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PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN UGANDA

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

Confidential

**Prosecution response to Defence request for leave to appeal the Decision
granting article 56 measures to preserve evidence**

Source: The Office of the Prosecutor

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

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Introduction

1. Dominic Ongwen's request for leave to appeal the Single Judge's decision granting measures, under article 56 of the Statute, to preserve the evidence of Prosecution witnesses P-0226 and P-0227 should be dismissed.¹ The Application fails to meet the article 82(1)(d) test for leave to appeal. The two alleged issues² are not appealable. The First Issue misstates the Decision. The Second Issue misapprehends the scope of the article 56 Decision and equally does not arise from the Decision. Both Issues merely disagree with the Decision, and rehearse earlier rejected submissions. Moreover, the Application fails to show any impact on the fairness and expedition of the proceedings, or the outcome of the trial. Nor is the Appeals Chamber's intervention necessary at this stage.

2. Likewise, the Defence fails to justify its request for an interim stay of the article 56 Decision. With more than five weeks before the evidence of the two witnesses is taken under article 56, the request to stay the Decision and their testimony is premature and unwarranted.

Level of Confidentiality

3. The Prosecution files this response confidentially, pursuant to regulation 23bis(2) of the Regulations of the Court, consistent with the classification of the Defence Application.

¹ ICC-02/04-01/15-284-Conf ("Application"); ICC-02/04-01/15-277-Conf ("Decision" or "article 56 Decision").

² Here, "Issues".

Submissions

A. The Application should be dismissed

4. As the Appeals Chamber has held, “only an issue may form the subject-matter of an appealable decision. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.”³ Moreover, according to the Appeals Chamber’s consistent case law, mere disagreements or conflicting opinions fall short of constituting appealable issues.⁴

(i) *The First Issue is not appealable*

5. The First Issue—whether the Single Judge erred when he found that the Prosecution’s disclosure of the statements from each of the two relevant witnesses would be sufficient to enable the Defence to participate meaningfully in the taking of their testimony under article 56, even though the counts are not yet defined⁵— is not appealable. The First Issue must fail for two reasons: it misunderstands the Decision, and wrongly assumes that article 56 measures are linked to, or even contingent upon, the definition of the new “counts”. It also merely disagrees with the Decision.

6. At the outset, in the First Issue the Defence incorrectly suggests that measures taken to preserve and collect evidence pursuant to the article 56 Decision require that the specific related counts be known at the time. Despite the Defence’s concession that “[t]he Rome Statute allows for the taking of testimony before ‘counts’ are filed[...]”,⁶ the First Issue—in claiming that the

³ ICC-01/04-168 OA3, para.9; ICC-02/04-01/05-367, para.22; ICC-02/05-02/09-267, p.6; ICC-01/04-01/06-2463, para.8; ICC-01/09-02/11-27, para.7. *See also* ICC-01/04-01/06-1433 OA11 (Partly Dissenting Opinion of Judge Song), para.4, specifying that “[a] decision ‘involves’ an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

⁴ *See e.g.*, ICC-01/04-168 OA3, para.9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.25; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27.

⁵ Application, paras.2, 10,11.

⁶ Application, para.11.

Defence cannot meaningfully cross-examine the witnesses because the counts are still undefined—is contrary to this understanding.

7. The Application also fails to fully acknowledge the Single Judge's findings. Contrary to the Defence's submission,⁷ the Single Judge's findings relevant to the First Issue are contained not only in paragraph 11, but also in paragraph 4 of the Decision. The Single Judge noted that article 56 allows "a unique investigative opportunity" at any stage of the investigation, including prior to formally requesting "new counts" beyond the arrest warrant.⁸ The Decision makes clear that the purpose of article 56 is to enable the Chamber to take "measures, for the benefit of the Prosecutor's investigation, aimed at collecting evidence in the presence of a risk that it would not be subsequently available". Recourse to article 56 measures is unrelated to any question of what the charges against any individual might ultimately be, whether relating to article 61(4) or article 101.⁹ The Single Judge further found that "[w]hether any such evidence [collected pursuant to the article 56 Decision] would eventually be used in the present proceedings or, potentially, in any separate proceedings is irrelevant."¹⁰

8. Secondly, the Application merely disagrees with the Decision and repeats the Defence's earlier unsuccessful submissions.¹¹ And although the Application alleges that "[t]he Single Judge did not appreciate the complexities with conducting meaningful cross-examination", it fails to explain why this is so. Indeed, as the Single Judge found, the Defence can meaningfully participate in the questioning conducted in the article 56 procedure because the written statements are "short, linear and clear as to the facts on which the two

⁷ Application, para.11.

⁸ Decision, para.4.

⁹ Decision, para.4.

¹⁰ Decision, para.4.

¹¹ Application, para.11. See ICC-02/04-01/15-259-Conf ("Defence response to the article 56 request"), paras.11-20. See *e.g.*, para.19, stating *inter alia* "[t]he Defence cannot provide a meaningful examination of the potential witnesses if it has not been informed of the counts they intend to testify to."

witnesses would testify.”¹² Further, the Defence has received all three relevant statements at least 10 weeks before the dates fixed for the testimony to be taken.¹³ In these circumstances, the Defence’s claim that its “questioning as to the witnesses’ veracity will be highly limited” is neither substantiated nor persuasive.

9. Because the First Issue misapprehends the Decision and disagrees with it, it is not appealable. It should therefore be dismissed.

(ii) *The Second Issue is not appealable*

10. The Second Issue—whether the Single Judge erred by failing to consider whether the Prosecution should have sought the Victims and Witnesses Unit (“VWU”)’s advice for its article 56 application¹⁴—is not appealable. The Second Issue wrongly assumes that article 56 measures are “protective measures” requiring consultation with the VWU. Moreover, it does not arise from the Decision, but instead from previous rulings.

11. First, the Application misunderstands the nature of the article 56 Decision. By claiming that “[t]he 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 [a]rticle 56[...]”,¹⁵ the Application assumes that an article 56 measure is a “protective measure” falling within the VWU’s mandate. This is incorrect. Article 56 measures are not “protective measures and security arrangements, counselling and other appropriate assistance for witnesses.”¹⁶ Instead article 56—as the Statute makes clear—relates to measures to benefit the Prosecution’s investigation and to preserve evidence when it may not be subsequently available for trial. Moreover,

¹² Decision, para.11.

¹³ See also Decision, para.14.

¹⁴ Application, paras.2, 10, 12.

¹⁵ Application, para.10.

¹⁶ Article 43(6) stating the VWU’s mandate. *Contra* Application, para.16.

contrary to the Application,¹⁷ consultation with the VWU at any stage cannot supplant the need for article 56 measures. That measures to preserve evidence may be needed in any given case remains a separate and distinct question.

12. In any case, the Application fails to note that the Single Judge considered that articles 68(1) and 69(2) were “an additional legal basis” for the Decision because the witness statements showed that “[the witnesses] may require specific protective measures as a result of their victimisation.”¹⁸ The Single Judge even ordered the Registrar “to make any necessary arrangements, including those that may be necessary to ensure the safety of the witnesses.”¹⁹ Accordingly, the VWU may still be consulted on matters of witness protection and safety now that article 56 measures have been ordered, and the Application is wrong to suggest otherwise.

13. In addition, the Second Issue does not arise from this Decision. The Application fails to specify why the VWU must be consulted at the article 56 stage.²⁰ Nevertheless, to the extent that the Application suggests that the VWU’s role was necessary at this stage to determine the existence of any risk to the two witnesses or their testimonies, preliminary findings on the risk were already made in the Single Judge’s earlier Decision of 24 June 2015 *inter alia* allowing the Prosecution access to Dominic Ongwen’s telephone communications.²¹

14. In the article 56 Decision, the Single Judge only recalled his earlier findings in the Decision of 24 June 2015 that:

“[T]here is reasonable suspicion that the meeting in question was not innocuous but was held with a view to exercising some form of influence on persons who possess information relevant to the case.

¹⁷ Application, para.10.

¹⁸ Decision, para.10.

¹⁹ Decision, Disposition.

²⁰ Application, paras.2,10,12.

²¹ ICC-02/04-01/15-254 (“Decision of 24 June 2015”), para.6.

The Single Judge agrees with the Prosecutor that '[s]imply gathering a number of potential witnesses in a single location with a view to discussing matters which are *sub judice* may lead to the pollution of those witnesses' accounts and thus interfere with the collection (and later presentation) of accurate evidence'. [...]"²²

Based on this earlier finding, the Single Judge concurred with the Prosecution that "the recurrence of such events may cause pressure upon witnesses" and found that such pressure created a risk that the witnesses may no longer be willing to testify freely or that their testimony may be tainted.²³ The Single Judge then granted the Prosecution's article 56 application.²⁴

15. Finally, the Application only repeats its earlier arguments.²⁵ The Prosecution's reliance on the opinion of a professional located in Uganda, rather than the VWU, in its article 56 application is irrelevant.²⁶ The Single Judge was not obliged to discuss this issue in the Decision.²⁷

16. Because the Second Issue misunderstands the nature of the article 56 measures ordered and does not arise from the Decision, it should be dismissed.

(iii) *The Issues do not meet the article 82(1)(d) criteria*

a) *The Issues do not significantly affect the fairness of the proceedings*

17. Neither Issue affects the fairness of the proceedings.²⁸ The Application simply fails to acknowledge the ample safeguards provided by the Decision to ensure that the proceedings remain fair. The Single Judge expressly considered

²² Decision, para.5, quoting Decision of 24 June 2015, para.6.

²³ Decision, para.6.

²⁴ Decision, para.8.

²⁵ Defence response to the article 56 request, paras.36-39; Application, para.12.

²⁶ *Contra* Application, para.12.

²⁷ *Contra* Application, para.12.

²⁸ Application, paras.13-16.

that the course of action did not prejudice Dominic Ongwen's rights.²⁹ First, the Single Judge held that Dominic Ongwen's Counsel could participate in the taking of testimony from the two witnesses and question them. The Defence has been provided the witnesses' statements and their identities in advance, so they can meaningfully participate in the testimony. Second, the Single Judge found that any eventual admissibility and weight attached to such testimony is to be decided only at trial, and only if "not prejudicial to or inconsistent with the rights of the accused." The use of such evidence at the confirmation phase in a similar manner would equally guarantee Dominic Ongwen's rights.³⁰ Third, the testimony is scheduled to take place on 16 and 17 September 2015, giving the Defence adequate time to prepare.³¹

18. Moreover, because the witness testimony will only be recorded, but not yet admitted, any alleged concerns of fairness are merely hypothetical at this stage. The Defence may raise any concrete issues of prejudice if and when they arise during the course of the trial.³²

19. Further, regarding the First Issue, the Defence once again wrongly assumes that article 56 measures are contingent on specific counts having been filed against a suspect.³³ In addition, the Application does not show why the Defence would be precluded from further investigations if it demonstrates why these are needed.³⁴ The Application also speculates that the Defence will be required to disclose evidence, and part of its case theory.³⁵ However, the Decision does not oblige it to do so.³⁶

²⁹ Decision, paras.11-12.

³⁰ Decision, paras.11-15.

³¹ Decision, paras.13-15.

³² See e.g. ICC-02/11-01/15-117, para.25; ICC-01/04-02/06-604, paras.19-20.

³³ Application, para.14.

³⁴ Application, paras.13-14.

³⁵ Application, para.15.

³⁶ Decision, Disposition.

20. Regarding the Second Issue, the Defence once again wrongly assumes that article 56 measures to preserve evidence and benefit the Prosecution's investigations fall within the VWU's remit.³⁷ Significantly, the Application fails to demonstrate any impact on fairness which may have resulted from the Prosecution not having consulted the VWU. Indeed, the Defence advances no argument.³⁸ Nor does it acknowledge that the Single Judge ordered the Registry to take measures to ensure the safety of witnesses.³⁹ Instead, the Application postulates that "a significant amount of the trial" would be conducted before the confirmation hearing,⁴⁰ but fails to note that such testimony would only be admitted at trial if consistent with Dominic Ongwen's right to a fair trial.

21. In this context, the Application fails to show that the proceedings would be rendered unfair by the Decision.

b) The Issues do not significantly affect the expedition of the proceedings

22. The Application speculates that the expedition of the proceedings would be affected,⁴¹ but fails to demonstrate any such impact. The Defence's claim that it will have to cease its investigations for 10 days to cross-examine the witnesses is unsupported, and remains its estimate.⁴² Nor does it show that the proceedings will be affected in any manner. Whether now or later at the confirmation hearing or at trial, Defence teams are expected to prioritise their work to prepare for the questioning of witnesses. Such tasks are legitimately and routinely expected of all counsel and cannot be said to impact the expedition of the proceedings. Neither is the Defence's complaint on

³⁷ Application, para.16. Moreover, article 68(4) states that the VWU *may* advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6. (emphasis added).

³⁸ Application, para.16.

³⁹ Decision, Disposition.

⁴⁰ Application, para.16.

⁴¹ Application, paras.17-19.

⁴² Application, paras.17-18.

purportedly insufficient resources relevant.⁴³ The Defence's determination of the distribution of its work load within its team is an internal matter, and not one that could impact the expedition of the proceedings.

23. Regarding the First Issue, the Defence claims that it would need to "alter its investigations and strategy based on the testimony", but fails to show that this would be the case.⁴⁴ As argued above, knowledge of the specific counts is not a prerequisite to take testimony under article 56. Likewise, on the Second Issue, the Application speculates that "the VWU could have recommended a different course of action for the potential witnesses."⁴⁵ Yet, these claims remain abstract and do not demonstrate any impact on the proceedings.

c) The Issues do not significantly affect the outcome of the trial

24. The Issues fail to show any impact on the outcome of the case, including the article 74 decision.⁴⁶ The Defence's repeated arguments that it would have to halt its investigations in the interim or disclose its evidence and case theory are unsupported.⁴⁷ Nor do they persuade, in any manner, that any purported prolonging of proceedings would "[jeopardise Dominic Ongwen's] chances of defeating the current counts in the arrest warrant".⁴⁸ The Application fails to show that these alleged concerns *significantly affect* the outcome of the case.

d) The Appeals Chamber's immediate resolution of the Issues will not materially advance the proceedings

25. Contrary to the Application,⁴⁹ the Appeals Chamber is not an advisory body on general principles and hypothetical matters, nor is its intervention

⁴³ *Contra* Application, paras.17-18.

⁴⁴ Application, para.18.

⁴⁵ Application, para.19.

⁴⁶ ICC-01/04-168 OA3, 13 July 2006, para.13.

⁴⁷ Application, para.20. *See also* paras.17,18.

⁴⁸ Application, para.20.

⁴⁹ Application, paras.21-22.

needed to correct the Defence's misunderstanding of article 56 and the Decision.⁵⁰ Although the Defence argues that it would "be forced to significantly alter its investigations and strategy",⁵¹ these claims are unsupported. In these circumstances, the Appeals Chamber need not intervene at this stage of the proceedings.

B. The Request for Interim Stay is unfounded

26. The Defence fails to justify its request for interim stay.⁵² It fails to show that such a stay is "necessary to facilitate the fair and expeditious conduct of the proceedings."⁵³ Moreover, the Application's reliance on the Single Judge's earlier decision⁵⁴ is inapposite. There, the Single Judge stayed the decision because the ongoing obligation to produce and submit "in-depth analysis charts" with each batch of disclosure had "the potential of tainting the present confirmation proceedings."⁵⁵ This is not the case here. Indeed, based on the current schedule, the testimony of the two witnesses will only be heard in mid-September.⁵⁶ In the interim five weeks, the Pre-Trial Chamber/Single Judge may decide on the Application. Even if leave to appeal were granted, the Appeals Chamber is equipped to grant suspensive effect pending the appeal if needed.⁵⁷ The request for the stay of the article 56 Decision at this stage is simply not justified and should be dismissed.

Conclusion

27. Both Issues are not appealable, and the Application fails to meet the article 82(1)(d) test for leave to appeal. Neither is the Defence's request for stay

⁵⁰ ICC-01/04-503 OA4 OA5 OA6, para.30.

⁵¹ Application, para.22.

⁵² Application, paras.23-25.

⁵³ ICC-02/11-01/11-809, para.38. *See also* ICC-01/04-01/06-2536, para.2 and ICC-01/05-01/13-711, paras.1-5.

⁵⁴ Application, para.23, referring to ICC-02/04-01/15-220 ("Decision of 14 April 2015"), paras.12-13.

⁵⁵ Decision of 14 April 2015, para.12.

⁵⁶ Decision, para.15 and Disposition.

⁵⁷ Article 82(3).

of the article 56 Decision justified. For these reasons, the Application should be dismissed.



Fatou Bensouda,
Prosecutor

Dated this 7th day of August 2015
At The Hague, The Netherlands