

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 25 May 2016

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge
Judge Marc Perrin de Brichambaut
Judge Chang-ho Chung

SITUATION IN UGANDA

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

Public

Public Redacted Version of 'Response to "Second Prosecution Application to the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute"', filed on 8 October 2015 as ICC-02/04-01/15-314-Conf

Source: Defence for Dominic Ongwen

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

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Legal Representatives of the Victims

Legal Representatives of the Applicants

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**Unrepresented Applicants
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I. INTRODUCTION

1. The Defence for Dominic Ongwen (“Defence”) hereby responds to the Office of the Prosecutor’s (“Prosecution”) application made pursuant to Article 56 of the Rome Statute (“Statute”). The Defence submits that measures pursuant to Article 56 of the Statute are of an *exceptional* nature¹ and that: (i) the wide-sweeping measures requested is beyond the scope of Article 56 of the Statute; and violates the fair trial rights of Mr. Ongwen; (ii) the factual basis upon which the Prosecution relies is without merit; and (iii) the Prosecution had the opportunity to present the matters contained in this application when making its first application pursuant to Article 56 on 26 June 2015.²
2. It is therefore argued that the Prosecution’s application extends beyond the scope for which it has been made, neither ensures the efficiency and integrity of the proceedings against Mr. Ongwen nor protects the rights of Mr. Ongwen who is a suspect before the Court. The Defence respectfully requests Pre-Trial Chamber II (‘Chamber’) to find that no unique investigative opportunity exists with regard to Witnesses P-0099, P-0101, P-0198, P-0214, P-0235 and P-0236.
3. In the alternative, if the Chamber decides to utilize Article 56, the Defence requests that such hearings do not take place until after the Confirmation of Charges Hearing.

II. CONFIDENTIALITY LEVEL

4. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court, the Defence files this response and annexes as confidential *ex parte* because it discusses Defence

¹ See Decisions taken by the Preparatory Committee at its Session held from 4 to 15 August 1997, UN Doc. A/AC.249/1997/L8/Rev.1 (1998).

² ICC-02/04-01/15-256-Conf.

work-product and investigations. A confidential redacted version is filed concurrently.

5. In relation to [REDACTED], the Defence contends that rules of confidentiality are intended to protect witnesses or sensitive information. Neither [REDACTED] nor the Prosecution cite valid grounds to maintain confidentiality of a report which is of a general nature. The Defence asserts that [REDACTED] desire to have [REDACTED] assistance remain confidential is not a valid reason when weighed against the need for transparency.³ It is argued that the maintenance of confidentiality in relation to [REDACTED] report is therefore neither warranted nor in the interests of justice.

III. PROCEDURAL HISTORY

6. On 26 June 2015 the Prosecution filed the 'Prosecution application for the Pre-Trial Chamber to preserve evidence and take measures under Article 56 of the Rome Statute' ('First Application'), wherein it requested for measures under Article 56 of the Rome Statute *vis-à-vis* witnesses P-0226 and P-0227.⁴
7. The Defence filed its response to the First Application on 27 July 2015, opposing the application.⁵
8. On 3 July 2015 the Single Judge of the Chamber issued its Decision on the First Application ('Decision'), finding that a unique investigative opportunity existed with regard to Witnesses P-0226 and P-0227 and deciding that both witnesses should give testimony.⁶
9. On 30 July 2015 the Prosecution filed the 'Prosecution's submissions on the conduct of proceedings pursuant to decision ICC-02/04-01/15-277'.⁷

³ The Prosecution contends that [REDACTED] wishes [REDACTED] assistance to the Court to remain confidential" (see *ibid*, para. 12, emphasis added).

⁴ ICC-02/04-01/15-256-Conf.

⁵ ICC-02/04-01/15-259-Conf.

⁶ ICC-02/04-01/15-277-Conf.

⁷ ICC-02/04-01/15-282-Conf.

10. The Defence filed the 'Defence Request for Leave to Appeal Decision ICC-02/04-01/15-277' on 3 August 2015, requesting the Single Judge of the Chamber to grant leave to appeal on the two issues mentioned therein and to grant interim stay on the taking of the testimony of P-0226 and P-0227.⁸
11. On 7 August 2015 the Prosecution filed the 'Prosecution response to Defence request for leave to appeal the Decision granting article 56 measures to preserve evidence'.⁹ Therein the Prosecution submitted that the issues put forward by the Defence failed to meet the threshold of Article 82(1)(d) of the Statute and that there was no justification for the Defence's request for stay of the implementation of the Decision.
12. The Defence filed the 'Defence Response on the Conduct of the Article 56 Testimony' on 10 August 2015.¹⁰
13. On 11 August 2015, the Chamber issued its 'Decision on the "Defence Request for Leave to Appeal Decision ICC-02/04-01/15-277"', rejecting the Defence's request for leave to appeal.¹¹
14. 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' on 14 August 2015, requesting the Chamber to reply to two matters raised by the Defence.¹²
15. On 17 August the Defence filed the 'Defence Response to the Prosecution's Request for a Right to Reply to ICC-02/04-01/15-286-Conf', requesting the Chamber to reject the request.¹³
16. The Chamber issued its 'Decision on the "Prosecution's submissions on the conduct of proceedings pursuant to decision ICC-02/04-01/15-277-Conf. In that

⁸ ICC-02/04-01/15-284-Conf.

⁹ ICC-02/04-01/15-285-Conf.

¹⁰ ICC-02/04-01/15-286-Conf.

¹¹ ICC-02/04-01/15-287-Conf.

¹² ICC-02/04-01/15-289-Conf.

¹³ ICC-02/04-01/15-291-Conf.

same decision, the Chamber also decided on the Prosecution's request for leave to reply as a preliminary matter.

17. On 15-19 September 2015, the Single Judge, Judge Tarfusser heard the Article 56 testimonies for P-0226 and P-0227 with the Prosecution and Defence.
18. On 2 October 2015, the Prosecution filed its second request for Article 56 testimonies, requesting to have six witnesses testify under Article 56.¹⁴
19. On 5 October 2015, the Single Judge notified the parties that the Defence's response time was shortened from 12 October 2015 to 8 October 2015.¹⁵

IV. SUBMISSIONS

A. The Prosecution's Application is Beyond the Scope of Article 56 of the Statute and violates the rights of Mr. Ongwen

20. The Defence refers to submissions made concerning the intention of Article 56 of the Statute in the Defence Response the Prosecution's Request for an Article 56 Unique Investigative Opportunity.¹⁶ The Defence submits that measures pursuant to Article 56 of the Statute are of an exceptional nature as demonstrated by the *travaux préparatoires* of the Rome Statute and that the intention of the drafters was to ensure that the rights of suspects be protected during the investigative stage of proceedings.¹⁷
21. The Defence notes that the Prosecution's request for additional and unique investigative opportunities relates to six additional witnesses. Should this request be granted, the Prosecution will therefore have the opportunity to examine nearly 10% of its witnesses prior to the confirmation of charges, which is excessive and not in line with the *unique* and *exceptional* nature of the measures sought.¹⁸

¹⁴ See ICC-02/04-01/15-310-Conf, with associated confidential annexes.

¹⁵ Email from Legal Officer Silvestro Stazzone to Krispus Ayena Odonga on 5 October 2015 at 11h16 GMT+2.

¹⁶ See ICC-02/04-01/15-259-Conf, paras 11-12.

¹⁷ See ICC-02/04-01/15-259-Conf, paras 11-12.

¹⁸ The Defence notes that the Prosecution has disclosed 89 witnesses to the Defence, which does not include P-221 because she will only testify for the Defence. If these women testify, eight of the 89 persons disclosed would have given trial testimony before the Confirmation of Charges Hearing. It is also noted that many of the pre-

22. The Defence stresses that the crimes intended to be charged against Mr. Ongwen are, however, not limited to the sexual and gender-based crimes (SGBC) for which the Prosecution seeks to obtain evidence pursuant to Article 56 of the Statute.¹⁹ Since the witnesses in question very easily could also speak to events relating to other alleged crimes, or the lack of Mr. Ongwen's participation in the allegations, the scope of the Application is excessive and prejudicial to Mr. Ongwen's right to adequately prepare his defence under Article 67(1)(b) of the Rome Statute. The Defence only became aware of the Prosecution's interests in Odek and Abok on 18 September 2015.

B. The Prosecution's Submissions are Without Factual Basis

23. The Defence submits that the: (i) passage of time supports the contention that unique investigatory measures are not warranted; (ii) Prosecution's challenge to the use of the term "brother" is culturally insensitive and inaccurate; (iii) and Prosecution's submissions in relation to the [REDACTED] are inaccurate.
24. At the outset, the Defence notes that it has not been afforded the appropriate time to procure an expert with sufficient knowledge of the contextual situation of this case so to rebut the report of [REDACTED]. It is argued that [REDACTED] request for confidentiality calls into question the credibility of the "expert" whose report is derived from research.²⁰ One would presume that an expert's report based on research would be public, save for where confidential information in relation to specific victims was provided. The Defence therefore reserves the right to challenge the assertions made therein at a later date.
25. Further, considering that the allegations contained in the report cannot be rebutted at this time and that the Prosecution largely relies upon the report, it is submitted

2015 witnesses do not testify to acts allegedly committed by Mr. Ongwen, which means that the percentage would invariably rise.

¹⁹ ICC-02/04-01/15-305-Conf.

²⁰ The Defence notes that [REDACTED] is not an expert admitted to the ICC List of Experts before the ICC: <http://www.icc-cpi.int/iccdocs/PIDS/other/180815-List-of-Experts-Eng.pdf>

that granting this application without the appropriate opportunity to rebut the presumptions contained therein would violate the rights of Mr. Ongwen.²¹

1. *The Passage of Time Supports the Contention that Unique Measures are not Warranted*

26. The Prosecution argues that the passage of time may have impacted the veracity of the witnesses' testimony. The Defence notes that *some* of the witnesses in question: (i) have lived in Uganda for over 10 years²² since the alleged crimes; (ii) have either received or are receiving psycho-social care or group therapy, noting the extensive SGBV support in Northern Uganda both during and after the conflict; and (iii) are settled with their families, who together with the community, have welcomed them and their children.²³ Therefore, the implementation of measures pursuant to Article 56, as argued by the Prosecution, is not necessary for the protection and psychological well-being of these witnesses.²⁴

27. This issue is therefore not new and the alleged negative consequences of delaying testimony are not heightened in this case as the witnesses have had the opportunity to discuss these matters. In this regard, the suggestion of re-traumatization during trial is also inapposite. There is also therefore no evidence to suggest that the witnesses' testimony would be altered by failing to hear their testimony under unique investigatory measures in light of the passage of time, therapy, and integration in society for over a decade in some cases.²⁵

²¹ See *supra*, para. 21.

²² See ICC-02/04-01/15-310-Conf-AnxC, pg. 5, para. 11 (P-0101); pg. 24, para. 70 (P-099); and pg. 69, para. 119 (P-0198).

²³ The Defence points to the communities in [REDACTED], which have accepted [REDACTED] with open arms.

²⁴ See *contra* ICC-02/04-01/15-310-Conf, para. 20.

²⁵ *Supra*, footnote 11.

2. The Prosecution's Submissions in Relation to the [REDACTED] are Inaccurate

28. The Defence contends that the Prosecution's submissions in relation to third party tampering – namely by the Uganda-based NGO, [REDACTED] [REDACTED] are also inapposite. The Defence submits that the organisations such as [REDACTED] have been working in northern Uganda for years and their output is appreciated by the affected women and society at large. In relation to the meeting held by [REDACTED] [REDACTED] representatives explained that this meeting was group therapy which is an effective form of therapy. They also meant to use it as a means to give the women information on the ICC process.

29. In relation to the suggestion that the forthcoming [REDACTED] report will traumatize the witnesses,²⁶ the Defence further reminds the Prosecution that, organizations such as [REDACTED], [REDACTED]²⁷ [REDACTED] and UN Office of the High Commissioner for Human Rights,²⁸ Human Rights Watch,²⁹ [REDACTED]³⁰ and Save the Children, among others, have made such publications for several years. The Prosecution has not provided any evidence or demonstrated that these reports, much like the forthcoming [REDACTED] report, will lead to further traumatising warranting the imposition of unique investigating measures. The Prosecution's arguments are speculative and should therefore be dismissed in this regard.

²⁶ See ICC-02/04-01/15-310-Conf, paras 37-40.

²⁷ [REDACTED]
[REDACTED]
[REDACTED]

²⁸ See for instance 'The Dust has not yet Settled: Victim's views on the Right to Remedy and Reparations: A report from the Greater North of Uganda (2011) (Chapter 4 deals with serious violations including SGBV and gets views from victims. Available at <http://www.ohchr.org/Documents/Press/WebStories/DustHasNotYetSettled.pdf>

²⁹ Has documented various reports detailing voices of victims in the Northern Uganda Conflict.

³⁰ [REDACTED]
[REDACTED]

3. *Submissions in Relation to Individual Witnesses*

30. Concerning P-0235 (D26-004), the Defence contends that this witness is not a genuine Prosecution witness, noting that she provided a statement to the Prosecution after what appears to be poor interpretations from the Prosecution's interpreter. She told the Defence on [REDACTED] that she thought that she was talking to people who were working on Mr. Ongwen's behalf at the ICC.³¹
31. D26-004 informed the Defence on 6 October 2015 that she wanted to testify on behalf of the Defence, her only worry being that the Prosecution and Court would come after her for being a Defence witness. D26-004 was reassured by the Defence that neither would come after her because we are all looking for the same thing, the truth. She stated that it was okay to tell the Chamber this, but that she would inform the Prosecution the next time they contacted her.³²
32. The Defence notes similar issues in relation to P-0214 (D26-010). D26-010 has met with the Defence severally, and wishes to testify on behalf of the Defence, not the Prosecution. She is scheduled for a follow-up interview with the Defence [REDACTED] [REDACTED], and two weeks later to sign her statement for the Defence. The Defence wonders why the Prosecution believes that D26-010 wants to testify for it if she and P-0221 (D26-013) allegedly "facilitated Dominic Ongwen's communication with his other alleged forced wives"?³³ D26-010 unequivocally told the Defence that she wanted to testify on behalf of the Defence.
33. In relation to P-0236 (D26-005), she too stated that she wished to testify for the Defence, in [REDACTED] 2015. She has talked to the Defence regularly, and has offered to introduce the Defence to further witnesses.

³¹ See Confidential *ex parte* Annex A.

³² See Confidential *ex parte* Annex B.

³³ ICC-02/04-01/15-310-Conf, para 28.

4. *The Prosecution's Challenge to the Use of the Term "Brother" is Culturally Insensitive*

34. The Prosecution further argues that Counsel's reference to Mr. Ongwen as "brother" caused distress to the witness. The Defence contends that the Prosecution's assertion is culturally insensitive and that it ought to know – in light of their work in Uganda – that the terms "brother" and "sister" are commonly used among individuals of Acholi ethnicity when referring to one another. These references are in no way meant to intimidate or exert influence and must be read in their cultural context.
35. Since people of Acholi ethnicity typically relate to one another, the suggestion that the witness who is of Acholi ethnicity could have found the address 'strange' is simply inaccurate. It is therefore unreasonable to conclude that these common addresses are alienating or distressing.

C. *In the Alternative, if the Chamber if the Chamber Decides to Hold Another Article 56 Hearing, it Should Wait until After the Confirmation of Charges Hearing*

36. The Defence notes that there are three trial proceedings currently underway, *Ruto and Sang*, *Bemba et al*, and *Ntaganda*. On 10 November 2015, opening statements in *Gbagbo and Blé Goudé* are scheduled. Starting from 19 October 2015, both courtrooms at the ICC will be in continual use until the move to the new building. From there, there are three weeks for the move, and then winter recess begins.³⁴
37. From the Article 56 testimonies during September, it took two days to examine each witness. This witnesses spoke to the new prospective counts of SGBC, and not to any other allegation or prospective allegation. Most of the witnesses which the Prosecution proposes to examine will be able to speak to more than the allegations of SGBC. These examinations could last three to four days each, meaning that a full month would be need to conduct Article 56 testimonies of these six witnesses.

³⁴ See the tentative courtroom calendar at: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/hearing%20schedule/Documents/2015calendarbilingual.pdf

38. Furthermore, the Defence, when asked how long it would need to investigate additional charges if filed by the Prosecution, stated that it would need four to five months to investigate new charges.³⁵ This statement was made in reference to Pajule, child soldiers and SGBC only. The Prosecution has now introduced prospective new crimes for Abok and Odek. Even if courtroom space becomes available for a month, it would still violate Mr. Ongwen's right to adequate time to prepare for the Confirmation of Charges Hearing.³⁶
39. In the alternative, if the Chamber decides to hold another Article 56 hearing for these six witnesses, the Defence respectfully requests that the hearing be held after the Confirmation of Charges Hearing.

IV. RELIEF

40. The Defence respectfully requests that the Prosecution's request to conduct a unique investigative examination pursuant to Article 56 of the Statute be denied.
41. In the alternative, if the Chamber decides to hold another Article 56 testimonies, the Defence respectfully requests that it be held after the Confirmation of Charges Hearing.

³⁵ ICC-02/04-01/15-T-6-ENG, lines 7-16.

³⁶ See Article 67(1)(b) of the Rome Statute.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 25th day of May 2016

At Kampala, Uganda