

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 17 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 to the Prosecution's Request for a Right to Reply to ICC-02/04-01/15-286-Conf

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
Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Herman Von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Section
Other**

I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby responds to the Office of the Prosecutor's ('Prosecution') request to reply to Defence filing 286.¹ The Prosecution's request does not contain any new or distinct issue of law not proposed by the Prosecution in ICC-02/04-01/15-282-Conf and respectfully requests His Honour, Judge Cuno Tarfusser ('Single Judge') to deny the 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 Single Judge and the Parties.

III. PROCEDURAL HISTORY

3. On 26 June 2015, the Prosecution requested for an Article 56 unique investigative opportunity.²
4. On 3 July 2015, the Defence opposed the request.³
5. On 27 July 2015, the Single Judge granted the Prosecution's request.⁴
6. On 31 July 2015, the Prosecution filed its proposals on the conduct of the Article 56 proceedings ('Prosecution Proposal').⁵

¹ ICC-02/04-01/15-289-Conf.

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 ICC-02/04-01/15-282-Conf.

7. On 10 August 2015, the Defence filed its response to the Prosecution Proposal ('Defence Proposal').⁶
8. On 14 August 2015, the Prosecution filed the "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" ('Prosecution Request').⁷

IV. SUBMISSIONS

A. Initial Remarks

9. The Defence notes the complete lack of *inter partes* discussions about procedures to be used for the Article 56 testimonies. Knowing that Chambers of the Court routinely order the Parties to discuss issues like these before submitting joint or separate proposals, the Defence expected an email or telephone call, not an official notice from Court Management. Even so, the Defence can understand why the Prosecution might have "jumped-the-gun" on issue because of the rarity of the use of Article 56. Henceforth, the Defence respectfully asks that there be an *inter partes* discussion before such pleadings are submitted.

B. The Defence Proposal was Explicitly Limited to the Article 56 Testimonies

10. The comments within the Defence Proposal were specifically limited to the Article 56 testimonies.⁸ The Prosecution's assertion that Pre-Trial Chamber II might usurp the Trial Chamber's power is misplaced and incorrect.⁹ The Defence does not and never did intend for these recommendations to persist through the entire proceedings.

⁶ ICC-02/04-01/15-286-Conf.

⁷ ICC-02/04-01/15-289-Conf.

⁸ ICC-02/04-01/15-286-Conf, para. 9.

⁹ ICC-02/04-01/15-289-Conf, para. 7.

C. The Prosecution Proposal Raised the Issues Discussed in the Defence Proposal

11. The Prosecution specifically recommended the use of paragraphs 20-51 of the *Ntaganda Decision*, which encompasses paragraph 41-43.¹⁰ It stated:

*The Prosecution submits that the scope, order and mode of questioning, the use of documents during the examination of the witnesses, the provisions for the possibility of the witnesses incriminating themselves or turning hostile and the provisions for in-court protective measures and special measures under rules 87 and 88 of the Rules should be those set out in paragraphs 20 to 51 of the Ntaganda decision.*¹¹

12. The Defence comment in paragraph 13(c) of the Defence Proposal is a direct response to the Prosecution Proposal, and does not amount to a “new and distinct issue[] of law”.¹² Paragraphs 41-43 of the *Ntaganda Decision* speak directly to Rule 68(3) of the Rules of Procedure and Evidence.

13. Furthermore, following the Prosecution’s logic, all of the issues raised in paragraph 13(a)-(e) and paragraph 23(a)-(d) would be “new and distinct issues of law”. Why has the Prosecution not requested to comment on the other issues, which includes the recommendation of a protocol different from the *Ntaganda Protocol*?

14. Finally, if the Prosecution does not foresee any ruling on the applicability of Rule 68 for the Article 56 testimonies being necessary, the question is purely moot, and no further submissions need to be taken by the Single Judge.

15. As for witness preparation and the location in which the Defence sits, the Defence does not completely understand the Prosecution’s assertion about the Defence

¹⁰ ICC-02/04-01/15-282-Conf, para. 21.

¹¹ *Ibid.*

¹² ICC-02/04-01/15-289-Conf, para. 9.

being in Uganda.¹³ The Defence requested to be in Kampala for the same reason that the Prosecution requested the potential witnesses be in Kampala, judicial and financial economy.¹⁴ Additionally, according to the witness preparation protocol recommended by the Prosecution, the person conducting the witness preparation should be the person questioning the witness.¹⁵ Logically, the Defence only thought it normal that the Prosecutor(s) conducting the examination would be at the location of the witnesses, i.e. Kampala.

16. The Defence does not require being in the same physical room as the witnesses if the Prosecution is not there. As it has stated before, the Defence does not have dedicated investigation staff. The persons conducting investigations are the same that are drafting pleadings, interviewing witnesses, reviewing evidence, etc. The Defence only seeks to save time and money from the extremely limited budget for indigent persons.

IV. RELIEF

17. The Defence respectfully requests the Single Judge to deny the Prosecution Request. None of the requests in the Prosecution Request amount to a “new and distinct issues of law” as stated by the Prosecution.

¹³ *Ibid*, para. 8.

¹⁴ Compare ICC-02/04-01/15-282-Conf, paras 6-7 and ICC-02/04-01/15-286-Conf, para. 11.

¹⁵ ICC-01/04-02/06-652-Anx, para. 6. See also paragraph 7 which requires a second attorney from the calling Party to be present “unless exceptional circumstances render this impossible.” [emphasis added]

Respectfully submitted,



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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 17th day of August 2015

At Gulu, Uganda