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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

**Decision on Prosecution's Application to Introduce Prior Recorded Testimony and
Related Documents Pursuant to Rule 68(3) of the Rules**

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

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Trial Chamber IX ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64(2), 67 and 69(2) of the Rome Statute ('Statute') and Rule 68(3) of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Prosecution's Application to Introduce Prior Recorded Testimony and Related Documents Pursuant to Rule 68(3) of the Rules'.

I. Background and submissions

1. On 21 October 2016, the Office of the Prosecutor ('Prosecution') filed a request pursuant to Rule 68(3) of the Rules ('Request').¹ In the Request, the Prosecution asks the Chamber to 'conditionally introduce'² the prior recorded testimony and related documents (collectively, 'the Materials')³ of 14 witnesses: P-6, P-81, P-119, P-199, P-218, P-275, P-306, P-307, P-351, P-352, P-366, P-374, P-396 and P-414 into evidence.⁴
2. The Prosecution submits that introduction of the Materials will further the efficiency of the proceedings by reducing the estimated duration of the Prosecution's case by about 50 hours.⁵ It further submits that the Materials are relevant, bear sufficient indicia of reliability and their introduction under Rule 68(3) of the Rules respects the fair trial rights of the accused.⁶ The Prosecution

¹ Prosecution's Application to Introduce Prior Recorded Testimony and Related Documents Pursuant to Rule 68(3) of the Rules, ICC-02/04-01/15-575-Conf, with confidential Annex A (the decision was notified on 24 October 2016 and a public redacted version of the Request and Annex A was filed on 26 October 2016).

² The Prosecution notes that by 'conditionally', it means that the introduction of the material is dependent on the witnesses not objecting to the procedure. Request, ICC-02/04-01/15-575-Red, para. 1, Fn. 3. The Prosecution also uses the language 'conditionally admit'. Request, ICC-02/04-01/15-575-Red, para. 57.

³ Annex A contains the evidence number of the documents sought to be introduced under Rule 68(3). ICC-02/04-01/15-575-Conf-AnxA.

⁴ Request, ICC-02/04-01/15-575-Red, para. 1.

⁵ Request, ICC-02/04-01/15-575-Red, paras 2, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44, 47, 50, 53 and 56. *See also* ICC-02/04-01/15-575-Conf -AnxA.

⁶ Request, ICC-02/04-01/15-575-Red, para. 2.

also makes individualised arguments for the introduction of the materials related to each witness.⁷

3. On 14 November 2016, the defence for Mr Ongwen ('Defence') filed its response to the Request ('Defence Response').⁸ The Defence requests that the Chamber deny the Request,⁹ arguing that it is premature,¹⁰ violates the Statute and the Rules¹¹, and violates Mr Ongwen's right to a fair trial.¹² The Defence also submits that in the alternative, should the Chamber decide to admit or conditionally admit any prior recorded testimony pursuant to Rule 68(3) of the Rules, the Defence should be granted additional time to examine the witnesses for whom the prior recorded testimony is admitted.¹³ The Defence also makes individualised arguments against the introduction of the materials related to each witness.¹⁴

4. On 15 November 2016, the Common Legal Representative of victims ('CLR') filed its response to the Request,¹⁵ asking the Chamber to grant the Prosecution's Request.¹⁶

⁷ Request, ICC-02/04-01/15-575-Red, paras 15-56.

⁸ Defence Response to the Prosecution's Rule 68(3) Request, ICC-02/04-01/15-592-Conf. To the extent that this Decision makes reference to confidential filings, the Chamber is of the view that the references do not warrant confidential treatment at the present time.

⁹ Defence Response, ICC-02/04-01/15-592-Conf, paras 4 and 48.

¹⁰ Defence Response, ICC-02/04-01/15-592-Conf, paras 9-11 and 48.

¹¹ Defence Response, ICC-02/04-01/15-592-Conf, paras 12-15 and 48.

¹² Defence Response, ICC-02/04-01/15-592-Conf, paras 16-21 and 48.

¹³ Defence Response, ICC-02/04-01/15-592-Conf, paras 22-24 and 49.

¹⁴ Defence Response, ICC-02/04-01/15-592-Conf, paras 26-47. Note that in relation to P-414, while the Defence does not object to the introduction of the entire expert reports, it does not deem them all necessary and argues for some redactions of certain information.

¹⁵ Common Legal Representative's Response to the Prosecution's application to introduce prior recorded testimony and related documents pursuant to rule 68(3) of the Rules, ICC-02/04-01/15-593-Conf.

¹⁶ ICC-02/04-01/15-593-Conf, page 11.

II. Analysis

A. General considerations

5. Rule 68(3) of the Rules allows the introduction of prior recorded testimony when: (i) the witness is present before the Chamber; (ii) the witness does not object to the introduction of his or her prior recorded testimony; and (iii) both parties and the Chamber have the opportunity to examine the witness.

6. As required under Rule 68(3) of the Rules, the introduction of prior recorded testimony must not be prejudicial to or inconsistent with the rights of the accused or the fairness of the trial generally.¹⁷ In this regard, the Chamber emphasises that, pursuant to Rule 68(3) of the Rules, ‘the Prosecutor, the defence and the Chamber have the opportunity to examine’ the witness who gave the prior recorded testimony. As held by the Appeals Chamber, under Rule 68(3) of the Rules, ‘the testimony cannot be considered to be exclusively written as it is not necessarily intended to replace oral testimony but, rather, complement it’.¹⁸

7. Importantly, the Chamber’s determination to allow the introduction of prior recorded testimony under Rules 68(3) of the Rules requires a case by case assessment and is discretionary in nature. Several factors may be relevant to the Chamber’s decision to allow the introduction of such testimony. For example, the Chamber may consider whether the evidence relates to issues that are not materially in dispute, whether that evidence is not central to core issues in the

¹⁷ Rule 68(1) of the Rules. See Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’, 5 November 2011, ICC-01/05-01/08-1386 OA 5 OA 6 (‘Bemba OA 5’), para. 78. See also Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0024 and associated material, 2 November 2016, ICC-01/04-02/06-1602-Red, para 7.

¹⁸ Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and 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 OA 8 (‘Gbagbo and Blé Goudé OA 8’), para, 79.

case, but only provides relevant background information, and whether the evidence is corroborative of other evidence.¹⁹ At the same time, as recently clarified by the Appeals Chamber, these are only factors, but not requirements under Rule 68(3) of the Rules and prior recorded testimonies may still be introduced even if they relate to issues that are materially in dispute, central to core issues of the case or are uncorroborated.²⁰

8. The Appeals Chamber has further indicated that ‘expeditiousness is a factor relevant to the implementation of rule 68 (3) of the Rules, since its use in principle aims at reducing the amount of time devoted to hearing oral testimony in court’.²¹ Further, the Appeals Chamber held that ‘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 sense that ‘[t]he 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 [Rule 68(3) of the Rules]’.²²

9. The Chamber notes that, at this point in the proceedings, a determination whether a witness statement is suitable for introduction under Rule 68(3) of the Rules is a preliminary decision, subject to the satisfaction of the conditions of the rule during the trial. Thus, contrary to the Defence’s position,²³ the Chamber does not consider the Prosecution’s request for this preliminary determination at the present time premature. Further, the Chamber notes the Defence’s contention that the Statute and the Rules do not contain a provision to ‘conditionally admit’ evidence and that as such the Request should be dismissed.²⁴ The Chamber understands the ‘conditional’ language used by the Prosecution to refer to the

¹⁹ *Bemba* OA 5, ICC-01/05-01/08-1386, para. 78.

²⁰ *Gbagbo and Blé Goudé* OA 8, ICC-02/11-01/15-744, paras 67 and 69.

²¹ *Gbagbo and Blé Goudé* OA 8, ICC-02/11-01/15-744, para. 61.

²² *Gbagbo and Blé Goudé* OA 8, ICC-02/11-01/15-744, para. 71.

²³ Defence Response, ICC-02/04-01/15-592-Conf, paras 9-11.

²⁴ Defence Response, ICC-02/04-01/15-592-Conf, paras 12-15.

very thing Rule 68(3) permits, namely a preliminary decision that material is suitable for submission subject to the satisfaction of the conditions of Rule 68(3) of the Rules.²⁵ The Chamber sees no reason why a request for such a determination should only be made five days before a witness testifies, as suggested by the Defence.²⁶ On the contrary, an advance preliminary determination allows the participants to better prepare. Additionally, the Chamber points the participants to some of its previous decisions in relation to the submission of evidence in these proceedings.²⁷

10. As for the Defence's submissions in support of its arguments that the introduction of the Materials would violate Mr Ongwen's fair trial rights,²⁸ the Defence's argument against the introduction of these materials essentially amount to opposition of the use of Rule 68(3) of the Rules for fact based witnesses. This argument, if accepted, would render Rule 68(3) entirely ineffective. The Statute and the Rules clearly conceive the introduction of prior recorded testimony, including by fact based witnesses, in this manner. The Chamber also emphasises that: (i) whenever evidence is introduced under Rule 68(3), the Defence has a full opportunity to examine the witness in question and (ii) the time saved by proceeding under Rule 68(3) furthers the accused's right to an expeditious trial without undue delay.

11. Further, contrary to the Defence's contention,²⁹ the up to 50 hours of estimated time that would be saved through the introduction of these statements is not insignificant. That the Prosecution's relief only targets a limited sub-set of its witnesses, and the introduction of prior recorded testimony is not requested

²⁵ See *Gbagbo and Blé Goudé* OA 8, ICC-02/11-01/15-744 OA 8, para. 72.

²⁶ See Defence Response, ICC-02/04-01/15-592-Conf, para. 15.

²⁷ See Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497; and Decision on the Prosecution Request to Submit Interception Related Evidence, 1 December 2016, ICC-02/04-01/15-615.

²⁸ Defence Response, ICC-02/04-01/15-592-Conf, paras 16-21.

²⁹ Defence Response, ICC-02/04-01/15-592-Conf, paras 16, 17, and 19.

as a matter of course, also militates in favour of Request not being prejudicial to or inconsistent with the rights of the accused.

12. As for the Defence's contention that the Prosecution did not adequately plead its Request,³⁰ the Chamber finds that it had sufficient information to render its decision.

B. The 14 submitted prior recorded testimonies

13. The Chamber will now turn to the 14 prior recorded testimonies and attendant materials which are being considered for introduction under Rule 68(3) of the Rules:

i. P-6

14. P-6's written statement relates to the attack at the Pajule internally displaced persons ('IDP') camp.³¹ P-6 provides a narrative of her abduction during the attack and her time in captivity with the Lord's Resistance Army ('LRA') after her abduction and her perspective of what she witnessed during her captivity, including the distribution of abducted women to LRA fighters.³² Further, several other witnesses are expected to give full in-court testimony on many of the same issues as P-6.³³ The Chamber finds that, given its nature and content, it is not necessary for the evidence provided by P-6 to be presented orally in its entirety.

ii. P-81

³⁰ Defence Response, ICC-02/04-01/15-592-Conf, paras 20-21.

³¹ See UGA-OTP-0144-0072-R01.

³² See UGA-OTP-0144-0072-R01.

³³ For example: P-9, P-45, P-48, P-67, P-138, P-144, P-209, P-249, P-250, P-309 and P-330. See Prosecution's Pre-Trial Brief, 6 September 2016, ICC-02/04-01/15-533 ('Pre-Trial Brief'), paras 209, 211-212, 214, 219, 223, 232, 240, and 738.

15. P-81's written statement relates to the attack at the Pajule IDP camp.³⁴ He provides a narrative of his abduction and time in captivity with the LRA.³⁵ A follow-up statement clarifies some points in his initial statement.³⁶ Additionally, several other witnesses are expected to offer full in-court testimony on many of the same issues as P-81.³⁷ The Chamber notes the Defence argues that the Prosecution has not questioned P-81 since 2007 and live direct examination is required to test the witness's memory.³⁸ The Chamber is of the view that the time since their last interview does not mandate a full live questioning by the Prosecution. Further, Rule 68(3) of the Rules affords the Defence the opportunity to raise any deficiencies it perceives in the witness's testimony during its questioning.

16. Regarding the Defence statement that the Prosecution met with P-81 on 6 June 2015 but no notes or statement from that meeting were disclosed, the Chamber notes that there is no requirement that the Defence be apprised of the content of a meeting the Prosecution has with its own witnesses.³⁹ Also, not every contact with a witness inevitably results in the production of a witness statement.⁴⁰

17. The Chamber finds that, given its nature and content, it is not necessary for the evidence provided by P-81 to be presented orally in its entirety.

iii. P-119

³⁴ See UGA-OTP-0070-0029-R01.

³⁵ See UGA-OTP-0070-0029-R01.

³⁶ See UGA-OTP-0201-0229-R01.

³⁷ For example: P-9, P-45, P-67, P-138, P-144, P-209, P-249, and P-309. See Pre-Trial Brief, ICC-02/04-01/15-533, paras 211, 219, 232.

³⁸ Defence Response, ICC-02/04-01/15-592-Conf, para. 28.

³⁹ See Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-02/04-01/15-596-Red, para. 130.

⁴⁰ ICC-02/04-01/15-596-Conf, para. 130.

18. P-119's written statement relates to the attack at the Lukodi IDP camp.⁴¹ He provides a narrative of the attack, his abduction, and his time in captivity with the LRA.⁴² P-119 was an abductee with a minor role in the LRA, recounting his observations about and activities in captivity. Several other witnesses are expected to offer full in-court testimony on many of the same issues as P-119.⁴³ As with P-81, the Defence argues that the time since P-119's interview with the Prosecution mandates a live direct examination to test the witness's memory.⁴⁴ In this regard, the Chamber's view in relation to P-81 applies.⁴⁵ The Defence also contends that an investigation note disclosed by the Prosecution raise serious concerns as to the credibility and veracity of P-119.⁴⁶ The Chamber notes that under Rule 68(3) of the Rules, the Defence is afforded the opportunity to question a witness as to any alleged discrepancy in his testimony. The Prosecution seeks to introduce the notes from a Prosecution follow-up interview with the witness.⁴⁷ The Chamber finds that, given its nature and content, it is not necessary for the evidence provided by P-119 to be presented orally in its entirety.

iv. P-199

19. P-199's written statement is a narrative of her abduction and time in captivity with the LRA.⁴⁸ She stated that she had little interaction with Mr Ongwen and generally provided testimony as to what she observed and experienced while in captivity.⁴⁹ Additionally, the Chamber notes that several other witnesses are expected to offer full in-court testimony on many of the same

⁴¹ See UGA-OTP-0171-0064-R01.

⁴² See UGA-OTP-0171-0064-R01.

⁴³ For example: P-24, P-187, P-202, P-205, and P-410. See Pre-Trial Brief, ICC-02/04-01/15-533, paras 371-372, 379 and 392-393.

⁴⁴ Defence Response, ICC-02/04-01/15-592-Conf, para. 30.

⁴⁵ See para. 17 above.

⁴⁶ Defence Response, ICC-02/04-01/15-592-Conf, para. 31.

⁴⁷ Request, ICC-02/04-01/15-575-Ref, para. 22 and UGA-OTP-0207-0079-R01.

⁴⁸ See UGA-OTP-0236-0557-R01.

⁴⁹ UGA-OTP-0236-0557-R01, at 0569.

issues as P-199.⁵⁰ The Defence alleges that P-199's account of her captivity 'does not make sense or accord with other accounts of people in the bush'.⁵¹ The Chamber reiterates that Rule 68(3) of the Rules affords the Defence the opportunity to question a witness. The Chamber finds that, given its nature and content, it is not necessary for the evidence provided by P-199 to be presented orally in its entirety.

v. P-218

20. P-218's written statement provides a narrative of the attack at the Odek IDP camp as well as the aftermath of the attack, including the loss of life.⁵² P-218 stated that he was informed that Mr Ongwen's group was operating in the Odek area at the time of the attack and that one of the commanders leading the attack belonged to Mr Ongwen's group.⁵³ Several other witnesses are expected to offer full in-court testimony on many of the same issues as P-218.⁵⁴ The Prosecution also seeks to introduce a sketch of the Odek camp drawn by the witness during his interview.⁵⁵ The Chamber notes that the Defence specifically requests six hours to question this witness if his prior recorded testimony is submitted under Rule 68(3) of the Rules.⁵⁶ The Chamber finds that, given its nature and content, it is not necessary for the evidence provided by P-218 to be presented orally in its entirety.

vi. P-275

⁵⁰ For example: P-18, P-264, P-314, and P-410. *See* Pre-Trial Brief, ICC-02/04-01/15-533, paras 702 and 713.

⁵¹ Defence Request, ICC-02/04-01/15-592-Conf, para. 32.

⁵² *See* UGA-OTP-0238-0720-R01.

⁵³ UGA-OTP-0238-0720-R01, at 0727.

⁵⁴ For example: P-54, P-142, P-264, P-269, P-309, P-314, P-340, P-410 and P-422. *See* Pre-Trial Brief, ICC-02/04-01/15-533, paras 162, 288, 290-291, 301-302, 307, 315-316, 324-325, and 738.

⁵⁵ Request, ICC-02/04-01/15-575-Red, para. 28; and UGA-OTP-0238-0731-R01.

⁵⁶ The Defence states that this is generally the amount of time used by the Prosecution to interview this witness in the field. Defence Response, ICC-02/04-01/15-592-Conf, para. 33.

21. P-275's written statement provides a narrative of the attack at the Odek IDP camp as well as of his time in captivity with the LRA and the LRA's use of child soldiers.⁵⁷ Several witnesses are expected to offer full in-court testimony on similar issues as P-275.⁵⁸ The Defence argues that given the witness's young age at the time he alleges to be in the LRA, his memory must be tested live in-court during direct examination. In this regard, the Chamber notes that the Defence will be afforded the opportunity to address any perceived deficiency during its questioning of P-275. The Prosecution also seeks to introduce three documents referenced in the witness's statement: his birth certificate,⁵⁹ his national ID card⁶⁰ and a letter from the Gulu Support the Children organisation attesting to his captivity.⁶¹ The Chamber finds that, given its nature and content, it is not necessary for the evidence provided by P-275 to be presented orally in its entirety.

vii. P-306

22. P-306's written statement provides a narrative of the attack at the Abok IDP camp.⁶² He stated that he escaped during the attack and witnessed the aftermath of the attack on the community.⁶³ He stated that he had been informed after the attack that a group led by Mr Ongwen carried out the attack.⁶⁴ Several witnesses are expected to offer full in-court testimony on many of the same issues addressed by P-306.⁶⁵ The Prosecution also seeks to introduce several documents referenced in the witness's statement: a map of Abok IDP camp drawn by P-

⁵⁷ See UGA-OTP-0244-3398-R01.

⁵⁸ For example: P-97, P-200, P-205, P-224, P-245, P-264, P-269, P-280, P-309, P-314, P-330, P-340, P-379 and P-410. See Pre-Trial Brief, ICC-02/04-01/15-533, paras 302, 316, 711-712, 714-716, 731, 733 and 736.

⁵⁹ Request, ICC-02/04-01/15-575-Red, para. 31 and UGA-OTP-0244-3417.

⁶⁰ Request, ICC-02/04-01/15-575-Red, para. 31 and UGA-OTP-0244-3418.

⁶¹ Request, ICC-02/04-01/15-575-Red, para. 31 and UGA-OTP-0244-3419.

⁶² See UGA-OTP-0261-0277-R01.

⁶³ See UGA-OTP-0261-0277-R01.

⁶⁴ UGA-OTP-0261-0277-R01, at 0283.

⁶⁵ For example: P-280, P-286, P-293, P-304, and P-340. See Pre-Trial Brief, ICC-02/04-01/15-533, paras 431-434 and 438.

306,⁶⁶ a list of persons killed during the Abok attack⁶⁷ and a list of names of the camp block leaders.⁶⁸ The Chamber notes that the Defence specifically requests six hours to question this witness if his prior recorded testimony is submitted under Rule 68(3) of the Rules.⁶⁹ The Chamber finds that, given its nature and content, it is not necessary for the evidence provided by P-306 to be presented orally in its entirety.

viii. P-307

23. P-307's written statement is a narrative of his capture by LRA fighters, his time in captivity, and operations attributed to Mr Ongwen's group.⁷⁰ He stated that his time in captivity was spent with Mr Ongwen's group and provided information about attacks and crimes allegedly committed by Mr Ongwen's group as well as observations about Mr Ongwen's leadership role within the LRA.⁷¹ Other witnesses are expected to offer full in-court testimony about many of the same issues as P-307.⁷² The Defence argues that P-307 is 'an alleged insider' and that because of the alleged amount of time he spent with Mr Ongwen he should recount all of his testimony live.⁷³ However, the Chamber notes that the Defence makes no specific submission challenging the witness's credibility, and that, in any case, the witness's statement indicates that he was a low-level abductee on the periphery of the group. The Prosecution also seeks to introduce several documents referenced in P-307's statement: his child health card⁷⁴ and his

⁶⁶ Request, ICC-02/04-01/15-575-Red, para. 34 and UGA-OTP-0261-0285.

⁶⁷ Request, ICC-02/04-01/15-575-Red, para. 34 and UGA-OTP-0247-1270-R01.

⁶⁸ Request, ICC-02/04-01/15-575-Red, para. 34 and UGA-OTP-0247-1269.

⁶⁹ The Defence states that this is generally the amount of time used by the Prosecution to interview this witness in the field. Defence Response, ICC-02/04-01/15-592-Conf, para. 35.

⁷⁰ UGA-OTP-0266-0425-R01.

⁷¹ UGA-OTP-0266-0425-R01.

⁷² For example: P-54, P-97, P-200, P-205, P-224, P-231, P-245, P-264, P-280, P-309, P-314, P-330, P-379 and P-410. See Pre-Trial Brief, ICC-02/04-01/15-533, paras 711, 715-716, 730-733 and 735-737.

⁷³ Defence Response, ICC-02/04-01/15-592-Conf, para. 36.

⁷⁴ UGA-OTP-0266-0446.

national ID card.⁷⁵ The Chamber finds that, given its nature and content, it is not necessary for the evidence provided by P-307 to be presented orally in its entirety.

ix. P-351

24. P-351's written statement provides a narrative of her abduction and her time in captivity with Mr Ongwen's group.⁷⁶ P-351 described her time in Mr Ongwen's household and in his group generally and in one instance described Mr Ongwen's participation in an attack.⁷⁷ Other witnesses are expected to offer full in-court testimony on many of the same issues as P-351.⁷⁸ The Defence argues that her alleged direct knowledge of Mr Ongwen requires a full direct examination and asserts that the corrections and explanations P-351 gave to the Prosecution between her screening interview and her signed statement depicts a 'type of memory [that] demands a full direct and cross examination'.⁷⁹ However, while the witness allegedly has direct knowledge of Mr Ongwen, she was an abductee with a minor role in the LRA and a level of knowledge corresponding to that role. The Chamber also notes that Rule 68(3) of the Rules gives the Defence the opportunity to conduct a meaningful examination of the witness. The Prosecution also seeks to introduce her national ID card,⁸⁰ referenced in her statement. The Chamber finds that, given its nature and content, it is not necessary for the evidence provided by P-351 to be presented orally in its entirety.

x. P-352

⁷⁵ UGA-OTP-0266-0448.

⁷⁶ UGA-OTP-0263-0002-R01.

⁷⁷ UGA-OTP-0263-0002-R01, at 0015.

⁷⁸ For example: P-18, P-269, P-280, P-309 and P-314.

⁷⁹ Defence Response, ICC-02/04-01/15-592-Conf, paras 37-38.

⁸⁰ Request, ICC-02/04-01/15-575-Red, para. 40, UGA-OTP-0266-0016 and UGA-OTP-0266-0017.

25. P-352's written statement provides a narrative of her abduction and time spent in captivity with the LRA, and various attacks of civilian communities by the LRA.⁸¹ She provided information about her time with Mr Ongwen's group, including observing Mr Ongwen distribute a girl to a LRA fighter.⁸² She also stated that Mr Ongwen ordered her and other captive girls to kill another accused of witchcraft.⁸³ Other witnesses are expected to offer full in-court testimony on many of the same issues as P-352.⁸⁴ Similarly to P-351, the Defence asserts that P-352's alleged knowledge of Mr Ongwen and corrections of her interview mandates a full direct and cross examination.⁸⁵ The Chamber reiterates that Rule 68(3) of the Rules affords the Defence the opportunity to question a witness. The Chamber finds that, given its nature and content, it is not necessary for the evidence provided by P-352 to be presented orally in its entirety.

xi. P-366

26. P-366's written statement is a narrative of her abduction by the LRA and her time in captivity.⁸⁶ She described her time with Mr Ongwen's group, Mr Ongwen's role as a leader, seeing Mr Ongwen distribute captive women to LRA fighters, Mr Ongwen forcing abductees to kill other abductees, and Mr Ongwen's treatment of abductees.⁸⁷ She also stated that Mr Ongwen ordered that she be beaten after she refused to sleep with a fighter.⁸⁸ Several other witnesses are expected to offer full in-court testimony on many of the same issues as P-366.⁸⁹ The Defence argues that her alleged direct knowledge of Mr Ongwen demands a

⁸¹ UGA-OTP-0260-0315-R01.

⁸² UGA-OTP-0260-0315-R01, at 0325-0326.

⁸³ UGA-OTP-0260-0315-R01, at 0330.

⁸⁴ For example: P-18, P-54, P-205, P-245, P-264, P-269, P-280, P-309, P-314, P-330, P-340, and P-410. *See* Pre-Trial Brief, ICC-02/04-01/15-533, paras 291, 317, 324, 702, 732 and 737.

⁸⁵ Defence Response, ICC-02/04-01/15-592-Conf, paras 40-41.

⁸⁶ UGA-OTP-0260-0289-R01.

⁸⁷ UGA-OTP-0260-0289-R01.

⁸⁸ UGA-OTP-0260-0289-R01, at 301-303.

⁸⁹ For example: P-18, P-205, P-224, P-264, P-280, P-309, P-314, P-330, P-379, and P-410. *See* Pre-Trial Brief, ICC-02/04-01/15-533, paras 702, 714-715, 719 and 731.

full direct examination.⁹⁰ However, her statement reflects that of a person with a minor role with the LRA offering her perspective of her time in captivity. She does not offer of the kind of depth and breadth of knowledge that will mandate that the entirety of her testimony be given orally. The Prosecution seeks to introduce several documents referenced in the witness's statement: her amnesty card⁹¹ and her national ID card.⁹² The Chamber finds that, given its nature and content, it is not necessary for the evidence provided by P-366 to be presented orally in its entirety.

xii. P-374

27. P-374's written statement is a narrative of her abduction by the LRA and her time in captivity.⁹³ She described her observations about the LRA, including the use of child soldiers within the LRA.⁹⁴ She also made some mention of Mr Ongwen's role as a leader within the LRA.⁹⁵ Several other witnesses are expected to offer full in-court testimony on many of the same issues as P-374.⁹⁶ The Defence argues that her alleged direct knowledge of Mr Ongwen demands a full direct examination.⁹⁷ In this regard, the Chamber's observation in relation to P-351, P-352 and P-366 applies to this witness as well.⁹⁸ The Prosecution seeks to introduce her intake form at a rehabilitation centre,⁹⁹ referenced in her statement. The Chamber finds that, given its nature and content, it is not necessary for the evidence provided by P-374 to be presented orally in its entirety.

⁹⁰ Defence Response, ICC-02/04-01/15-592-Conf, para. 43.

⁹¹ Request, ICC-02/04-01/15-575-Red, para. 46, UGA-OTP-0265-0077, UGA-OTP-0265-0078 and UGA-OTP-0265-0079.

⁹² Request, ICC-02/04-01/15-575-Red, para. 46 and UGA-OTP-0265-0298.

⁹³ UGA-OTP-0263-0023-R01.

⁹⁴ UGA-OTP-0263-0023-R01.

⁹⁵ UGA-OTP-0263-0023-R01, at 0029 and 0040-0043.

⁹⁶ For example: P-18, P-205, P-224, P-245, P-249, P-264, P-280, P-314, P-330, and P-410. *See* Pre-Trial Brief, ICC-02/04-01/15-533, paras 702, 716 and 735-737.

⁹⁷ Defence Response, ICC-02/04-01/15-592-Conf, para. 44.

⁹⁸ *See* paras 24-26 above.

⁹⁹ Request, ICC-02/04-01/15-575-Red, para. 49 and UGA-OTP-0244-2258.

xiii. P-396

28. P-396's written statement is a narrative of her abduction by the LRA and her time in captivity.¹⁰⁰ She described her observations about the LRA, including Mr Ongwen's role as a leader within the LRA and his treatment of abductees.¹⁰¹ She stated that Mr Ongwen give captive girls to his commanders as wives and gave orders for abductees to be killed or beaten for misbehaviour.¹⁰² She also stated that she observed child soldiers within the ranks of Mr Ongwen's group.¹⁰³ Several other witnesses are expected to offer full in-court testimony on many of the same issues as P-396.¹⁰⁴ The Defence argues that her alleged direct knowledge of Mr Ongwen demands a full direct examination.¹⁰⁵ In this regard, the Chamber's observation in relation to P-351, P-352, P-366 and P-374 applies to this witness as well.¹⁰⁶ The Prosecution seeks to introduce her national ID card, referenced in her statement.¹⁰⁷ The Chamber finds that, given its nature and content, it is not necessary for the evidence provided by P-396 to be presented orally in its entirety.

xiv. P-414

29. P-414 is a forensic and DNA kinship analysis expert working in the Netherlands Forensic Institute ('NFI'). The Prosecution seeks to introduce the three expert reports created by the NFI which detail the outcome of DNA profile analysis for various reference samples.¹⁰⁸ The Prosecution also seeks to introduce

¹⁰⁰ UGA-OTP-0267-0246.

¹⁰¹ UGA-OTP-0267-0246-R01, at 0252-255.

¹⁰² UGA-OTP-0267-0246-R01, at 0255-256 and 259.

¹⁰³ UGA-OTP-0267-0246-R01, at 0259.

¹⁰⁴ For example: P-97, P-205, P-245, P-264, P-314, P-330, and P-410. *See* Pre-Trial Brief, ICC-02/04-01/15-533, paras 714, 731, 735 and 737.

¹⁰⁵ Defence Response, ICC-02/04-01/15-592-Conf, para. 45.

¹⁰⁶ *See* paras 24-27 above.

¹⁰⁷ UGA-OTP-0267-0264-R01.

¹⁰⁸ UGA-OTP-0258-0357: 1 March 2016 report detailing the outcome of a request to generate DNA profiles from ten reference samples and to conduct kinship analysis on them; UGA-OTP-0265-0106: 6 June 2016 report detailing the outcome of a request to investigate the parenthood of Mr Ongwen and his alleged children with P-

the correspondence between the NFI and the Prosecution transferring the DNA-profiling data to the Prosecution.¹⁰⁹

30. The Defence questions the need to introduce all three of the reports.¹¹⁰ However, the Chamber does not consider any of the reports superfluous and notes that the Defence does not specify exactly which of the reports it finds unnecessary. The Chamber also notes the Defence request that any material within the reports referencing ‘any child other than the three found in the Confirmation Decision and any material referring to any woman other than the two found in the Confirmation Decision’ be removed from the reports before the reports are submitted into evidence.¹¹¹ At this point in the proceedings, the Chamber is not prepared to rule on the scope of evidentiary detail that will be considered in the judgment pursuant to Article 74 of the Statute. As such, the Chamber finds the three reports, unabridged, and the forwarding email, suitable for introduction pursuant to Rule 68(3) of the Rules.

C. Conclusions

31. In light of the above, the Chamber considers it appropriate to allow the Materials to be introduced pursuant to Rule 68(3) of the Rules. The Chamber finds that introduction of the Materials would enhance the efficiency of the proceedings, avoiding unnecessary repetition. As noted above, the nature and content of the evidence provided by these 14 witnesses is not such that the Chamber considers it necessary for it to be presented orally in its entirety. Additionally, the documents attendant to the written statements the Prosecution seeks to introduce are each used or explained by the relevant witness or are

99 and P-101 and to crosscheck the labelling of previous samples of these persons; and UGA-OTP-0267-0160: 6 July 2016 report detailing the outcome of the resampling operation of six persons previously sampled in 2006 and the DNA profiles of four persons who had not been analysed before.

¹⁰⁹ UGA-OTP-0267-0413-R01.

¹¹⁰ Defence Response, ICC-02/04-01/15-592-Conf, para. 46.

¹¹¹ Defence Response, ICC-02/04-01/15-592-Conf, para. 47.

statements or notes from a follow-up interview and merely aid in the understanding of the statements. The Chamber also notes that the Defence does not specifically object to any of these attendant documents.

32. The Chamber finds that the introduction of the Materials in this context would not be prejudicial to or inconsistent with the rights of the accused. The Defence will have an opportunity to examine these witnesses. While the Prosecution is granted the opportunity to conduct a limited focused supplementary examination of the witnesses, the Defence is not constrained to the amount of time used by the Prosecution and will be granted a reasonable amount of time to examine each witness. In these circumstances, there are no overriding reasons preventing the introduction of the witness statements under Rule 68(3) of the Rules.

33. The Chamber also notes that the Materials is recognized as submitted only when the legal requirements are met, i.e. when the witnesses appears before the Chamber and does not object to have their prior recorded testimony introduced.

34. The Chamber notes that the Defence has not yet been provided with Acholi translations of many of the statements and reminds the Prosecution that such translation should be produced at least three months before the witness is called to testify at trial.¹¹²

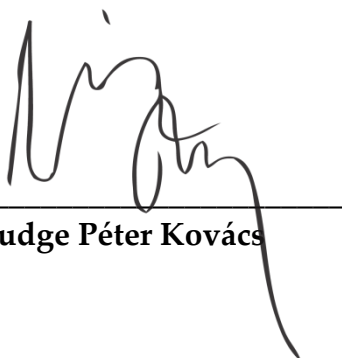
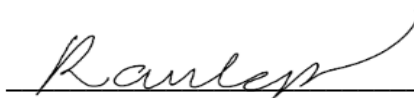
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY:

DECIDES, subject to the procedural pre-requisites of Rule 68(3) of the Rules being satisfied when each witness appears, that the materials identified in Annex A to the Request are allowed to be introduced into evidence pursuant to Rule 68(3) of the Rules; and

¹¹² 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').

DIRECTS the Defence to file a public redacted version of ICC-02/04-01/15-592-Conf and the CLR to file a public redacted version of ICC-02/04-01/15-593-Conf by 10 days of notification of this Decision.

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


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

Dated 5 December 2016

At The Hague, The Netherlands