence may militate in favour of the introduction of a prior recorded testimony.

19. As held by the Appeals Chamber, Trial Chambers, in the assessment of indicia of reliability under Rule 68(2)(b)(i) of the Rules, are not obliged to consider factors beyond formal requirements, nor are they precluded from doing so if they consider it to be appropriate in a particular case.<sup>38</sup> In this respect, the Chamber emphasises that any consideration beyond formal requirements, if considered appropriate in particular circumstances, must be performed consistently with the Chamber’s decision to defer its consideration of the standard evidentiary criteria of the evidence submitted until deliberating the judgment under Article 74(2) of the Statute.<sup>39</sup> In view of this approach, any consideration of the substance of the statement for the purposes of the determination concerning the ‘sufficient indicia of reliability’ is limited to establishing whether or not problems as to the credibility of the information provided by a witness in his or her prior recorded testimony are so manifest and of such nature that the questioning of the witness at trial would be more appropriate than the introduction of the prior recorded testimony under Rule 68(2)(b) of the Rules.

20. In conclusion, the Chamber considers that the relevant factors listed in Rule 68(2)(b)(i) of the Rules – including whether the prior recorded testimony ‘is of

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<sup>36</sup> See *e.g.* *Ruto and Sang* Decision on Prior Recorded Testimony, ICC-01/09-01/11-1938-Corr-Red2, paras 65-66; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on ‘Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence’, 12 November 2015, ICC-01/05-01/13-1481-Red, para. 20; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103, 11 March 2016, ICC-01/04-02/06-1205, para. 16; *Gbagbo and Blé Goudé* Rule 68 Decision, ICC-02/11-01/15-573-Red, para. 22.

<sup>37</sup> See *e.g.* *Ruto and Sang* Decision on Prior Recorded Testimony, ICC-01/09-01/11-1938-Corr-Red2, para. 65.

<sup>38</sup> *Gbagbo and Blé Goudé* OA 8, ICC-02/11-01/15-744, para. 104.

<sup>39</sup> Initial Directions on the Conduct of Proceedings, 13 July 2016, ICC-02/04-01/15-497, para. 24.



cumulative or corroborative nature’ and ‘relates to background information’ – all respond, from different angles, to the same consideration, namely to identify situations in which the prior recorded testimony provided by a witness is – also in light of its relative importance in the system of evidence expected to be presented at trial<sup>40</sup> – of such nature that it is unnecessary that the witness be called to testify live, and examination by the parties may rather be dispensed of without prejudicing the rights of the accused.

## II. DEFENCE OBJECTIONS TO THE ENTIRETY OF THE APPLICATIONS

21. The Defence argues that the Applications violate several statutory provisions. In particular, according to the Defence, the Applications must be dismissed in their entirety on the grounds that they violate: (i) Article 74 of the Statute;<sup>41</sup> and (ii) Articles 64(2), 67(1)(b) and 67(2) of the Statute and Rules 76(3) and 77 of the Rules.<sup>42</sup>
22. As for the first set of arguments, the Defence submits that the Applications violate Article 74 of the Statute, namely in the part in which it provides that the

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<sup>40</sup> Similarly, albeit in the context of a determination on the introduction of prior recorded testimonies in the circumstances provided for in Rule 68(3) of the Rules, see *Gbagbo and Blé Goudé* OA 8, ICC-02/11-01/15-744, paras 71-72 (‘[I]n order to make its determination under rule 68 (3) of the Rules, a Trial Chamber inevitably needs, and indeed must, carry out an individual assessment of the evidence sought to be introduced under that provision based on the circumstances of each case. In carrying out this individual assessment, the Trial Chamber must also necessarily analyse the ‘importance’ of each witness statement in light of the charges and the evidence already presented or intended to be presented before it. In the Appeals Chamber’s view, this assessment is part and parcel of the analysis a Chamber must undertake in determining whether it is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally, to allow for the evidence in question to be introduced under rule 68 (3) of the Rules. Indeed, the more important the Chamber assesses the evidence in question to be, the more likely it is that the Chamber will have to reject any application under this provision. [...] In the Appeals Chamber’s view, rule 68 (3) of the Rules requires a Chamber to carry out a preliminary assessment of the evidence in question in order to determine whether its introduction under that provision is appropriate. This assessment, which includes an analysis of the relative importance of the evidence, is without prejudice to the weight that the Trial Chamber will ultimately attach to a witness’s evidence, which indeed can only be determined once the Trial Chamber has heard all of the evidence.’)

<sup>41</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, paras 9-14. The Defence incorporates these arguments by reference also with respect to the Second Application (Defence Response to the Second Application, ICC-02/04-01/15-555-Red, paras 7-8).

<sup>42</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, paras 42-50. The Defence makes the same arguments also with respect to the Second Application (Defence Response to the Second Application, ICC-02/04-01/15-555-Red, paras 10-13).

Chamber ‘may base its decision only on the evidence submitted and discussed before it *at the trial*’,<sup>43</sup> and that the Chamber ‘should take a narrow approach when interpreting the scope of the “entire proceedings” [within the meaning of the first sentence of Article 74(2) of the Statute]’.<sup>44</sup> In any case, according to the Defence, the Applications violate Article 74 of the Statute also because ‘[i]f 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[s]’.<sup>45</sup>

23. The Defence arguments are unconvincing. The purpose of Rule 68(2)(b) of the Rules is precisely to allow the introduction for the purposes of the trial of a testimony, which has been previously recorded. The Statute itself, when prescribing in Article 69(2) of the Statute that a witness shall give testimony in person, explicitly states that this applies except, *inter alia*, to the extent provided in the Rules. When a prior recorded testimony is introduced in accordance with Rule 68(2)(b) of the Rules, such testimony is to be considered ‘submitted’ within the meaning of Article 74 of the Statute and for the purposes of the trial, and the participants will have the opportunity to ‘discuss’ it at trial if they so wish. In addition, the Chamber observes that nowhere does Rule 68(2)(b) of the Rules – or any other statutory provision – state, explicitly or implicitly, that a decision to introduce prior recorded testimony must be taken after the opening statements have been delivered. Such a decision is in fact a procedural determination and is without prejudice to the evaluation of the prior recorded testimony for the purpose of the merits of the case which will be conducted at the time when the

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<sup>43</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 10 (emphasis in the original).

<sup>44</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 11. The first sentence of Article 74(2) of the Statute, on which the Defence relies for its argument, reads: ‘The Trial Chamber’s decision shall be based on its evaluation of the evidence and the entire proceedings’.

<sup>45</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 12. The same arguments are incorporated by reference also with respect to the Second Application (Defence Response to the Second Application, ICC-02/04-01/15-555-Red, para. 7).

Chamber will deliberate its judgment under Article 74 of the Statute and on the basis of any argument that the participants may wish to bring in this respect at trial. The Defence arguments appear to suggest a disagreement with Rule 68 of the Rules rather than with the merits, and timing, of the Applications.

24. Further, the Chamber considers that the second prong of the Defence argument is purely speculative, since there is no announced change in the Chamber's composition. In any case, the Chamber emphasises that when a testimony is introduced under Rule 68(2)(b) of the Rules, it is that testimony which, as already obtained and recorded out of court rather than being provided *viva voce* at trial, will be assessed by the Judges as part of their deliberations. Such assessment – including, *arguendo*, by 'any new judge' – is no way prejudiced or impaired by the disposal, before the opening statements of the trial, of requests for introduction of prior recorded testimonies under Rule 68 of the Rules, which only concerns the procedural requirements for their introduction.
25. The Defence also argues that the Applications violate Mr Ongwen's right to have adequate time to prepare his defence under Article 67(1)(b) of the Statute. In this respect, the Defence argues that the Applications do not comply with the Chamber's decision that the Defence must have three months between the completion of disclosure of incriminating evidence on 6 September 2016 and the commencement of the trial<sup>46</sup> because for its responses to the Applications it had less time from the disclosure of a number of prior recorded testimonies<sup>47</sup> and, in any case, at the time of its Response to the First Application the Prosecution had not completed its disclosure of incriminating evidence.<sup>48</sup> Moreover, the Defence argues that the Applications violate Rule 76(3) of the Rules and a Chamber's

<sup>46</sup> The Defence makes reference to the Decision Setting the Commencement Date of the Trial, 30 May 2016, ICC-02/04-01/15-449.

<sup>47</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 46, and its Annex B (ICC-02/04-01/15-509-Conf-AnxB); Defence Response to the Second Application, ICC-02/04-01/15-555-Red, para. 12 and its Annex A (ICC-02/04-01/15-555-AnxA).

<sup>48</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para.47.

decision recognising Mr Ongwen's right to have the statements of prosecution witnesses in Acholi three months in advance of the witness's testimony,<sup>49</sup> since for the majority of the prior recorded testimonies which are subject to the Applications this requirement has not been complied with.<sup>50</sup>

26. The Chamber finds these arguments unpersuasive. At the outset, the Chamber notes that the Defence submissions are not accurate. In its Response to the First Application, the Defence refers to 13 prior recorded testimonies being 'disclosed between 16 May and 15 July 2016'.<sup>51</sup> However, the statements that the Defence refers to were disclosed at the latest on 5 June 2016 – one as early as 15 June 2015.<sup>52</sup> That said for the accuracy of the record, the Chamber emphasises that the timeframe determined by the Chamber for the completion of the disclosure of incriminating evidence by the Prosecution three months prior to the commencement of the trial and the provision, under Rule 76(3) of the Rules, of Acholi translation of prior statements of prosecution witnesses three months before the testimony of the witness concerned was only required for the purpose of the Defence's ability to adequately prepare for the trial and the witnesses' oral examination.<sup>53</sup> Nowhere did the Chamber determine that the same timeframe is also warranted for responses to an application under Rule 68(2)(b) of the Rules, in which the Defence raises only procedural arguments as to the possible introduction of witnesses' prior recorded testimony. The Chamber considers that the difference between examination of a *viva voce* witness at trial and the

<sup>49</sup> The Defence refers to para. 10 of the Decision on Disclosure Issues Arising Out of First Status Conference, 7 June 2016, ICC-02/04-01/15-457.

<sup>50</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 48, and its Annex B (ICC-02/04-01/15-509-Conf-AnxB); Defence Response to the Second Application, ICC-02/04-01/15-555-Red, para. 11 and its Annex A (ICC-02/04-01/15-555-AnxA).

<sup>51</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 46. According to the Defence, this is the case for the prior recorded testimony of Witnesses P-126 (two statements), P-242, P-279, P-281, P-282, P-287, P-303, P-370, P-384, P-385, P-386, P-400.

<sup>52</sup> Namely Witness P-325's statement.

<sup>53</sup> Decision on Disclosure Issues Arising Out of First Status Conference, 7 June 2016, ICC-02/04-01/15-457, para. 10 ('the Single Judge directs the Prosecution to disclose all Acholi translations of statements falling under its Rule 76(3) obligations by no later than three months prior to the testimony of the witness concerned').

provision of a response to an application under Rule 68(2)(b) is so significant that it cannot be said that they are equivalent or even comparable in terms of the time required for the Defence preparation and the accused's degree of participation therein.

27. The Chamber also notes that upon notification of the First Application, the Defence requested to be granted an additional three weeks for its response.<sup>54</sup> That request was granted in full by the Single Judge.<sup>55</sup> At no point did the Defence argue that the time limit for its response ought to be extended until after completion of disclosure by the Prosecution and provision of translation of all the prior recorded testimonies concerned.<sup>56</sup> On the contrary, since the Defence obtained all time it requested, the Chamber cannot accede to its arguments that the Applications must now be rejected because the responses should be filed at an even later time.
28. Finally, the Chamber considers that there exists no actual prejudice in this regard to Mr Ongwen's rights ensuing from consideration of the merits of the Applications. As observed above, all statements were disclosed to the Defence sufficiently in advance of its response.<sup>57</sup> Concerning the prior recorded testimonies that had not yet been translated into Acholi at the time of the

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<sup>54</sup> ICC-02/04-01/15-470. A corrigendum was subsequently filed, ICC-02/04-01/15-470-Corr.

<sup>55</sup> Decision on the 'Defence Request for Variation of the Time Limit for its Response to the Prosecution's Request Pursuant to Rule 68(2)(b) of the Rules', 17 June 2016, ICC-02/04-01/15-475.

<sup>56</sup> The Defence indeed requested an extension of time limit for its response to the First Application on the grounds that 'the amount of witnesses which [the Defence] must comprehensively review in the short period allotted by Regulation 34(b) of the RoC, compounded by the amount of material received on 15 June 2016, shortages in personnel and two (2) separate field missions during this period, demonstrates good cause required for a variation of a time limit pursuant to Regulation 35(2) of the RoC' (ICC-02/04-01/15-470-Corr, para. 12).

<sup>57</sup> As recalled at paragraph 26 above, the Defence had been in possession of all prior recorded testimonies subject to the First Application for at least six weeks before it filed its response on 26 July 2016. As far as the Second Application – which relates to a total of eight statements for five witnesses – is concerned, the Defence had received disclosure of the relevant statements at least one month prior to its response of 5 October 2016, the latest two statements having been disclosed to it on 6 September 2016 (*i.e.* the statement of Witness P-256 and the second statement of Witness P-337).

Defence Response to the First Application,<sup>58</sup> the Chamber observes, in any case, that the statements are all brief and of well-defined subject matters, that the Defence had six weeks for the preparation of its response to the First Application, and that Mr Ongwen is assisted by a Defence team whose members, including the lead counsel, who are fluent in both English and Acholi.

29. In light of the above, the Chamber rejects the Defence arguments to dismiss the Applications in their entirety.

### III. ANALYSIS OF THE PRIOR RECORDED TESTIMONIES

30. The Chamber will hereunder proceed to its analysis of the prior recorded testimonies whose introduction under Rule 68(2)(b) of the Rules is requested in the Applications, taking into account the arguments raised by the Defence in relation to each of them.<sup>59</sup> At this stage, any such introduction is subject to the filing in the record of the case of the declaration under Rule 68(2)(b)(ii) and (iii) of the Rules.

#### A. Prior recorded testimonies mainly related to the attack on Pajule IDP camp

31. Under Counts 1 to 10 of the confirmed charges, Mr Ongwen is charged with the crimes of attacks against the civilian population, murder, torture, cruel treatment, other inhumane acts, enslavement, pillaging, and persecution committed by the Lord Resistance Army ('LRA') during an attack on Pajule IDP camp on or about 10 October 2003.<sup>60</sup> The parties agree that an attack occurred at

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<sup>58</sup> According to the Defence, this is the case with the statements of Witnesses P-8, P-15, P-27 (second statement), P-32 (third statement), P-38, P-47, P-130, P-242, P-270, P-279, P-282, P-284, P-287, P-291, P-301, P-303, P-325, P-370, P-384, P-385, P-386 and P-400.

<sup>59</sup> The Chamber notes that the Defence, in the alternative to the rejection of the Applications in their entirety, seeks that the Chamber 'adopt a cautious approach and evaluate each proposed witness on a case-by-case basis' (Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para 3; ICC Defence Response to the Second Application, ICC-02/04-01/15-555-Red, para. 3).

<sup>60</sup> Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15-422-Red, confirmed charges, pages 71-101, paras 14-25.

this camp on or about this date.<sup>61</sup> The Defence has indicated its intention to raise an alibi in relation to the charges concerning this attack.<sup>62</sup> In particular, the Defence anticipates claiming that, at the time of the attack, Mr Ongwen was held in detention by the LRA, and more specifically by Vincent Otti.<sup>63</sup>

32. From the list of witnesses filed by the Prosecution,<sup>64</sup> read in conjunction with the summary of anticipated testimonies of these witnesses provided by the Prosecution,<sup>65</sup> the Prosecution's Pre-Trial Brief,<sup>66</sup> as well as the information included in the First Application under consideration,<sup>67</sup> the Chamber understands that the Prosecution intends to call several witnesses to testify orally at trial in relation (also) to the charges concerning the attack on Pajule IDP camp, including civilian residents of the camp who were also abducted during the attack (*e.g.* Witnesses P-6, P-9, P-67, P-81 and P-249) and LRA insiders who participated in the attack and/or can testify about the planning of the attack (*e.g.* Witnesses P-45, P-48, P-70, P-138, P-144, P-146, P-209, P-309 and P-330). Witness P-101 who already testified under Article 56 of the Statute<sup>68</sup> is also relied upon by the Prosecution for the charges in relation to the attack on Pajule IDP camp.
33. The Prosecution requests the introduction, under Rule 68(2)(b) of the Rules, of the prior recorded testimony of seven witnesses principally related to the attack on Pajule IDP camp: Witnesses P-7, P-8, P-15, P-47, P-61, P-84 and P-130. Below, they are analysed in turn.

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<sup>61</sup> Annex A to the Joint Prosecution and Defence submission on agreed facts, 1 July 2016, ICC-02/04-01/15-487-Conf-AnxA, page 6.

<sup>62</sup> ICC-02/04-01/15-519-Red.

<sup>63</sup> ICC-02/04-01/15-519-Red, para. 4.

<sup>64</sup> Updated List of Prosecution Witnesses, ICC-02-04/15-548-Conf-AnxA.

<sup>65</sup> ICC-02/04-01/15-532-Conf-AnxC

<sup>66</sup> Prosecution's Pre-Trial Brief, ICC-02/04-01/15-533, paras 204-287.

<sup>67</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 17-48.

<sup>68</sup> The transcripts and video-recording of the live testimony of Witness P-101 have been already recognised as formally submitted for the purpose of the present trial: Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute, 10 August 2016, ICC-02/04-01/15-520.



1. *Prior recorded testimony of Witness P-7*<sup>69</sup>

34. Witness P-7 was a civilian resident of the Lapul part of Pajule IDP camp at the time of the attack in October 2003, who [REDACTED]  
[REDACTED]. In his written statement,<sup>70</sup> he describes the nature, duration and consequences of the attack as well as the manner in which the consequences of the attack were documented. The Chamber is satisfied that, as it does not go to proof of Mr Ongwen's acts and conduct, Witness P-7's statement is suitable to be introduced pursuant to Rule 68(2)(b) of the Rules.
35. The Chamber observes that the issues addressed by the witness in his statement are not matters materially in dispute with respect to the attack on Pajule IDP camp, and that other witnesses (such as Witnesses P-6, P-9, P-67, P-81 and P-249) are expected to testify at trial essentially on the same issues. The Defence objects to the introduction of Witness P-7's prior recorded testimony under Rule 68(2)(b) of the Rules because of its associated documents,<sup>71</sup> among which there are some records of Pajule IDP camp, including collected data on those abducted and killed in the years 2002-2005<sup>72</sup> and some population figure of the camp.<sup>73</sup> The Chamber is not persuaded that the fact that certain records are associated with Witness P-7's prior recorded testimony militates against, or precludes the introduction of his testimony under Rule 68(2)(b) of the Rules.
36. At the outset, and in general terms, the Chamber emphasises that the Court's applicable law does not require that documents be introduced only 'through' a witness,<sup>74</sup> or, *a fortiori*, 'through' *viva voce* testimony at trial. Without more, the

<sup>69</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 18-22.

<sup>70</sup> UGA-OTP-0147-0214-R01.

<sup>71</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para, 147.

<sup>72</sup> UGA-OTP-0147-0225; UGA-OTP-0147-0239; UGA-OTP-0150-0172.

<sup>73</sup> UGA-OTP-0150-0124.

<sup>74</sup> See also *Gbagbo and Blé Goudé* Rule 68 Decision, ICC-02/11-01/15-573-Red, para. 9. The Chamber also recalls in this regard that documents may also be submitted as documentary evidence through a 'bar table' application, after which all the Chamber will generally do is recognise their formal submission, deferring



Chamber is not convinced that the introduction of documentary evidence without *viva voce* examination at trial of related witnesses is, in and of itself, prejudicial to the Defence. The Defence is in fact in no way precluded from or limited in challenging this documentary evidence, by presenting its arguments, calling witnesses as appropriate and/or submitting any evidence in support of its challenge.

37. That said, the Chamber recalls that the question under consideration is whether the prior recorded testimony of Witness P-7 may be introduced pursuant to Rule 68(2)(b) of the Rules or the information that he provides should be rather given live at trial. The Chamber observes that in his written statement Witness P-7 explains and comments on the records that he submitted to the Prosecution. With the introduction of the witness's prior recorded testimony, these explanations and comments could therefore be relied upon by the participants at trial without the need that they be rehearsed *viva voce* at trial. The Defence does not explain – nor is it otherwise apparent to the Chamber – how the introduction of this information would limit the Defence's ability to present its arguments at trial, including any challenge to the material associated with the prior recorded testimony. This holds particularly true in that (i) the Defence does not identify which information contained in the witness's statement would – if not tested through live questioning at trial – prejudice any of its prospective arguments, and (ii) the only aspects that the Defence indicates it would like to explore with the witness appear to be of limited significance and to rest on a misunderstanding of the witness's testimony,<sup>75</sup> or to relate to the general

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consideration of their relevance, probative value and potential prejudice to the deliberation of its judgment (see Initial Directions on the Conduct of Proceedings, 13 July 2016, ICC-02/04-01/15-497, paras 24 and 27).

<sup>75</sup> The Defence indicates that 'it is necessary to question the witness as to why the records [REDACTED] about the attack were not created until June 2004' (Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 149). Without taking a position on the merits of this argument, the Chamber finds it sufficient to observe that, in any case, the witness explains in his statement that the records concerned were compiled following a request by the Prosecution but were based on pre-existing documents (UGA-OTP-0147-0214, at 0220, paras 35-37).

‘methodology’ used in the creation of the records concerned.<sup>76</sup> Therefore, and also recalling that these matters are not, in the Chamber’s view, issues materially in dispute for the final determination of the charges presented against Mr Ongwen under Counts 1 to 10, the Chamber considers that the introduction of Witness P-7’s prior recorded testimony is not prejudicial to or inconsistent with Mr Ongwen’s rights.

38. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of witness P-7, together with its associated documents.<sup>77</sup>

*2. Prior recorded testimony of Witness P-8<sup>78</sup>*

39. Witness P-8 was [REDACTED] and was present when the attack occurred. In his written statement,<sup>79</sup> he describes the attack and its aftermath, how the attack was documented and what he was told by the abductees who later returned. None of the matters on which Witness P-8 testifies in his statement concerns Mr Ongwen’s acts and conduct.

40. The Chamber considers that the evidence of Witness P-8 is largely cumulative to that expected to be provided at trial by other witnesses, who also include those individuals, such as Witnesses P-9 and P-67, that the witness explicitly names as his sources for certain information. The Chamber is also of the view that the matters addressed in Witness P-8’s written statement are not issues materially in dispute in relation to the attack on Pajule IDP camp.

41. The Defence objects to the introduction of Witness P-8’s prior recorded testimony for the same reasons argued with respect to Witness P-7, namely on

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<sup>76</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 149.

<sup>77</sup> UGA-OTP-0147-0225, UGA-OTP-0147-0239, UGA-OTP-0150-0124, UGA-OTP-0150-0146, UGA-OTP-0150-0172 and UGA-OTP-0151-0131.

<sup>78</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 23-27.

<sup>79</sup> UGA-OTP-0137-0002-R01.

the mere ground that the witness gave records of the aftermath of the attack to the Prosecution.<sup>80</sup> The Chamber recalls its general finding above in respect of introduction of material as documentary evidence rather than ‘through’ a witness to be examined live at trial,<sup>81</sup> and further finds that, *in concreto*, there is no prejudice to the Defence ensuing from the introduction of official records as documents associated with Witness P-8’s statement. In fact, the Defence does not indicate – and it is not apparent to the Chamber – what the Defence would seek to obtain from calling Witness P-8 to testify *viva voce* at trial beyond what is already contained in his written statement in relation to each of these documents.<sup>82</sup> Conversely, the Chamber is satisfied that the introduction of Witness P-8’s written statement is not prejudicial to or inconsistent with Mr Ongwen’s rights.

42. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-8, together with its associated documents.<sup>83</sup>

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<sup>80</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, paras 147-149.

<sup>81</sup> See above para. 36.

<sup>82</sup> The Defence submits only that the introduction of Witness P-8’s testimony including the records without examination by the Defence ‘would be a grave injustice’ (Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 147).

<sup>83</sup> UGA-OTP-0137-0029, UGA-OTP-0137-0051, UGA-OTP-0137-0058, UGA-OTP-0137-0068, UGA-OTP-0137-0089, UGA-OTP-0137-0123, UGA-OTP-0137-0145, UGA-OTP-0137-0190 and UGA-OTP-0137-0193. The Chamber notes that the Prosecution also indicates UGA-OTP-0132-0192-R01 as one of the documents associated with Witness P-8’s prior recorded testimony (Annex A to the First Application, ICC-02/04-01/15-465-AnxA-Corr, p. 3). This document, which is the translation of an intercepted communication, appears however unrelated to Witness P-8. In the absence of any explanation, it is not evident to the Chamber how this document would be associated with Witness P-8’s testimony, which makes no mention of interception of communications. Similarly, the sketch at UGA-OTP-0027-0212 does not appear to the Chamber to be related to Witness P-8, as it was produced by another witness during interview with the Prosecution and attached as ‘Exhibit A’ to the statement of this other individual (UGA-OTP-0027-0200-R01). While the Chamber considers that these may be only clerical errors on the part of the Prosecution, it is in any case appropriate, to preserve the clarity of the record, to clarify that these documents at issue are not introduced as part of Witness P-8’s prior recorded testimony by virtue of the present decision.

3. *Prior recorded testimony of Witness P-15*<sup>84</sup>

43. Witness P-15 testifies, in her two witness statements,<sup>85</sup> that she was abducted by the LRA in June 2003 and that while she did not participate in the attack on Pajule IDP camp, she was present when the order to attack the camp was given. She also describes the treatment of girls and women in the LRA. Her prior recorded testimony does not go to proof of Mr Ongwen's acts and conducts.
44. The Chamber observes that a large part of Witness P-15's evidence concerns events which, while contextually relevant, are not material in the present case – such as the witness's own abduction and experience in the Control Altar. The information provided with respect to the attack on Pajule IDP camp is limited and not the central part of the witness statement, and in any case does not concern the critical aspects which are materially in dispute. Moreover, other witnesses are expected to testify at trial in relation to the same matters concerning both the planning and the purpose of the attack on Pajule IDP camp – such as Witnesses P-45, P-48, P-138, P-146, P-209, P-309 and P-330 – and the distribution of girls and women as forced wives within the LRA – such as, for example, Witnesses P-142, P-351, P-352, P-366, P-374 and P-396, in addition to Witnesses P-99, P-101, P-214, P-226, P-227, P-235 and P-236 whose testimony under Article 56 of the Statute is already submitted at the present trial.<sup>86</sup>
45. The Defence argues that the request to introduce the prior recorded testimony of Witness P-15 must be rejected for several reasons. First, according to the Defence,<sup>87</sup> the witness's statement should not be introduced under Rule 68(2)(b) of the Rules because she states that Vincent Otti sent people to attack Pajule IDP camp at 19.00 on 9 October 2003 and that she heard him calling a commander at

<sup>84</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 28-31.

<sup>85</sup> UGA-OTP-0043-0131-R01; UGA-OTP-0191-0254-R01.

<sup>86</sup> See Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute, 10 August 2016, ICC-02/04-01/15-520.

<sup>87</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 139.

the Uganda People's Defence Force ('UPDF') barracks and telling him that LRA fighters would be at the camp around 20.00,<sup>88</sup> while the Prosecution's case theory is that the Pajule IDP camp was attacked around 5.00 or 6.00 in the morning. Irrespective of the merits of this argument and the compatibility of the information provided by Witness P-15 with the Prosecution's case theory – on which it is unnecessary to take a position at this point in time – the Chamber observes that this information, as it is contained in the witness's prior recorded testimony, could be relied upon following the introduction of the statement under Rule 68(2)(b) of the Rules. It is unclear how the introduction of this information – which the Defence considers to be relevant to its case – could in any way prejudice the rights of Mr Ongwen. In particular, the Chamber considers it unwarranted to reject the introduction of a prior recorded testimony so that the same information be reheard *viva voce* at trial in a case, like the present one, where the Defence does not claim that such information would need clarifications or further details that can be obtained through the witness's questioning at trial or, in general, what added value the witness's examination at trial would have.

46. The Defence also submits that Witness P-15's prior recorded testimony should not be introduced pursuant to Rule 68(2)(b) of the Rules because, whereas in her statement of 2004 she stated that she had not heard of 'Dominic Ongwen', in the second statement given in 2006 she stated that she had heard of 'Dominic Ongwen' but had never seen him and that she had heard of and seen 'Odomi' but could not remember where.<sup>89</sup> The Chamber does not consider this to be of

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<sup>88</sup> UGA-OTP-0043-0131-R01 at 0146, paras 87 and 91. The Chamber notes, however, that the witness also adds that 'I do not know why [Vincent Otti] was calling the UPDF to tell them this. I think he did this just to fool the commander. He told the commander they would reach there at 8pm, but when the people came back they did not say when they had arrived but said that they had not arrived at 8pm' (UGA-OTP-0043-0131-R01 at 0146, para. 91).

<sup>89</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Red, para. 140. The Defence refers to paragraph 101 of Witness P-15's first statement (UGA-OTP-0043-0131-R01) and paragraph 40 of her second statement (UGA-OTP-0191-0254-R01)

relevance for the purposes of the present decision. Witness P-15 is not relied upon to prove Mr Ongwen's acts and conduct – indeed she does not mention any. The fact that she declared that she had heard Dominic Ongwen's name only in her second statement to the Prosecution and that she was unaware that 'Dominic Ongwen' and 'Odomi' were one and the same person are raised as aspects concerning the probative value of the evidence – which will be considered at the end of the trial. The Chamber is unconvinced by the Defence argument that this 'inconsistency' would militate against the introduction of Witness P-15's statements under Rule 68(2)(b) of the Rules, in particular as the witness testifies in her prior recorded testimony on different aspects and on things that she claims she witnessed and experienced directly.

47. Lastly, the Defence argues that witness P-15 should be required to testify in order for the Defence to question her about Mr Ongwen's alibi claim.<sup>90</sup> Indeed, according to the Defence, as Witness P-15 travelled with Vincent Otti before and after the attack on Pajule IDP camp, she should be asked whether she noticed anyone under arrest who travelled with the group.<sup>91</sup> The Chamber recalls, at first, that the purpose of a determination under Rule 68(2)(b) of the Rules is not whether a person shall testify at trial, but whether the information provided by a witness in a prior recorded testimony can be introduced without the need that the witness appears live at trial and be subject to questioning by the participants. The prior recorded testimony of Witness P-15 contains no information which, if introduced in writing and untested through examination at trial, could prejudice the Defence's ability to raise and support its alibi claim.

48. Moreover, the Chamber considers that the speculation that Witness P-15 could have information relevant to the Defence solely because she travelled – together with many other individuals – with Vincent Otti and the Control Altar at the

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<sup>90</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, paras 39 and 141.

<sup>91</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, paras 39 and. 141.

relevant time does not warrant that her prior recorded testimony should not be introduced under Rule 68(2)(b). In fact, the Chamber does not intend to envisage the appearance at trial of possibly hundreds individuals on the mere basis that they were – or claim to have been – with Vincent Otti/Control Altar at the relevant time. The Defence may conduct its own investigations and, on their basis, make its alibi claim relying on its own witnesses and questioning the prosecution witnesses who will be testifying at trial. In any case, the Chamber recalls that there is a procedure in place enabling the Defence to seek to question prosecution witnesses,<sup>92</sup> and that the introduction of Witness P-15's prior recorded testimony under Rule 68(2)(b) of the Rules does not, in and of itself, prevent that a supplementary statement from being obtained from the witness, should the Defence consider it useful for its alibi claim.

49. In these circumstances, the Chamber is satisfied that the introduction of Witness P-15's written statements is not prejudicial to or inconsistent with Mr Ongwen's rights.
50. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-15.

#### *4. Prior recorded testimony of Witness P-47<sup>93</sup>*

51. Witness P-47 was a UPDF soldier stationed at the army barracks of Pajule IDP camp at the time relevant to the charges against Mr Ongwen, who was present when the camp was attacked. In his written statement,<sup>94</sup> the witness discusses the layout of the camp, the time of the attack, the nature of the attack and the weapons used by the attackers, the duration of the attack, the scene after the

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<sup>92</sup> Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, ICC-02/04-01/15-339-Anx.

<sup>93</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 32-35.

<sup>94</sup> UGA-OTP-0027-0177-R01.



attack and how the attack was documented. The Chamber is satisfied that Witness P-47's statement goes to proof of matters other than Mr Ongwen's acts and conduct.

52. The Chamber is also of the view that issues with respect to the layout of the Pajule IDP camp and the time, nature, modalities and consequences of the attack on the camp are similarly addressed by other witnesses on whom the Prosecution relies and are not issues materially in dispute in the present case.
53. At the same time, the Chamber notes the Defence argument that Witness P-47, in his written statement, also mentions some issues related to Witness P-9.<sup>95</sup> The Defence anticipates that one of its arguments at trial on the charges against Mr Ongwen with respect to the attack on Pajule IDP camp is the lack of credibility of Witness P-9's testimony on account of his alleged collaboration with the LRA.<sup>96</sup> The Chamber notes that, indeed, in his prior recorded testimony Witness P-47 states that there were allegations at Pajule IDP camp that Witness P-9, 'because of the way he behaves', was an LRA collaborator, and that following these allegations Witness P-47 arrested Witness P-9, but released him soon after 'because there was no evidence'.<sup>97</sup> No further detail is offered in the witness's written statement as to the nature, basis and source of the allegations brought forward against Witness P-9, the measures taken by Witness P-47 in that regard or whether any investigation was conducted into these allegations. Considering that the prior recorded testimony is deficient on these issues which the Defence claims to be of critical importance for its challenge to the credibility of Witness P-9, and while refraining, at this stage, to take any position as to the validity of such an argument, the Chamber considers it in the interest of justice not to allow the introduction in writing of the prior recorded testimony of

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<sup>95</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 151.

<sup>96</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, paras 151 and 156.

<sup>97</sup> UGA-OTP-0027-0177-R01 at 0194-0195, paras 120-121.



Witness P-47 pursuant to Rule 68(2)(b) of the Rules. In fact, the Chamber considers that permitting the introduction in writing of Witness P-47's claim that 'there was no evidence' against Witness P-9 without obtaining further details on these matters could prejudice the Defence's ability to challenge the credibility of Witness P-9 on the grounds it intends to raise.

54. The Chamber therefore decides not to allow the introduction of Witness P-47's prior recorded testimony pursuant to Rule 68(2)(b) of the Rules. However, taking into account the participants' submissions with respect to the requested introduction of the prior recorded testimony of Witness P-47 under Rule 68(2)(b) of the Rules, and considering that large parts of Witness P-47's written statement are of cumulative nature with respect to other expected witnesses' live testimonies, the Chamber considers that the prior recorded testimony can be introduced pursuant to Rule 68(3) of the Rules.<sup>98</sup> Therefore, should Witness P-47 appear as a witness at trial and not object to such introduction, his prior recorded testimony will be introduced under Rule 68(3) of the Rules. The Prosecution would then be allowed to conduct a short supplementary examination of the witness,<sup>99</sup> followed by questioning by the legal representatives of the victims and the Defence.

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<sup>98</sup> Rule 68(1) of the Rules allows the Chamber to decide *proprio motu* whether to introduce a prior recorded testimony 'after hearing the parties'. The Chamber considers that, for the purpose of this requirement, the submissions made by the parties in their filings under Rule 68(2)(b) of the Rules with respect to the introduction of the prior recorded testimony of Witness P-47 are sufficiently comprehensive and detailed also for its determination under Rule 68(3) of the Rules. Furthermore, as indeed proposed by the Defence, the Defence would be allowed to question Witness P-47 at trial, including on the topics it has identified as of relevance to its case.

<sup>99</sup> It is recalled in this regard that, as stated by the Presiding Judge in the Initial Directions on the Conduct of Proceedings, the Chamber 'expects the calling participant to streamline its questioning considerably when resorting to [Rule 68(3)]' (ICC-02/04-01/15-497, para. 18).

5. *Prior recorded testimony of Witness P-61*<sup>100</sup>

55. Witness P-61 is a former civilian resident of Pajule IDP camp, who was present when the camp was attacked in October 2003. In his statement,<sup>101</sup> he describes the attack, during which he was abducted together with other residents of the camp. The Chamber is satisfied that the prior recorded testimony of Witness P-61 does not go to proof of Mr Ongwen's acts and conduct.
56. The Chamber also considers that Witness P-61's statement appears cumulative to other evidence expected to be obtained at trial from other witnesses scheduled to testify live, who are expected to provide evidence in relation to similar facts.<sup>102</sup> Witnesses P-9, P-67 and P-247, for example, will testify, *inter alia*, about their abduction during the attack on Pajule IDP camp, and several LRA insiders who participated in the attack or witnessed its aftermath will appear at trial as prosecution witnesses.
57. Similarly, the Chamber is of the view that the prior recorded testimony of Witness P-61 does not relate to the issues of central importance over which a material dispute exists between the parties. In this regard, the Chamber finds it relevant that the Defence arguments opposing the introduction of the prior recorded testimony are based on the fact that Witness P-61 mentions having heard that one of the LRA leaders was Otti Lagony who had however died few years before.<sup>103</sup> Without taking a position on the merits, the Chamber in any case considers that this submission by the Defence would rather concern the probative value to be attached to the testimony provided by Witness P-61, which

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<sup>100</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 36-39.

<sup>101</sup> UGA-OTP-0144-0043-R01.

<sup>102</sup> The Chamber does not consider relevant the Defence argument that Witness P-61's prior recorded testimony would be 'only partly corroborative' because the witness 'speaks about hearing that Charles Tabuley was present at Latanya Hill, even though not directly told this "fact"' and '[t]he other commanders he remember had grey hair' (Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 152, making reference to UGA-OTP-0144-0043-R01 at 0048, para. 29).

<sup>103</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 153, with reference to UGA-OTP-0144-0043-R01 at 0054, para. 71.

will be considered as part of the Chamber's deliberation of its judgment. Indeed, the Chamber is of the view that the issue raised by the Defence is also of such limited nature that it does not militate against the introduction of the statement under Rule 68(2)(b) of the Rules. In any case, the Chamber also notes that Witness P-61 explicitly states that he has never seen Otti Lagony himself,<sup>104</sup> and that his prior recorded testimony – which bears sufficient indicia of reliability of formal nature<sup>105</sup> – is not so manifestly unbelievable or incoherent so as to make it unsuitable for introduction under Rule 68(2)(b) of the Rules.

58. In conclusion, taking into account the relevant factors, and in the absence of any prejudice to Mr Ongwen's rights, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-61, together with its associated document.<sup>106</sup>

*6. Prior recorded testimony of Witness P-84<sup>107</sup>*

59. Witness P-84 was an officer with the UPDF during the attack on Pajule IDP camp. In his statement,<sup>108</sup> the witness explains that he was not present during the attack but flew over the camp in a helicopter as the attack was ending, and was also part of a fact-finding team that visited Pajule after the attack had ended on 10 October 2003.
60. The Prosecutor does not intend to rely on paragraph 71 of the statement,<sup>109</sup> in which the witness states that he was told by abductees, both from Pajule IDP camp and elsewhere, including by Witness P-9, that Dominic Ongwen was one of the seven major LRA commanders who commanded and coordinated the

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<sup>104</sup> UGA-OTP-0144-0043-R01 at 0054, para. 77.

<sup>105</sup> See above para. 17.

<sup>106</sup> UGA-OTP-0207-0136.

<sup>107</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 40-43.

<sup>108</sup> UGA-OTP-0139-0149-R01.

<sup>109</sup> First Application, ICC-02/04-01/15-465-Corr-Red, para. 40.

attack on Pajule IDP camp.<sup>110</sup> Considering that (i) this is only a minor information obtained from other persons, (ii) persons who can testify directly to Mr Ongwen's role in the attack, if any, are scheduled to testify at trial and (iii) the Prosecution, in any case, does not intend to rely on this information, the Chamber is of the view that Witness P-84's statement is suitable to be introduced under Rule 68(2)(b) with the limitation that the Chamber will not rely on the information contained at paragraph 71 for the purposes of establishing Mr Ongwen's acts and conduct.<sup>111</sup>

61. The Defence argues that Witness P-84's testimony 'leaves open the possibility that Mr Ongwen did not participate in the attack' as his name is mentioned only at paragraph 71 of the statement, but not at paragraph 128 in which the witness states that Witness P-9 said that when he met Vincent Otti after the attack on Pajule IDP camp there were at least other four commanders.<sup>112</sup> Indeed, Witness P-84 mentions the names of these four commanders (and Mr Ongwen's is not among them) and states that he 'cannot remember the other names of commanders'. The Chamber is of the view that there exists no prejudice to Mr Ongwen's rights ensuing from the introduction of Witness P-84's prior recorded testimony. First, as observed above, the Prosecution does not seek to rely on the one paragraph mentioning Mr Ongwen, and the Chamber will disregard this information for the purposes of establishing Mr Ongwen's acts and conduct. Second, and without taking a position at this stage on the relevance of any such argument, the Chamber considers that the Defence may make full use of the information included at paragraph 128 of the statement and the fact that Mr Ongwen's name is absent therefrom. In particular, it is not evident to the

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<sup>110</sup> UGA-OTP-0139-0149-R01 at 0162, para. 71.

<sup>111</sup> This information is repeated in the witness's investigation report which, *inter alia*, also lists Dominic Ongwen among the commanders of the attack on the camp (UGA-OTP-0069-0416 at 0418). However, this report would not be introduced as a 'prior recorded testimony' under Rule 68(2)(b) of the Rules, but as documentary evidence associated with Witness P-84's statement, and the exclusion of information concerning the acts and conduct of the accused does not apply to this item of documentary evidence which is not testimonial in nature.

<sup>112</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 155.

Chamber nor is it explained by the Defence<sup>113</sup> why the information provided by Witness P-84 in his written statement would need to be repeated live at trial for the Defence to present its arguments, including on the credibility of Witness P-9. Furthermore, the Chamber observes that other witnesses whom the Prosecution intends to call to testify live at trial would be able to provide information about Witness P-9 (who will also appear before the Chamber), including Witnesses P-6, P-67, P-81 and P-249, who will also testify about their own abductions together with Witness P-9, as well as, by virtue of the present decision,<sup>114</sup> Witness P-47.

62. The rest of the testimony provided by Witness P-84 is also not of such significance as to militate against its introduction under Rule 68(2)(b) of the Rules, in particular considering that several other witnesses (both civilian residents of the camp and LRA insiders who participated in the attack) can give more direct evidence on the relevant facts than Witness P-84. The existence of a fact-finding mission in relation to the attack on Pajule IDP camp and the conclusions of such mission in relation to the modalities and consequences of the attack are also not the issues that are materially in dispute for the purpose of the charges against Mr Ongwen concerning the attack on Pajule IDP camp.
63. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-84, together with its associated documents.<sup>115</sup>

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<sup>113</sup> The Defence only refer to the need to ‘verify specifics’ about the information provided by Witness P-84 (Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 156.

<sup>114</sup> See above paras 51-54.

<sup>115</sup> UGA-OTP-0069-0416 and UGA-OTP-0139-0178.

7. *Prior recorded testimony of Witness P-130*<sup>116</sup>

64. Witness P-130 was a civilian who was abducted by the LRA in August 2002 and subsequently participated as an LRA fighter in the attack on Pajule IDP camp. In his prior recorded testimony,<sup>117</sup> he testifies about the lead-up to the attack as well as its purpose, nature, modalities and duration. The prior recorded testimony does not go to proof of Mr Ongwen's acts and conduct. In particular, the witness explicitly states that, while he had heard the name 'Odomi', he had never seen him and 'cannot say whether he was at this fight at Pajule or not'.<sup>118</sup>
65. With respect to Witness P-130, the Defence raises the same argument as for Witness P-15, namely that the witness should be called to testify live to be asked whether anyone was arrested by Vincent Otti at the time of the attack on Pajule IDP camp.<sup>119</sup> Similarly to Witness P-15,<sup>120</sup> the Defence argument rests only on the speculation that Witness P-130 might be able to provide information to advance its case as to the existence of an alibi for Mr Ongwen with respect to the charged crimes committed in Pajule IDP camp. There is no indication in the witness's prior recorded testimony in support of this argument. The Defence will be allowed to question on matters relevant to its alibi claim the prosecution witnesses who will be testifying live at trial and, importantly, will be allowed to call its own witnesses in support of such claim. As already observed above, this does not however entail that anyone who claims having been with Vincent Otti at the time of the attack on Pajule IDP camp must, for this fact alone, appear as a *viva voce* witness at trial. Finally, the Chamber recalls again that there exists a procedure enabling the Defence to contact prosecution witnesses and, possibly,

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<sup>116</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 44-48.

<sup>117</sup> UGA-OTP-0191-0272-R01.

<sup>118</sup> UGA-OTP-0191-0272-R01 at 0280, para. 59.

<sup>119</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, paras 144-145.

<sup>120</sup> See above, paras 47-48.

obtain a statement from them,<sup>121</sup> and considers that the Defence investigation and its ability to present its case before the Chamber are in no way impaired by the introduction under Rule 68(2)(b) of the Rules of Witness P-130's prior recorded testimony.

66. Moreover, the Chamber observes that the other witnesses scheduled to appear at trial in relation to the attack on Pajule will testify to facts similar to those to which Witness P-130 testifies in his prior recorded testimony. This holds true with respect to the planning of the attack on the camp as well as its timing, development and purpose. As already indicated, the Chamber also considers that these aspects are not matters materially in dispute on which the determination of Mr Ongwen's responsibility for the charges concerning the attack on Pajule IDP camp will eventually rest.

67. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-130.

#### **B. Prior recorded testimonies mainly related to the attack on Odek IDP camp**

68. Mr Ongwen is charged with the crimes of attacks against the civilian population, murder, attempted murder, torture, other inhumane acts, cruel treatment, enslavement, pillaging, outrages upon personal dignity and persecution committed by the LRA during the attack on Odek IDP camp on or about 29 April 2004 (Counts 11 to 23 of the confirmed charges).<sup>122</sup>

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<sup>121</sup> Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, ICC-02/04-01/15-339-Anx.

<sup>122</sup> Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15-422-Red, confirmed charges, pages 71-101, paras 27-39.

69. From the list of witnesses filed by the Prosecution,<sup>123</sup> read in conjunction with the summary of anticipated testimonies of these witnesses provided by the Prosecution,<sup>124</sup> the Prosecution's Pre-Trial Brief,<sup>125</sup> as well as the information included in the Applications,<sup>126</sup> the Chamber understands that the Prosecution intends to call several witnesses to testify orally in relation (also) to the charges concerning the attack on Odek IDP camp, including a number of civilians who were residents at the camp at the time of the attack (Witnesses P-218, P-252, P-269 and P-275), a number of LRA fighters who participated in the attack on the camp (Witnesses P-54, P-245, P-309, P-340, P-352, P-406 and P-410), and some other LRA insiders, such as Witnesses P-142 and P-205.
70. The Prosecution requests the introduction, under Rule 68(2)(b) of the Rules, of the prior recorded testimony of four witnesses who were all civilian residents of Odek IDP camp at the time of the attack: Witnesses P-270, P-274, P-268 and P-325. They are addressed in turn below.<sup>127</sup>

*1. Prior recorded testimony of Witnesses P-270<sup>128</sup>*

71. Witness P-270 is a victim of the attack on Odek IDP camp. In her written statement,<sup>129</sup> she describes the attack and her personal experience of it as well as the abductions of two of her sons, one of whom – Witness P-275 – will testify live at trial. At one point of her statement, Witness P-270 states that, during the attack on the camp, people were screaming 'Ongwen today has finished the people of Odek. Ongwen has killed us today'.<sup>130</sup> This limited and

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<sup>123</sup> Updated List of Prosecution Witnesses, ICC-02/04/15-548-Conf-AnxA.

<sup>124</sup> ICC-02/04-01/15-532-Conf-AnxC

<sup>125</sup> Prosecution's Pre-Trial Brief, ICC-02/04-01/15-533 paras 288-370

<sup>126</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 50-68; Second Application, ICC-02/04-01/15-538-Red, paras 16-19.

<sup>127</sup> The Chamber will analyse the concerned witnesses following the order in which the witnesses are addressed in the First Application rather than the progressive number of the assigned codes.

<sup>128</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 50-53.

<sup>129</sup> UGA-OTP-0241-0168-R01.

<sup>130</sup> UGA-OTP-0241-0168-R01, para. 33.



inconsequential reference to Mr Ongwen, on which the Prosecution in any case does not intend to rely,<sup>131</sup> will not be considered by the Chamber for the purpose of its final judgment. No other matter contained in the prior recorded testimony of Witness P-270 goes to proof of Mr Ongwen's acts and conduct.

72. The Chamber considers that the statement of Witness P-270 appears cumulative to that which will be provided live at trial by other prospective witnesses, bears sufficient indicia of reliability and does not concern issues which are materially in dispute. Indeed, the Chamber notes that the Defence submits 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'.<sup>132</sup> As recalled above, the Chamber observes that there exists a procedure under which the Defence may seek to question a prosecution witness and obtain a statement from him or her.<sup>133</sup> However, that the Defence conduct an interview with the witness is not a pre-condition to the introduction of her prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, in particular as it is not apparent to the Chamber on which issues the Defence would want to question the witness which would justify that the introduction of her statement be precluded or deferred.<sup>134</sup> In these circumstances, and considering the content of the witness's statement, the Chamber is satisfied that its introduction in writing is not prejudicial to or inconsistent with Mr Ongwen's rights.

73. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-270.

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<sup>131</sup> First Application, para. 50.

<sup>132</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 181.

<sup>133</sup> Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, ICC-02/04-01/15-339-Anx.

<sup>134</sup> The Defence only argues that 'P-0270 recanted the date of the attack from when she had her screening interview and her interview for a statement' (Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 181).

2. *Prior recorded testimony of Witness P-274*<sup>135</sup>

74. Witness P-274 was a civilian resident, and leader, of Odek IDP camp. In his two written statements,<sup>136</sup> the witness primarily provides background information about the Odek IDP camp and describes the unfolding of the attack of 29 April 2004, as well as his personal experience (and that of his wife, Witness P-268) during that attack. The Chamber is satisfied that the prior recorded testimony of Witness P-274 goes to proof of matters other than Mr Ongwen's acts and conduct.
75. The Defence argues that it should be allowed to examine Witness P-274 at trial on the grounds that he was the camp leader of Odek IDP camp and that his 'performance as the commandant was lacking'.<sup>137</sup> In the absence of any explanation by the Defence as to the relevance of this argument with respect to the charges brought against Mr Ongwen, the Chamber fails to see why the prior recorded testimony of Witness P-274 should not be introduced under Rule 68(2)(b) of the Rules on account of the alleged 'lacking' nature of his 'performance' as camp commandant.
76. In any case, the Chamber observes that other witnesses will testify at trial about the unfolding of the attack on Odek IDP camp and the attackers' actions during such attack. These include, *inter alia*, Witnesses P-54, P-142, P-218, P-245, P-252, P-264, P-269, P-275, P-309 and P-314. Background information about the Odek IDP camp is also expected to be provided by other former residents of the camp who will testify live at trial, such as Witnesses P-218, P-252, P-269 and P-275. The Chamber is therefore of the view that the evidence provided by Witness P-274 – which, in any case, does not concern the issues materially in dispute with respect

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<sup>135</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 54-58; Second Application, paras 16-19.

<sup>136</sup> UGA-OTP-0244-3375-R01, the introduction of which was requested by the Prosecution in the First Application; and UGA-OTP-0267-0174, which is instead subject to the Second Application.

<sup>137</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 179. See also Defence Response to the Second Application, ICC-02/04-01/15-555-Red, para. 19.

to the attack on Odek IDP camp – is at all events cumulative to the evidence expected to be obtained at trial from the witnesses who will testify *viva voce*.

77. Regardless of its content, the Defence objects to the introduction of Witness P-274's prior recorded testimony, also on the basis of its intention to challenge the 'admission' of some documents attached to the witness's first statement on the grounds that they are not 'official records' but entries in the witness's personal diary.<sup>138</sup> The Chamber takes note of this and expresses no position at this stage on the validity of the Defence argument. Nevertheless, the Chamber is not persuaded that, in order for the Defence to challenge the material, Witness P-274 must be called to testify live. The Defence can make its announced argument – namely that the documents concerned were not 'created in the normal course of business'<sup>139</sup> – fully on the basis of the witness's prior recorded testimony. It is the witness himself who explains, in his first statement, that he wrote the names of those residents of the camp who were wounded or killed during the attack on Odek IDP camp in his 'personal diary for the year 2004',<sup>140</sup> the relevant pages of which are the documents which the Defence intends to challenge. It is unclear to the Chamber, in the absence of any explanation by the Defence, what additional information the Defence could reasonably obtain in this regard through the questioning of the witness at trial in support of its argument, beyond that already included in the written statement. The Chamber also recalls that the introduction of documentary evidence – whether as associated documents to a prior recorded testimony introduced under Rule 68(2)(b) or submitted through a 'bar table' application – does not, in and of itself, result in its 'admission'. The Chamber will still determine, *inter alia*, the probative value of such material and entertain any relevant challenge by the Defence as part of the deliberation of its final judgment. The Chamber therefore

<sup>138</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 179.

<sup>139</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 179.

<sup>140</sup> UGA-OTP-0244-3375-R01 at 3381, para. 46.

finds no prejudice to the rights of the Defence from the introduction of the written statements of Witness P-274 including the documents concerned.

78. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-274, together with its associated documents.<sup>141</sup>

*3. Prior recorded testimony of Witness P-268<sup>142</sup>*

79. Witness P-268 is another victim of the attack on Odek IDP camp, who, in her prior recorded testimony,<sup>143</sup> describes the events during the attack and a number of crimes committed by the attackers, some of them directly against her. The witness's testimony, which does not concern Mr Ongwen's acts and conduct, is also of cumulative or corroborative nature as other prospective witnesses, including Witnesses P-218, P-252, P-269 and P-275 and several LRA insider witnesses who participated in the attack, are expected to testify live essentially on the same matters.
80. The Defence submits that 'it would be satisfactory to conduct an interview with [Witness P-268] and the Prosecution before admitting her testimony'.<sup>144</sup> The Chamber reiterates in this regard that the arrangement of an interview between the Defence and a prosecution witness – which is possible following the appropriate procedure<sup>145</sup> – is not in itself a pre-condition to the introduction of a prior recorded testimony pursuant to Rule 68(2)(b) of the Rules. As the Defence mentions only that its problem with Witness P-268 is that the witness's

<sup>141</sup> UGA-OTP-0244-3388-R01, UGA-OTP-0244-3391, UGA-OTP-0244-3392, UGA-OTP-0244-3393, UGA-OTP-0244-3395, UGA-OTP-0267-0180, UGA-OTP-0267-0182.

<sup>142</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 59-63.

<sup>143</sup> UGA-OTP-0248-0013-R01.

<sup>144</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 180.

<sup>145</sup> Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, ICC-02/04-01/15-339-Anx. Moreover, considering that Witness P-268 is also a victim participating in the case (see Updated List of Prosecution Witnesses, ICC-02-04/15-548-Conf-AnxA), due regard shall also be given to the 'Mechanisms for exchange of information on individuals enjoying dual status', ICC-02/04-01/15-504-Anx2

‘screening note states that her child was killed during the attack, but states in her testimony that her child died about two (2) weeks later’,<sup>146</sup> it is also not apparent to the Chamber what the Defence would seek to obtain from an interview with the witness, as in any case the matter raised is not of such significance that it would warrant the rejection or the deferral of the request to introduce the statement under Rule 68(2)(b) of the Rules. In these circumstances, the Chamber is of the view that the introduction of Witness P-268’s statement is not prejudicial to or inconsistent with Mr Ongwen’s rights.

81. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-268.

*4. Prior recorded testimony of Witness P-325<sup>147</sup>*

82. Witness P-325 was [REDACTED] at the Odek IDP camp at the time of the attack. In his statement,<sup>148</sup> he provides some background information about the Odek IPD camp, describes his personal experience of the attack of 29 April 2004, what he saw the day after the attack when he returned to the camp and the burying of the deceased. The witness also names certain people who were killed or abducted during the attack. The matters on which Witness P-325 testifies in his statement do not concern Mr Ongwen’s acts and conduct.

83. The Chamber also considers that the information provided by the witness in his statement relates to issues that are not materially in dispute in the present case, and that, in large part, may be obtained through the questioning of the several other residents of Odek IDP camp who will be testifying at trial, including

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<sup>146</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 180.

<sup>147</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 64-68.

<sup>148</sup> UGA-OTP-0264-0242-R01.

Witness P-252 who is explicitly mentioned as one of the sources of the information provided by Witness P-325 in his prior recorded testimony.

84. The Chamber notes that, with respect to Witness P-325, the Defence submits that, prior to the introduction of his prior recorded testimony, 'it would be satisfactory to conduct an interview with the witness and the Prosecution' in particular in relation to the witness's role as [REDACTED]<sup>149</sup> The Chamber reiterates that, while the Defence may wish to follow the procedure for contact with prosecution witnesses,<sup>150</sup> it is not required that the Defence interview a prosecution witness prior to his or her prior recorded testimony being introduced under Rule 68(2)(b) of the Rules. Furthermore, in this particular case, considering the questions that the Defence wishes to ask the witness<sup>151</sup> and the fact that in the written statement the witness describes his personal experience as a civilian present during the attack rather than in his function as [REDACTED], the Chamber finds no prejudice to Mr Ongwen's rights resulting from the introduction of the witness statement under Rule 68(2)(b) of the Rules.

85. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-325, together with its annex.<sup>152</sup>

### **C. Prior recorded testimonies mainly related to the attack on Lukodi IDP camp**

86. Mr Ongwen is charged with the crimes of attacks against the civilian population, murder, attempted murder, torture, other inhumane acts, cruel treatment,

<sup>149</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 182.

<sup>150</sup> Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, ICC-02/04-01/15-339-Anx.

<sup>151</sup> The Defence argues that it would ask the witness about whether [REDACTED] (Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 182).

<sup>152</sup> UGA-OTP-0264-0252-R01.

enslavement, pillaging, destruction of property and persecution committed by the LRA during an attack on Lukodi IDP camp or on about 19 May 2004 (Counts 24 to 36 of the confirmed charges).<sup>153</sup>

87. From the list of witnesses filed by the Prosecution,<sup>154</sup> read in conjunction with the summary of anticipated testimonies of these witnesses provided by the Prosecution,<sup>155</sup> the Prosecution's Pre-Trial Brief,<sup>156</sup> as well as the information included in the First Application under consideration,<sup>157</sup> the Chamber understands that the Prosecution intends to call several witnesses to testify orally in relation (also) to the charges concerning the attack on Lukodi IDP camp, including some civilians who were residents at the camp at the time of the attack (such as Witnesses P-24, P-119 and P-187), LRA fighters who participated in the attack on the camp (such as Witnesses P-18, P-142, P-172, P-205, P-245, P-410) as well as other LRA insiders, such as Witnesses P-101,<sup>158</sup> P-202 and P-258.
88. By its First Application, the Prosecution requests the introduction, under Rule 68(2)(b) of the Rules, of the prior recorded testimony of eight witnesses principally related to the attack on Lukodi IDP camp: Witnesses P-185, P-195, P-196, P-26, P-35, P-36, P-17 and P-60. Below, they are analysed in turn.<sup>159</sup>

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<sup>153</sup> Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15-422-Red, confirmed charges, pages 71-101, paras 40-52.

<sup>154</sup> Updated List of Prosecution Witnesses, ICC-02-04/15-548-Conf-AnxA.

<sup>155</sup> ICC-02/04-01/15-532-Conf-AnxC

<sup>156</sup> Prosecution's Pre-Trial Brief, ICC-02/04-01/15-533, paras 371-429.

<sup>157</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 69-106.

<sup>158</sup> The transcripts and video-recording of the live testimony of Witness P-101 have been already recognised as formally submitted for the purpose of the present trial: Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute, 10 August 2016, ICC-02/04-01/15-520.

<sup>159</sup> The Chamber will analyse the witnesses concerned following the order in which the witnesses are addressed in the First Application rather than the progressive number of the assigned codes.



*1. Prior recorded testimony of Witness P-185<sup>160</sup>*

89. Witness P-185 was a resident of Lukodi IDP camp when it was attacked on 19 May 2004. In his written statement,<sup>161</sup> he describes the attack and, in particular, his attempts to hide and escape from the attackers, the aftermath of the attack and the events which occurred to his family. Witness P-185's statement does not concern Mr Ongwen's acts and conduct.
90. The Defence objects to the introduction of the written statement of Witness P-185 on two main grounds. Firstly, the Defence submits<sup>162</sup> that the witness should be called to testify live at trial because relevant information about his experience during the attack on Lukodi IDP camp which is included in his prior recorded testimony (and in that of his wife, Witness P-195) does not appear in the statement which the witness gave to the police in the immediate aftermath of the attack.<sup>163</sup> The Chamber does not consider that the existence of these discrepancies constitutes a sufficient reason to disallow the introduction of the prior recorded testimony of Witness P-185, also considering that the witness explains that he had encountered the police on the way to the hospital and given them a witness statement containing only 'the highlights'.<sup>164</sup> In any case, as recalled above, any argument concerning the probative value of the evidence provided – including that introduced under Rule 68(2)(b) of the Rules – would be entertained by the Chamber as part of its deliberation of the final judgment under Article 74 of the Statute. For the purpose of the present decision, the Chamber finds it sufficient to observe that the prior recorded testimony of Witness P-185 bears sufficient indicia of reliability of a formal nature<sup>165</sup> and is also not so manifestly unbelievable or incoherent that his testimony must be

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<sup>160</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 70-73.

<sup>161</sup> UGA-OTP-0233-1020-R01.

<sup>162</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, paras 171-172.

<sup>163</sup> UGA-OTP-0233-1046.

<sup>164</sup> UGA-OTP-0233-1020-R01 at 1026, para. 26. See also 1027, para. 29.

<sup>165</sup> See above para. 17.

provided live and 'tested' at trial rather than being introduced under Rule 68(2)(b) of the Rules.

91. Secondly, the Defence submits that the prior recorded testimony of Witness P-185 should not be introduced under Rule 68(2)(b) of the Rules because in the screening notes about P-185 it is stated that the witness's wife (Witness P-196) mentioned Mr Ongwen to him, but this information does not appear in any witness statement by either of the two witnesses.<sup>166</sup> The Chamber does not consider this to be relevant. The prior recorded testimony of Witness P-185 – regardless of what may have been mentioned in the witness's screening notes compiled by investigators of the Office of the Prosecutor – does not mention Mr Ongwen at any point. The Chamber is therefore not persuaded that introducing Witness P-185's statement would be prejudicial to or inconsistent with Mr Ongwen's rights.
92. Conversely, the Chamber considers that the statement under consideration does not relate to materially disputed issues in this case, and that the witness's testimony, which essentially concerns the looting and burning of property and the injuring and killing of civilians during the attack on Lukodi IDP camp, appears on these aspects cumulative to the evidence expected to be provided at trial by other residents in the camp, such as Witnesses P-24, P-119 and P-187, and LRA insiders who participated in the attack, such as Witnesses P-18, P-142, P-205, P-245 and P-410.
93. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-185.

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<sup>166</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 175. The Defence refers to the Prosecution screening note of Witness P-185 marked UGA-OTP-0233-1119.

2. *Prior recorded testimony of Witness P-195*<sup>167</sup>

94. Witness P-195, the wife of Witness P-185, also resided at Lukodi IDP camp when the camp was attacked on 19 May 2004. In her written statement,<sup>168</sup> she states that the attackers set her and others' houses on fire, abducted her together with other civilians, forced her and the other women to abandon their children who were thrown in the bush, and eventually released her with some other abductees. She also describes what she saw when she returned to the camp. The Chamber is satisfied that the prior recorded testimony of Witness P-195 goes to proof of matters other than Mr Ongwen's acts and conduct.
95. As already observed, several other witnesses, including Witnesses P-24, P-119 and P-187, who were also victims of the attack, and several former LRA fighters who participated in it, are expected to testify at trial regarding the wounding and killing of civilians and the looting, burning and destruction of property during the attack on Lukodi IDP camp. Furthermore, the prior recorded testimony of Witness P-195 does not relate to crucial issues which are materially in dispute in relation to the charges against Mr Ongwen for crimes allegedly committed during the attack on Lukodi IDP camp.
96. Finally, the Chamber observes that the Defence objects to the introduction under Rule 68(2)(b) of the Rules of the prior recorded statement of Witness P-195 for the same reasons for which it submits that her husband's (P-185's) written statement should not be introduced.<sup>169</sup> The Chamber recalls its analysis above with respect to Witness P-185<sup>170</sup> and observes that the same considerations as to the arguments raised by the Defence are equally applicable with respect to Witness P-195.

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<sup>167</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 74-78.

<sup>168</sup> UGA-OTP-0233-1046-R01.

<sup>169</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, paras 171-175.

<sup>170</sup> See above paras 90-91.

97. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-195.

*3. Prior recorded testimony of Witness P-196<sup>171</sup>*

98. Witness P-196 was a resident of Lukodi IDP Camp who was about seven years old at the time of the attack. In his prior recorded testimony,<sup>172</sup> the witness states that during the attack he hid in a hut together with his brother and sister and was later abducted, thrown into a burning hut and threatened with being shot when he tried to escape, but was eventually able to flee. He states that he spent three months at the hospital, his brother never returned and his sister, upon return from abduction, was taken to hospital and died afterwards. The witness's prior recorded testimony does not concern matters regarding Mr Ongwen's acts and conduct, and is therefore suitable for introduction under Rule 68(2)(b) of the Rules.

99. In the Chamber's view, Witness P-196's statement is cumulative to the testimony expected to be obtained at trial with respect to the attack on Lukodi IDP camp, in particular by those witnesses – residents of the camp or LRA fighters – who were present during the attack and will testify about it.

100. The Chamber also notes that Defence argues against the introduction of P-196's testimony 'without being able to examine and interview him first'.<sup>173</sup> According to the Defence, this is warranted by the fact that 'P-0196 is unsure of the attackers and only "knows" who allegedly attacked Lukodi IDP Camp because of hearsay evidence', and he was only seven years old at the time of the attack.<sup>174</sup>

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<sup>171</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 79-82.

<sup>172</sup> UGA-OTP-0233-1061-R01.

<sup>173</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 177.

<sup>174</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 177.

First, the Chamber reiterates that a prior interview by the Defence<sup>175</sup> is not a pre-condition to the introduction of a prior recorded testimony under Rule 68(2)(b) of the Rules. Second, as recalled above, the factor concerning the existence of sufficient indicia of reliability must be understood in the context of Rule 68(2)(b) of the Rules, namely whether live testimony can be dispensed of and replaced by the introduction of the prior recorded testimony. The argument by the Defence that the witness's statement about the identity of the attackers is only 'hearsay evidence' concerns the probative value of the statement – and will be considered in the context of the Chamber's deliberation of its judgment – but does not entail that the statement cannot be introduced under Rule 68(2)(b) of the Rules, also considering that, in any case, there is no formal evidentiary rule making hearsay evidence inadmissible as such.<sup>176</sup>

101. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-196.

#### 4. *Prior recorded testimony of Witness P-26*<sup>177</sup>

102. Witness P-26 was also a civilian resident of Lukodi IDP camp. In her statement,<sup>178</sup> she describes her personal experience of the attack, during which she and one of her daughters were injured and another daughter was killed. Her statement does not go to proof of Mr Ongwen's acts and conduct.

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<sup>175</sup> In accordance with the modalities established in the Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, ICC-02/04-01/15-339-Anx. Considering that Witness P-196 is also a victim participating in the case (see Updated List of Prosecution Witnesses, ICC-02/04/15-548-Conf-AnxA), due regard shall also be given to the 'Mechanisms for exchange of information on individuals enjoying dual status', ICC-02/04-01/15-504-Anx2.

<sup>176</sup> See, e.g., Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on requests for leave to appeal the 'Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and (68(3))', 7 July 2016, ICC-02/11-01/15-612, para. 17. See also *Gbagbo and Blé Goudé* OA 8, ICC-02/11-01/15-744, paras 106-107.

<sup>177</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 83-86.

<sup>178</sup> UGA-OTP-0069-0018-R01.

103. The Chamber is of the view that Witness P-26's testimony is largely cumulative to the expected testimony which will be given at trial by other witnesses, in particular by Witnesses P-24, P-119 and P-187, who were also residents of the Lukodi IDP camp. Furthermore, the Chamber considers that the matters addressed in the witness statement are not central matters which are materially in dispute and that no prejudice to Mr Ongwen's rights ensues from the introduction of such statement under Rule 68(2)(b) of the Rules. In this regard, the Chamber notes that the Defence submits that, while it challenges the applicability of Rule 68(2)(b) to these proceedings, Witness P-26's statement 'almost meets the requirements of the new rule' and that it merely 'seeks a short interview with P-0026 in the presence of the Prosecution before P-0026's statement is admitted into evidence'.<sup>179</sup> The Chamber recalls that the possibility for the Defence to seek an interview with prosecution witnesses<sup>180</sup> is, in itself, unrelated to the introduction of a prior recorded testimony under Rule 68(2)(b) of the Rules. The Chamber is of the view that the introduction of Witness P-26's statement is not prejudicial to or inconsistent with Mr Ongwen's rights, also considering that the Defence merely 'wishes to discuss with P-0026 about possible government investigations [...] at the hospital after the attack'<sup>181</sup> and that any such matter is at all events not an issue of critical importance for the Chamber's eventual determination of Mr Ongwen's criminal responsibility for the crimes allegedly committed in the context of the attack on Lukodi IDP camp.

104. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-26.

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<sup>179</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 162.

<sup>180</sup> In accordance with the Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, ICC-02/04-01/15-339-Anx. Moreover, considering that Witness P-26 is also a victim participating in the case (see Updated List of Prosecution Witnesses, ICC-02/04/15-548-Conf-AnxA), due regard shall also be given to the 'Mechanisms for exchange of information on individuals enjoying dual status', ICC-02/04-01/15-504-Anx2

<sup>181</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 162.

5. *Prior recorded testimony of Witness P-35*<sup>182</sup>

105. The witness was the UPDF commander of the military detachment stationed at Lukodi IDP camp. In his statement,<sup>183</sup> he describes the unfolding of the attack, explaining, *inter alia*, that, since there were civilians between the UPDF troops and the attackers, the UPDF troops could not shoot. The witness also states that one man and two women (whose names he does not remember), who were abducted during the attack and returned the day after, told him that 'Dominic Ongwen was around but did not describe to him what his role was during the attack'.<sup>184</sup> The Prosecution states that it does not intend to rely on this limited reference to Mr Ongwen in the witness's statement. In light of this and taking into account that (i) the information about Mr Ongwen is mentioned by the witness as only being reported to him by civilians abducted during the attack, (ii) the statement is effortlessly understandable even without this reference to Mr Ongwen and (iii) the prior recorded testimony of Witness P-35, with this limited exception, does not go to proof of matters concerning (and is not relied upon with respect to) Mr Ongwen's acts and conduct, the Chamber considers that Witness P-35's statement may, in principle, be introduced under Rule 68(2)(b) of the Rules. The Chamber will in any case not rely on the information contained at paragraph 68 of the statement in order to establish Mr Ongwen's acts and conduct.

106. The Defence argues that the prior recorded testimony of Witness P-35 should not be introduced under Rule 68(2)(b) of the Rules because the Defence must examine him 'to determine the apparent change-in-heart of the abductees and why Mr Ongwen is now being blamed for an attack which he did not order or

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<sup>182</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 87-91.

<sup>183</sup> UGA-OTP-0036-0082-R01.

<sup>184</sup> UGA-OTP-0036-0082-R01 at 0091, para. 68. See also para. 67 and 54.



command'.<sup>185</sup> The Chamber is not convinced by this argument. It is not evident to the Chamber what this 'change-in-heart' of the abductees would be and, even more, how any such 'change-in-heart' would be determined through questioning Witness P-35 at trial. The witness explicitly states that he was not told what role Mr Ongwen played during the attack on Lukodi IDP camp. If, by a 'change-in-heart', the Defence refers to the witness's statement that the abducted people reported to him that they were, in turn, told by other soldiers and abductees that Raska Lukwiya was the overall commander of the attack,<sup>186</sup> the Chamber observes that this information may be relied upon by the Defence following the testimony's introduction without the need that it be rehearsed at trial. Considering that the witness states that he was not given any other details from the concerned abductees and that he does not even remember their names, it is not evident to the Chamber what information, beyond that already contained in the witness's statement, the Defence would seek to elicit by questioning Witness P-35 at trial. Rather, the Defence will be in a position to fully examine at trial any of the individuals who were abducted during the attack on Lukodi IDP camp and whom the Prosecution (or the Defence itself) would wish to call to testify live, and is obviously not precluded from using the information contained in Witness P-35's statement for this purpose. The Chamber is satisfied that introducing this testimony under Rule 68(2)(b) of the Rules would bring no prejudice to Mr Ongwen's rights.

107. The Chamber considers, moreover, that Witness P-35's statement – with the exception of the limited hearsay information about Mr Ongwen – does not concern central matters which are materially in dispute in the present case, and relates to issues on which other witnesses will testify at trial, such as Witnesses P-24, P-119 and P-187 (former resident of the Lukodi IDP camp) and Witnesses

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<sup>185</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 165.

<sup>186</sup> UGA-OTP-0036-0082-R01 at 0091, para. 67.

P-18, P-142, P-205, P-245 and P-410 (LRA insiders who will testify about the attack on the camp). Furthermore, the Chamber does not attach importance, for the purposes of the present decision, to the fact that the witness states that the LRA attack occurred sometime between 20 and 22 May 2004,<sup>187</sup> while the vast majority of the witnesses states that the attack was carried on 19 May 2004. As all information reasonably indicates that the attack concerned is indeed one and the same, the Chamber is of the view that this 'obvious error'<sup>188</sup> on the part of Witness P-35 does not militate against the introduction of his statement under Rule 68(2)(b) of the Rules.

108. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-35, together with its annex.<sup>189</sup>

*6. Prior recorded testimony of Witness P-36<sup>190</sup>*

109. Witness P-36 is a government pathologist who arrived with his team at Lukodi IDP camp in the immediate aftermath of the attack. In his statement, he explains that he carried out post-mortem exhumation and examination on 25 bodies, determining that most of the bodies had multiple gunshot injuries, one was stabbed to death and two were burned.<sup>191</sup> The post-mortem reports are associated documents to the witness's prior recorded testimony. In his statement, the witness also comments on a number of photographs and video footage that were taken upon his arrival at the camp.

110. The Defence argument against the introduction of the prior recorded testimony of Witness P-36, together with the associated documents, is based exclusively on

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<sup>187</sup> UGA-OTP-0036-0082-R01 at 0087, para. 34.

<sup>188</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 163.

<sup>189</sup> UGA-OTP-0036-0094.

<sup>190</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 92-96.

<sup>191</sup> UGA-OTP-0036-0042-R01.

a purported 'right to question the witness on the material which he collected, which the Prosecution seeks to admit'.<sup>192</sup> However, as already observed, the accused's rights cannot be understood so broadly as to require this questioning *per se*.<sup>193</sup> The Prosecution may have chosen to submit the relevant materials via a 'bar table' motion, but including them in a request under Rule 68(2)(b) as documents associated with a prior recorded testimony instead is immaterial because this does not lead to the materials being considered any differently by the Chamber in its deliberations. What matters is that, however the submission is framed, the Prosecution clearly submits the materials to the Chamber – as it has happened in the present case – so that the Defence can raise any issues under Rule 64 of the Rules.

111. Moreover, the material concerned is described and discussed by the witness and any information included in his written statement may therefore be relied upon by the participants, including by the Defence if it intends to challenge the reliance in these proceedings of any such material. The submission of this material as associated documents to a prior recorded testimony introduced under Rule 68(2)(b) of the Rules – rather than its 'admission' as incorrectly stated by the Defence – in no way precludes the Defence from challenging, *inter alia*, its probative value or disputing its use on any other ground. It is in fact of significance that the Defence, rather than arguing a concrete prejudice arising from the submission of the material concerned, limits itself to objecting to the introduction of Witness P-36's statement merely by claiming a 'right' to examine him. In these circumstances, the Chamber is satisfied that the introduction of Witness P-36's prior recorded testimony under Rule 68(2)(b) of the Rules, together with its associated documents, is not prejudicial to or inconsistent with Mr Ongwen's rights.

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<sup>192</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 166.

<sup>193</sup> See above para. 36.

112. Furthermore, it does not appear to the Chamber, in light of the available information, that the death of civilians during the attack on Lukodi IDP camp is an issue materially in dispute. In any case, other witnesses, such as, among others, Witnesses P-24, P-187 and P-202, are scheduled to testify at trial about, *inter alia*, the shooting of civilians during the attack on Lukodi IDP camp.

113. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-36, together with its associated documents.<sup>194</sup>

7. *Prior recorded testimony of Witness P-17*<sup>195</sup>

114. Witness P-17 is a police detective who investigated the attack on Lukodi IDP camp. In his statement,<sup>196</sup> he explains what he saw at the camp when he arrived there the day after the attack, as well the investigation into the attack, the conclusions reached and the exhumation of 25 bodies. Together with the witness's prior recorded testimony, the Prosecution requests the introduction of

<sup>194</sup> UGA-OTP-0023-0008; UGA-OTP-0023-0188; UGA-OTP-0023-0310; UGA-OTP-0023-0311; UGA-OTP-0023-0312; UGA-OTP-0023-0313; UGA-OTP-0023-0314; UGA-OTP-0023-0315; UGA-OTP-0023-0316; UGA-OTP-0023-0317; UGA-OTP-0023-0318; UGA-OTP-0023-0319; UGA-OTP-0023-0320; UGA-OTP-0023-0321; UGA-OTP-0023-0322; UGA-OTP-0023-0323; UGA-OTP-0023-0324; UGA-OTP-0023-0325; UGA-OTP-0023-0326; UGA-OTP-0023-0327; UGA-OTP-0023-0328; UGA-OTP-0023-0329; UGA-OTP-0023-0330; UGA-OTP-0023-0331; UGA-OTP-0023-0332; UGA-OTP-0023-0333; UGA-OTP-0023-0334; UGA-OTP-0023-0335; UGA-OTP-0023-0336; UGA-OTP-0023-0337; UGA-OTP-0023-0338; UGA-OTP-0023-0339; UGA-OTP-0023-0340; UGA-OTP-0023-0341; UGA-OTP-0023-0342; UGA-OTP-0023-0343; UGA-OTP-0023-0344; UGA-OTP-0023-0345; UGA-OTP-0023-0346; UGA-OTP-0023-0347; UGA-OTP-0023-0348; UGA-OTP-0023-0349; UGA-OTP-0023-0350; UGA-OTP-0023-0351; UGA-OTP-0023-0352; UGA-OTP-0023-0353; UGA-OTP-0023-0354; UGA-OTP-0023-0355; UGA-OTP-0023-0356; UGA-OTP-0023-0357; UGA-OTP-0023-0358; UGA-OTP-0023-0359; UGA-OTP-0023-0360; UGA-OTP-0023-0386; UGA-OTP-0023-0387; UGA-OTP-0023-0388; UGA-OTP-0023-0389; UGA-OTP-0023-0390; UGA-OTP-0023-0391; UGA-OTP-0023-0392; UGA-OTP-0023-0393; UGA-OTP-0023-0394; UGA-OTP-0023-0395; UGA-OTP-0023-0396; UGA-OTP-0023-0397; UGA-OTP-0023-0398; UGA-OTP-0023-0399; UGA-OTP-0023-0400; UGA-OTP-0023-0401; UGA-OTP-0023-0402; UGA-OTP-0023-0403; UGA-OTP-0023-0404; UGA-OTP-0023-0405; UGA-OTP-0023-0406; UGA-OTP-0023-0407; UGA-OTP-0036-0063; UGA-OTP-0146-0154; UGA-OTP-0146-0157; UGA-OTP-0146-0160; UGA-OTP-0146-0163; UGA-OTP-0146-0166; UGA-OTP-0146-0169; UGA-OTP-0146-0172; UGA-OTP-0146-0175; UGA-OTP-0146-0178; UGA-OTP-0146-0182; UGA-OTP-0146-0185; UGA-OTP-0146-0188; UGA-OTP-0146-0191; UGA-OTP-0146-0194; UGA-OTP-0146-0197; UGA-OTP-0146-0200; UGA-OTP-0146-0203; UGA-OTP-0146-0206; UGA-OTP-0146-0209; UGA-OTP-0146-0212; UGA-OTP-0146-0215; UGA-OTP-0146-0218; UGA-OTP-0146-0221; UGA-OTP-0146-0224; UGA-OTP-0146-0227.

<sup>195</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 97-101.

<sup>196</sup> UGA-OTP-0036-0007-R01.

several associated documents, including a brief 'preliminary report into investigations' of the murders at Lukodi IDP camp,<sup>197</sup> on which the witness comments in his statement. Witness P-17's statement does not refer to Mr Ongwen's acts and conduct.

115. The Defence objects to the introduction of Witness P-17's prior recorded testimony on the grounds that the witness's testimony, and the associated police investigation report, cannot be read in isolation without the statements given by a number of witnesses to the police, some of which, in turn, link Mr Ongwen's to the attack on Lukodi IDP camp.<sup>198</sup> However, the statements collected by the police are not documents associated with Witness P-17's prior recorded testimony of which the Prosecution seeks introduction, nor are they an integral part of, or otherwise necessary to understand Witness P-17's statement. Furthermore, the Chamber notes that the person referred to by the Defence<sup>199</sup> who gave a statement to the police describing Mr Ongwen as one of the commanders of the attack on the Lukodi IDP camp is scheduled to testify live at trial.<sup>200</sup>

116. The Defence also argues that '[f]or a complete picture on the investigations', it will wish to examine Witness P-17 'about the methodology used, the chain of custody of the evidence collected [and] the role of the UPDF in the investigations'.<sup>201</sup> Irrespective of any other consideration, the Chamber considers it sufficient to observe that: (i) the witness addresses these issues in his written statement and it is unclear to the Chamber what the Defence would seek to obtain from examining the witness live beyond the testimony already recorded;

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<sup>197</sup> UGA-OTP-0023-0022. The Prosecution also requests the introduction of photographs and video footage. These same materials are introduced also following the introduction of Witness P-36's prior recorded testimony with which they are associated too.

<sup>198</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, paras 158-159.

<sup>199</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 159 and footnote 195.

<sup>200</sup> Namely Witness P-18.

<sup>201</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 161.

(ii) no 'evidence collected' allegedly demanding the establishment through live questioning of the 'chain of custody' is introduced following the introduction of Witness P-17's prior recorded testimony under Rule 68(2)(b) of the Rules;<sup>202</sup> and

(iii) in any case, the limited conclusions of the police investigation are, on their own, not of particular significance in the present case as the Chamber will reach its own conclusions after, *inter alia*, hearing (some of) the witnesses who provided their statements to the police, as well as others. Conversely, the Chamber is of the view that Witness P-17's conclusions as to the consequences of the attack on Lukodi IDP camp – which is the core of the witness's prior recorded testimony – are not, in large part, central disputed matters in the present case, and that a 'complete picture' of the police investigation is not a critical issue for the Chamber's final determination of the charges brought against Mr Ongwen in relation to the attack on Lukodi IDP camp. The fact that other witness, including camp residents who were present during the attack, will testify *viva voce* before the Chamber on essentially the same matters also militate in favour of the introduction of Witness P-17's statement under Rule 68(2)(b) of the Rules.

117. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-17, together with its associated documents.<sup>203</sup>

<sup>202</sup> As indicated already, the 'evidence collected', which is associated with the prior recorded testimony of Witness P-17 consists of a number of photographs, and a video footage, of Lukodi IDP camp after the attack, and the same material is also associated with (and commented upon in) the prior recorded testimony of Witness P-36.

<sup>203</sup> UGA-OTP-0023-0022; UGA-OTP-0023-0008; UGA-OTP-0023-0310; UGA-OTP-0023-0311; UGA-OTP-0023-0312; UGA-OTP-0023-0313; UGA-OTP-0023-0314; UGA-OTP-0023-0315; UGA-OTP-0023-0316; UGA-OTP-0023-0317; UGA-OTP-0023-0318; UGA-OTP-0023-0319; UGA-OTP-0023-0320; UGA-OTP-0023-0321; UGA-OTP-0023-0322; UGA-OTP-0023-0323; UGA-OTP-0023-0324; UGA-OTP-0023-0325; UGA-OTP-0023-0326; UGA-OTP-0023-0327; UGA-OTP-0023-0328; UGA-OTP-0023-0329; UGA-OTP-0023-0330; UGA-OTP-0023-0331; UGA-OTP-0023-0332; UGA-OTP-0023-0333; UGA-OTP-0023-0334; UGA-OTP-0023-0335; UGA-OTP-0023-0336; UGA-OTP-0023-0337; UGA-OTP-0023-0338; UGA-OTP-0023-0339; UGA-OTP-0023-0340; UGA-OTP-0023-0341; UGA-OTP-0023-0342; UGA-OTP-0023-0343; UGA-OTP-0023-0344; UGA-OTP-0023-0345; UGA-OTP-0023-0346; UGA-OTP-0023-0347; UGA-OTP-

8. *Prior recorded testimony of Witness P-60*<sup>204</sup>

118. Witness P-60 was a resident and [REDACTED] of Lukodi IDP camp. In his statement,<sup>205</sup> he explains that he witnessed the attack and its aftermath but managed to hide from the attackers. He describes that he heard gunshots and saw other camp residents running and the light from burning houses. The prior recorded testimony of Witness P-60 does not concern Mr Ongwen's acts and conduct.

119. The Chamber considers that the matters on which Witness P-60 testifies in his statement are not issues materially in dispute in this case. The description of the relevant events, which largely corresponds to that provided by other witnesses, will also be made at trial by witnesses who will testify *viva voce*, including other former residents of Lukodi IDP camp. The information provided as to the camp administration system and camp registration system is also not of such significance for the present case that it would warrant calling the witness to testify orally, rather than introducing this information in writing.<sup>206</sup>

120. The Defence objects to the introduction of the prior recorded testimony of Witness P-60 on the grounds that, as a result of this introduction, official camp records would also be introduced, and the Defence wishes to examine the witness 'as to the protocols and procedures to create, authenticate and store the materials'.<sup>207</sup>

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0023-0348; UGA-OTP-0023-0349; UGA-OTP-0023-0350; UGA-OTP-0023-0351; UGA-OTP-0023-0352; UGA-OTP-0023-0353; UGA-OTP-0023-0354; UGA-OTP-0023-0355; UGA-OTP-0023-0356; UGA-OTP-0023-0357; UGA-OTP-0023-0358; UGA-OTP-0023-0359; UGA-OTP-0023-0360; UGA-OTP-0023-0386; UGA-OTP-0023-0387; UGA-OTP-0023-0388; UGA-OTP-0023-0389; UGA-OTP-0023-0390; UGA-OTP-0023-0391; UGA-OTP-0023-0392; UGA-OTP-0023-0393; UGA-OTP-0023-0394; UGA-OTP-0023-0395; UGA-OTP-0023-0396; UGA-OTP-0023-0397; UGA-OTP-0023-0398; UGA-OTP-0023-0399; UGA-OTP-0023-0400; UGA-OTP-0023-0401; UGA-OTP-0023-0402; UGA-OTP-0023-0403; UGA-OTP-0023-0404; UGA-OTP-0023-0405; UGA-OTP-0023-0406; UGA-OTP-0023-0407; UGA-OTP-0036-0040.

<sup>204</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 102-106.

<sup>205</sup> UGA-OTP-0069-0034-R01.

<sup>206</sup> See Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 167.

<sup>207</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 169.



121. The Chamber observes that, in fact, three of the annexes to Witness P-60 are records from Lukodi IDP camp: the first contains the list of all those killed and injured during the attack on the camp in May 2004,<sup>208</sup> while the second<sup>209</sup> and the third<sup>210</sup> list the residents, prior to the attack, of two of the three *Rwodi Kweri* from Zone F of Lukodi IDP camp. In his statement, the witness discusses each of the three annexes. The Chamber recalls that there is no principle demanding that documentary evidence be introduced only 'through' witnesses testifying at trial. In this particular case, the Defence argues that the examination of the witness at trial is required 'as it appears that standard procedures for the creation and storage of government or government-like documents were not followed'.<sup>211</sup> The only basis provided by the Defence for this claim is that the witness states that he could not find the lists of the residents of the other two *Rwodi Kweri* of Lukodi IDP camp.<sup>212</sup> This information is in any case recorded in Witness P-60's statement and the Defence would be in a position to present any argument against the use of the records provided by this witness even without calling the witness to testify live about these matters, which at all events do not appear to concern the critical elements on which the determination of the charges against Mr Ongwen will eventually rest. The Chamber therefore considers that the introduction of the prior recorded testimony of Witness P-60 is not prejudicial to or inconsistent with Mr Ongwen's rights.

122. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-60, together with its four annexes.<sup>213</sup>

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<sup>208</sup> UGA-OTP-0069-0049.

<sup>209</sup> UGA-OTP-0069-0054.

<sup>210</sup> UGA-OTP-0069-0092.

<sup>211</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 169.

<sup>212</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 169, with reference to UGA-OTP-0069-0034-R01 at 0046, para. 85.

<sup>213</sup> UGA-OTP-0069-0048, UGA-OTP-0069-0049, UGA-OTP-0069-0054 and UGA-OTP-0069-0092.

#### **D. Prior recorded testimonies mainly related to the attack on Abok IDP camp**

123. Mr Ongwen is charged with the crimes of attacks against the civilian population, murder, attempted murder, torture, other inhumane acts, cruel treatment, enslavement, pillaging, destruction of property and persecution committed by the LRA during an attack on Abok IDP camp or on about 8 June 2004 (Counts 37 to 49 of the confirmed charges).<sup>214</sup>

124. From the list of witnesses filed by the Prosecution,<sup>215</sup> read in conjunction with the summary of anticipated testimonies of these witnesses provided by the Prosecution,<sup>216</sup> the Prosecution's Pre-Trial Brief,<sup>217</sup> as well as the information included in the Applications,<sup>218</sup> the Chamber understands that the Prosecution intends to call several witnesses to testify orally in relation (also) to the charges concerning the attack on Abok IDP camp, including a number of civilians who were resident at the camp at the time of the attack (such as Witnesses P-280, P-286, P-293, P-304 and P-306) as well as LRA fighters who participated in the attack on the camp (*e.g.* Witnesses P-54, P-330 and P-406).

125. The Prosecution requests the introduction, under Rule 68(2)(b) of the Rules, of the prior recorded testimony of five witnesses principally related to the attack on Abok IDP camp: Witnesses P-279, P-281, P-282, P-284 and P-287. They are analysed in turn, below.

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<sup>214</sup> Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15-422-Red, confirmed charges, pages 71-101, paras 53-65.

<sup>215</sup> Updated List of Prosecution Witnesses, ICC-02-04/15-548-Conf-AnxA.

<sup>216</sup> ICC-02/04-01/15-532-Conf-AnxC

<sup>217</sup> Prosecution's Pre-Trial Brief, ICC-02/04-01/15-533, paras 371-429.

<sup>218</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 107-123; Second Application, ICC-02/04-01/15-538-Red, paras 20-21.

*1. Prior recorded testimony of Witness P-279<sup>219</sup>*

126. Witness P-279 testifies that she was abducted by LRA rebels during the attack on Abok IDP camp on 8 June 2004. In her statement,<sup>220</sup> she describes the attack on the camp and states that the rebels burned houses and killed and abducted many people. She also testifies that she was forced by the rebels to carry two goats and later a big bag and that she was beaten and injured with a machete when she could no longer carry the load. The Chamber is satisfied that Witness P-279's statement goes to proof of matters other than Mr Ongwen's acts and conduct.

127. The Chamber notes that several other witnesses have been included in the Prosecution's witness list for the purpose of testifying to similar facts to those to which Witness P-279 testifies in her statements – in particular, Witnesses P-280, P-286, P-293, P-304 and P-306. The Chamber also observes that, with respect to the introduction of the prior recorded testimony of Witness P-279, the Defence submits that 'it would be satisfactory to conduct an interview with the witness and the Prosecution before admitting her testimony'.<sup>221</sup> The Chamber recalls in this regard that the Defence may seek to interview the witness<sup>222</sup> but that this is not required for the introduction of the witness's statement under Rule 68(2)(b) of the Rules, and it is not apparent to the Chamber why any such an interview with Witness P-279 would be necessary before her written statement is introduced.<sup>223</sup>

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<sup>219</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 108-111.

<sup>220</sup> UGA-OTP-0258-0478-R01.

<sup>221</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 184.

<sup>222</sup> In accordance with the modalities established in the Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, ICC-02/04-01/15-339-Anx. Considering that Witness P-279 is also a victim participating in the case (see ICC-02/04-01/15-576, para. 10), due regard shall also be given to the 'Mechanisms for exchange of information on individuals enjoying dual status', ICC-02/04-01/15-504-Anx2.

<sup>223</sup> The Defence merely submits that it can express a final position only after receiving the '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' (Defence Response to the First Application, ICC-02/04-01/15-509-Corr-

128. In conclusion, and considering that the Chamber is satisfied that there is no prejudice to Mr Ongwen's rights, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-279.

*2. Prior recorded testimony of Witness P-281*<sup>224</sup>

129. Witness P-281, who was a civilian resident of Abok IDP camp at the time of the attack on 8 June 2004, provided a witness statement to the Prosecution in April 2016.<sup>225</sup> On 15 August 2016, the Prosecution disclosed to the Defence a 'record of reimbursement and/or service acknowledgment' that indicates that the Prosecution met with Witness P-281 again in June 2016.<sup>226</sup> The Defence argues that without knowing the discussion of this further meeting it 'cannot properly assess as to whether the witness's statement agrees with, or contradicts, statements made by other witnesses or in fact, her disclosed statement'.<sup>227</sup>

130. The Chamber takes note of the position expressed by the Defence, but it is of the view that the Defence was fully able to provide its observations on the Prosecution's request to introduce the prior recorded testimony of Witness P-281 under Rule 68(2)(b) of the Rules. The statement in question is in the Defence's possession and there is no basis, either in principle or in this particular case, to conclude that an evaluation under the criteria of Rule 68(2)(b) of the Rules would require that the Defence is apprised of the content of any meeting that the Prosecution may have with its own witnesses. The Chamber recalls, in this respect, that, with the exception of contacts with witnesses scheduled to testify *viva voce* as of the commencement of the familiarisation preparation of the

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Red2, para. 184). This general argument by the Defence has, however, already been addressed and rejected by the Chamber (see above paras 25-29).

<sup>224</sup> Second Application, ICC-02/04-01/15-538-Red, paras 20-21.

<sup>225</sup> UGA-OTP-0261-0257-R01.

<sup>226</sup> UGA-OTP-0268-0309.

<sup>227</sup> Defence Response to the Second Application, ICC-02/04-01/15-555-Red, para. 21.

witnesses by the Victims and Witnesses Unit,<sup>228</sup> participants are free to contact their own witnesses. It is obvious that not every such contact will inevitably result in the production of a witness statement and that the Defence speculation that, in her further meeting with the Prosecution, Witness P-281 may have given information which contradicts other witnesses' evidence or possibly her own previous statement cannot be upheld. There is no reason to doubt that the Prosecution would not have requested the introduction of a witness's written statement if the witness had subsequently retracted or modified her testimony, or given a further statement on the same facts. The fact that the introduction of the statement would take place only if complemented by a declaration by which the witness, *inter alia*, confirms the accuracy of the information reflected in the prior recorded testimony, constitutes, at any rate, an additional guarantee for the Defence.

131. As recalled above, Witness P-281 was a civilian resident of Abok IDP camp at the time relevant to the charges. In her prior recorded testimony, she describes the attack on the camp and her personal experience of the events, during which LRA rebels broke into her house, beating her father and pillaging their personal property. The witness's statement does not go to proof of Mr Ongwen's acts and conduct.

132. The Chamber is also of the view that the facts described by Witness P-281 in her written statement are not matters which are materially in dispute in this case. The actions of the attackers during the attack on Abok IDP camp will also be subject to the testimony of a number of other witnesses – both civilian victims of the attack and LRA insiders – who are scheduled to appear live before the Chamber.

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<sup>228</sup> See Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 22 July 2016, ICC-02/04-01/15-504-Anx1, paras 21-30. See also Decision on Prosecution Request for Leave to Appeal the Decision on Witness Preparation, 19 September 2016, ICC-02/04-01/15-537, para. 8.

133. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-281.

*3. Prior recorded testimony of Witness P-282<sup>229</sup>*

134. Witness P-282 was also a civilian resident of Abok IDP camp who witnessed the attack on the camp on 8 June 2004. In his written statement,<sup>230</sup> he describes the attack – during which he was shot in the leg – as well as its aftermath, when he saw the corpses of those, including relatives of his, who had been shot and burned to death in their homes. Witness P-282's statement does not go to proof of Mr Ongwen's acts and conduct.

135. The Chamber considers that the prior recorded testimony of Witness P-282 is cumulative to the expected evidence that will be provided at trial by other witnesses with respect to the actions of the attackers during the attack on Abok IDP camp and its consequences, including Witnesses P-54, P-280, P-286, P-293, P-304, P-306, P-330 and P-406.

136. Furthermore, the Chamber is of the view that Witness P-282's statement does not relate to issues which are materially in dispute. Indeed, the Defence submits that it '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'.<sup>231</sup> In the absence of any further detail from the Defence,<sup>232</sup> and recalling that the introduction of the prior recorded testimony does not prejudice the Defence's ability to seek a statement from a prosecution witness following

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<sup>229</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 112-115.

<sup>230</sup> UGA-OTP-0261-0246-R01.

<sup>231</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 185.

<sup>232</sup> Also for this witness, the Defence argues only that it must receive an Acholi translation of the testimony, and the Prosecution Pre-Trial Brief and final list of witnesses before taking a final position on the introduction of the witness's prior recorded testimony (Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 185). For the Chamber's position on this point, see above paras 25-29.

the appropriate procedure,<sup>233</sup> the Chamber finds no reason to conclude that the introduction under Rule 68(2)(b) of the Rules of Witness P-282's statement would be prejudicial to or inconsistent with Mr Ongwen's rights.

137. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-282, together with its annex.<sup>234</sup>

*4. Prior recorded testimony of Witness P-284<sup>235</sup>*

138. Witness P-284 was a resident of Abok IDP camp at the time of the attack on 8 June 2004. In his prior recorded testimony,<sup>236</sup> he states that as soon as the rebels attacked the camp he fled together with his family and that when he returned, the day after, he saw many bodies of children and adults who had died from burns or gunshot wounds. The witness testifies that he counted 28 bodies in the camp and that the rebels had burned many huts, looted foodstuff and other relief supplies, wounded several people and abducted others. The Chamber is satisfied that the prior recorded testimony of Witness P-284 does not concern the acts and conduct of Mr Ongwen.

139. The Chamber considers that the modalities of the attack on Abok IDP camp and its consequences, which Witness P-284's statement goes to, will be addressed by the witnesses who are expected to testify live before the Chamber in relation to the attack. In particular, the Chamber observes that several other witnesses whom the Prosecution intend to call to testify live (in particular Witnesses P-280, P-286, P-293, P-304 and P-306, who were residents of the camp) will describe the

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<sup>233</sup> Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, ICC-02/04-01/15-339-Anx. Moreover, considering that Witness P-282 is also a victim participating in the case (see Updated List of Prosecution Witnesses, ICC-02-04/15-548-Conf-AnxA), due regard shall also be given to the 'Mechanisms for exchange of information on individuals enjoying dual status', ICC-02/04-01/15-504-Anx2.

<sup>234</sup> UGA-OTP-0261-0255.

<sup>235</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 116-119.

<sup>236</sup> UGA-OTP-0244-1180-R01.



attack on Abok IDP camp and the killing and abduction of civilian and pillaging of property.

140. Moreover, the issues do not appear to be significant disputed matters in the present case. Indeed, the Chamber notes that the Defence does not oppose the introduction of the prior recorded testimony of Witness P-284, but argues that ‘it would be satisfactory to conduct an interview with the witness and the Prosecution before admitting his testimony’.<sup>237</sup> In particular, the Defence submits that it would like to inquire with Witness P-284 about his discussion with Witness P-286.<sup>238</sup> The Chamber recalls that the Defence may seek a statement from a prosecution witness following the appropriate procedure,<sup>239</sup> and considers that the clarification which the Defence seeks to obtain from Witness P-284 is not so significant as to justify that the witness’s testimony of the witness be received orally at trial rather than introduced under Rule 68(2)(b) of the Rules. In these circumstances, the Chamber considers that the introduction of Witness P-284’s statement is not prejudicial to or inconsistent with Mr Ongwen’s rights.

141. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-284.

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<sup>237</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 186.

<sup>238</sup> In particular, the Defence makes reference to the fact that Witness P-284’s states in his prior recorded testimony that Witness P-286 when he returned to the camp ‘told us that there was a rebel called Okello Kalalang who was the commander of the group that attacked the camp but [he] did not say who had ordered the attack’ (UGA-OTP-0244-1180-R01 at 1188, para. 45).

<sup>239</sup> Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, ICC-02/04-01/15-339-Anx.

5. *Prior recorded testimony of Witness P-287*<sup>240</sup>

142. Witness P-287 was another resident of Abok IDP camp when the camp was attacked on 8 June 2004. In his statement,<sup>241</sup> the witness states that the rebels set huts on fire and shot at civilians, and that he was abducted by the rebels, together with many other people including his mother and brother, and later rescued by government soldiers. The matters to which Witness P-287 testifies in this statement do not concern Mr Ongwen's acts and conduct.

143. The Defence objects to the introduction of this statement under Rule 68(2)(b) of the Rules on the grounds that, as the witness was only a child at the time of the attack at Abok IDP camp, there exists 'serious doubt as to the witness's ability to recall the event with such specificity' and it is possible that this is 'a story made of hearsay'.<sup>242</sup> This argument by the Defence concerns the determination of the probative value to be accorded to the witness's statement, and not in itself the consideration under Rule 68(2)(b) of the Rules. Even if the Chamber were to conclude that the witness does only report hearsay information, this would not in itself prevent the introduction of the statement pursuant to Rule 68(2)(b) of the Rules<sup>243</sup> but would eventually be a relevant consideration for the Chamber's deliberation of its judgment.

144. The Chamber also observes that, as noted by the Defence itself,<sup>244</sup> the substance of the statement of Witness P-287 consists of three pages only and that such statement appears of limited relative importance within the system of evidence expected to be provided at trial. Indeed, the Chamber considers that the witness's written statement is largely cumulative on aspects on which several other witnesses would testify – including civilian victims of the attack, such as

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<sup>240</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 120-123.

<sup>241</sup> UGA-OTP-0261-0268-R01.

<sup>242</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 183.

<sup>243</sup> As noted above, there is no rule making hearsay evidence inadmissible before the Court.

<sup>244</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 183.

Witnesses P-280, P-286, P-293, P-304 and P-306, and former LRA fighters who participated in such attack, such as Witnesses P-54, P-330 and P-406.

145. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-287.

#### **E. Prior recorded testimonies concerning the interception of LRA radio communications**

146. In support of its charges against Mr Ongwen, the Prosecution relies on 18 witnesses from the three Ugandan government organisations who were directly or indirectly involved in the operation of intercepting LRA radio communications.<sup>245</sup> More specifically: (i) nine of these witnesses worked with the Internal Security Organisation ('ISO') – Witnesses P-27, P-32, P-59, P-291, P-301, P-303, P-384, P-385 and P-386;<sup>246</sup> (ii) six with the UPDF – P-3, P-29, P-337, P-339, P-400 and P-404;<sup>247</sup> and (iii) three with the Ugandan Police – Witnesses 125, P-126 and P-370.<sup>248</sup> The Prosecution intends to call to testify at trial the principal intercept operatives of the three branches, namely Witness P-59 from the ISO, Witnesses P-3 and P-339 from the UPDF, and Witness P-125 from the Police.<sup>249</sup> For the other 14 witnesses, the Prosecution requests the introduction, under Rule 68(2)(b) of the Rules, of their prior recorded testimony.

<sup>245</sup> See Updated List of Prosecution Witnesses, ICC-02-04/15-548-Conf-AnxA; Prosecution's Pre-Trial Brief, ICC-02/04-01/15-533, paras 62-88; Summaries of Anticipated Witnesses Testimonies, ICC-02/04-01/15-532-Conf-Anxc; Second Application, ICC-02/04-01/15-538-Red, para. 23.

<sup>246</sup> Witness P-27 was the officer in charge of the ISO operations. He was based at ISO headquarters in Kampala together with Witnesses P-303 and P-385. Witnesses P-59, P-291, P-284 and P-386 were ISO intercept operatives in Gulu and Witnesses P-32 and P-301 their supervisors.

<sup>247</sup> Witness P-29 was in charge of the UPDF interception operations. Witnesses P-3, P-339, P-400 and P-404 were UPDF intercept operatives. Witness P-337 was the Officer Commanding in Gulu and administrative head of the UPDF interception and direction-finding operations in northern Uganda.

<sup>248</sup> Witness P-126 was the supervisor of the Police interception operation in Kamdini. Witness P-125 was the Police's principal intercept operative and was assisted in this by Witness P-370.

<sup>249</sup> See Updated List of Prosecution Witnesses, ICC-02-04/15-548-Conf-AnxA

147. The Defence objects to the introduction of these statements on several grounds, both in general as applicable to all intercept witnesses and specifically with respect to each of them. The core argument raised by the Defence with respect to the entire category of these witnesses is that their statements ‘are directed at authenticating evidence which the Prosecution will subsequently tender’ in the course of the proceedings<sup>250</sup> – namely the combined audio recordings of intercept of LRA radio communications and related log-books.<sup>251</sup> According to the Defence, the ‘completeness, reliability and authenticity’ of this material<sup>252</sup> as well as their ‘admission and interpretation’ in the present proceedings<sup>253</sup> are necessarily related to these witnesses, who, therefore, must all be called to testify live at trial. In its Response to the Second Application, the Defence reiterates that ‘any and all persons related to the collection and storage of the alleged intercept information’ should testify at trial.<sup>254</sup>

148. The Chamber is not persuaded by these arguments. By its Applications, the Prosecution does not seek the introduction or the ‘admission’ of the recordings of intercepted LRA communications or of any related logbooks. Indeed, the Prosecution itself has announced that this material would be introduced ‘at a later time, through witnesses or via a bar table motion’,<sup>255</sup> and has in the meantime made a separate filing requesting the Chamber to recognise as formally submitted 2,507 items of evidence related to the interception of LRA radio communications by the Ugandan government.<sup>256</sup> The witnesses whose prior recorded testimony the Prosecution seeks to introduce under Rule 68(2)(b) of the Rules mainly provide an overview of the interception procedure. The

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<sup>250</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 73

<sup>251</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 83.

<sup>252</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 74.

<sup>253</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 84.

<sup>254</sup> Defence Response to the Second Application, ICC-02/04-01/15-555-Red, para. 15.

<sup>255</sup> First Application, ICC-02/04-01/15-465-Corr-Red, para. 131; Second Application, ICC-02/04-01/15-538-Red, para. 27.

<sup>256</sup> Prosecution’s formal submission of intercept evidence *via* the ‘bar table’, ICC-02/04-01/15-580, together with seven confidential annexes.

Chamber considers that the Defence will be fully in a position to raise any argument against the use of the intercepts and related material in these proceedings even without the *viva voce* examination of all individuals who were part of the interception process. Indeed, also considering the scope of the Applications, the Chamber is of the view that having been part of interception operations is not sufficient, in and of itself, to require the witnesses' appearance at trial as opposed to the introduction of their prior recorded testimony under Rule 68(2)(b) of the Rules – in particular because the Prosecution intends in any case to call the main interception officers of the three branches involved (Witnesses P-3, P-59, P-125 and P-339) to testify at trial. Also, considering that the intercepts and related logbooks – which, it is worth recalling, are not being submitted as material associated with prior recorded testimonies introduced under Rule 68(2)(b) of the Rules – are not testimonial in nature, the Chamber does not attach importance to the Defence submission that this material will eventually be used by the Prosecution to prove, *inter alia*, Mr Ongwen's acts and conduct.<sup>257</sup>

149. The Defence also requests that five of the intercept witnesses subject to the First Application, namely Witnesses P-291, P-301, P-303, P-385 and P-386 – who were supposedly present, as ISO interception officers, at the 4<sup>th</sup> Division intercept house in Gulu in the period when another intercept officer, Witness P-3 from the UPDF, was working there<sup>258</sup> – be called to testify live at trial 'to further elucidate P-0003's erratic and destructive behaviour to identify whether it could have an impact upon the reliability of the evidence'.<sup>259</sup> In its Response to the Second Application, the Defence submits that Witnesses P-29, P-337 and P-404 from the

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<sup>257</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, paras 72-74 and 76-79.

<sup>258</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr para. 102.

<sup>259</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 103.

UPDF should also be called to testify at trial for the same reason, namely to be questioned on Witness P-3's 'activities and character'.<sup>260</sup>

150. In support of its argument that these eight witnesses should all testify live, the Defence relies on<sup>261</sup> a letter which refers to the fact that Witness P-3, a UPDF interception officer, invited his family and 'visitors from the church and outside' to the intercept house and '[tore] some documents from the file'.<sup>262</sup> According to the Defence, '[t]his calls into question the integrity of all of the documentary evidence from the period when P-0003 was working in the 4<sup>th</sup> Division intercept house'.<sup>263</sup>

151. While the letter is not signed, Witness P-59, in his written statement, states that he wrote the letter in about 2006 and sent it to the Director General of ISO headquarters in Kampala.<sup>264</sup> Witness P-59 is scheduled to testify at trial early in the proceedings as is Witness P-3 himself.<sup>265</sup> The ISO witnesses who, according to the Defence,<sup>266</sup> should be called to testify *viva voce* (Witnesses P-291, P-301, P-303, P-385 and P-386) do not provide relevant information on Witness P-3 or do not even mention him – which is understandable considering that, while partly sharing the same facilities, they belonged to different organisations. The same holds true also with respect to the other witnesses mentioned by the Defence,<sup>267</sup> *i.e.* UPDF Witnesses P-29, P-337 and P-404. In these circumstances, the Chamber considers that there is no risk that relevant information concerning

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<sup>260</sup> Defence Response to the Second Application, ICC-02/04-01/15-555-Red, para. 16.

<sup>261</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, paras 97-102.

<sup>262</sup> UGA-OTP-0242-0219.

<sup>263</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 100.

<sup>264</sup> UGA-OTP-0258-0699-R01 at 0708, para. 41. As observed by the Defence, the metadata information introduced by the Prosecution indicates the provenance of the letter from Witness P-32 and Witness P-59. The Prosecution itself has however indicated that the letter was written by Witness P-59 (Second Application, ICC-02/04-01/15-538-Red, footnote 49), Witness P-32 does not mention the letter in his written statements, and Witness P-59, as observed, does recognise the letter as his.

<sup>265</sup> In the witness list filed by the Prosecution (ICC-02/04/15-548-Conf-AnxA) on 30 September 2016, Witness P-59 is indicated as its fourth witness, and Witness P-3 as its sixth.

<sup>266</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 102.

<sup>267</sup> Defence Response to the Second Application, ICC-02/04-01/15-555-Red, para. 16.

Witness P-3's 'activities and character' can be introduced without the Defence having the opportunity to test any such information through examination of the witnesses concerned at trial. In other words, there is no prejudice to the Defence's ability to challenge any material on which the Prosecution intends to rely.

152. While recalling that the purpose of the present decision exclusively concerns whether prior recorded testimony of witnesses on whom the Prosecution intends to rely may be introduced in writing – and not whether certain individuals shall testify at trial – in any case the Chamber considers it disproportionate, at this particular point in time, to envisage the appearance as witnesses at trial of all those (in principle whether or not relied upon by the Prosecution) who worked with Witness P-3 or even shared work facilities with him. At the same time, the Chamber recalls that the introduction of the prior recorded testimony of the witness concerned is without prejudice to the possibility for the parties to collect supplementary statements from the witnesses concerned (irrespective of any future introduction of any such a statement under Rule 68(2)(b) of the Rules) should the need arise. In these circumstances, the Chamber is satisfied that the prior recorded testimony of Witnesses P-29, P-291, P-301, P-303, P-337, P-385, P-386 and P-404 could be introduced pursuant to Rule 68(2)(b) of the Rules, should the relevant requirements be met, as such an introduction would not be prejudicial to or inconsistent with the rights of Mr Ongwen to challenge the reliability of the evidence produced by the ISO when Witness P-3 was working at the 4<sup>th</sup> Division intercept house.

153. As the Chamber has addressed the general objections raised by the Defence to the introduction of the prior recorded testimony of the intercept witnesses, it will now proceed to the individual analysis of each of these witnesses in accordance with Rule 68(2)(b) of the Rules.



1. *Prior recorded testimony of Witness P-27*<sup>268</sup>

154. Witness P-27 is an ISO officer. He works at the ISO headquarters in Kampala and oversees the interception of LRA radio communications by the ISO in Gulu. In his two written statements,<sup>269</sup> he explains the history and purpose of the ISO operations to intercept LRA radio communications, the process by which ISO intercepted and recorded communications, the storage and safekeeping of the records and the tapes, and the functions of the relevant ISO staff in Gulu, as well as his own work in Kampala. The prior recorded testimony of the witness does not relate to Mr Ongwen's acts and conduct.

155. The Defence argues that the prior recorded testimony of Witness P-27 should not be introduced under Rule 68(2)(b) of the Rules on the grounds that the witness provides exculpatory information. In particular, the Defence notes that Witness P-27 observes that the LRA used satellite phones but that the ISO was unable to intercept them.<sup>270</sup> The Chamber notes that this information is in fact recorded in Witness P-27's statement,<sup>271</sup> and would be introduced in the record under Rule 68(2)(b) – the Prosecution itself, in its Pre-Trial Brief, does make reference to this information provided by Witness P-27.<sup>272</sup> It is unclear what the Defence seeks to obtain, beyond the repetition of this information (which is not disputed between the parties) by proposing to call the witness to testify live. Furthermore, this information about the use of satellite phones by the LRA and the ISO technical limitations can also be obtained, as noted by the Defence itself,<sup>273</sup> from other witnesses<sup>274</sup> as well as the available documentary evidence. The same applies, in principle, with respect to the Defence argument that Witness P-27 refers in his

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<sup>268</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 132-133.

<sup>269</sup> UGA-OTP-0207-0256-R01 and UGA-OTP-0249-0444-R01.

<sup>270</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Red2, para. 105/

<sup>271</sup> UGA-OTP-0249-0444-R01 at 0449, para. 29.

<sup>272</sup> Prosecution's Pre-Trial Brief, ICC-02/04-01/15-533, footnote 212.

<sup>273</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 105.

<sup>274</sup> For example Witness P-59, who will testify live at trial, provides the same information in his written statement (UGA-OTP-0258-0699-R01 at 0718, para. 79).

prior recorded testimony to the fact that 'the LRA commanders also inflated casualty counts'<sup>275</sup> – which the Prosecution also acknowledges in its Pre-Trial Brief<sup>276</sup> – and to 'greater informality of command structure of the LRA post-1995'.<sup>277</sup>

156. The Chamber also notes the Defence argument that Witness P-27 should be called to testify live because he mentions in his statement that Witness P-386, another ISO officer, [REDACTED].<sup>278</sup> Considering that Witness P-386 himself mentions this fact and explains that [REDACTED] after his deployment in Gulu and, in any case, it never had an effect on his work<sup>279</sup> and that, likewise, Witness P-27 does not refer to any problem resulting from it affecting the interception operations, the Chamber considers that this reference in Witness P-27's statement is not an obstacle to its introduction under Rule 68(2)(b) of the Rules. The Chamber is therefore satisfied that the introduction of Witness P-27's written statement is not prejudicial to or inconsistent with Mr Ongwen's rights.

157. In this regard, the Chamber also observes that several other ISO witnesses provide similar information as to the ISO interception process, including Witness P-59, who will testify live at trial,<sup>280</sup> and who, according to Witness P-27, was in fact the 'primary interceptor'.<sup>281</sup> Moreover, the issues concerning the existence and modalities of the ISO interception operations are not, in and of themselves, materially in dispute, and any challenge concerning the reliability of

<sup>275</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 106.

<sup>276</sup> Prosecution's Pre-Trial Brief, ICC-02/04-01/15-533, para. 66 and corresponding footnote 151.

<sup>277</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 106. The Chamber observes however that Witness 27's actual statement reads: '[w]e began intercepting LRA radio communications in 1990. At that time LRA used formal messages, perhaps because some of the LRA commanders in those early years had previously served in armies. The formal messages were used until about 1994 to 1995, when the LRA communications became less formal and more like conversations' (UGA-OTP-0207-0256-R01 at 0257, para. 6).

<sup>278</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 107.

<sup>279</sup> UGA-OTP-0260-0508-R01 at 0516, paras 35-36.

<sup>280</sup> See Updated List of Prosecution Witnesses, ICC-02-04/15-548-Conf-AnxA.

<sup>281</sup> UGA-OTP-0207-0256-R01 at 0258, para. 13. See also para. 9.

the intercepts collected by the ISO and related material may be mounted by the Defence without the need that Witness P-27's testimony be obtained *viva voce* at trial.

158. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-27, together with the two annexes to the witness's second statement.<sup>282</sup>

2. *Prior recorded testimony of Witness P-29*<sup>283</sup>

159. Witness P-29 was a UPDF officer who oversaw the interception of LRA radio communications by the UPDF in Gulu and other locations in northern Uganda. In his two written statements,<sup>284</sup> he explains the history and purpose of the UPDF interception operation, the process by which his staff intercepted, decoded and recorded LRA radio communications, and the reporting requirements within the UPDF. None of the matters addressed in Witness P-29 statements concerns Mr Ongwen's acts and conduct.

160. The Defence submits that Witness P-29's prior recorded testimony should not be introduced under Rule 68(2)(b) of the Rules as he discusses, *inter alia*, the direction-finding operations of the UPDF, which are issues 'materially in dispute'.<sup>285</sup> The Chamber observes that the Prosecution has already indicated that it does not intend to rely on the direction-finding evidence produced by the UPDF as it 'is not satisfied as to the reliability of the process by which direction finding was obtained'.<sup>286</sup> The Defence likewise does not intend to rely on this

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<sup>282</sup> Annex 1 contains a list of the ISO staff working at the interception facilities in Gulu (UGA-OTP-0246-0038-R01) as referred at para. 18 of the witness's second statement; Annex 2 consists of a number of 'pre-registration forms' (UGA-OTP-0246-0039-R01) to which the witness refers at paras 34, 35, 37 and 38 of his second statement.

<sup>283</sup> Second Application, ICC-02/04-01/15-538-Red, paras 30-31.

<sup>284</sup> UGA-OTP-0027-0231-R01 and UGA-OTP-0267-0455.

<sup>285</sup> Defence Response to the Second Application, ICC-02/04-01/15-555-Red, para. 17.

<sup>286</sup> Prosecution's Pre-Trial Brief, ICC-02/04-01/15-533, para. 78. See also Second Application, ICC-02/04-01/15-538-Red, para. 29.

body of material, which the Prosecution, in any case, disclosed to it. On the contrary, the Defence explicitly states that it intends to challenge the UPDF direction-finding processes and explain the deficiencies in the UPDF techniques.<sup>287</sup> The unreliability of the UPDF direction-finding evidence is therefore not disputed between the parties, neither of which intends to rely on this material in the present trial, and there is no reason why witnesses who participated in direction-finding operations need appear to testify live at trial about such operations.

161. The Chamber is of the view that the rest of Witness P-29's prior recorded testimony regarding the UPDF interception procedure, including its historical background,<sup>288</sup> concerns matters which are not, in themselves, materially in dispute and, in any case, could be satisfactorily addressed *viva voce* through the examination at trial of Witness P-59.

162. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-29.

### 3. *Prior recorded testimony of Witness P-32*<sup>289</sup>

163. Witness P-32 is a radio operative officer in the ISO who was involved in the ISO interception of LRA radio communications. In his written statements,<sup>290</sup> he describes the ISO interception procedure, the role of the different ISO staff, the reporting requirements within the ISO hierarchy and the storing and preparation of the tapes of the recording. With the exception of one discrete

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<sup>287</sup> Defence Response to the Second Application, ICC-02/04-01/15-555-Red, para. 17.

<sup>288</sup> See on this, Defence Response to the Second Application, ICC-02/04-01/15-555-Red, para. 18.

<sup>289</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 134-135.

<sup>290</sup> UGA-OTP-0069-0796-R01, UGA-OTP-0150-0030-R01 and UGA-OTP-0246-0003-R01.

point in his written statement of June 2005<sup>291</sup> – which is a limited piece of information that the Chamber would, in any case, disregard – the prior recorded testimony does not concern Mr Ongwen's acts and conduct.

164. Witness P-32 states that LRA commanders would sometimes not report an attack until one month later, especially if they have arranged to meet.<sup>292</sup> According to the Defence this is relevant to the issue of 'whether attack claims were accurate and is related to the question of whether commanders would take responsibility for attacks that they thought would impress Kony'. However, in order for the Defence to make its argument it is not necessary that the introduction of the prior recorded testimony of Witness P-32 be prevented. The information relevant to the Defence is in fact contained in the written statements at issue and may be further explored with other interception officers or LRA insiders who will testify at trial or with reference to the intercepted communications themselves. Similarly, the issues related to collective punishment within the LRA, which in the Defence submission are relevant to its prospective argument at trial<sup>293</sup> and which are in any case already contained in the witness's prior recorded testimony, may be more adequately addressed through questioning of other witnesses (in particular, those who have spent time with the LRA) or by reference to the intercepted radio communications themselves – considering that any knowledge in the possession of Witness P-32 in this respect was obtained exclusively through his interception activity. Finally, the Defence relies on<sup>294</sup> Witness P-32's statement according to which Witness P-59 – who was the primary person to listen to and intercept LRA radio communications<sup>295</sup> – would sometimes not tape unimportant conversations or 'unimportant portions of

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<sup>291</sup> UGA-OTP-0150-0030-R01 at 0032, para. 8 ('DOMINIC is still a Brigade commander and has been terrorising the sector of Gulu recently, and is in Uganda at the moment').

<sup>292</sup> UGA-OTP-0150-0030-R01 at 0033, para. 20.

<sup>293</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 112.

<sup>294</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 110.

<sup>295</sup> UGA-OTP-0069-0796-R01 at 0798, para. 12.

conversations like greetings by LRA members'.<sup>296</sup> The Chamber considers that with this information already contained in the prior recorded testimony of Witness P-32, the matter may be adequately explored directly during the examination of Witness P-59.

165. The same applies also to the rest of Witness P-32's statement, which is cumulative to the evidence expected to be obtained from Witness P-59 at trial and which in any case does not concern, in terms of the existence and procedure of ISO interception operations, issues materially in dispute of critical importance to the case. The Chamber observes in this respect that Witness P-32 states that he does not speak Acholi, did not listen to the radios, did not write rough notes and normally did not write in the logbooks, but on occasion only copied information into the logbooks because his handwriting was clearer than that of Witnesses P-291 and P-386.<sup>297</sup>

166. For these reasons, the Chamber is of the view that allowing the introduction of the prior recorded testimony of Witness P-32 is not prejudicial to or inconsistent with Mr Ongwen's rights.

167. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-32, together with the seven annexes to the latest statement.<sup>298</sup>

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<sup>296</sup> UGA-OTP-0069-0796-R01 at 0798, para. 15.

<sup>297</sup> UGA-OTP-0246-0003-R01 at 0010, para. 31.

<sup>298</sup> UGA-OTP-0246-0019, UGA-OTP-0246-0020, UGA-OTP-0246-0021, UGA-OTP-0246-0022, UGA-OTP-0246-0023-R01, UGA-OTP-0246-0024-R01 and UGA-OTP-0246-0025-R01.

4. *Prior recorded testimony of Witness P-126*<sup>299</sup>

168. Witness P-126 gave two written witness statements to the Prosecution.<sup>300</sup> The witness, who worked with the Special Branch of the Ugandan Police, supervised the police interception of LRA radio communications in Kamdini from 2003. His evidence, which relates to the police interception operation, is primarily on the process by which Witness P-125 (and another police officer) intercepted and recorded LRA radio communications and reported to him and other supervisors. The witness also comments on some intelligence reports that he produced mostly on the basis of the information provided by Witness P-125. The Chamber observes that the written statements of Witness P-126 go to proof of matters other than Mr Ongwen's acts and conduct.

169. According to Witness P-126, Witness P-125 was the main interception officer in the police as he knew best all the call signs used by the LRA, had the best understanding of the terminology used by the LRA, owing, *inter alia*, to his ethnicity, and was able to listen to LRA radio communications day and night.<sup>301</sup> Witness P-125 is scheduled to appear to testify live before the Chamber. Any matter related to the police interception operation may therefore be fully explored through questioning of Witness P-125. Witness P-126's prior recorded testimony is in fact of cumulative nature and does not relate to issues that are materially in dispute. Indeed, the Defence submission with respect to Witness P-126 is that the witness 'has extensive experience in gathering information from human sources, and at relevant times, the LRA' and that, therefore, if his statement is introduced under Rule 68(2)(b) of the Rules, 'this should not preclude the Defence from calling this witness on other matters'.<sup>302</sup> As recalled above, the introduction of a prior recorded testimony under Rule 68(2)(b) – and

<sup>299</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 136-137.

<sup>300</sup> UGA-OTP-0253-0764-R01 and UGA-OTP-0264-0002-R01.

<sup>301</sup> UGA-OTP-0253-0764-R01 at 0774, paras 58-59.

<sup>302</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 113.



therefore of the information it contains – does not preclude, in and of itself, the possibility for the participants, following the appropriate procedure,<sup>303</sup> to obtain a supplementary statement on matters not included in the original prior recorded testimony. This is particularly the case when, as with respect to the present witness, the Defence argues that a witness may be called to testify on matters other than those addressed in the prior recorded testimony.

170. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-126.

*5. Prior recorded testimony of Witness P-291<sup>304</sup>*

171. Witness P-291 was a radio operative in the ISO. In his written statement,<sup>305</sup> the witness describes the process by which he and other ISO staff intercepted and recorded communications, the equipment they used, as well as the modalities in which the LRA used the radio. The issues discussed by the witness in his written statements do not relate to Mr Ongwen's acts and conduct.

172. The Defence submits that Witness P-291 is the only intercept witness who says that, between LRA transmissions, the radio was left on stand-by whereby it did not intercept, and that, like Witness P-301, he describes manually operating the tape recorder – while Witness P-27 states that the recorder was voice-operated.<sup>306</sup> Once again, the Chamber observes that this information – which according to the Defence affects the reliability of the collected material – is already included

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<sup>303</sup> Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, ICC-02/04-01/15-339-Anx.

<sup>304</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 138-139.

<sup>305</sup> UGA-OTP-0246-0061-R01.

<sup>306</sup> Defence Response to the First Application, IC-02/04-01/15-509-Corr-Red2, para. 114. The Defence makes reference to the statements of Witness P-301 (UGA-OTP-0249-0423-R01 at 0431, para. 42) and Witness P-27 (UGA-OTP-0207-0256-R01 at 0258, para. 10).

in the witness's prior recorded testimony<sup>307</sup> and could therefore be relied upon by the Defence following the introduction of the statement under Rule 68(2)(b) of the Rules. In the Chamber's view, it is unnecessary for the same information already contained in the written statement to be provided live at trial for the Defence to use it.

173. Furthermore, the Chamber considers that any matter concerning the ISO interception procedure (including the equipment used) which is addressed in Witness P-291's prior recorded testimony, may be satisfactorily examined through the questioning of Witness P-59, who is recognised by several witnesses as the main ISO interception officer and who is scheduled to appear *viva voce* at trial. The introduction pursuant to Rule 68(2)(b) of the Rules of Witness P-291's written statement is therefore, in the Chamber's view, not prejudicial to or inconsistent with Mr Ongwen's rights.

174. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-291, together with its two annexes.<sup>308</sup>

*6. Prior recorded testimony of Witness P-301*<sup>309</sup>

175. Witness P-301 was also a radio operative in the ISO. Like the other ISO witnesses, in his written statement,<sup>310</sup> Witness P-301 describes the ISO interception process, the applicable reporting requirements within the ISO hierarchy and the modalities of the LRA radio communications. In addition, the witness discusses his visits to Lukodi and Odek IDP camps after the LRA attacks and his participation in the exhumation of the bodies at Lukodi IDP camp and his report of the attack on Odek IDP camp. In his written statement, he mentions

<sup>307</sup> UGA-OTP-0246-0061-R01 at 0067-0068, paras 36 and 38.

<sup>308</sup> UGA-OTP-0246-0074-R01 and UGA-OTP-0246-0075-R01.

<sup>309</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 140-141.

<sup>310</sup> UGA-OTP-0249-0423-R01.

having been told by certain individuals that Mr Ongwen was the LRA commander responsible for the attacks on Lukodi and Odek IDP camps,<sup>311</sup> and that he was told that Mr Ongwen himself, in intercepted communications, had claimed to be responsible for the attack on Lukodi IDP camp.<sup>312</sup> Considering (i) the limited value of this information, (ii) the fact that the sources of this information would most likely appear to testify live at trial or be established (or not) through reference to documentary evidence, and (iii) the Prosecution's submission that it does not intend to rely on these passages in Witness P-301's statement,<sup>313</sup> the Chamber is of the view that the existence of this information at paragraphs 56, 57 and 60 – which will be disregarded to establish Mr Ongwen's acts and conduct – does not preclude the introduction of Witness P-301's prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, as the rest of it goes to proof of matters other than Mr Ongwen's acts and conduct.

176. As far as the factors listed in Rule 68(2)(b)(i) of the Rules are concerned, the Chamber notes that the information concerning the ISO interception procedure largely corresponds to that provided by other ISO witnesses in the same position and does not concern issues which are materially in dispute as such. The same applies with respect to the limited information provided by the witness in relation to the attack on Lukodi IDP camp, and the list of names of people killed and abducted during the attack on Odek IDP camp which the witness produced after his visit to Odek and is attached to, and referred to in the witness's written statement. In any case, the Chamber also notes that the Defence challenges the introduction of this specific prior recorded testimony only on the ground that it briefly attributes to Mr Ongwen the responsibility for the attack on Odek and

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<sup>311</sup> UGA-OTP-0249-0423-R01 at 0433, paras. 56 and 57, and at 0435, para. 60

<sup>312</sup> UGA-OTP-0249-0423-R01 at 0433, para. 57.

<sup>313</sup> First Application, ICC-02/04-01/15-465-Corr-Red, para. 141.

Ludoki IDP camps.<sup>314</sup> However, as stated above, the Chamber will not consider this information for its final judgment.<sup>315</sup>

177. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-301, together with its two annexes.<sup>316</sup>

*7. Prior recorded testimony of Witness P-303<sup>317</sup>*

178. Witness P-303 was an ISO officer who worked in the ISO Gulu intercept house and later in Kampala. Like other ISO witnesses, in his written statement,<sup>318</sup> he describes the ISO interception process as well as the reporting procedure and the roles of the other ISO intercept staff. He also explains that he located and provided to the Prosecution sound recordings of LRA radio communications made in Gulu. None of the matters addressed by Witness P-303 in his written statement concern Mr Ongwen's acts and conduct.

179. The content of the prior recorded testimony concerns, in general, the ISO interception process, which are matters that are not in themselves central issues materially in dispute, and on which, in any case, Witness P-59 will testify and be questioned at trial.

180. The Defence submits that it is 'of particular interest' that Witness P-303, asked by Witness P-27 to seek out tapes for the time period 2002-2005, found 'only 53 tapes for approximately 1460 days of interception'.<sup>319</sup> The Defence argues that '[t]his raises enough questions about the storage, transmission, possible political

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<sup>314</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 115. The Chamber indeed recalls that the general arguments with respect to all intercept witnesses have already been addressed (see above paras 147-152).

<sup>315</sup> First Application, ICC-02/04-01/15-465-Corr-Red, para. 141.

<sup>316</sup> UGA-OTP-0249-0437-R01 and UGA-OTP-0249-0438-R01.

<sup>317</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 142-143.

<sup>318</sup> UGA-OTP-0258-0723-R01.

<sup>319</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 116.

interference and processes concerning the recorded material'.<sup>320</sup> The Chamber is not convinced however that this information, in and of itself, militates against the introduction of the prior recorded testimony of Witness P-303 in writing pursuant to Rule 68(2)(b) of the Rules. In fact, the Defence does not indicate what information, beyond that already contained in the written statement, could be obtained by questioning the witness at trial, nor is the prospect of any such additional information apparent to the Chamber. In particular, the Chamber considers that the introduction of the witness statement does not prejudice the right of the Defence to make its prospective arguments concerning the recorded material without the need for Witness P-303 to appear to testify live to confirm the information he provided in his written statement.

181. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-303.

*8. Prior recorded testimony of Witness P-337<sup>321</sup>*

182. Witness P-337 was the UPDF Officer Commanding in Gulu and administrative head of the UPDF interception and direction-finding operations in northern Uganda. In his two written statements,<sup>322</sup> the witness primarily describes the reporting requirements of the UPDF staff involved in the interception operations and the procedure followed for the interception and storage of the records.

183. The Defence again argues that, as Witness P-337 was involved in the UPDF direction-finding operation, he should be called to testify at trial.<sup>323</sup> In this regard, the Chamber finds it sufficient to refer to the considerations made above

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<sup>320</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 117.

<sup>321</sup> Second Application, ICC-02/04-01/15-538-Red, paras 32-33.

<sup>322</sup> UGA-OTP-0256-0201-R01 and UGA-OTP-0267-0445-R01.

<sup>323</sup> Defence Response to the Second Application, ICC-02/04-01/15-555-Conf, para. 17.

precisely on this same argument on the irrelevance of information concerning the direction-finding operation in the present case.<sup>324</sup>

184. With respect to the procedure for the UPDF interception operation, the Chamber observes that the information contained in Witness P-337's prior recorded testimony is not, in and of itself, materially in dispute and of central significance in the present case as such, and that in any case these matters will be addressed by Witnesses P-3 and P-339 who will testify live at trial and be subject to questioning.

185. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-337, together with the three annexes to the first statement.<sup>325</sup>

*9. Prior recorded testimony of Witness P-370<sup>326</sup>*

186. Witness P-370 was a police officer who directly monitored LRA communications. In his written statement,<sup>327</sup> he discusses the assistance he provided to Witness P-125 for the interception and recording of LRA radio communications, the equipment that he and Witness P-125 used and how they reported to Witness P-126. He also confirms his and P-125's handwriting on the records they produced. The Chamber is satisfied that the prior recorded testimony of Witness P-370 does not go to proof of Mr Ongwen's acts and conduct.

187. The Chamber also considers that the existence and the modalities of the police interception process are not in themselves central matters materially in dispute

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<sup>324</sup> See above para. 172.

<sup>325</sup> UGA-OTP-0256-0213-R01, UGA-OTP-0256-0215 and UGA-OTP-0256-0216.

<sup>326</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 144-145.

<sup>327</sup> UGA-OTP-0258-0687-R01.

as such, and observes that the main police interception officer, Witness P-125, is scheduled to appear to testify live at trial.

188. The Defence observes that Witness P-370 explains that the radio they used for the interception operations was also used for police communications and that he mentions that the LRA communicated, *inter alia*, at 7.00 in the morning. According to the Defence, these are very important exculpatory facts.<sup>328</sup> The Chamber takes note of this argument, but does not find it warranted to call the witness to testify live in order to confirm this information, which is already contained in his written statement. In this regard, the Chamber observes that the Defence does not indicate what could be obtained from oral questioning of the witness other than what is already recorded in the written statement beyond '[e]stablishing the accuracy of this statement'.<sup>329</sup> This is however unnecessary, and it is sufficient to observe in this respect that the statement will be introduced only if the witness signs a declaration, *inter alia*, confirming that the contents of his prior recorded testimony are true and correct to the best of his knowledge and belief. Furthermore, the same matters with respect to the police interception can be satisfactorily addressed through the questioning of Witness P-125 who is scheduled to testify at trial, as are the issues with respect to the time of transmission by LRA on which also other witnesses may provide information during their live testimony at trial.

189. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-370.

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<sup>328</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 118.

<sup>329</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 118.



*10. Prior recorded testimony of Witness P-384<sup>330</sup>*

190. Witness P-384 was a radio operative in the ISO. In his prior recorded testimony,<sup>331</sup> he does not discuss issues concerning Mr Ongwen's acts and conduct, but describes the ISO process of interception and recording of LRA communications and his own duty to report to UDPF commanders. The witness also confirms his handwriting in two logbooks.

191. According to the Defence, P-384 can also provide insight into direction-finding evidence.<sup>332</sup> However, as already observed, neither the Prosecution nor the Defence intends to rely on direction-finding evidence in the present case, and no such insight would be of any use in this trial. Similarly, the Chamber fails to see why the fact that Witness P-384 'authenticates material' in his written statement<sup>333</sup> should militate against the introduction of the prior recorded testimony. As for the information provided by the witness in relation to the ISO interception procedure, the Chamber recalls that similar and, likely more detailed, evidence is expected to be provided at trial by Witness P-59, who was the main ISO interception officer. In these circumstances, the Chamber is satisfied that the introduction of Witness P-384's statement is not prejudicial to or inconsistent with Mr Ongwen's rights.

192. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-384.

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<sup>330</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 146-147.

<sup>331</sup> UGA-OTP-0260-0491-R01.

<sup>332</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Red2, para. 119.

<sup>333</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 119.

*11. Prior recorded testimony of Witness P-385<sup>334</sup>*

193. Witness P-385 was an ISO officer based at the ISO headquarters in Kampala. In his written statement,<sup>335</sup> the witness explains his work under Witness P-27 and describes how the ISO recorded, stored and reported on intercepts. He also confirms his handwriting in a number of ISO logbooks. The matters addressed by the witness in his statement do not concern Mr Ongwen's acts and conduct.

194. The Chamber considers that the information provided by Witness P-385 in his prior recorded testimony does not relate to matters that are materially in dispute. The Defence submits that Witness P-385's written statement should not be introduced under Rule 68(2)(b) of the Rules because the witness, if called to testify live, may be able to add clarity to the issue concerning Witness P-3.<sup>336</sup> In this regard, Chamber recalls its findings above with respect to this argument by the Defence,<sup>337</sup> and observes in any case that, contrary to the Defence submission,<sup>338</sup> Witness P-385 was based in Kampala at all times, and not at the Gulu intercept house.<sup>339</sup> The Chamber is therefore satisfied that the introduction of Witness P-385's statement is not prejudicial to or inconsistent with Mr Ongwen's rights.

195. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-385, together with its annex.<sup>340</sup>

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<sup>334</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 148-149.

<sup>335</sup> UGA-OTP-0260-0498-R01.

<sup>336</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 120.

<sup>337</sup> See above, paras 149-152.

<sup>338</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 102.

<sup>339</sup> UGA-OTP-0260-0498-R01 at 0502, para. 25. See also the prior recorded testimony of Witness P-27, UGA-OTP-0249-0444-R01 at 0448, para. 18(j).

<sup>340</sup> UGA-OTP-0260-0506-R01.

12. *Prior recorded testimony of Witness P-386*<sup>341</sup>

196. Witness P-386 was a radio operative in the ISO, who provided a written statement to the Prosecution in April 2016.<sup>342</sup> He describes how the ISO intercepted and recorded LRA communications, together with the functions of the relevant ISO staff and the ISO reporting requirements. He explains, in addition, where his handwriting appears in ISO records. None of the issues addressed in the prior recorded testimony of Witness P-386 relates to the acts and conduct of Mr Ongwen.

197. According to the Defence, Witness P-386 should be called to testify *viva voce* at trial because he ‘authenticates a record found in UGA-OTP-0242-5078 at 5095’,<sup>343</sup> which is an entry in a book of short-hand rough notes, the introduction of which is not requested by the Prosecution by the Application under consideration, but which is, in the Defence’s submission, ‘important to the defence as it claims to indicate Mr Ongwen’s movements around important dates’.<sup>344</sup> Irrespective of the issue of the appropriate degree of ‘authentication’ of documentary evidence, the Chamber observes that, in reference to the material mentioned by the Defence, the witness states explicitly: ‘these are rough notes covering LRA radio communication on a range of date between 2 and 14 May 2004 which I produced in Gulu. I have reviewed these notes and recognised that they bear my handwriting on all twenty pages’.<sup>345</sup> In the absence of any challenge in this respect, it is not apparent to the Chamber why the Defence objects to the introduction of the witness’s prior recorded testimony as this information – which it considers ‘important’ to its case – is already included in the witness’s written statement which would be introduced in its entirety pursuant to Rule

<sup>341</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 150-151.

<sup>342</sup> UGA-OTP-0260-0508-R01.

<sup>343</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 121.

<sup>344</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 121.

<sup>345</sup> UGA-OTP-0260-0508-R01 at 0513, para. 27(a). At sub-paragraph (d), the witness also gives more details on the precise entry referred to by the Defence.

68(2)(b) of the Rules following the filing of a declaration by which the witness confirms its contents. No identifiable prejudice to Mr Ongwen's rights ensues from the introduction of Witness P-386's written statement.

198. The Chamber also considers that Witness P-386's written statement – which concerns ISO interception procedures – does not relate to those aspects about the intercept material that are materially in dispute, but to matters on which, in any case, other witnesses – and Witness P-59 in particular – will testify live at trial.

199. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-386.

*13. Prior recorded testimony of Witness P-400<sup>346</sup>*

200. Witness P-400 was a UPDF intercept operative who worked in the intercept house in Gulu between 2003 and 2004. In his prior recorded testimony,<sup>347</sup> the witness describes the modalities for the interception, decoding and recording of the LRA radio communications, his working with Witnesses P-3, P-29 and P-337 and the reporting requirements within his team. The witness also comments on a series of UPDF logbooks, including whether they contain his handwriting. The Chamber is satisfied that the prior recorded testimony of Witness P-400 goes to proof of matters other than Mr Ongwen's acts and conduct.

201. The Defence objects to the introduction of Witness P-400's prior recorded testimony on essentially the same grounds as its objections to the introduction of the written statement of Witness P-370.<sup>348</sup> In fact, the Defence submits that Witness P-400 is 'the only witness to describe the 0800 in the morning unit report of the LRA', which, in its submission, is a 'potentially highly material or

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<sup>346</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 152-153.

<sup>347</sup> UGA-OTP-0264-0015-R01.

<sup>348</sup> See above para. 188.

exculpatory' information.<sup>349</sup> The Chamber notes that, in his prior recorded testimony, Witness P-400 indeed states that the LRA 'regularly communicated', *inter alia*, 'at 0800 hours', and that when that communication failed, the LRA would communicate one hour later.<sup>350</sup> The Chamber is of the view that, as this information is already contained in the witness's written statement, it is not warranted that the witness be called to testify live at trial in order to provide further details on this point. Further, it finds that the LRA transmission time can be fully explored through questioning of other witnesses already scheduled to appear, in particular the other interception officers (Witnesses P-3, P-59, P-125 and P-339), former LRA signallers (Witnesses P-16 and P-19) or, in general, other LRA insider witnesses. The Chamber is therefore of the view that the introduction of P-400's written statement under Rule 68(2)(b) of the Rules does not prejudice Mr Ongwen's rights. The same considerations apply also with respect to the rest of Witness P-400's statement which does not concern issues which are in themselves materially disputed between the parties or of central importance in the present case and relates to matters on which other witnesses (Witnesses P-3 and P-339 in particular) will be testify *viva voce* at trial.

202. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-400.

#### *14. Prior recorded testimony of Witness P-404<sup>351</sup>*

203. Witness P-404 is an intercept operative, who intercepted LRA radio communications in Gulu from April to November 2004. In his statement,<sup>352</sup> he explains how the UPDF in Gulu intercepted, decoded and recorded LRA radio

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<sup>349</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 122.

<sup>350</sup> UGA-OTP-0264-0015-R01, at 0022, para. 42.

<sup>351</sup> Second Application, ICC-02/04-01/15-538-Red, para. 34.

<sup>352</sup> UGA-OTP-0267-0470-R01.

communications and how the LRA used the radio, and describes the hierarchy within the UPDF. The prior recorded testimony of Witness P-404 does not concern Mr Ongwen's acts and conduct.

204. The witness also provides information on radio-related direction finding. The presence of this information appears to be the reason why the Defence objects to the introduction of Witness P-404's prior recorded testimony.<sup>353</sup> However, and as already observed,<sup>354</sup> in the circumstances of the present case, this information concerning direction finding operations is of no significance and does not warrant that witnesses be examined on these matters. As far as the rest of Witness P-404's statement is concerned, the Chamber observes that the information it contains, with respect to the existence and process of the UPDF interception activity, is not, in and of itself, materially in dispute between the parties. The prior recorded testimony of Witness P-404 is also cumulative, in the sense that the main UPDF intercept officers, Witnesses P-3 and P-339, are expected to testify at trial on precisely the same matters.

205. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-404.

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<sup>353</sup> While not stated explicitly, this appears to be the case from the Defence submissions at para. 17 of its Response to the Second Application. The other general arguments, concerning the fact that the witness must be called because he was an intercept officer and/or because he worked directly with Witness P-3 (Defence Response to the Second Application, ICC-02/04-01/15-555-Red, paras 15-16) have already been addressed by the Chamber (see above paras 147-153).

<sup>354</sup> See above paras 160.

15. *Prior recorded testimony of Witness P-242<sup>355</sup> and prior recorded testimony of Witness P-256<sup>356</sup>*

206. The Chamber addresses the prior recorded testimony of Witnesses P-242 and P-256 together as the two witnesses are effectively in the same position as far as their testimonies are concerned. Both witnesses performed the audio enhancement of a number of sound recordings of LRA radio communications provided by the UPDF and ISO. Witness P-242, who enhanced 43 sound recordings, is an external expert in the field of audio forensics, while Witness P-256, who performed the audio enhancement of 106 sound recordings, is a forensic officer in the Forensic Science Section at the Court's Office of the Prosecutor. In their respective prior recorded testimony,<sup>357</sup> the two witnesses explain the audio enhancement procedure for the respective batches of sound recordings. The Chamber is satisfied that the prior recorded testimony of the two witnesses goes to proof of matters other than Mr Ongwen's acts and conduct.

207. The Chamber considers that it is not required that every person involved in the processing of evidence be called to testify live at trial.<sup>358</sup> This holds particularly true with respect to the two witnesses under consideration and the audio enhancement procedure given that, *inter alia*, the Defence is in possession of the sound recordings concerned in unenhanced form and is therefore able to challenge the material, if it so wishes, without the need to call these witnesses to testify *viva voce*. Furthermore, the Chamber observes that in their statements the witnesses explain the audio enhancement procedure and that the Defence does not indicate that it would wish to examine the witnesses at trial on any

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<sup>355</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 154-157.

<sup>356</sup> Second Application, ICC-02/04-01/15-538-Red, paras 35-37.

<sup>357</sup> UGA-OTP-0261-0333-R01 for Witness P-242; UGA-OTP-0269-0015 for Witness P-256.

<sup>358</sup> See Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba et al.*, Judgment pursuant to Article 74 of the Statute, 19 October 2016, ICC-01/05-01/13-1989-Red, paras 217-225.



particular aspect.<sup>359</sup> The Chamber also considers that the Defence is in a position to challenge the procedure for the creation, collection and storage of the audio recordings as well as the content of the relevant tapes (including the alleged voice attribution to Mr Ongwen) by, *inter alia*, questioning at trial the main interception officers who will be called to testify *viva voce*, as well as Witness P-403 – an analyst employed by the Prosecution who is expected to testify in particular about the processing at the Office of the Prosecutor of the evidence of the LRA radio communications.

208. At the same time, the Chamber observes that the enhanced radio intercepts form a crucial body of evidence in the present case and that the Defence considers it of the utmost importance to examine the two witnesses about this material.<sup>360</sup> The Chamber also considers it of relevance that the two witnesses are not victims of the crimes charged, and that Witness P-256, who is present at the seat of the Court, and Witness P-242, who resides in the United Kingdom, may both easily appear before the Chamber.

209. In these circumstances, the Chamber, exercising its discretion under Rule 68(2)(b) of the Rules, decides not to allow the introduction of the prior recorded testimonies of Witness P-242 and P-256 under this provision. Conversely, in light of the considerations above and the content of the prior recorded testimony at issue, the Chamber is of the view that the statements of Witnesses P-242 and P-256 are suitable for introduction under Rule 68(3) of the Rules.<sup>361</sup> Should the

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<sup>359</sup> The Defence simply states, in general terms, that ‘any conviction based upon this material should have the processing of the material carefully scrutinised by the Defence’ (Defence Response to the Second Application, ICC-02/04-01/15-555-Conf, paras 22-24). The Chamber notes that the Defence does indicate, with respect to Witness P-242, that, as the audio recordings that the witness enhanced were not originals but copies, it should be allowed the witness ‘to test the authenticity of the tape’ (Defence response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 7). However, as the witness performed only the audio enhancement operation of the tapes provided to him by the Prosecution, the witness would arguably not be in a position to discuss matters concerning the authenticity of the tapes.

<sup>360</sup> Defence Response to the Second Application, ICC-02/04-01/15-555-Conf, paras 22-24.

<sup>361</sup> Rule 68(1) of the Rules allows the Chamber to decide *proprio motu* whether to introduce a prior recorded testimony ‘after hearing the parties’. The Chamber considers that, for the purpose of this requirement, the

witnesses appear and not object to such introduction, their prior recorded testimony will be introduced under Rule 68(3) of the Rules and the participants will be given an opportunity to question them as appropriate.<sup>362</sup>

## **F. Prior recorded testimonies of other witnesses**

### *1. Prior recorded testimony of Witness P-38<sup>363</sup>*

210. Witness P-38 is an officer in the Ugandan military who acted as a liaison for the Minister of Defence, the UPDF and the Office of the Prosecutor of the Court. In his prior recorded testimony,<sup>364</sup> the witness describes the collection, collation and handover to the Prosecution of documentary evidence, in particular intercepted material, captured documents and photographs. The Chamber is satisfied that the prior recorded testimony goes to proof of matters different than Mr Ongwen's acts and conduct.

211. The Chamber also considers that the matters addressed in Witness P-38's prior recorded testimony do not relate to issues that are materially in dispute in the present case, in particular considering that: (i) the Prosecution does not seek to rely on any portion of this testimony which refers to the interception process of LRA radio communications;<sup>365</sup> and (ii) the witness does not discuss the substance of the items he describes but only the context of their collection. Furthermore – and with respect to the arguments raised by the Defence<sup>366</sup> – the Chamber considers that: (i) adequate explanations as to the reasons why there are missing

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submissions made by the parties in their filings under Rule 68(2)(b) of the Rules with respect to the introduction of the prior recorded testimony of Witnesses P-242 and P-256 are sufficiently comprehensive and detailed also for its determination under Rule 68(3) of the Rules, in particular, as the Defence would be allowed to question Witnesses P-242 and P-256 at trial as it has requested.

<sup>362</sup> As stated by the Presiding Judge in the Initial Directions on the Conduct of Proceedings, the Chamber 'expects the calling participant to streamline its questioning considerably when resorting to [Rule 68(3)]' (ICC-02/04-01/15-497, para. 18).

<sup>363</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 158-161.

<sup>364</sup> UGA-OTP-0069-0784-R01 and UGA-OTP-0244-0912-R01.

<sup>365</sup> First Application, ICC-02/04-01/15-465-Corr-Red, para.160.

<sup>366</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, paras 125-126.

dates in the intercepted evidence may be better requested of the interception officers who will testify at trial, rather than of Witness P-38<sup>367</sup> who was not involved in the process of intercepting, taping or transcribing LRA radio communications;<sup>368</sup> and (ii) the reference in the first statement given in November 2004 to 'six incidents involving the LRA that are currently being investigated by the ICC'<sup>369</sup> is not 'unclear', as argued by the Defence,<sup>370</sup> given that, in May 2005, the Prosecution requested warrants of arrest against LRA commanders for their responsibility in a total of six incidents during which crimes within the jurisdiction of the Court were allegedly committed.<sup>371</sup>

212. Nevertheless, considering that Witness P-38 describes the kind of material that he provided to the Prosecution and mentions that a certain, limited, selection and review of relevance was made prior to certain material being transmitted to the Prosecution,<sup>372</sup> the Chamber agrees with the Defence that it should be allowed to question the witness at trial on these matters.<sup>373</sup> The Chamber, therefore, decides not to allow the introduction of Witness P-38's prior recorded testimony under Rule 68(2)(b) of the Rules.

213. At the same time, considering the content of the prior recorded testimony of Witness P-38 and in light of the above considerations, the Chamber is of the view that the prior recorded testimony may be introduced pursuant to Rule 68(3) of the Rules should the witness appear at trial and not object to such

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<sup>367</sup> The witness himself states that he is unable to provide more details on this and that 'the signals people will know better the reasons why intercepts may not be available for any dates on which intercepts appear to be missing' (UGA-OTP-0069-0784-R01 at 0788, para. 15).

<sup>368</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para.125.

<sup>369</sup> UGA-OTP-0069-0784-R01 at 0789, para. 22.

<sup>370</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para.126.

<sup>371</sup> See ICC-02/04-01/15-3-Conf-Red3.

<sup>372</sup> See, for example, UGA-OTP- 0069-0784-R01 at 0789, para 25, and UGA-OTP-0244-0912-R01 at 0918, para. 46.

<sup>373</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 127.

introduction.<sup>374</sup> In that case, the Prosecution would be allowed to conduct a short supplementary examination of the witness,<sup>375</sup> followed by questioning by the legal representatives of the victims and the Defence.

*2. Prior recorded testimony of Witness P-28<sup>376</sup>*

214. Witness P-28 is a former LRA member who served as a senior advisor to Joseph Kony. In his prior recorded testimony taken in October 2004,<sup>377</sup> the witness does not discuss issues which concern Mr Ongwen's acts and conduct. Witness P-28 provides important information in particular with respect to the persecutory policy of the LRA and the system of discipline and control over the LRA members. These issues go to the core of the Prosecution's charges against Mr Ongwen as well as of the Defence arguments in response.<sup>378</sup> It also appears to the Chamber, from the information in its possession, that Witness P-28 is one of the highest ranking LRA members on whose testimony the Prosecution intends to rely for the purpose of the present trial. The witness's privileged observation point as a senior advisor to Joseph Kony suggests to the Chamber that this witness can provide more detailed information than other LRA insider witnesses and from a different perspective.

215. Taking into account these circumstances, and in the exercise of its discretion, the Chamber considers that, rather than introducing Witness P-28's prior recorded

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<sup>374</sup> In this case too, the Chamber finds the comprehensive submissions of the parties in relation to the introduction of the prior recorded testimony of Witness P-38 made in their filings under Rule 68(2)(b) sufficient for its determination under Rule 68(3).

<sup>375</sup> It is recalled in this regard that, as stated in the Initial Directions on the Conduct of Proceedings, the Chamber 'expects the calling participant to streamline its questioning considerably when resorting to [Rule 68(3)]' (ICC-02/04-01/15-497, para. 18).

<sup>376</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 162-165.

<sup>377</sup> Transcripts of interview: UGA-OTP-0217-0054-R01; UGA-OTP-0217-0075-R01; UGA-OTP-0217-0100-R01; UGA-OTP-0217-0125-R01; UGA-OTP-0217-0148-R01; UGA-OTP-0217-0171-R01; UGA-OTP-0217-0192-R01; UGA-OTP-0217-0218-R01; UGA-OTP-0217-0241-R01; UGA-OTP-0217-0266-R01; UGA-OTP-0217-0287-R01; UGA-OTP-0217-0305-R01; UGA-OTP-0217-0327-R01.

<sup>378</sup> The Defence states in this respect that 'th[e] type of punishment and belief system [within the LRA] is central to the development of the defence of duress' and that Witness P-28 'has direct knowledge of Joseph Kony and the fear he propagated through the LRA' (Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, paras 130 and 132).

testimony under Rule 68(2)(b) of the Rules, it is more appropriate that the witness testify *viva voce* at trial so that the different matters can be fully explored through questioning by the participants and, as warranted, the Chamber itself. For these reasons the Chamber decides not to allow the introduction of Witness P-28's prior recorded testimony under Rule 68(2)(b) of the Rules.

3. *Prior recorded testimony of Witness P-40*<sup>379</sup>

216. Witness P-40 is a former LRA captain. In his prior recorded testimony,<sup>380</sup> the witness primarily testifies about the general LRA's objectives in relation to persecution of civilians who were perceived to support the government and abduction of girls and women and forced marriage.<sup>381</sup> In a few passages of his testimony, the witness mentions Mr Ongwen and his participation in the attack on Lukodi IDP camp. However, considering that these references are of limited significance and that the Prosecution explicitly states that it does not rely on these limited portions, the Chamber considers that Witness P-40's prior recorded suitable may in principle be introduced pursuant to Rule 68(2)(b) of the Rules, with the clarification that the references to Mr Ongwen<sup>382</sup> will not be relied upon by the Chamber for any determination concerning his acts and conduct.

217. The aspects concerning LRA's policy with regard to persecution of civilians and sexual and gender-based crimes are of crucial importance in the present case. It

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<sup>379</sup> First Application, ICC-02/04-01/15-465-Corr-Red, paras 166-169.

<sup>380</sup> Transcripts of interview: UGA-OTP-0209-0406-R01; UGA-OTP-0209-0436-R01; UGA-OTP-0209-0461-R01; UGA-OTP-0209-0497-R01; UGA-OTP-0209-0530-R01; UGA-OTP-0209-0569-R01; UGA-OTP-0209-0602-R01; UGA-OTP-0209-0634-R01; UGA-OTP-0209-0668-R01; UGA-OTP-0209-0696-R01; UGA-OTP-0209-0732-R01; UGA-OTP-0209-0762-R01; UGA-OTP-0209-0786-R01; UGA-OTP-0209-0813-R01; UGA-OTP-0209-0842-R01; UGA-OTP-0209-0877-R01; UGA-OTP-0209-0912-R01; UGA-OTP-0220-0652-R01; UGA-OTP-0220-0678-R01; UGA-OTP-0220-0704-R01; UGA-OTP-0220-0729-R01; UGA-OTP-0220-0753-R01; UGA-OTP-0220-0779-R01; UGA-OTP-0220-0805-R01; UGA-OTP-0220-0833-R01.

<sup>381</sup> The Chamber notes that, while in his prior recorded testimony Witness P-40 testifies to several facts, the Prosecution submits that it intends to rely on this testimony to establish the persecution of civilians and sexual and gender-based crimes (First Application, ICC-02/04-01/15-465-Corr-Red, under section B.(ii)g, pages 58-60).

<sup>382</sup> UGA-OTP-0209-0436-R01 at 0454-0456; UGA-OTP-0209-0461-R01 at 0480-0481; UGA-OTP-0209-0569-R01 at 0592-0596; UGA-OTP-0209-0634-R01 at 0640-0642, 0665-0666; UGA-OTP-0209-0877-R01 at 0908-0909; UGA-OTP-0220-0779-R01 at 0780-0782, 0793-0797; UGA-OTP-0220-0805-R01 at 0812-0813.

is also unclear, at the present stage of the proceedings, to what extent such issues are materially disputed between the parties in the present case, save for Mr Ongwen's responsibility, if any. The Chamber notes, however, that several other witnesses are scheduled to testify at trial on essentially the same matters. For example, at least Witnesses P-45, P-70, P-85, P-105 P-138, P-245, P-258, as well as, by virtue of the present decision, Witness P-28<sup>383</sup> are all expected, in light of the information that they provided in their respective statements to the Prosecution, to discuss issues concerning orders given by Joseph Kony to target civilians for their perceived opposition to the LRA. Matters related to the treatment of women and girls and forced marriage will also be addressed by several witnesses (including, for example, Witnesses P-142, P-351, P-352, P-366, P-374 and P-396) and have already been extensively discussed in the testimonies of Witnesses P-99, P-101, P-214, P-226, P-227, P-235 and P-236 which have been recognised as formally submitted in the present trial.<sup>384</sup> In these circumstances, the Chamber considers that the prior recorded testimony of Witness P-40, while it relates to significant matters in the present case, is cumulative and of limited relative importance also considering that he does not offer a different perspective from a unique vantage point (contrary to Witness P-28 for example)<sup>385</sup> and in any case, differently from other prospective *viva voce* witnesses, is not relied upon to establish Mr Ongwen's responsibility for the crimes charged.

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<sup>383</sup> See above paras 214-215.

<sup>384</sup> See Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute, 10 August 2016, ICC-02/04-01/15-520.

<sup>385</sup> For this consideration, the Chamber is also attentive to the Defence argument that it 'near impossible' that Witness P-40 would have at some point reached the same rank as Vincent Otti, being subsequently demoted for his outspoken condemnation of Joseph Kony (Defence Response to the First Application, ICC-02/04-01/15-509-Conf-Corr, para. 137).

218. The Defence objects to the introduction pursuant to Rule 68(2)(b) of Witness P-40's prior recorded testimony on two main grounds,<sup>386</sup> namely that the witness provides relevant potentially exculpatory information and that the witness is not reliable. As for the first argument, the Defence observes that the witness 'strongly believes [...] 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'.<sup>387</sup> This information is, however, already contained in the prior recorded testimony of the witness and is explicitly acknowledged also by the Prosecution both in its First Application<sup>388</sup> and its Pre-Trial Brief.<sup>389</sup> In these circumstances, and in the absence of any indication of what the Defence would seek to obtain by questioning the witness beyond the scope of his prior recorded testimony, it is not apparent to the Chamber why the introduction of such testimony under Rule 68(2)(b) of the Rules would not suffice for the Defence to make its prospective arguments at trial.

219. As for the Defence arguments that certain parts of P-40's statement render it unreliable,<sup>390</sup> these arguments – while potentially relevant when ultimately considering the statement's probative value – do not persuade the Chamber that the statement, which otherwise meets the relevant formal requirements, is so manifestly unbelievable or incoherent so as to make its introduction under Rule 68(2)(b) of the Rules inapposite.

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<sup>386</sup> The Defence also argues that the prior recorded testimony should not be introduced under Rule 68(2)(b) of the Rules as his statement addresses Mr Ongwen's acts and conduct (Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 133). The Chamber has concluded, however, on this point that it would disregard any such information for the purpose of its final judgment.

<sup>387</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, para. 133.

<sup>388</sup> First Application, ICC-02/04-01/15-465-Corr-Red, para. 167.

<sup>389</sup> Prosecution's Pre-Trial Brief, ICC-02/04-01/15-533, para. 663.

<sup>390</sup> Defence Response to the First Application, ICC-02/04-01/15-509-Corr-Red2, paras 136-137.



220. In conclusion, taking into account the relevant factors, the Chamber allows the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-40, together with its associated documents.<sup>391</sup>

#### IV. CONCLUSION

221. In light of the above, the Chamber concludes that the prior recorded testimony of 38 witnesses<sup>392</sup> as analysed in the present decision are suitable to be introduced under Rule 68(2)(b) of the Rules.

222. As already observed, the introduction of the prior recorded testimony of these witnesses is subject to the receipt and filing in the record of the case of the accompanying declaration by each of the witnesses concerned in accordance with Rule 68(2)(b)(ii) and (iii) of the Rules. This latter sub-paragraph provides that the declaration must be witnessed by a person authorised by the Chamber for this purpose, or otherwise obtained in accordance with the law and procedure of a State. The Chamber agrees, as submitted by the Prosecution,<sup>393</sup> that the Legal Counsel of the Registry is best placed to witness such declarations, as it has been recognised in previous decisions of the Court.<sup>394</sup> The Chamber accordingly designates the Legal Counsel of the Registry (or a person delegated by him) to witness declarations made pursuant to Rule 68(2)(b) of the Rules with respect to the witnesses who are subject to the present decision and, more

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<sup>391</sup> UGA-OTP-0006-0003, UGA-OTP-0006-0005, UGA-OTP-0006-0006, UGA-OTP-0006-0007 and UGA-OTP-0006-0008.

<sup>392</sup> Witnesses P-7, P-8, P-15, P-17, P-26, P-27, P-29, P-32, P-35, P-36, P-40, P-47, P-60, P-61, P-84, P-126, P-130, P-185, P-165, P-196, P-268, P-270, P-274, P-279, P-281, P-282, P-284, P-287, P-291, P-301, P-303, P-325, P-337, P-370, P-384, P-385, P-386, P-400 and P-404.

<sup>393</sup> First Application, ICC-02/04-01/15-465-Corr-Red, para. 4 and 170.

<sup>394</sup> See *e.g.* Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution's request to designate a person authorised to witness a declaration under Rule 68(2)(b) of the Rules', 16 July 2015, ICC-01/04-02/06-729; Trial Chamber VII; *The Prosecutor v. Jean-Pierre Bemba et al.*, Decision on the Prosecution's Request to Designate a Person Authorised to Witness a Declaration Under Rule 68(2)(b) of the Rules of Procedure and Evidence, 29 July 2015, ICC-01/05-01/13-1109; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the Prosecution's request to designate a person authorised to witness a declaration under Rule 68(2)(b) of the Rules, 21 October 2015, ICC-02/11-01/15-303.

generally, for the purposes of the present case. The template for such declarations, which is uniform across all cases to date,<sup>395</sup> is apt for this purpose.

223. The Chamber recalls that, following the filing of each declaration, the corresponding prior recorded testimony will be entered the record of the case<sup>396</sup> as evidence to be considered for the purposes of the Chamber's decision under Article 74 of the Statute. In this respect, the Chamber emphasises that the publicity of the trial is a fundamental right of the accused and a necessary component of a fair and transparent trial. Article 64(7) of the Statute provides in this regard that '[t]he trial shall be held in public', and Article 67(1) that '[i]n the determination of any charge, the accused shall be entitled to a public hearing'. The Chamber has also already stated that "[i]nsofar as possible, witness testimony shall be given in public".<sup>397</sup> The Chamber considers that the same principles equally apply to any testimony which was previously obtained and recorded out of court and is introduced under Rule 68(2)(b) of the Rules. For these reasons, the Chamber is of the view that the written record of introduced prior recorded testimony – *i.e.* the transcripts of Witness P-40's testimony and the written statements of the other concerned witnesses – shall be public to the extent possible. To this end, the Prosecution is instructed to file a proposed redacted version of the written record of each prior recorded testimony, or indicate that it may be made public in its entirety (including the witness's identity), within 21 days of filing in the record of the case of the declaration of the corresponding witness. Within 21 days of receipt of the Prosecution's filing,

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<sup>395</sup> ICC-02/04-01/15-465-AnxB.

<sup>396</sup> This fact shall then be reflected in the eCourt metadata (similarly, see also Initial Directions on the Conduct of Proceedings, 13 July 2016, ICC-02/04-01/15-497, para. 28(v)).

<sup>397</sup> Initial Directions on the Conduct of Proceedings, 13 July 2016, ICC-02/04-01/15-497, para. 36.

the other participants may raise any objection to the redactions proposed by the Prosecution or propose additional redactions.<sup>398</sup>

224. Finally, the Chamber notes that both the Prosecution and the Defence have filed their Applications and Responses respectively as ‘confidential’ together with a corresponding public redacted version. The Chamber observes that, in the meantime, the need to withhold certain information from the public has been superseded<sup>399</sup> or is otherwise no longer warranted after the issuance of the present decision in its public redacted version.<sup>400</sup> The parties are therefore directed to review, in light of the public version of this decision, their respective filings and to file lesser redacted versions thereof. In doing so, the parties are also instructed to liaise with each other to avoid that the same or similar information being given a different classification in their respective public versions. The response to the First Application by the legal representatives of individual victims (filing ICC-02/04-01/15-508-Conf) and the response to the Second Application by the common legal representative of victims (filing ICC-02/04-01/15-554-Conf) can be reclassified as ‘public’ without need for redactions.

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<sup>398</sup> The Chamber recalls that a similar procedure, *mutatis mutandis*, has been adopted in the present case with respect to the filing of lesser redacted public versions of the transcripts of trial hearings (Initial Directions on the Conduct of Proceedings, 13 July 2016, ICC-02/04-01/15-497, para. 37) and for the preparation of public redacted versions of the transcripts of the testimony already taken under Article 56 of the Statute (Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute, 10 August 2016, ICC-02/04-01/15-520, para. 16).

<sup>399</sup> For example, the redactions of all information about the Defence prospective arguments concerning alleged grounds excluding criminal responsibility which is now available to the public. Also, compare, for example, paras 54-55 of the public version of the First Application with para. 16 of the public version of the Second Application.

<sup>400</sup> This applies to all information which, while redacted by the Prosecution and/or the Defence in their public filings, the Chamber has decided to make public in the present decision either on account of it being already in the public domain as a result of other public filings in the record or because its withholding from the public is considered unwarranted. The Chamber redacts in the public version of the decision also some information about Witnesses P-7, P-8, P-60 and P-325. These redactions are applied following the same redactions in the parties’ public filings and consistently with a margin of deference accorded to the participants in this respect at this point in time. Nonetheless, the parties are directed to determine whether these redactions are actually necessary and, if this is not the case, to remove them in the lesser redacted public versions of their respective filings ordered in the present decision.

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

**DECIDES** that, subject to the receipt of the respective declarations under Rule 68(2)(b)(ii) and (iii) of the Rules, the prior recorded testimonies of the following witnesses are introduced into evidence pursuant to Rule 68(2)(b) of the Rules:

- **Witness P-7** (UGA-OTP-0147-0214-R01); together with its related documents (UGA-OTP-0147-0225; UGA-OTP-0147-0239; UGA-OTP-0150-0124; UGA-OTP-0150-0146; UGA-OTP-0150-0172; and UGA-OTP-0151-0131);
- **Witness P-8** (UGA-OTP-0137-0002-R01); together with its associated documents (UGA-OTP-0137-0029; UGA-OTP-0137-0051; UGA-OTP-0137-0058; UGA-OTP-0137-0068; UGA-OTP-0137-0089; UGA-OTP-0137-0123; UGA-OTP-0137-0145; UGA-OTP-0137-0190; UGA-OTP-0137-0193);
- **Witness P-15** (UGA-OTP-0043-0131-R01; UGA-OTP-0191-0254-R01);
- **Witness P-17** (UGA-OTP-0036-0007-R01); together with its associated documents (UGA-OTP-0023-0022; UGA-OTP-0023-0008; UGA-OTP-0023-0310; UGA-OTP-0023-0311; UGA-OTP-0023-0312; UGA-OTP-0023-0313; UGA-OTP-0023-0314; UGA-OTP-0023-0315; UGA-OTP-0023-0316; UGA-OTP-0023-0317; UGA-OTP-0023-0318; UGA-OTP-0023-0319; UGA-OTP-0023-0320; UGA-OTP-0023-0321; UGA-OTP-0023-0322; UGA-OTP-0023-0323; UGA-OTP-0023-0324; UGA-OTP-0023-0325; UGA-OTP-0023-0326; UGA-OTP-0023-0327; UGA-OTP-0023-0328; UGA-OTP-0023-0329; UGA-OTP-0023-0330; UGA-OTP-0023-0331; UGA-OTP-0023-0332; UGA-OTP-0023-0333; UGA-OTP-0023-0334; UGA-OTP-0023-0335; UGA-OTP-0023-0336; UGA-OTP-0023-0337; UGA-OTP-0023-0338; UGA-OTP-0023-0339; UGA-OTP-0023-0340; UGA-OTP-0023-0341; UGA-OTP-0023-0342; UGA-OTP-0023-0343; UGA-OTP-0023-0344; UGA-OTP-0023-0345; UGA-OTP-0023-0346; UGA-OTP-0023-0347; UGA-OTP-0023-0348; UGA-OTP-0023-0349; UGA-OTP-0023-0350; UGA-OTP-0023-0351; UGA-OTP-0023-0352; UGA-OTP-0023-0353; UGA-OTP-0023-0354; UGA-OTP-0023-0355; UGA-OTP-0023-0356; UGA-OTP-0023-0357; UGA-OTP-0023-0358; UGA-OTP-0023-0359; UGA-OTP-0023-0360; UGA-OTP-0023-0386; UGA-OTP-0023-0387; UGA-OTP-0023-0388; UGA-OTP-0023-0389; UGA-OTP-0023-0390; UGA-OTP-0023-0391; UGA-OTP-0023-0382; UGA-OTP-0023-0393; UGA-OTP-0023-0394; UGA-OTP-0023-0395; UGA-OTP-0023-0396; UGA-OTP-0023-0397; UGA-OTP-0023-0398; UGA-OTP-0023-0399; UGA-OTP-0023-0400; UGA-OTP-0023-0401; UGA-OTP-0023-0402; UGA-OTP-0023-0403; UGA-OTP-0023-0404; UGA-OTP-0023-0405; UGA-OTP-0023-0406; UGA-OTP-0023-0407; UGA-OTP-0036-0040);
- **Witness P-26** (UGA-OTP-0069-0018-R01);

- **Witness P-27** (UGA-OTP-0207-0256-R01; UGA-OTP-0249-0444-R01); together with its associated documents (UGA-OTP-0246-0038-R01; UGA-OTP-0246-0039-R01);
- **Witness P-29** (UGA-OTP-0027-0231-R01; UGA-OTP-0267-0455);
- **Witness P-32** (UGA-OTP-0069-0796-R01; UGA-OTP-0150-0030-R01; UGA-OTP-0246-0003-R01); together with its associated documents (UGA-OTP-0246-0019; UGA-OTP-0246-0020; UGA-OTP-0246-0021; UGA-OTP-0246-0022; UGA-OTP-0246-0023-R01; UGA-OTP-0246-0024-R01; UGA-OTP-0246-0025-R01);
- **Witness P-35** (UGA-OTP-0036-0082-R01), with the clarification at paragraph 105 above; together with its together with its associated document (UGA-OTP-0036-0094);
- **Witness P-36** (UGA-OTP-0036-0042-R01); together with its associated documents (UGA-OTP-0023-0008; UGA-OTP-0023-0188; UGA-OTP-0023-0310; UGA-OTP-0023-0311; UGA-OTP-0023-0312; UGA-OTP-0023-0313; UGA-OTP-0023-0314; UGA-OTP-0023-0315; UGA-OTP-0023-0316; UGA-OTP-0023-0317; UGA-OTP-0023-0318; UGA-OTP-0023-0319; UGA-OTP-0023-0320; UGA-OTP-0023-0321; UGA-OTP-0023-0322; UGA-OTP-0023-0323; UGA-OTP-0023-0324; UGA-OTP-0023-0325; UGA-OTP-0023-0326; UGA-OTP-0023-0327; UGA-OTP-0023-0328; UGA-OTP-0023-0329; UGA-OTP-0023-0330; UGA-OTP-0023-0331; UGA-OTP-0023-0332; UGA-OTP-0023-0333; UGA-OTP-0023-0334; UGA-OTP-0023-0335; UGA-OTP-0023-0336; UGA-OTP-0023-0337; UGA-OTP-0023-0338; UGA-OTP-0023-0339; UGA-OTP-0023-0340; UGA-OTP-0023-0341; UGA-OTP-0023-0342; UGA-OTP-0023-0343; UGA-OTP-0023-0344; UGA-OTP-0023-0345; UGA-OTP-0023-0346; UGA-OTP-0023-0347; UGA-OTP-0023-0348; UGA-OTP-0023-0349; UGA-OTP-0023-0350; UGA-OTP-0023-0351; UGA-OTP-0023-0352; UGA-OTP-0023-0353; UGA-OTP-0023-0354; UGA-OTP-0023-0355; UGA-OTP-0023-0356; UGA-OTP-0023-0357; UGA-OTP-0023-0358; UGA-OTP-0023-0359; UGA-OTP-0023-0360; UGA-OTP-0023-0386; UGA-OTP-0023-0387; UGA-OTP-0023-0388; UGA-OTP-0023-0389; UGA-OTP-0023-0390; UGA-OTP-0023-0391; UGA-OTP-0023-0392; UGA-OTP-0023-0393; UGA-OTP-0023-0394; UGA-OTP-0023-0395; UGA-OTP-0023-0396; UGA-OTP-0023-0397; UGA-OTP-0023-0398; UGA-OTP-0023-0399; UGA-OTP-0023-0400; UGA-OTP-0023-0401; UGA-OTP-0023-0402; UGA-OTP-0023-0403; UGA-OTP-0023-0404; UGA-OTP-0023-0405; UGA-OTP-0023-0406; UGA-OTP-0023-0407; UGA-OTP-0036-0063; UGA-OTP-0146-0154; UGA-OTP-0146-0157; UGA-OTP-0146-0160; UGA-OTP-0146-0163; UGA-OTP-0146-0166; UGA-OTP-0146-0169; UGA-OTP-0146-0172; UGA-OTP-0146-0175; UGA-OTP-0146-0178; UGA-OTP-0146-0182; UGA-OTP-0146-0185; UGA-OTP-0146-0188; UGA-OTP-0146-0191; UGA-OTP-0146-0194; UGA-OTP-0146-0197; UGA-OTP-0146-0200; UGA-OTP-0146-0203; UGA-OTP-0146-0206;

UGA-OTP-0146-0209; UGA-OTP-0146-0212; UGA-OTP-0146-0215; UGA-OTP-0146-0218; UGA-OTP-0146-0221; UGA-OTP-0146-0224; UGA-OTP-0146-0227);

- **Witness P-40** (UGA-OTP-0209-0406-R01; UGA-OTP-0209-0436-R01; UGA-OTP-0209-0461-R01; UGA-OTP-0209-0497-R01; UGA-OTP-0209-0530-R01; UGA-OTP-0209-0569-R01; UGA-OTP-0209-0602-R01; UGA-OTP-0209-0634-R01; UGA-OTP-0209-0668-R01; UGA-OTP-0209-0696-R01; UGA-OTP-0209-0732-R01; UGA-OTP-0209-0762-R01; UGA-OTP-0209-0786-R01; UGA-OTP-0209-0813-R01; UGA-OTP-0209-0842-R01; UGA-OTP-0209-0877-R01; UGA-OTP-0209-0912-R01; UGA-OTP-0220-0652-R01; UGA-OTP-0220-0678-R01; UGA-OTP-0220-0704-R01; UGA-OTP-0220-0729-R01; UGA-OTP-0220-0753-R01; UGA-OTP-0220-0779-R01; UGA-OTP-0220-0805-R01; UGA-OTP-0220-0833-R01), with the clarification at paragraph 216 above; together with its associated documents (UGA-OTP-0006-0003; UGA-OTP-0006-0005; UGA-OTP-0006-0006; UGA-OTP-0006-0007; UGA-OTP-0006-0008);
- **Witness P-60** (UGA-OTP-0069-0034-R01); together with its associated documents (UGA-OTP-0069-0048; UGA-OTP-0069-0049; UGA-OTP-0069-0054; UGA-OTP-0069-0092);
- **Witness P-61** (UGA-OTP-0144-0043-R01); together with its associated document (UGA-OTP-0207-0136);
- **Witness P-84** (UGA-OTP-0139-0149-R01), with the clarification at paragraph 60 above; together with its associated documents (UGA-OTP-0069-0416; UGA-OTP-0139-0178);
- **Witness P-126** (UGA-OTP-0253-0764-R01; UGA-OTP-0264-0002-R01);
- **Witness P-130** (UGA-OTP-0191-0272-R01);
- **Witness P-185** (UGA-OTP-0233-1020-R01);
- **Witness P-195** (UGA-OTP-0233-1046-R01);
- **Witness P-196** (UGA-OTP-0233-1061-R01);
- **Witness P-268** (UGA-OTP-0248-0013-R01);
- **Witness P-270** (UGA-OTP-0241-0168-R01), with the clarification at paragraph 71 above;
- **Witness P-274** (UGA-OTP-0244-3375-R01; UGA-OTP-0267-0174); together with its associated documents (UGA-OTP-0244-3388-R01; UGA-OTP-0244-3391; UGA-OTP-0244-3392; UGA-OTP-0244-3393; UGA-OTP-0244-3395; UGA-OTP-0267-0180; UGA-OTP-0267-0182);

- **Witness P-279** (UGA-OTP-0258-0478-R01);
- **Witness P-281** (UGA-OTP-0261-0257-R01);
- **Witness P-282** (UGA-OTP-0261-0246-R01); together with its associated document (UGA-OTP-0261-0255);
- **Witness P-284** (UGA-OTP-0244-1180-R01);
- **Witness P-287** (UGA-OTP-0261-0268-R01);
- **Witness P-291** (UGA-OTP-0246-0061-R01); together with its associated documents (UGA-OTP-0246-0074-R01; UGA-OTP-0246-0075-R01);
- **Witness P-301** (UGA-OTP-0249-0423-R01), with the clarification at paragraph 175 above; together with its associated documents (UGA-OTP-0249-0437-R01; UGA-OTP-0249-0438-R01);
- **Witness P-303** (UGA-OTP-0258-0723-R01);
- **Witness P-325** (UGA-OTP-0264-0242-R01); together with its associated document (UGA-OTP-0264-0252-R01);
- **Witness P-337** (UGA-OTP-0256-0201-R01; UGA-OTP-0267-0445-R01); together with its associated documents (UGA-OTP-0256-0213-R01; UGA-OTP-0256-0215; UGA-OTP-0256-0216);
- **Witness P-370** (UGA-OTP-0258-0687-R01);
- **Witness P-384** (UGA-OTP-0260-0491-R01);
- **Witness P-385** (UGA-OTP-0260-0498-R01); together with its associated document (UGA-OTP-0260-0506-R01);
- **Witness P-386** (UGA-OTP-0260-0508-R01);
- **Witness P-400** (UGA-OTP-0264-0015-R01); and
- **Witness P-404** (UGA-OTP-0267-0470-R01);

**REJECTS** the request for the introduction pursuant to Rule 68(2)(b) of the Rules of the prior recorded testimony of Witnesses P-28, P-38, P-47, P-242 and P-256;



**DECIDES** that the prior recorded testimony of Witness P-38 (UGA-OTP-0069-0784-R01 and UGA-OTP-0244-0912-R01), Witness P-47 (UGA-OTP-0027-0177-R01), Witness P-242 (UGA-OTP-0261-0333-R01) and Witness P-256 (UGA-OTP-0269-0015) will be introduced under Rule 68(3) of the Rules, subject to the witnesses appearing for examination before the Chamber and not objecting to the submission of their respective previously recorded testimony, and **DIRECTS** the participants to prepare accordingly;

**DESIGNATES**, pursuant to Rule 68(2)(b)(iii) of the Rules, the Legal Counsel of the Registry, or any other person delegated by him, to witness declarations under Rule 68(2)(b) of the Rules for the purposes of the case of *The Prosecutor v. Dominic Ongwen*;

**APPROVES** the template for declarations under Rule 68(2)(b) of the Rules proposed by the Prosecution in filing ICC-02/04-01/15-465-AnxB;

**ORDERS** the Registry, upon filing each declaration under Rule 68(2)(b) of the Rules, to reflect in the eCourt metadata the introduction of the prior recorded testimony of the corresponding witness and the associated documents as identified in the present decision;

**ORDERS** the Prosecution to file a proposed public redacted version of the record of each prior recorded testimony introduced under Rule 68(2)(b) of the Rules, or indicate that it may be made public in its entirety (including the witness's identity), within 21 days of the filing in the record of the case of the declaration of the corresponding witness, and the other participants to raise any objection to the redactions proposed by the Prosecution or propose additional redactions, within 21 days of receipt of the Prosecution's filing;

**ORDERS** the Prosecution to file lesser redacted public versions of its Applications (ICC-02/04-01/15-465-Conf-Corr and ICC-02/04-01/15-538-Conf), and the Defence to

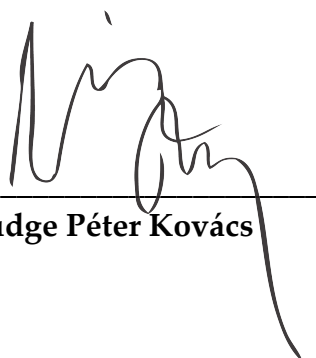
file lesser redacted public versions of its Responses (ICC-02/04-01/15-509-Conf-Corr and ICC-02/04-01/15-555-Conf), within 14 days of notification of the present decision; and

**ORDERS** the Registry to reclassify filings ICC-02/04-01/15-508-Conf and ICC-02/04-01/15-554-Conf as 'public'.

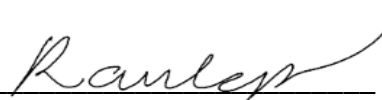
Done in both English and French, the English version being authoritative.



**Judge Bertram Schmitt**  
**Presiding Judge**



**Judge Péter Kovács**



**Judge Raul C. Pangalangan**

Dated 18 November 2016

At The Hague, The Netherlands