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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*

Public redacted

Decision on the “Prosecution application for the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute”

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

The Office of the Prosecutor

Fatou Bensouda

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Legal Representatives of the Victims

Legal Representatives of the 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

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Cuno Tarfusser, Single Judge exercising the functions of the Chamber, issues this decision on the “Prosecution application for the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute” filed on 26 June 2015 (ICC-02/04-01/15-256-Conf).

1. The Prosecutor submits that two potential witnesses who are victims of sexual violence (namely, [REDACTED] and [REDACTED], referred to as P-0226 and P-0227, respectively) have been subjected to pressure that may impact on their willingness to testify at trial and the content of their testimony. The Prosecutor requests that their testimony be taken as soon as possible and video recorded, on the grounds that their current willingness to give evidence represents a unique opportunity to obtain and preserve their testimony within the meaning of article 56 of the Statute.

2. In its response filed on 3 July 2015 (ICC-02/04-01/15-259-Conf), the Defence submits that the Prosecutor’s application should be rejected as “it violates: a. Mr Ongwen’s rights to know the charges before him, pursuant to Articles 61(4) and 67(1)(a) because the Prosecution has not proffered new counts pursuant to Article 58(6) of the Statute; b. Mr Ongwen’s rights to have adequate time to prepare for trial, pursuant to Article 67(1)(b); c. Article 101 of the Statute; and d. Article 56, when interpreted by Article 21, of the Statute”.

3. Pursuant to article 56(1) of the Statute, in case of “a unique opportunity to take testimony or a statement from a witness [...] which may not be available subsequently for the purposes of a trial”, the Chamber may, upon request of the Prosecutor, “take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence”. Among the non-exhaustive list of possible measures, article 56(2) of the Statute explicitly mentions “[d]irecting that a record be made of the proceedings”, “[a]uthorizing counsel for a person who has been

arrested [...] to participate” and, in general, “[t]aking such other action as may be necessary to collect or preserve evidence”.

4. Article 56 of the Statute refers to “a unique investigative opportunity” without restriction and is therefore, in principle, applicable at any stage of the investigation. Article 56(2)(d) also reveals that measures aimed at preserving and collecting evidence pursuant to article 56 may be taken even before a person has been arrested or appeared before the Court in response to a summons or before counsel has been designated. Thus, the Single Judge is not persuaded by the Defence argument that recourse to measures under article 56 is not possible prior to “new counts”, additional to those on the basis of which the warrant of arrest against Dominic Ongwen was issued, being formally “requested”. In the latest status conference (ICC-02/04-01/15-T-6-ENG), the Single Judge has stated that the Prosecutor may bring in the present proceedings charges having a factual basis going beyond that for which the warrant of arrest was issued insofar as formal notice thereof is given by 21 September 2015. However, the matter *sub judice* in the present decision is different and relates to 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. Whether any such evidence would eventually be used in the present proceedings or, potentially, in any separate proceedings is irrelevant. For these reasons, the Defence argument that the Prosecutor’s request for measures under article 56 of the Statute violates articles 61(4) and 101 of the Statute cannot be sustained.

5. In the application under consideration the Prosecutor refers to a particular episode which illustrates the pressure that the two potential witnesses are facing. As the Single Judge observed in a previous decision (ICC-02/04-01/15-254), in early June 2015 a meeting was held in Uganda under the auspices of a Ugandan non-governmental organisation, during which

proceedings in the present case were discussed, including opinions as to the guilt or innocence of Dominic Ongwen and the collaboration of participants with the Court. Witnesses P-0226 and P-0227 both attended this meeting. The Single Judge already found that this meeting, during which Dominic Ongwen personally intervened by telephone from the Court's Detention Centre, had the potential of tainting the evidence in the present case. In particular, the Single Judge held:

[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. 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". The information that the organisers of the meeting attempted to impress upon the attendees the importance of Dominic Ongwen's return to Uganda, and Dominic Ongwen's personal intervention, by telephone, in the meeting are factors of particular concern. The fact that the attendees were told to tell the "truth" cannot be taken as negating these concerns.

6. The Single Judge concurs with the Prosecutor that "as months and possibly years elapse before these potential witnesses give evidence at any future trial, the recurrence of such events may cause pressure upon witnesses". In particular, the Single Judge is concerned of the risk that such pressure may result in the witnesses being no longer willing to testify freely before the Court or in the genuineness of their testimony being tainted.

7. The Single Judge is not persuaded by the Defence submission that "Article 56(1)(a) is clear as to its intent" in that "[t]he issue is whether the witness will be physically able to attend trial, not if the witness might forget his or her testimony by the time trial starts or decide not to testify". Contrary to the Defence argument, article 56(1)(a) contains no wording to the effect that a unique investigative opportunity to take testimony is present only in case of a risk that the witness will not be physically able to attend trial. Rather, this

provision speaks of testimony “which may not be available subsequently for the purposes of a trial”. The Single Judge is of the view that not only physical conditions may pose a risk to the subsequent availability of a testimony, but that any such risk may equally result from interference on the part of third persons causing a witness not to attend when called to testify at trial or to testify incompletely or insincerely.

8. The Single Judge considers that there exists a risk that the testimony from witnesses P-0226 and P-0227 “may not be available subsequently for the purposes of a trial”, within the meaning of article 56 of the Statute.

9. In these circumstances, in order to preserve the potentially relevant evidence of witnesses P-0226 and P-0227 in the presence of such risk, it is warranted to provide for their testimony under oath before the Chamber, in the presence of the Prosecutor and the Defence. The testimony will be video recorded and written transcripts be made. The video recording and the transcripts will then be available for any future trial.

10. Article 68(1) of the Statute, which obliges the Court to take appropriate measures for the protection of, *inter alia*, the psychological well-being, dignity and privacy of victims and witnesses, read together with article 69(2) of the Statute, which makes an exception for this purpose to the requirement that the testimony of witnesses at trial shall be given in person, provides an additional legal basis for the present decision. Indeed, it is evident from the statements of witnesses P-0226 and P-0227 that they may require specific protective measures as a result of the nature of their victimisation. In particular, there may be benefit in completing the witnesses’ involvement with the Court as soon as possible, so as not to force them to keep reliving their victimisation for a long period of time. The present decision is therefore

taken also with a view to making it possible for the eventual Trial Chamber to consider not calling the two witnesses to testify in person.

11. The Single Judge considers that this course of action is not prejudicial to Dominic Ongwen's rights. His counsel will have the opportunity to participate in the taking of testimony from the two witnesses, including by conducting his questioning of the two witnesses after the Prosecutor. The Single Judge is of the view that the Defence, having been provided with the written statements of the two witnesses collected by the Prosecutor, which 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.

12. In addition, the Single Judge underlines that the taking of testimony of the two witnesses will be done for the purpose of preserving their evidence, without prejudice to the eventual use of that evidence in the proceedings. Indeed, article 56(4) of the Statute states that the admissibility and weight of the evidence taken under article 56 of the Statute shall be ruled on at any eventual trial by the relevant Trial Chamber. More specifically, in accordance with article 69(2) of the Statute, the use at trial of recorded testimony of a witness by means of video technology is permitted only insofar as the Trial Chamber considers that this is not prejudicial to or inconsistent with the rights of the accused. Accordingly, if charges are confirmed, the recorded testimony of witnesses P-0226 and P-0227 will be admitted by the Trial Chamber only if the latter is satisfied that this would not prejudice Dominic Ongwen's statutory rights. In the view of the Single Judge, this constitutes an additional guarantee for the rights of the defence and militates in favour of obtaining testimony of the two witnesses pursuant to article 56 of the Statute already at this stage. If the evidence is sought to be presented at the confirmation of charges hearing, this Chamber will be bound by essentially the same rules as concerns the guaranteeing of defence rights.

13. In considering the date for the testimony of the two witnesses, the Single Judge must strike the necessary balance between the risk, as identified above, that the evidence of the two witnesses becomes unavailable, on the one hand, and the need to allow the Defence sufficient time to prepare in order to be able to meaningfully participate in the taking of the testimony and fully exercise its defence rights, on the other hand. This requires that the Defence be given sufficient time to prepare.

14. As explained above, rather than an immediate threat, the identified risk in the present case is that the passage of time, with possible recurrence of episodes in which witnesses P-0226 and P-0227 are put under pressure, may adversely impact on their willingness to testify in the proceedings or on the genuineness of their testimony. In terms of the Defence right to prepare for the taking of testimony, the Single Judge notes that the Defence was provided with the statements of the witnesses as part of the Prosecutor's application that is the subject matter of the present decision on 26 June 2015. The identity of the two witnesses has been disclosed to the Defence at the same time.

15. In light of these circumstances, the Single Judge considers it appropriate to set the date for the taking of testimony of witnesses P-0226 and P-0227 at 16 and 17 September 2015.

16. For the proper conduct of the proceedings, the Prosecutor is instructed to inform the Chamber and the Defence, no later than 17 August 2015, of the documents, if any, she intends to use during the examination of each witness.

FOR THESE REASONS, THE SINGLE JUDGE

FINDS that there exists a unique investigative opportunity with respect to prosecution witnesses [REDACTED] (P-0226) and [REDACTED] (P-0227) and therefore

GRANTS the Prosecutor's application;

DECIDES that, subject to their willingness, prosecution witnesses [REDACTED] [REDACTED] (P-0226) and [REDACTED] (P-0227) will give testimony, on oath pursuant to rule 66 of the Rules of Procedure and Evidence, in closed session, in the presence of the Prosecutor and the Defence;

DECIDES that the testimony shall be video recorded and a written transcript be made;

DECIDES that the Defence of Dominic Ongwen, if it so wishes, will be permitted to question prosecution witnesses [REDACTED] (witness P-0226) and [REDACTED] (witness P-0227) after the questioning by the Prosecutor;

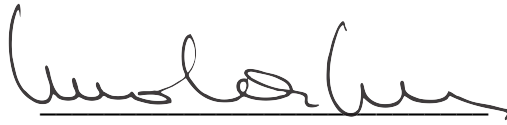
SETS the date for the testimony of prosecution witness [REDACTED] (witness P-0226) at 16 September 2015;

SETS the date for the testimony of prosecution witness [REDACTED] (witness P-0227) at 17 September 2015;

ORDERS the Prosecutor to inform the Chamber and the Defence, no later than 17 August 2015, of the documents, if any, she intends to use during the examination of each witness; and

ORDERS the Registrar to make any necessary arrangements, including those that may be necessary to ensure the safety of the witnesses.

Done in both English and French, the English version being authoritative.

A handwritten signature in dark ink, appearing to read 'Cuno Tarfusser', written over a horizontal line.

Judge Cuno Tarfusser
Single Judge

Dated this 27 July 2015

At The Hague, The Netherlands