

**Cour
Pénale
Internationale**



**International
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Date: 3 July 2015

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN UGANDA

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

Confidential with Confidential Annex A

**Defence Response to the Prosecution's Request for an Article 56 Unique
Investigative Opportunity**

Source: Defence for Dominic Ongwen

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

The Office of the Prosecutor
Fatou Bensouda, Prosecutor
Benjamin Gumpert, QC

Counsel for the Defence
Krispus Ayena Odongo

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for the Victims

The Office of Public Counsel for the Defence

States' Representatives

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby responds to the Office of the Prosecutor's ('Prosecution') request for special evidence collection measures under Article 56 of the Rome Statute ('Statute'). The Defence finds this request is:
 - a. Premature and speculative, as the Defence is currently unaware of any formal counts against Mr Ongwen which touch or concern the testimony proffered by potential Prosecution witnesses P-226 and P-227 and
 - b. Antithetical to Article 56 of the Statute.
2. The Defence asserts that the Prosecution should follow the Statute and consult with the Victims and Witnesses Unit ('VWU') on the proper and necessary steps to take for potential witnesses P-226 and P-227.

II. CONFIDENTIALITY

3. The Defence files this response as confidential because it responds to a submission classified as such. The Defence reserves its right to argue the confidentiality level of the alleged expert (Dr Holly Porter) report at a later date.¹

III. PROCEDURAL HISTORY

4. On 29 July 2004, then Prosecutor Luis Moreno-Ocampo announced the opening of the investigation into Northern Uganda.²

¹ The Defence notes that Dr Porter's name does not appear on the list of experts certified by the Registrar of the Court. Retrieved at <http://www.icc-cpi.int/iccdocs/PIDS/other/300615-List-of-Experts-Eng.pdf> on 3 July 2015.

² Press Release ICC-OTP-20040729-65. Retrieve at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/press%20releases/Pages/prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20northern%20uganda.aspx on 3 July 2015.

5. On 18 May 2005, then Prosecutor Moreno-Ocampo requested an arrest warrant for Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen from Pre-Trial Chamber II.³
6. On 8 July 2005, Pre-Trial Chamber II issued an arrest warrant for the abovementioned five persons.⁴ Mr Ongwen's counts are restricted to incidents which occurred at the Lukodi IDP Camp.
7. On 5 June 2015, the Single Judge ordered Mr Ongwen's communication to the outside world restricted to Counsel only.⁵
8. On 24 June 2015, the Single Judge ordered the continued restrictions on Mr Ongwen's communication to the outside world.⁶
9. On 26 June 2015, the Prosecution filed a submission requesting to take evidence under the auspice of Article 56 of the Statute.
10. On 29 June 2015, the Single Judge ordered the Defence's response to be filed by 2 July 2015, which was subsequently altered to 3 July 2015 on request of the Defence.

IV. SUBMISSIONS

A. The Prosecution's Request is Antithetical to Article 56 of the Statute

11. The drafting history of article 56 indicates that it arose from a desire to ensure that the rights of future suspects and defendants be protected during the investigative

³ ICC-02/04-9-US-Exp-AnxA (now ICC-02/04-01/15-3-Conf-Red2).

⁴ ICC-02/04-10-US-Exp (now ICC-02/04-01/15-6).

⁵ ICC-02/04-01/15-241. (noting that the Single Judge altered the restriction to allow for confidential visits to Mr Ongwen from his Assistant to Counsel).

⁶ ICC-02/04-01/15-254.

phase - to create a mechanism for collective defence evidence which might be unavailable subsequent to the person's arrest.⁷ The draft adopted in 1997 (article 26ter), which constituted the "core" of the eventual Article 56,⁸ stated that "in exceptional circumstances in which a unique opportunity appears to exist for the taking or collection of evidence, the Pre-Trial Chamber may be involved in order to assure a fair trial/protect the rights of the accused".⁹ For this reason, it has been opined that "the explicit goal of article 56 is "to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence".¹⁰

12. When all was said and done, the delegates in Rome in 1998 decided that the purpose of Article 56 was "to ensure the efficiency and integrity of the proceedings and, *in particular, to protect the rights of the defence.*"¹¹

13. The Defence takes note that there has not been a decision by the Single Judge on the applicability of Article 101 of the Statute. The Defence submits, as it submitted before, that Article 101 is applicable to this case, and that any additional counts levied against Mr Ongwen must be acceded to by the Government of the Central African Republic. As the Defence understands the law, the Prosecution is

⁷ F. Guariglia, 'Article 56: the Role of the Pre-Trial Chamber in relation to a unique investigative opportunity' page 736 (Triffterer 1st edition) : "The concern that without some form of judicial intervention at the investigation stage, an accused would be incapable of effectively collecting evidence and preparing his or her defence lead to the presentation of the first proposals to involve a judicial organ of the Court in an investigation, which were submitted during the August 1996 Preparatory Committee Session. Their aim was to ensure that there was at least partial "equality of arms" between an accused or a suspect and the Prosecutor at the stage of investigation and prosecution. Thus, the prejudice to the accused resulting from the particular nature of the ICC proceedings – conducted away from the country of the defendants and away from where the evidence and witnesses were readily available – would be minimised."

⁸ F. Guariglia page 737.

⁹ Decisions taken by the Preparatory Committee at its Session held from 4 to 15 August 1997, UN Doc A/AC.249/1997/L8/Rev.1 (1997) p 20 fn 18 (cited by F. Guariglia page 737). UN Document retrieved at: <http://www.iccnw.org/documents/DecisionsTaken14Aug97.pdf> on 3 July 2015.

¹⁰ F. Guariglia, G Hochmayr ' Article 56' in Triffterer (ed) Commentary on the Rome Statute of the International Criminal Court (Hart Publishing 2008, 2nd ed) at p. 1109.

¹¹ Article 56(1)(b) of the Statute. [emphasis added]

currently forbidden to add any additional counts against Mr Ongwen, making this entire process useless as against Mr Ongwen's and the Central African Republic's rights pursuant to Article 101(2).

14. Furthermore, the Defence notes Article 58(6) of the Statute, which states:

The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

15. Assuming *arguendo* that the Prosecution's argument of Article 101(2)'s applicability to Mr Ongwen goes in favour of the Prosecution, it still has not proffered any such counts to Pre-Trial Chamber II pursuant to Article 58(6) of the Statute. Mr Ongwen has been under investigation since 2004, and the Prosecutors, both current and former, never proffered any such charges. Even Senior Trial Attorney Benjamin Gumpert, QC stated: "I'm not in a position now to say what those offences will be and, indeed, whether the Prosecution is currently in the possession of evidence which would sufficiently support them. That is the purpose of our current investigative efforts."¹²

16. On 19 May 2015, Mr Gumpert, the senior trial attorney for this case, could not state which offences might be put forth. He could not state what evidence the Prosecution had. He could not state whether or not the evidence would support a request under Article 58(6) of the Statute.

17. The Prosecution annexed two statements to its last requests.¹³ This was the first "evidence" of these supposed counts that the Prosecution is investigating.¹⁴ This

¹² ICC-02/04-01/15-T-6-ENG ET WT, p. 7, lines 5-7.

¹³ See ICC-02/04-01/15-256-Conf-AnxA.

¹⁴ The Defence does not consider ICC-02/04-01/15-241-Conf and its annex to be a true notification of the supposed counts.

came seven days ago. The interviews are from the end of May and beginning of June. The Prosecution has possessed these statements for about a month. It began this Article 56 application process before the inks from the signatures were dry.

18. No requests under Article 58(6) of the Statute exist. Mr Ongwen and his Defence have not been placed on proper notice of the alleged counts relating to the statements of P-226 and P-227. Two weeks before the interviews took place, the Prosecution could not even say whether it would proffer any new counts, but within two weeks, it has new ones?
19. Instead of protecting the rights of Mr Ongwen, the Prosecution is attempting to pervert his rights by taking the official testimony of two potential witnesses before new counts are requested. The Defence cannot provide a meaningful examination of the potential witnesses if it has not been informed of the counts they intend to testify to. How is it that the Prosecution can state “[c]ross-examination in the near future will be no more or less effective than cross-examination at any eventual trial[]”¹⁵ when the Defence does not know what the supposed counts are? Mr Ongwen has a rights under Articles 61(4) and 67(1)(a) of the Statute to have reasonable notice of the counts levied against him, and adequate time to prepare his defence with counsel under Article 67(1)(b) of the Statute. The testimony of these two potential witnesses under Article 56 of the Statute would perilously violate these rights of Mr Ongwen.
20. The Defence understands from the filing that these two potential witnesses intended to talk about alleged sexual crimes against them by Mr Ongwen.¹⁶ This is not the notice required under Articles 61(4) and 67(1)(a) of the Statute. This is a submission by a party.

¹⁵ ICC-02/04-01/15-256-Conf, para. 29.

¹⁶ See ICC-02/04-01/15-256-Conf and its associated annexes.

B. The Prosecution's Interpretation of Article 56 Violates Article 21 of the Statute

21. The Prosecution's interpretation of Article 56 violates Article 21 of the Statute.

Article 21(1)(a)-(c) of the Statute reads:

1. *The Court shall apply:*

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

Article 21(1)(a)

22. Article 21(1)(a) requires the Court to apply the Statute, Elements of Crimes and Rules of Procedure and Evidence above all other law. Article 56(1)(a) is clear as to its intent. The issue is whether the witness will be physically able to attend trial, not if the witness might forget his or her testimony by the time trial starts or decide not to testify.

23. The Prosecution notes that the issue of vulnerable witness testimony and Article 56 arose during the drafting committee of the Rules of Procedure and Evidence, not the drafting of Article 56.¹⁷ The Prosecution admitted that the committee left the issue of vulnerable witness testimony undecided, but the Defence contends it goes further. The Assembly of State Parties ('ASP') noticed that something was missing, which is why it closed this gap with the introduction of Rule 68(2)(d) on

¹⁷ See ICC-02/04-01/15-256, para. 20 and fn. 22.

27 November 2013.¹⁸ Article 56 is only to be used when a witness cannot come to testify at trial, not when the witness does not want to come and testify at trial.

24. The Defence also reminds the Prosecution, as noted in the procedural history above, that the investigation began in 2004 and the arrest warrant was issued in 2005. Mr Ongwen's entire proceeding falls under the old Rule 68, not the one adopted on 27 November 2013.¹⁹

25. Considering the discussion during the committee developing the Rules, and the actions taken by the ASP on 27 November 2013, the Defence contends that the proper interpretation of Article 56 is that the testimony should only be taken when it is foreseeable that the potential witness will not be able to attend the trial to give testimony, not that the potential witness might not want to attend the trial to give testimony. The Single Judge need not go further than what Article 21(1)(a) states.

Article 21(1)(b)

26. Assuming that the Single Judge disagrees with the above argument and finds no clear interpretation, the Defence notes that the established principles and rules of international law, unlike as the Prosecution briefly alludes to in its submission, is that there must be exceptional circumstances as to why the witness cannot physically attend the trial at The Hague or testify via video link.

27. The Prosecution points to the ICTR in the "Decision on the Prosecutor's Extremely Urgent Motion for the Deposition of Witness QX" to help show the

¹⁸ Resolution ICC-ASP/12/Res.7, Retrieved at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf on 3 July 2015.

¹⁹ *Ibid* at para.2, stating "the following shall replace rule 68 of the Rules of Procedure and Evidence, *emphasizing* article 51, paragraph 4, of the Rome Statute according to which amendments to the Rules of Procedure and Evidence shall not be applied retroactively to the detriment of the *person who is being investigated or prosecuted*..." [first emphasis in the original, second emphasis added].

developed area of international law.²⁰ The Defence draws attention to the Single Judge of paragraph 10 of that decision, which states:

*"In the instant case, the Chamber considers that Witness QX's age, coupled with his critical state of health, constitutes exceptional circumstances within the meaning of Rule 71 of the Rules. If the state of his health worsened, the Prosecutor would be deprived of his evidence. Furthermore the Chamber notes the Prosecutor's submission that the anticipated evidence of Witness QX is highly important to its case not only because he was allegedly an eyewitness of the acts alleged by the Prosecutor against both Accused, but also because his status makes him a special witness. The Chamber therefore considers that the interests of justice require that the evidence of Witness QX be taken by way of deposition, pursuant to Rule 71 of the Rules, before commencement of trial, so as to adequately facilitate the administration of justice."*²¹

28. The ICTR Trial Chamber granted this application not for the reason that the Prosecution advanced, but because the witness was old, in a poor state of health and that the witness was crucial to the ICTR prosecution case. Most notably, the decision said nothing about the testimony protecting the rights of the defence.

29. Additionally, the Defence notes that Rule 71*bis* of the ICTR, which was mentioned in footnote 23 of the Prosecution's submission, was enacted in 2009, six years after the decision in the *Muvunyi* case. The 2003 decision in *Muvunyi* constitutes the prevailing international view when the Rome Statute and Rules of Procedure and Evidence were decided.²² Article 56 was meant to be used when someone could

²⁰ ICC-02/04-01/15-256-Conf, para. 21 and fn. 24.

²¹ Decision on the Prosecutor's extremely urgent motion for the deposition of Witness QX, *Prosecutor v. Muvunyi*, ICTR-2000-55-I, 11 November 2003, para. 10. (noting that Ms Adesola Adeboyejo was a Prosecutor on this case). [emphasis added] Retrieved at: <http://ictr-archive09.library.cornell.edu/ENGLISH/cases/Muvunyi/decisions/111103.html> on 3 July 2015, also submitted by the Prosecution at ICC-02/04-01/15-256-Conf-AnxE, pgs 16-19.

²² See also *Prosecutor v. Kupreskic*, Decision On Appeal By Dragan Papic Against Ruling To Proceed By Deposition 15 July 1999 at para. 19, stating, "Appeals Chamber deems it necessary to recall one of the fundamental principles governing the giving of evidence before the Trial Chambers, namely the principle that witnesses shall as a general rule be heard directly by the Judges of the Trial Chambers. This principle is laid down in Article 21(4) of the Statute which grants to every accused person appearing before the Tribunal as one of the "minimum guarantees, in full equality", the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. Sub-rule 90(A) embodies

not physically attend the trial to give testimony. It is not meant for people that foreseeably could attend the trial to give testimony, but decides not to at a later date.

Article 21(1)(c)

30. Failing clear principles above, the Single Judge is required to use the “general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime....”²³

31. There is not much dispute as to whether the Prosecution’s request would be granted in the civil law jurisdictions it cited.²⁴ The Defence informs the Prosecution though that Western and Central European countries are not the definitive answer on general principles of law derived from the national laws of the legal systems of the world.

32. The Prosecution admits that the common law traditions do not allow this form of testimony.²⁵ The Prosecution has not shown principles of law derived from the Americas, from Asia, from Africa, Oceania and from the Middle East. Merely because national laws were derived from a system 50, 70, 100 or 200 years ago

that same principle and specifically prescribes that witnesses shall in principle be heard directly by the Chambers. Furthermore, this principle is a predominant feature in the criminal procedure of national legal systems, underpinned as it is by the compelling reason of facilitating the determination of the charges against an accused person. One of the consequences of this principle is the advantage that all three Judges of a Trial Chamber shall have of observing the demeanour of the witness in person while he or she is being examined by the parties, apart from their ability to put questions to the witness under solemn circumstances in order to best ascertain the truth in respect of the crimes with which an accused is being charged.” (The Appeals Chamber denied the Trial Chamber’s order to conduct a deposition because the exceptional circumstances of the person not being able to come to The Hague to give testimony had not been met.) Retrieved at: <http://www.icty.org/x/cases/kupreskic/acdec/en/90715EV39111.htm> on 3 July 2015.

²³ Article 21(1)(c) of the Statute.

²⁴ ICC-02/04-01/15-256-Conf, paras. 22-24.

²⁵ ICC-02/04-01/15-256-Conf, para. 25.

does not mean that they follow the same procedure now. The Prosecution has not shown that the civil law systems from the Americas allow for this. It cannot show that the common law systems from the Americas allow for this. There is no mention of Sharia Law principles at all.

33. Furthermore, Article 74 of the Statute requires “[a]ll the judges of the **Trial Chamber**...be present at each stage of the trial....”²⁶ If testimony was taken from P-226 and P-227 as the Prosecution suggests, it would violate Article 74(1) of the Statute. Article 74(1) was discussed during the last ASP meeting in 2014. It was urged to the ASP to change the Statute, but it did not happen. All judges must be present. This shows a clear intent of the legislative body, i.e. the ASP, to maintain the status quo. Failing exceptional circumstances, all the judges of the trial chamber must be present during the testimony of P-226 and P-227, especially since the judges are allowed to question the potential witness. The Prosecution has failed to show these exceptional circumstances.

34. If the Single Judge reaches Article 21(1)(c) of the Statute, he should apply the “national laws of the State that would normally exercise jurisdiction over the crime,”²⁷ to wit, the criminal procedural laws of the Republic of Uganda.

35. The Republic of Uganda uses the common law system. Under its current practices, depositions are not allowed in criminal proceedings, saving for extreme circumstances when the witness will not be available for trial because of the likelihood of death or an untreatable mental illness. The situation the Prosecution puts forth is neither of these situations.

²⁶ Article 74(1) of the Statute. [emphasis added]

²⁷ Article 21(1)(c) of the Statute.

C. The Proper Procedure for the Prosecution in Handling P-226 and P-227

36. Pursuant to Article 43(6) of the Statute, the Registrar of the Court, in consultation with the Office of the Prosecutor, is tasked with creating and maintaining VWU at the ICC. Its function is to provide:

[P]rotective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

37. The Prosecution has not mentioned anything about these measures, measures which would fully respect the rights of the Defence while preserving the proposed testimony of the potential witnesses. Instead of consulting the VWU, the Prosecution wanted to open the water for the slippery slope to conduct trial proceedings before it has even proposed additional counts pursuant to Article 58(6) of the Statute.

38. The proper procedure would have been to consult VWU, a unit within the Court with is mandated to have experts in trauma related to crimes of sexual violence. Did the Prosecution do that? No. It contacted Dr Holly Porter for support in its quest to conduct the trial proceedings before it even requested additional counts against Mr Ongwen.²⁸ It is also noteworthy that Dr Porter did not mention anything to do with VWU, or any of the procedures available through VWU, or trying to find a way to preserve the potential witnesses' testimony without violating Mr Ongwen's rights.

39. The Defence submits that the Prosecution must consult with VWU on protection measures so VWU specialists can decide the best course of action for the potential

²⁸ ICC-02/04-01/15-256-Conf-AnxC.

witnesses, whether it is monitoring, relocation or admission into the ICC Witness Protection Programme. This is why VWU was created.

V. RELIEF

40. The Defence respectfully requests the Single Judge to deny the Prosecution's request to conduct an examination under Article 56 because it violates:

- a. Mr Ongwen's rights to know the charges before him, pursuant to Articles 61(4) and 67(1)(a) because the Prosecution has not proffered new counts pursuant to Article 58(6) of the Statute;
- b. Mr Ongwen's rights to have adequate time to prepare for trial, pursuant to Article 67(1)(b);
- c. Article 101 of the Statute; and
- d. Article 56, when interpreted by Article 21, of the Statute.

41. The Defence also requests the Single Judge to order the Prosecution to follow proper procedure and consult with VWU on how to handle the potential witnesses.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 3rd day of July, 2015

At Kampala, Uganda