

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 3 August 2015

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN UGANDA

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

Confidential

Defence Request for Leave to Appeal Decision ICC-02/04-01/15-277

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
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar
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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Rome Statute, the Defence for Dominic Ongwen ('Defence') respectfully requests leave to appeal His Honour, Judge Cuno Tarfusser's ('Single Judge') Decision granting the Prosecution's request pursuant to Article 56 of the Rome Statute for a unique investigative opportunity.
2. The Defence requests leave to appeal on the following two issues:
 - a. The Single Judge erred when he determined that two statements¹ would be enough information for the Defence to participate meaningfully in the taking of testimony of persons which are testifying completely to alleged actions which are in no way described in the Prosecution's application for an arrest warrant or the arrest warrant ('First Issue');
 - b. The Single Judge erred when he did not consider whether the proper conduct for the Prosecution should have been to seek the advice of the ICC's experts on victims and witnesses, to wit, the Victims and Witnesses Unit ('VWU') before granting the Prosecution's request ('Second Issue'); and
3. An immediate determination of these issues by the Appeals Chamber is necessary for the fair and expeditious outcome of the proceedings and trial, and would materially advance the proceedings and the functions of the Court.
4. The Defence also requests for an interim stay of the Article 56 testimony until such time that the Appeals Chamber can decide whether to grant suspensive effect if the Defence is granted leave to appeal.

II. CONFIDENTIALITY LEVEL

5. Pursuant to Regulation 23*bis* of the Regulations of the Court, the Defence files this request as Confidential because it deals with matters deemed confidential by the Single Judge and the Parties.

¹ The Prosecution has now submitted three total statements from P-226 and P-227.

III. PROCEDURAL HISTORY

6. On 26 June 2015, the Prosecution requested for an Article 56 unique investigative opportunity.²
7. On 3 July 2015, the Defence opposed the request.³
8. On 27 July 2015, the Single Judge granted the Prosecution's request ('Decision').⁴

IV. SUBMISSIONS

A. *The Law*

9. Article 82(1)(d) sets the standard for interlocutory appeals before any chamber of the court. The standard for an interlocutory appeal is that:

A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

B. *Application of the Law*

i. Both Grounds of Appeal State Appealable Issues that Arise from the Decision

10. Both issues arise from the Decision and are not mere disagreements between the Single Judge and the Defence.⁵ The Decision grants the Prosecution the ultimate decision on whether to refer a witness to the VWU or to apply to the Chamber for a unique investigative opportunity under Article 56 of the Statute. Similarly, the Defence's ability to conduct a meaningful cross-examination of the witness arises from the Decision because the Single Judge ruled that the short witness

² ICC-02/04-01/15-256-Conf.

³ ICC-02/04-01/15-259-Conf.

⁴ ICC-02/04-01/15-277-Conf.

⁵ See ICC-01/04-168 AO3, para. 9.

statements made it possible to conduct examinations on counts which have not yet been defined.⁶

11. In particular, the First Issue, whether a few witness statements can properly inform the Defence to enable it to conduct meaningful cross-examinations of witnesses on "counts" not yet defined, is addressed at paragraph 11 of the Decision. In his discussion, the Single Judge states that the statements disclosed by the Prosecution are "short, linear and clear as to the facts on which the two witnesses would testify, will be in a position to participate meaningfully in the taking of the testimony".⁷ While making note that the Rome Statute allows for the taking of testimony before "counts" are filed, the Single Judge did not appreciate the complexities with conducting meaningful cross-examinations on witnesses when there is such little information. There are now three statements from these witnesses, which touch on several different potential topics. Additionally, questioning as to the witnesses' veracity will be highly limited because the Prosecution has not put forth any other meaningful evidence or explanation of the supposed counts.

12. Similarly, the Second Issue arises from the Decision because the Defence argued that the proper course of conduct for the Prosecution would be to seek the advice and counsel from the VWU instead of the outside opinion of a professional located in Uganda.⁸ The Single Judge did not discuss this issue in the Decision. The Second Issue is vital to know whether or not the witnesses should be examined at this juncture.

ii. The Issues Significantly Affect the Fairness of the Proceedings

13. The First Issue affects the fairness of the proceedings because the Defence cannot be expected to conduct meaningful examinations of witnesses unless it knows

⁶ ICC-02/04-01/15-277-Conf, para. 11.

⁷ ICC-02/04-01/15-277-Conf, para. 11.

⁸ ICC-02/04-01/15-259, paras 36-39. Again, as stated in the Defence's pleading on 3 July 2015, the Defence does not acknowledge Ms Porter as an official expert because she is not on the approved list maintained by the Registry.

which alleged counts the witnesses intend to testify to. Without knowing which crimes the Prosecution will attempt to proffer under Article 58(6) (if allowed), the Defence cannot conduct comprehensive investigations on the alleged crimes.

14. Moreover, there is a major discrepancy as to when one of the witnesses alleges to have been captured by the LRA.⁹ Under normal circumstances, the timing would not pose a significant issue, but if she was abducted in April 2004 as her GUSCO file states, the Defence would need to investigate as to her location and the location of Mr Ongwen at this important juncture in the case. A proper investigation into this question could help vindicate Mr Ongwen on the counts currently levied against him, but without proper time, time which is given before the Confirmation Hearing, the Defence cannot be expected to examine these witnesses properly on the counts before the Chamber. Witness testimony is not given in a vacuum; it is corroborated, damaged and questioned by other witness testimonies.
15. Finally, to examine the potential witnesses properly, the Defence would be required to disclose evidence, and thus part of its case theory, in advance of the Confirmation Hearing to the Prosecution.
16. The Second Issue significantly affects the fairness of the proceedings because it allows the Prosecution to circumvent VWU's advice and counsel on issues of victim and witness safety and wellbeing. VWU has exclusive domain in non-emergency situation over issues relating to "protective 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."¹⁰ This is not in conflict with Article 68(4) of the Rome Statute, which states that VWU may advise the Prosecutor and the Court on the above matters. This Article grants VWU the power to comment on all issues mentioned in Article 43(6), but does not grant the Prosecution the power to

⁹ See ICC-02/04-01/15-256-Conf-AnxA, pg. 39, paras 130.

¹⁰ Article 43(6) of the Rome Statute.

forego consulting the Court's experts on victim and witness related issues. Failure to require the Prosecution to follow the Rome Statute in this regard will allow the Prosecution to bypass this requirement regularly, and has the real, yet unlikely, possibility to have a significant amount of the trial conducted before opening statements of the Confirmation Hearing.

iii. The Issues Significantly Affect the Expeditious Conduct of the Proceedings

17. Foremost, the issues affect the expeditious conduct of the proceedings because it will require the Defence to cease its investigations for no less than ten days in September, right around the time that the Prosecution's Article 58(6) request is due.¹¹ The Defence does not have a dedicated investigation division, let alone a jurisdiction division, legal division, appellate division, etc. Counsel, Assistant to Counsel, two full time Case Managers and two part time Case Managers are it. Three of the four Case Managers are reviewing evidence and conducting some research for pleadings. Counsel, Assistant to Counsel and one full time Case Manager are conducting investigations, writing the pleadings, reviewing evidence, conducting research for pleadings, interviewing for another Defence post,¹² and now, preparing for two cross-examinations of potential witnesses.
18. The First Issue affects the expeditious conduct of the proceedings because it requires the Defence to alter its investigations and strategy based on testimony being given about allegations not yet defined by the Prosecution. Valuable time will be lost investigating possible avenues which the potential witnesses *might* speak to, especially considering that the Defence only has three persons in the field to investigate, which include Counsel and the Assistant to Counsel.¹³

¹¹ The Defence uses the estimate of ten days because the team would need to spend at least three days consulting Mr Ongwen on the potential witnesses, four days of travel and three days of testimony as proposed by the Prosecution.

¹² The Defence just received an increase in its funding from CSS (see footnote below).

¹³ CSS, through its powers delegated by the Registrar, has increased the monetary funding of the Defence for its operations based on requirements from May 2015. The request was based upon its needs to review disclosure from the Prosecution and investigate the case through the proscribed time-table set out by former Judge Trendafilova and the Single Judge.

Without defined counts, Defence investigations will be seriously hampered for more than one month, which could cause delays in the start of the Confirmation Hearing.

19. The Second Issue affects the expeditious conduct of the proceedings because VWU could have recommended a different course of action for the potential witnesses. Neither of the persons consulted by the Prosecution is on the official list of experts maintained by the Registry.¹⁴ Allowing the Prosecution to unilaterally decide who advises the office, and who tells it what to do with Court witnesses, without regard to the other established offices created for this very purpose, defeats the purpose of the Rome Statute. The Registry decides who is an expert and VWU advises on the abovementioned victim and witness issues. This should be so because all witnesses are witnesses of the Court, not of a Party.

iv. The Issues Significantly Affect the Outcome of the Trial

20. Both issues significantly affect the outcome of the trial. As described above, the Defence would be required to reallocate its resources to investigate yet-to-be-defined allegations during the month of August and September 2015. Moreover, the Defence would be required to halt its investigations for no fewer than ten days to be present for and participate in the testimony being given by the potential witnesses. Finally, the Defence would be required to disclose evidence and its case theory before the Confirmation Hearing. All of this has the possibility to prolong the proceedings, jeopardising Mr Ongwen's chances of defeating the current counts in the arrest warrant during the confirmation stage, drastically altering the outcome of the trial.

¹⁴ The question is not whether they can get on the list, it is whether they are on the list. Neither persons are on the list. Persons on the list have a public duty to the Court. The list was last updated on 30 June 2015 and was retrieved by the Defence on 3 August 2015.

v. The Immediate Resolution of the Issues will Materially Advance the Proceedings

21. Determination of both issues will materially advance the proceedings. A prompt resolution on these issues will allow the case to move forward without irreparable damage being done to the proceedings. The Appeals Chamber is the final arbiter of the legal texts of the Court. An appellate determination as to the proper conduct of testimony given under Article 56 will guide the Parties and chambers of the Court in applying this legal standard.
22. Without the prompt resolution of the Appeals Chamber, the Defence will be forced to significantly alter its investigations and strategy based on two potential witnesses whose evidence may ultimately ever be allowed. This will significantly setback the time needed to prepare for the Confirmation Hearing.

C. Request for Interim Stay

23. The Defence is not asking the Single Judge to grant suspensive effect, as that is the sole power of the Appeals Chamber. The Defence asks for the Single Judge, as he did earlier,¹⁵ to grant an interim stay on the Article 56 testimony until such time that the Appeals Chamber can decide whether to grant the Defence request for suspensive effect under Article 82(3) of the Statute.
24. Granting the interim stay will not harm the proceedings. If leave is not granted, no harm will have become of the Single Judge's order. If leave is granted, the Appeals Chamber will be properly notified within 20 days of reasons for and against a request for suspensive effect.
25. If leave is granted, and the Appeals Chamber ultimately decides in favour with the Defence, the two potential witnesses will have gone through the process of a court examination for naught.

¹⁵ ICC-02/04-01/15-220, paras 12-13.

V. RELIEF

26. The Defence respectfully request the Single Judge to grant leave to appeal on the two issues outlined above and to grant an interim stay on the taking of testimony pursuant to Article 56 until such time that the Appeals Chamber decides on suspensive effect or the Single Judge denies the Defence's request for leave to appeal.

Respectfully submitted,



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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 3rd day of August, 2015

At Kampala, Uganda