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TRIAL CHAMBER IX

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

SITUATION IN UGANDA

IN THE CASE OF
THE PROSECUTOR v. DOMINIC ONGWEN

Public with Public Annexes A - C

Defence Response to "Prosecution's request to admit evidence preserved under article 56 of the Statute"

Source: **Defence for Dominic Ongwen**

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

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I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') opposes the Prosecution's request that video-recorded evidence taken pursuant to Article 56 and related items are admitted into evidence.[1] As elaborated below, there are at least three reasons the request should be rejected. These are that:

    a. The irregular legal status of the evidence prevents admission;

    b. The prejudice of admission outweighs any other consideration; and

    c. The evidence should be excluded pursuant to Article 69(7) as its collection breached the terms of the Statute.

2. Even if Trial Chamber IX ('Chamber') deems the procedural mechanism used to collect the evidence to be the correct one, given the pending start of trial and on-going Defence investigations, the Request is pre-mature. The Defence notes that the material is preserved and does not need to be admitted until a point at which it can be sure that the Defence has no reason to recall the witnesses.

II. SUBMISSIONS

3. At the outset, a point must be stressed: while the arguments below address the legality of the actions of the Single Judge (Judge Tarfusser), the present request is not a request for re-consideration. Rather, since the Single Judge participated in the investigation and collection of evidence, the present submissions address the

[1] ICC-02/04-01/15-464 ('Request').

legality of those actions for the purpose of the admission of evidence – not whether the decisions themselves should be reviewed.

4. Though the recordings have the trappings of ordinary testimony, their irregular status, the circumstances in which they were created, and muddled legal basis begs for a second thorough evaluation and it is submitted should lead to the rejection of their admission.

A. The irregular legal status of the evidence prevents its admission

5. The Prosecution Request – and LRV endorsement thereof[2] – conspicuously fails to discuss the legal complexity of its request and rather simply asks for its submission through Article 69(4) while imploring the Chamber to attend to the well-being of witnesses and victims. When scrutinized, the Request fails to provide a convincingly legal reason for the admission of the material.

6. Even the Pre-Trial Single Judge seems to have predicted that the legal status of the recordings was not settled when he stated: "[w]hether any such evidence would eventually be used in the present proceedings or, potentially, in any separate proceedings is irrelevant"[3] and moreover, in a another decision where it is stated:

> the Single Judge considers that the specific circumstances of the testimony of only two witnesses to be taken under article 56 of the Statute *are to be distinguished from trial proceedings in which any established guidelines apply to the hearing of evidence* over longer periods of time and of potentially numerous witnesses, and is thus of the view that it is not necessary in the particular circumstances

[2] ICC-02/04-01/15-488.
[3] ICC-02/04-01/15-277-Conf, para. 4.

> at hand to adopt specific guidelines for the conduct of proceedings.[4] (emphasis added)

And also:

> [T]he Single Judge reiterates the view expressed above that *the specific circumstances of the taking of testimony under article 56 of the Statute in the present case are different from trial proceedings.*[5] (emphasis added)

i) The material cannot be considered trial-testimony due to its being collected before only one judge

7. The recorded material is not ordinarily legally admissible trial testimony. The Defence stresses this point because in the day-to-day practice of the court, in-court trial testimony ('Standard Trial-Testimony') is *de facto* automatically admissible unless there are compelling reasons to reject it regardless of its completeness, contradictions, or reliability. The material cannot be considered Standard Trial-Testimony due to the lack of a full panel of judges – its legal status must be that of *prior recorded testimony*.

8. As discussed below,[6] there is no legal mechanism to admit such material collected pursuant to Article 56. Moreover, Article 56 does not permit the delegation of the Trial Chamber power to collect Standard Trial-Testimony to a Single Judge of the Pre-Trial Chamber.

9. Though it is true that Article 56(1)(a) refers to opportunities to collect testimony, the power of the Pre-Trial Chamber to appoint a Single Judge in sub-paragraph (2)(e) only refers to empowering a Single Judge to make "*orders* regarding the

[4] ICC-02/04-01/15-293-Conf, para. 12.
[5] ICC-02/04-01/15-293-Conf, para. 14.
[6] *See* paras 15-19 *infra*.

collection and preservation of evidence and the *questioning* of persons".[7] Strictly construed, a power to make orders is the not the same as a power to take Standard Trial-Testimony.

10. Despite the saving-clause of sub-paragraph (2)(f), if such a power were to be able to be conferred on a Single Judge, then given the impact upon the Accused, it follows that the drafters would have made this explicit. By contrast, Rule 71 of the ICTY RPE explicitly authorises a Single Judge to take a deposition.[8] The serious implications and exceptionality of that procedure was underscored by the ICTY Appeals Chamber when faced with an appeal arguing that the rule had been improperly applied. It stated:

> [T]he Appeals Chamber takes the view that Rule 71 *must be construed strictly* and in accordance with its original purpose of providing an exception, with special conditions, to the general rule for direct evidence to be furnished, especially in the context of a criminal trial. In the result, any relaxation of Rule 71 or deviation from the purpose for which it was originally designed must require the consent of the accused.[9]

[7] "Article 56 […] (4) The measures referred to in paragraph 1 (b) may include: […](e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons."
[8] "Rule 71 Depositions (Adopted 11 Feb 1994, amended 10 July 1998) […] (A) Where it is in the interests of justice to do so, a Trial Chamber may order, proprio motu or at the request of a party, that a deposition be taken for use at trial, whether or not the person whose deposition is sought is able physically to appear before the Tribunal to give evidence. *The Trial Chamber shall appoint a Presiding Officer for that purpose*. (Amended 17 Nov 1999)" (emphasis added), available at: http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf, last accessed on 5 July 2016.
[9] ICTY, *Prosecutor v Kupreskic et al*, 'Decision on Appeal by Dragan Papic Against Ruling to Proceed by Deposition', No. IT-96-16-AR73.3 (15 July 1999), para. 19. available at: http://www.icty.org/x/cases/kupreskic/acdec/en/90715EV39111.htm, last accessed on 5 July 2016.

11. That a Single Judge cannot take Standard Trial-Testimony is also supported through consideration of Article 57(2)(b) which lists the powers and functions that can be delegated to a Single Judge.

12. Firstly, though this delegation provision is wide,[10] as Rule 132*bis* of the Rules of Procedure and Evidence ('RPE') is a matching provision to Article 57(2)(b) for the trial-phase, Rule 132*bis* must suggest a limitation on Article 57. The powers enumerated in Rule 132*bis* are not exhaustive; however, as the provision and the *travaux preperatoire*[11] make clear, the focus is upon preparation, not substantive, evidence taking decisions. The symmetry of Article 57 and Rule 132*bis* raises significant doubts about the scope of Article 57(2)(b) and thus whether a Single Judge can do under Article 56 what is not permitted under Article 57.

13. Secondly, and similarly, the Chamber can exercise powers under Article 56 following the provision of Article 64(6)(a) and Article 61(11).[12] It would be illogical if a Single Judge of a Trial Chamber could assume full trial powers of taking testimony by invoking Article 56, even though Rule 132*bis* would preclude the use of these powers. Put more simply: if a Trial Chamber Single Judge cannot take Standard Trial-Testimony under Article 56,[13] then this must preclude a Pre-Trial Chamber Single Judge.

[10] "[I]n all cases other than those listed in article 57(2)(a) of the Statute, a single judge of the Pre-Trial Chamber may exercise the functions provided for in the Statute, unless otherwise provided for in the Rules or by a majority of the Pre-Trial Chamber", ICC-02/04-01/15-213, para. 3.
[11] "The judges hereby propose to amend the Rules of Procedure and Evidence […], so as to specify that the functions of the Trial Chamber, in respect of trial preparation", para. 1; "Allowing trial preparation to be addressed by a single judge provides for greater efficiency and flexibility at the judicial divisional level as it will enable the remaining two members of a Trial Chamber to be more readily available to address other matters before the Trial Division and other divisions.", para. 9; and "the role of the trial judge acting alone was limited to the preparatory work while the more substantive issues remain solely within the remit of the full Trial Chamber", para. 12, *see* ICC-ASP/11/41, available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-41-ENG.pdf.
[12] "[A] Trial Chamber […] shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings."
[13] Furthermore, Article 69(2) states "[t]he testimony of a witness *at trial* shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence."

14. The arguments to the present point lead to the conclusion that the recorded material cannot be considered Standard Trial-Testimony. Thus, a legal avenue to admit it must be identified by the Prosecution – something it has failed to do.

ii) There is no legal mechanism to admit the recorded material

15. Article 56 specifies that admission of the evidence collected through it "shall be governed" by Article 69. Article 69(2) creates two exceptions to the requirement that the "testimony of a witness *at trial* shall be given in person" (emphasis added). The first is Article 68 and the second is any exceptions carved out by the RPE. The Appeals Chamber has stated:

> In deviating from the general requirement of in-court personal testimony and receiving into evidence any prior recorded witness testimony a Chamber must ensure that doing so is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally. In the view of the Appeals Chamber, this requires a cautious assessment.[14]

16. "The most relevant provision [in respect of "the introduction of documents or written transcripts"] in the Rules of Procedure and Evidence is rule 68."[15] Rule 68 does not provide a mechanism for admission. Rule 68(1) indicates that Rule 68 only applies to material "[w]hen the Pre-Trial Chamber has not taken measures under article 56". Sub-rule (2) and (3) make clear that they are linked to sub-rule (1) and show the two possible situations as regards prior recorded material. Sub-rule (2) covers the situation when the "witness who gave the previously recorded testimony is not present before the Trial Chamber" and sub-rule (3) covers the situation where the witness is present. Thus, sub-rule (1) applies to all of Rule 68 and textually precludes the introduction of the prior-recorded material collected

[14] ICC-01/05-01/08-1386 OA5, OA6, para. 78.
[15] ICC-01/05-01/08-1386 (OA 6), para. 76.

through Article 56. Even though discussed above and below, the Defence maintains that Rule 68, as amended by the ASP on 27 November 2013[16] is not applicable to this case, and shall be reflected in its response on 26 July 2016.

17. Article 68 provides an exception to the principle of public hearings in sub-section (2); however, it is submitted that this provision does not create a separate mechanism for the introduction of prior-recorded testimony. Sub-section (2) enables the Chamber to "conduct any part of the proceedings in camera". The reference to "presentation of evidence by electronic or other special means", it is submitted, concerns other mechanisms for facilitating testimony for proceedings either in pre-trial *for the purposes of the confirmation decision* or at trial *for the purposes of the judgment*. This precludes the collection of testimony for the judgment in the pre-trial phase. An example of the 'means' under this provision is when a witness is permitted to give testimony behind a screen.

18. This is made clearer by the text of Article 68, which states that measures "shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial," which strongly suggests that the provision cannot be contorted to create novel mechanisms and exceptions to evidential rules. That there is only one mechanism to admit prior recorded testimony is made clearer by a *Ruto and Sang* Appeals Chamber discussion of Rule 68 where it was said that:

> If [the specific circumstances of Rule 68] […] are not met, recourse to article 69 (2) and (4) of the Statute is not permissible given that such a course of action would render rule 68 of the Rules

[16] *See* ICC-ASP/12/Res.7, available at: https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf, last accessed on 5 July 2016.

> meaningless and would enable the party seeking the introduction of the evidence to avoid the stringency of the latter provision.[17]

19. The admission of the evidence, taken in the way it was, is barred from admission by the way that the Statute and RPE are structured.

B. In the alternative, but without prejudice to what it written above, the prejudice of admission outweighs any probative value

20. Admission pursuant to Article 69(4) is a multi-stage process. A Trial Chamber must satisfy itself that the evidence is relevant and admissible, and then balance the prejudice of admission against its probative value.[18] Prejudice is assessed by *inter alia* reference to a "fair trial or to a fair evaluation of the testimony of a witness." The Defence submits that admission must fail as a result of the substantial prejudice caused.

21. That admission should be barred due to its prejudice should not be taken as agreement that "there is no dispute among the parties as to the relevance and probative value of the written transcripts of and related items used during the testimonies of the seven witnesses"[19] – the Defence categorically rejects such a claim. Rather, the prejudice that would be caused is the most clear and simple basis upon which to reject the evidence. Furthermore, the prejudice – outlined below – strongly impacts upon the reliability of the evidence itself.

[17] ICC-01/09-01/11-2024 (OA10), para. 86 (citing ICTY, Appeals Chamber, *Prosecutor v. Stanislav Galić*, "Decision on Interlocutory Appeal concerning Rule 92 bis (C)", 7 June 2002, IT-98-29-AR73.2, para. 31and ICTY, Appeals Chamber, *Prosecutor v. Slobodan Milošević*, "Decision on Admissibility of Prosecution Investigators Evidence", 30 September 2002, IT-02-54-AR73.2, para. 18).
[18] Article 69(4) of the Rome Statute. *See* also ICC-01/04-01/06-1399, paras 27-31.
[19] ICC-02/04-01/15-488, para. 11.

i) The collection of recorded material infringes upon the rights in Article 67(1)(a) and Article 67(1)(g) and admission of the evidence would nullify the right to have adequate time and facilities for the preparation of the defence pursuant to Article 67(1)(b) of the Statute

22. The recorded evidence of two individuals was collected before the provision of a Document Containing the Charges ('DCC') or updated DCC.[20] Notwithstanding the Single Judges finding that Article 56 is not limited by this,[21] the point remains that with regards to that recorded evidence,[22] the Defence did not have timely *notice* of the charges.[23]

23. Notwithstanding the above argument that the evidence is not Standard Trial-Testimony, it bears stating that it was collected before the scope of the trial was defined following a decision on the Confirmation of Charges. All other things being equal, cross-examination by the Defence for the purpose of the Article 74 Judgment at a point where the charges have not been confirmed cannot be as effective as at a point where the Defence knows the charges and is able to conduct investigations to inform cross-examination. Moreover, it placed the Defence in a position where it had to take decisions in advance of the knowledge of the full-scope of the trial which placed it between a rock and hard place: between missing an opportunity for questioning and taking positions on matters not fully informed of the scope of the charges and evidence. Understanding the purpose with which Judge Tarfusser wanted to collect evidence pursuant to Article 56, the

[20] The material was collected 15-19 September 2105 and 9-18 November 2015, and the DCC was provided on 21 December 2015, of which was updated on 23 March 2016 by Pre-Trial Chamber II.
[21] ICC-02/04-01/15-277-Conf, para. 4.
[22] ICC-02/04-01/15-T-8-Conf, ICC-02/04-01/15-T-9-Conf, ICC-02/04-01/15-T-10-Conf, and ICC-02/04-01/15-T-11-Conf were taken from 15 to 19 September 2015. The amendment of the charges was requested on 18 September 2015, *see* ICC-02/04-01/15-305-Conf.
[23] ICC-02/04-01/15-286-Conf, para. 19.

Article 56 proceedings unlawfully forced the Defence to waive its Article 67(1)(g) right to remain silent.[24]

24. At the time of the testimony, the Defence had yet to be given the final list of evidence for trial. It therefore was not given *notice* of the evidential basis underpinning them. It was thus unable to ask questions to the witnesses as concerns the evidence that would be relevant to raise with them and it was unable to make missions to verify claims or challenge evidence.[25] This prejudice goes to the second limb of described in Article 69(4), namely that the "fair evaluation of the testimony of a witness" would be jeopardised if the Defence is precluded from completing its investigations and reviewing disclosed evidence.

25. Being before the deadline for disclosure, the Defence was also not in a position to put all relevant evidence to the witnesses. Since the recording of the evidence, more than 50,000 pages materials have been disclosed. This is aggravated by the fact that the recorded material goes directly to the acts and conduct of the Accused. In fact, when the Prosecution states "[t]he article 56 evidence *establishes the commission of the crimes* listed under counts 50-60 and 61-68 *and proves them as*

[24] For Judge Tarfusser's intentions, *see* e.g., ICC-02/04-01/15-T-9-Conf, pgs 77-78: "It's now two days that you, Witness, you are being questioned with all sort of questions. Now it is finished. You can go home. And thank you very much for having been here. And, well, all wish you obviously all the best, *and I wish you also not to have to relive again once again for another time what you have told us*. Thank you very much." (emphasis added); ICC-02/04-01/15-T-11-Conf, pg. 48: "So, Madam Witness, I think you are happy that now you are -- you can go home and *I hope for you that you have not to relive again what you have explained to us in these years you were abducted.* Thank you very much." (emphasis added); ICC-02/04-01/15-T-12-Conf, pg. 3: "I have a problem also with this as far as I think that if the Judge admits a witness or calls a witness to testify, the witness has to come to testify, it's not just a – the wishes expressed by a person "I want" or "I want not." *The witness has to come and to say the truth, full stop*." (emphasis added); ICC-02/04-01/15-T-17-Conf, pg. 71: "Madam Witness, I thank you very much for having come … to testify. Your testimony is now finished. You can go home. *I really and sincerely hope that you never again have to undergo questions on what happened to you in the time when you were in the bush*. So thank you very much and all the best." (emphasis added); ICC-02/04-01/15-T-17-Conf, pg. 46: "Thank you very much, Madam Witness. You are -- now you can go home. I thank you for your testimony and *I wish really all the best and to forget most things, to recover from your experience*. Thank you very much." (emphasis added)

[25] In the context of the admission of recorded testimony, the Appeals Chamber has stated that it "notes the importance of the principle of orality, the specific right to cross-examine witnesses enshrined in article 67 (1) (e) of the Statute, as well as the negative impact that depriving the accused of the opportunity to challenge evidence can have on the fairness of the proceedings", ICC-01/09-01/11-2024 (OA10), para. 94.

charged", it seems effectively to be saying the evidence is dispositive of its burden of proof.[26]

26. The Request seeks to obscure the prejudice to the Accused by conflating the Article 56 evidence with Standard Trial-Testimony. Though, as mentioned by the Prosecution, the provision of statements[27] and a list of evidence[28] prior to the hearings made the procedure fairer than it would have been absent these gestures, given the lack of full-notice of the charges or list of evidence, it is highly inaccurate to claim that "[t]here was no bar to the Accused giving clear and *complete* instructions concerning the allegations made by the witnesses" (emphasis added).[29] Complete instructions and an informed and prepared Defence were – logically speaking – impossible especially considering that translated copies of all the statements, required pursuant to Rule 76(3) of the RPE, made by the witnesses had not been given to the Mr Ongwen.[30]

27. The manner of taking the recorded material was also prejudicial. Trial Chamber VII chose to provide an indication to a witness that she "cannot be compelled to answer any questions that might tend to incriminate her husband."[31] Though the factual circumstance was different, what is relevant is that the Judges, authority figures for the witness, made the witness aware that given their relationship to an individual involved in the proceedings, they would not be placed under pressure to answer questions. No such information or caution about Rule 75 of the RPE was given.

[26] Request, para. 15.
[27] *Ibid*, para. 19.
[28] *Ibid.*
[29] Request, para. 20.
[30] *See* Public Annex A for the dates of disclosure for each witness and the date which the Defence received the Acholi translation. The Defence repeats its previous argument that Counsel is not an interpreter, and is not a legal substitute for Rule 76(3) of the RPE.
[31] ICC-01/05-01/13-T-37-Red-ENG, pg. 12:14 to pg. 13:23.

C. Admission of the evidence should be rejected pursuant to Article 69(7)

28. Under Article 69(7), the Chamber must first consider whether the evidence was collected in violation of the Court's statutory scheme or internationally recognised human rights. If such a violation is determined, the Chamber must then consider whether this violation "casts substantial doubt on the reliability of the evidence" or "would be antithetical to and would seriously damage the integrity of the proceedings."[32]

29. It has already been argued above[33] that that admission of the recorded evidence would amount to a breach of Article 67(1)(b). Additionally, the collection of the evidence breached the Statute in at least three ways: (1) The criteria for the application of Article 56 was not fulfilled; (2) Article 68 does not provide an independent legal basis for its collection; and (3) even if (1) and (2) are legal, the legal criteria for the collection of Standard Trial-Testimony requires a panel of three judges.

i) The use of discretion by the Single Judge under Article 56 was ultra vires

30. That Article 56(2) indicates that a Pre-Trial Chamber 'may' take measures requested by the Prosecution indicates that the Pre-Trial Chamber can also reject the measures. Thus the exercise of discretion can be examined for its legality.

31. The text of the provision indicates that the conditions for granting a Prosecution request are based upon a conjunctive criteria: (1) the existence of a "unique

[32] ICC-01/05-01/13-1854, para. 29.
[33] *See* paras 22-27.

investigatory opportunity" and (2) that the material will not "subsequently be available".

32. Unique implies a singular and discrete moment. The evidence upon which the Single Judge based his decision was at best speculative[34] and it was not explained why such an unorthodox and unprecedented procedure was merited *at that specific time* rather than later especially given the long time-frame contemplated in the reasoning by the Single Judge.[35] In short, there was no finding of immanent interference. As it appears, the Prosecution began its quest for the Article 56 proceedings almost two (2) months before it applied to Pre-Trial Chamber II for the Article 56 proceedings.[36] The fact that the witnesses appeared for the video-links is proof of this. It is irrelevant which party secured the appearance since the Court has the possibility of securing subpoenas for potential witnesses that refuse to appear for the proceedings.

33. Neither the Prosecution Request, nor the Single Judge, indicated which power in Article 56(2) was to be used to enable the Single Judge to take the decision that he did. The right to a reasoned decision[37] and basic notions of legality[38] in the administration of justice suggest that the power being used should be identified so as to enhance accountability and scrutiny. The lack of such identification in the

[34] ICC-02/04-01/15-277-Conf, paras 5-6 and ICC-02/04-01/15-316-Conf, para. 4.
[35] *See* ICC-02/04-01/15-277-Conf, para. 6, where "[t]he Single Judge concurs with the Prosecutor that "*as months* and *possibly years* elapse before these potential witnesses give evidence at any future trial, the recurrence of such events may cause pressure upon witnesses"". (emphasis added)
[36] *See* ICC-02/04-01/15-256-Conf-AnxC, pg. 2, first two paragraphs.
[37] "The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision", ICC-01/04-01/06-773 (OA5), para. 20.
[38] *See* for example United States Court of Appeals, First Circuit, *Delgado de Jesus v. Corporación del Centro Cardiovascular De Puerto Rico y Del Caribe*, 65 Fed.Appx. 325 (2003), p. 2 final paragraph (citing to *Lawton v. State Mut. Life Assur. o.*, 101 F.3d 218, 220 (1st Cir.1996); accord *Cruz-Ramos v. Puerto Rico Sun Oil Co.*, 202 F.3d 381, 383 (1st Cir.2000); Ayala v. Union de Tronquistas, Local 901, 74 F.3d 344, 345 (1st Cir.1996)), attached as Annex C.

present case should, it is submitted, heighten the scrutiny that is applied given the potential prejudice.

34. As regards to the risk, it can be said that with witnesses, there will always be a risk that information will not 'subsequently be available'. Absolute certainty in any domain of life is rare. There must therefore be controlling criteria or standard of proof which the Single Judge did not apparently apply or at least articulate. Put another way, the basis of the passage of time could always unaccountably justify Article 56 measures if the provision was not circumscribed by other conditions.

35. In conclusion, the exercise of the power under Article 56 was *ultra vires* which merits examination of the impact that it will have upon the reliability of evidence and integrity of the proceedings. This consideration is particularly weighty given that the Prosecution's claim that this evidence is dispositive.[39]

ii) The Article 68 basis suggested by the Single Judge is not sound

36. The Single Judge stated: "Article 68(1) of the Statute, which obliges the Court to take appropriate measures for the protection of, *inter alia*, the psychological well-being, dignity and privacy of victims and witnesses, read together with article 69(2) of the Statute, which makes an exception for this purpose to the requirement that the testimony of witnesses at trial shall be given in person, provides an additional legal basis for the present decision."[40]

[39] *See* para. 25, footnote 26, *supra*.
[40] ICC-02/04-01/15-277-Conf, para. 10.

37. With respect, it is submitted that this statement is not legally correct and Article 69(2) and Article 68(1) cannot provide a legal basis to collect testimony.

38. Article 69(2) provides that "The testimony of a witness *at trial* shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence." (emphasis added)

39. Article 68(2) provides "an exception to *the principle of public hearings*" (emphasis added) not an exception "to the requirement that the testimony of witnesses *at trial"* as claimed by the Single Judge. Moreover, both Article 69(2) and 68(1) requires that any investigatory act taken under Article 68 "shall not be prejudicial to or inconsistent with the rights of the accused" which, as discussed above,[41] is patently not the present case.

iii) The admission of the material at this stage would be antithetical to and would seriously damage the integrity of the proceedings and casts substantial doubt on the reliability of the evidence

40. For the reasons discussed above,[42] the admission of material would seriously impact upon two fundamental rights of the Accused – *notice* pursuant to Article 67(1)(a) and the right to *prepare a defence* pursuant to Article 67(1)(b). Where the respect of these two fundamental rights are questioned, the integrity of proceedings are jeopardised.

41. Additionally, as discussed above[43] and linked to the point just made, the impact upon those rights leads to serious doubt as concerns the reliability of evidence

[41] *See* paras 20-27 *supra*.
[42] *See* paras 22-24 *supra*.
[43] *See* para. 21*supra*.

since questioning by the Defence under the condition of lack of notice and lack of preparation means that evidence is inadequately scrutinised.

42. Finally, as the Prosecution raised the issue,[44] if the Defence decides to use an affirmative defence at trial, it will have been unfairly deprived of the opportunity to question these witnesses about the possible defence at trial. The Defence investigations were still developing, beginning in July 2015. Failure of the Chamber to allow the Defence to examine these witnesses shall violate the Defence's right under Article 67(1)(b).

D. The evidence is preserved – it is not necessary to admit it prior to the trial

43. Notwithstanding that the Request should be rejected, it must be borne in mind that the purpose of Article 56 is a means to *preserve* evidence while providing the Defence an opportunity have input so as to improve trial fairness.[45] The evidence is safely secured in the possession of the Registry; it is preserved, thus the hurry or urgency of the Prosecution's original requests has thus evaporated. There is no urgency to rush forward for admission.

44. It must be stressed – *the trial-phase has only begun, there has not even been a Prosecution opening statement.* If the Prosecution allegations and arguments about the weight of the recorded material are accepted, Mr Ongwen could be virtually convicted on the related charges before the start of trial, not through a public oral hearing, but through an exchange of filings, and without the opportunity for his Defence team to review all the disclosed evidence.

[44] ICC-02/04-01/15-435.
[45] Article 56 in Triffiter (O.) (Ed.), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, 2nd edition, C.H. Beck, 2016, pg. 1411-1420, attached as Annex B.

45. Trial Chambers such as Trial Chamber VII[46] have begun to take the approach whereby, due to the complexity of the evidence, admission of evidence is deferred until the whole evidential picture is clearer. The present request presents an opportunity to follow a similar approach; however, for different reasons.

46. There is no need to adopt the approach for all evidence in the trial, but given the special status of the recordings and transcripts – having been taken in circumstances heavily disputed by the Defence – the deferral would enhance trial fairness as it would provide the Defence breathing room to examine the totality of the disclosure.

47. For the reasons described in paragraphs 24 and 25, it is at least possible that the Defence will need to re-examine the Article 56 witnesses. Admitting the evidence now – in a not fully complete state – appears to foreclose the possibility of re-examination before the trial has even begun. Indeed the Prosecution argues "[i]f the Chamber grants the request, it would mean that the witnesses do not have to come and testify again".[47] The approach of the Prosecution would reduce the trial-phase on those charges to an administrative procedure coupled with a perfunctory head-nod to the notion of a public trial.

48. The well-being of the witnesses can be respected while employing fairer procedures. The Prosecution submits that its Request is the only way to balance the well-being of the witnesses against the right to a fair-trial; however, the Defence submits that this presents a false choice. In the event that examination of

[46] *See inter alia* ICC-01/05-01/13-1285 and ICC-02/11-01/15-405.
[47] Request, para. 22.

these witnesses is necessary, other mechanisms exist for example the collection of evidence under Rule 68 of the RPE.

III. CONCLUSION

49. For the reasons described above, the Defence requests the Chamber to reject the Prosecution Request. In the alternative, the Defence asks the Chamber to defer the decision on the admission of the recorded evidence and associated material until the end of the presentation of evidence.

Respectfully submitted,

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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 6th day of July, 2016

At The Hague, Netherlands