

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 10 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 Response on the Conduct of the Article 56 Testimony

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
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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for the Victims

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Detention Section

**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. Further to the "Prosecution's submissions on the conduct of proceedings pursuant to decision ICC-02/04-01/15-277" filed on 31 July 2015 ('Prosecution Request'), the Defence for Dominic Ongwen ('Defence') hereby submits its response to the Prosecution Request.

II. CONFIDENTIALITY LEVEL

2. Pursuant to Regulation 23*bis* of the Regulations of the Court, the Defence files this response as confidential because it deals with matters deemed confidential by the His Honour, Judge Cuno Tarfusser ('Single Judge') and the Parties.

III. PROCEDURAL HISTORY

3. On 26 June 2015, the Prosecution requested for an Article 56 unique investigative opportunity ('Prosecution Application').¹
4. On 3 July 2015, the Defence opposed the request.²
5. On 27 July 2015, the Single Judge granted the Prosecution's request ('Decision').³
6. On 31 July 2015, the Prosecution filed the Prosecution Request.⁴
7. On 3 August 2015, the Defence requested for Leave to Appeal the 'Decision'.⁵

¹ ICC-02/04-01/15-256-Conf.

² ICC-02/04-01/15-259-Conf.

³ ICC-02/04-01/15-277-Conf.

⁴ ICC-02/04-01/15-282-Conf.

⁵ ICC-02/04-01/15-284-Conf.

IV. SUBMISSIONS

A. Initial Remarks

8. The Defence opposes the recording of testimony of potential witnesses P-0226 and P-0227 as it considers that this does not fall within the purview of Article 56 to qualify as a unique investigative opportunity. In furtherance of this belief, the Defence filed a request for leave to appeal pursuant to Art. 82(1)(d) on 3 August 2015, arguing that the Single Judge erred in granting the Prosecution's Application to take the testimony.⁶
9. Assuming in the alternative that the Single Judge rejects the Defence's request for leave to appeal or the Appeals Chamber dismisses the appeal and allows the taking of testimony from the above mentioned witnesses, the Defence submits that the following guidelines be adopted. The Defence stresses that due to the unique situation in which these testimonies are to be taken, these recommendations are meant for the purpose of the Article 56 testimonies only.

B. Location of the Testimony

10. In principle, the Defence agrees with the Prosecution's proposal that the testimony of potential witnesses P-0226 and P-0227 be taken by video link, with the Chamber sitting in The Hague and the witnesses in camera from Kampala, Uganda, contingent on the Victims and Witnesses Unit's ('VWU') recommendations.
11. Similarly, the Defence further proposes that due to the limited resources available to the Defence at present, as well as the ongoing field investigations in Uganda, Counsel and his support staff be permitted to be in Uganda during the taking of the testimony of the potential witnesses.⁷ The Defence estimates that it will need

⁶ ICC-02/04-01/15-284-Conf.

⁷ By support staff, the Defence means Counsel, Assistant to Counsel and any other Defence personnel reasonably required for cross-examination of the witnesses.

to cease most of its investigations for at least ten days if it is required to attend at The Hague.

C. Time Allotment

12. The Defence concurs with the Prosecution that the two days allocated by the Single Judge for the taking of testimony might be insufficient. The Defence does not object to the dates suggested by the Prosecution. However, the Defence submits that the Single Judge allots one extra day, making it four days in total, just in case unforeseen issues arise during the testimony.

D. The Ntaganda Decision⁸

13. The Defence does not oppose the proposed principles set out in the 2 June 2015 "Decision on the Conduct of Proceedings" in the case of The Prosecutor v. Bosco Ntaganda ('Ntaganda Decision'),⁹ except a few key aspects therein.

- a. Because of the proximity of the Article 56 testimony to the interviews which encapsulate the witness statements, the Defence considers it unwarranted and unnecessary to allow these two potential witnesses to refresh their memories on the stand with their witness statements.¹⁰
- b. Since P-0226 and P-0227 are testifying to undefined counts, the Defence should be able to object to the use of any document with the witness during the examination, not two days beforehand.¹¹
- c. Rule 68, as amended by resolution ICC-ASP/12/Res.7, is not applicable to this case. This case is conducted under the previous version of Rule 68.¹²
- d. Any potential evidence submitted should be submitted through the potential witnesses only.¹³

⁸ ICC-01/04-02/06-619.

⁹ *Ibid.*

¹⁰ *See ibid*, para. 28.

¹¹ *Ibid*, para. 32.

¹² *Ibid*, paras 41-43 and 55.

¹³ *See ibid*, paras 52-53.

- e. Paragraphs 63-70 of the Ntaganda Decision should be removed, as the Defence argues below that the OPCV should not be allowed to partake in the Article 56 testimony.

E. Witness Preparation

- i. *There is no need for witness preparation*

14. The Defence opposes the proposed witness preparation/proofing because it is not warranted at this stage of the proceeding as there are no compelling circumstances to justify the practice.¹⁴
15. The practice and jurisprudence in regard to witness preparation or witness proofing has been received with mixed reactions by this Court.¹⁵
16. The Trial Chamber VI in the *Ntaganda Decision* gave consideration to the fact that both parties were agreeable to the practice.¹⁶ The Court also noted that witness preparation “*could, in principle, advance the fairness and expeditiousness of trial and at the same time help protect the well-being of witnesses.*”¹⁷ However, the Court observed that “*any decision on witness preparation should be made after a careful review of the circumstances prevailing in each case at the Court.*”¹⁸
17. There is a common thread in all the Prosecution’s submissions and the various Court decisions in support of witness preparation; facilitating a fair and expeditious trial, and ensuring the wellbeing of the witnesses. The Defence argues that these concerns are not applicable for the Article 56 testimony.
18. The Prosecution submits that the purpose of these sessions would be “to help ensure that the questioning of the witnesses during the proceedings is as focused,

¹⁴ The Defence clarifies that this opposition only applies to the Article 56 testimonies and reserves the right to submit otherwise for the remainder of the case against Mr Ongwen. The Defence feels that witness proofing should never be allowed.

¹⁵ Ntaganda Decision, para. 15.

¹⁶ *Ibid*, para. 16.

¹⁷ *Ibid*, para. 17.

¹⁸ *Ibid*, para. 17(emphasis added).

efficient and effective as possible, that the witnesses give relevant, accurate and structured testimony, and to help ensure the well-being of the witnesses.”¹⁹

19. Witnesses P-0226 and P-0227 will testify to alleged acts of sexual violence as per the Prosecution’s submissions.²⁰ However, there are no sexual crimes currently pending against Mr Ongwen. As such, the anticipated testimony is not in support of any particularised crimes and defeats the notion of “relevant, accurate and structured testimony”. For the Court to get a complete picture in its truth finding mission, the particular circumstances present in this case warrant an entire recounting of what happened to these witnesses. Unless and until particular charges are brought against Mr Ongwen, this proposed purpose of witness preparation is defeated.
20. The Prosecution also submits that preparation will ensure the wellbeing of the witnesses. The Defence argues otherwise based on the available witness statements which indicate that when the Prosecution interviewed the witnesses in May and June 2015, the witnesses had no security concerns and several even declined assistance from the Prosecution psychological expert.²¹ At this point, the Defence submits that an evaluation conducted by representatives from VWU would be appropriate to determine the well-being of the witnesses. Furthermore, the fact that this testimony is going to be taken in Uganda by video link negates the fears of uncertainty about testifying in a strange setting away from home.
21. The practice of witness preparation has been justified in various decisions by the time lapse between the events at issue and the last time witness statements were taken and the time of Court testimony.²² These circumstances are not applicable in the instant proceedings because the witness statements were taken in Uganda in May and June 2015.²³ The Prosecution’s proposed testimony is scheduled for

¹⁹ Prosecution Request, para. 22.

²⁰ *Ibid*, para. 8.

²¹ Prosecution application, Annex B.

²² *See generally* ICC-01/04-02/06-652, paras 8 and 11; ICC-01/09-01/11-524, parars 10, 32 and 36 ; ICC-01/04-01/06-1049, paras. 14, 50 and 55.

²³ *Ibid*, Annexes A and B.

15, 16, and 17 September 2015. The time difference in this case does not warrant another meeting between the Prosecution and the witnesses.

22. For all the above reasons taken in their entirety, the Defence submits that witness preparation is not warranted at this stage of the proceedings. The Defence asserts that witness familiarisation by the Victims and Witnesses unit, along with a courtesy greeting by the Prosecution, is all that is warranted under the circumstances.

ii. *If the Single Judge desires witness preparation, the Defence requests that the Ruto and Sang Protocol be used, with minor adjustments*

23. Assuming that the Single Judge finds that witness preparation in these proceedings is necessary, the Defence submits that the Ntaganda Protocol is not appropriate. The particular circumstances of this case and this portion of the proceedings in particular justify a different approach. The proceedings should follow the Ruto and Sang Protocol,²⁴ with a few modifications as outlined below.

- a. Paragraph 19 of the Ruto and Sang Protocol should be removed for this exercise. Considering the proximity of the statement to the testimony, there should be no need to ask about inconsistency statements.
- b. Paragraph 23 should be deleted because it is not relevant to the present case. The Defence is not aware of any exhibits that the Prosecution intends to use for these particular proceedings. In the event that exhibits are available, the protocol should be amended to allow only showing the witness the exhibits with a limited opportunity to comment on them. The purpose should be to familiarise the witness with the proposed exhibits to ensure an efficient and smooth taking of the testimony. Showing exhibits helps to avoid catching the witness off guard while on the stand without giving them adequate notice to consider whether they know of the exhibit. The only comment

²⁴ ICC-01/09-01/11

which the potential witness should be able to make about a potential exhibits is whether they know or recognise the exhibit.

- c. Paragraphs 24 and 25 should be deleted because this is the job of VWU during witness familiarisation.
- d. Paragraph 30 should be altered to require disclosure of extraneous material learned during the witness preparation session at least three days before the start of the examination-in-chief.

F. OPCV Involvement

24. The Defence submits that at this stage of the proceedings, victim participation applications have not been processed and participatory rights not granted. Yet, Article 68(3) of the Rome Statute read in conjunction with Rule 89(1) of the Rules of Procedure and Evidence (RPE) only allows for a victim to participate under the therein specified requirements. Those requirements are that the potential victim has submitted an application and it has been established that he or she is indeed the victim of a crime falling under the jurisdiction of the Court. Thus, the legal framework of the Court only provides for limited participatory rights for victims. The exercise of those rights falls furthermore under the discretion of the Chamber, which shall ensure that there is a balance between the rights of the suspect on the one hand, and those of victims on the other hand.

25. It has previously been established by Pre-Trial Chamber II that submissions in the name of victims presented under the above-mentioned conditions are unacceptable. Pre-Trial Chamber II decided that “the status of the victims concerned have not yet been submitted to the Chamber, which means that the status of the victim applicants has not been decided yet pursuant to rule 85 of the Rules. Thus, the status of the victims concerned for the time being is that of applicants. Consequently, only when a judicial decision on the status and participation modalities is taken, can the victims concerned exercise their rights

under article 68(3) of the Statute and present their 'views and concerns'".²⁵ In other words the mere 'intention' to apply for victim status does not suffice to reach the threshold of Article 68(3),²⁶ let alone a potential intention. Up until the moment a victim application is actually granted, the alleged victim remains anonymous and does not enjoy the status of victim under the Rome Statute. And thus, a victim's right to express his or her views and concerns cannot materialize until the moment the application has been granted.

26. When a Chamber eventually considers whether an applicant fulfils the criteria as set out in Rule 85, it must require certain proof of the elements set out therein. It cannot do so in abstract terms, but must instead decide on a case-by-case basis and take "into account all relevant circumstances".²⁷ Victim applications are in other words not something to be taken lightly. Only in an application can a potential victim explain why and how he or she was victimised, whether there was a causal link between an event and the suffering caused etc.
27. It is also submitted that only victims who have alleged to have suffered harm following directly from the counts as levied against a suspect are allowed to participate in the proceedings. Since potential victims have not been identified pursuant to Article 68(3) of the Rome Statute in conjunction with Rule 89(1) of the RPE, i.e. a causal link between a count and the alleged harm suffered, OPCV has not interests to represent.
28. Finally, the Defence maintains that Regulation 81(4)(c) of the RoC is not applicable to the Article 56 testimonies. The potential witnesses are giving testimony about undefined allegations, and the OPCV will not be able to take instructions from non-existent clients. It cannot represent the views of victims if there are no allegations to base victim-status on.

²⁵ ICC-01/09-01/11-14, para. 5.

²⁶ Ibid.

²⁷ See e.g. ICC-02/04-01/05-371, para. 2 and ICC-01/04-01/06-925, para. 28.

G. Standby Counsel for the Potential Witnesses

29. The Defence respectfully requests the Single Judge to order the Registrar to secure standby counsel for the potential witnesses. One of the witnesses, whilst signing her statement, admitting to having done actions which might fall under the Rome Statute if she were above 18 when the actions happened.²⁸ Whilst the Defence understands that the International Criminal Court lacks jurisdiction on actions committed by persons when they were under the age of 18, the same is not true of national governments. The Defence asks this out of caution, and feels that standby counsel *via* telephone should suffice.

IV. RELIEF

30. The Defence respectfully requests the Single Judge to adopt the abovementioned recommendations in the event that the Article 56 testimonies take place during mid-September 2015.

Respectfully submitted,



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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 10th day of August 2015

At The Hague, Netherlands

²⁸ UGA-OTP-0237-0230, 0230.