

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 14 August 2015

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Presiding Judge

SITUATION IN UGANDA

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

Confidential

**Prosecution application under regulation 24(5) for leave to reply to matters raised
in the Defence response on the conduct of the article 56 testimony**

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

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Mr Krispus Ayena Odongo

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

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REGISTRY

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Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. Pursuant to regulation 24(5) of the Regulations of the Court, the Office of the Prosecutor ("Prosecution") submits a request for leave to reply to two discrete submissions contained within the Defence's filing of 10 August 2015, "Defence Response on the Conduct of the Article 56 Testimony" ("filing 286"),¹ namely:
 - a. The application of rule 68 of the Rules of Procedure and Evidence ("RPE"), and
 - b. The modalities of the Defence's participation in potential video-link testimony.

Level of Confidentiality

2. Pursuant to regulation 23bis of the Regulations of the Court, the Prosecution files this application as "confidential" for the reasons set out at paragraphs 3 and 4 of filing 256.

Procedural History

3. On 26 June 2015, the Prosecution applied to the Pre-Trial Chamber for orders under article 56 of the Statute.² On 27 July 2015, the Single Judge exercising the functions of the Pre-Trial Chamber granted the Prosecution's application, setting 16 and 17 September 2015 for the dates to take the testimony of witnesses P-0226 and P-0227.³

¹ ICC-02/04-01/15-286-Conf.

² ICC-02/04-01/15-256-Conf.

³ ICC-02/04-01/15-277-Conf.

4. On 30 July 2015, the Prosecution submitted proposals ("filing 282")⁴ to take the testimony of witnesses P-0226 and P-0227 in accordance with the principles set out in "Decision on the conduct of proceedings" ("*Ntaganda* decision") and "Witness preparation protocol" in the case of *The Prosecutor v. Bosco Ntaganda*.⁵
5. On 10 August 2015, the Defence submitted filing 286 in response to filing 282. In paragraph 13, the Defence opposed a number of principles set out in the *Ntaganda* decision. In particular, the Defence advanced in paragraph 13.c that "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." Furthermore, the Defence also requested leave to remain in Uganda for the taking of the testimony of the two witnesses.⁶

Submissions

6. Resolution ICC-ASP/12/Res.7 amended rule 68 of the RPE on 27 November 2013. The resolution in paragraph 2 emphasised that in accordance with article 51, paragraph 4 of the Rome Statute, amendments to the RPE shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted.
7. Firstly, the Prosecution will submit that the rule 68, in either its amended or un-amended form, does not apply to the situation at hand. The rule itself states that it is inapplicable where, as here, the Pre-Trial Chamber has taken measures under article 56. In any event, it would be premature for the Pre-Trial Chamber to consider or rule upon the applicability of the amended

⁴ ICC-02/04-01/15-282-Conf.

⁵ ICC-01/04-02/06-619; ICC-01/04-02/06-652-Anx.

⁶ ICC-02/04-01/15-286-Conf, para.11.

rule 68 to the case against Dominic Ongwen, which will be a matter for any eventual Trial Chamber to rule upon.

8. Secondly, the Prosecution will submit that the Defence's request to be present in Uganda for the taking of the testimony of P-0226 and P-0227 is a matter upon which the Pre-Trial Chamber should hear further submissions to ensure that the Parties and the Chamber are all in the same effective position when hearing the testimony of the witness. The Defence team should not be present in the same room as the witness when the Prosecution and Pre-Trial Chamber are not.
9. Good cause⁷ exists for leave to be granted, as both issues cited above in paragraph 4 amount to "new and distinct issues of law".

⁷ See ICC-01/05-01/08-294, para.3 regarding the test of "good cause".

Request for Relief

10. The Prosecution seeks the leave of the Court to reply to the submissions made in Defence filing 286, paragraphs 11 and 13.c. In addition, the Prosecution proposes that no final determination regarding rule 68 need be made prior to the taking of testimony of witnesses P-0226 and P-0227.



Fatou Bensouda,
Prosecutor

Dated this 14th day of August 2015
At The Hague, The Netherlands