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Court

Original: **English**

No.: **ICC-02/04-01/15**
Date: **27 May 2016**

TRIAL CHAMBER IX

Before: **Judge Bertram Schmitt, Presiding Judge**
Judge Peter Kovacs
Judge Raul C. Pangalangan

SITUATION IN UGANDA

IN THE CASE OF
THE PROSECUTOR v. DOMINIC ONGWEN

Public
With Confidential Annexes A – F

Public redacted version of "Prosecution application for the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute", 26 June 2015, ICC-02/04-01/15-256-Conf

Source: **The Office of the Prosecutor**

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Introduction

1. Information recently collected by the Prosecution demonstrates that potential witnesses who are victims of sexual violence have been subjected to pressure that may impact on their willingness to testify at trial and the content of that testimony. There is an observable risk of similar pressure continuing to affect them. Their current willingness to give evidence represents a unique opportunity to obtain and preserve their testimony.

2. The Prosecution submits that this is a case for the Pre-Trial Chamber to exercise its powers under article 56 of the Rome Statute ("the Statute") and order that the testimony of two witnesses should be taken as soon as possible with the participation of the Defence and the Chamber,[1] and video recorded, rather than waiting for trial. The testimony so taken would be available to any eventual Trial Chamber to be dealt with under the provisions of article 69 of the Statute, in the same way as any other witness testimony or evidence. If the Pre-Trial Chamber does not exercise its powers, there is a risk that testimony or parts of it "may not be available subsequently for the purposes of a trial".[2]

Level of confidentiality

3. This application, any further written pleadings it may generate and any order made by the Pre-Trial Chamber should remain confidential, at least until any procedures under article 56 of the Statute are completed, but better still until the moment in the trial, should there be one, when the testimony taken under article 56 is considered by the Trial Chamber for admission into evidence.

[1] In this particular case it is possible for Dominic Ongwen's Counsel to question the witnesses in the same way as it would be done at any eventual trial. Article 56 makes provision for this.
[2] Article 56(1)(a) of the Statute.

4. As elaborated below, ongoing societal pressures upon the witnesses cited in this application may result in their evidence, or parts of it, becoming unavailable to the Court. The remedy is to take that testimony at the earliest opportunity, so as to preserve it for trial. If it becomes publicly known that the Prosecution was taking steps to defeat those pressures, the persons exerting them would be likely to increase and accelerate their actions, thereby defeating the purpose of this application.

5. A further reason for confidentiality is the Prosecution's reliance upon the expert report[3] of [REDACTED].[4] [REDACTED]

The facts

6. The Prosecution in this case has recently interviewed two potential witnesses, P-0226 and P-0227, who have stated that they were abducted from their homes at a young age by Lord's Resistance Army ("LRA") fighters, brought to Dominic Ongwen, kept under guard and the harshest of discipline, forced to join his household and after some time, raped by him continuously for a period of years. These witnesses provide first-hand evidence of criminal acts perpetrated by Dominic Ongwen. They have direct experience of his immediate inner circle.[5]

7. A few days after the statements were taken the potential witnesses were instructed by a person purporting to represent an NGO to attend a meeting together with three other women who had been sexually associated with (the Prosecution suggests raped by) Dominic Ongwen during his time as a senior commander in the LRA. At the meeting they were asked questions about their

[3] See Annex C.
[4] All legal submissions based upon the report of [REDACTED], as well as the report itself, should remain confidential (by means of redaction if necessary) even after the relevant moment in the trial has been reached.
[5] The statements of these potential witnesses are to be found at Annex A.

intentions and emotions, their belief as to whether Dominic Ongwen was responsible for an attack on a civilian camp at a location called Lukodi or not, whether he should be allowed to return to Uganda and their present or intended collaboration with the International Criminal Court. The questioning was such that not all of the persons attending felt they could give candid answers, apparently for fear of the consequences. The purpose of the meeting appeared to be to foster the notion that Dominic Ongwen should be permitted to return home to Uganda.

8. For a period during the meeting, Dominic Ongwen, apparently in coordination with the organisers of the meeting, was himself in telephone contact with the participants, speaking privately from the Detention Unit in the Netherlands to each of the five women who had attended the meeting.[6] P-0221 was present at this meeting. Notably, she is one of the approved telephone contacts for Mr Ongwen.[7]

Reports

9. In seeking measures under article 56 of the Statute, the Prosecution further relies upon the report of [REDACTED][8] and on the report of Dr Lamothe[9]. [REDACTED] Dr Lamothe is a consultant psychiatrist with particular expertise in the field of sexual violence.

10. [REDACTED][10].

11. [REDACTED].[11]

[6] The investigative reports on which the assertions contained in the three foregoing paragraphs are to be found at Annex B.
[7] Email of Legal Officer for the Registry to OTP Senior Trial Lawyer, 26 June 2015, 11.33am. See Annex F, a courtesy copy of Mr Ongwen's approved contact list, line 1.
[8] The report of [REDACTED] is to be found in Annex C.
[9] The report of Dr Lamothe is to be found in Annex D.
[10] [REDACTED].

12. The Prosecution further relies upon the general proposition that a prolonged elapse of time between the making of a complaint of a sexual or gender-based crime and the eventual trial of the matter may in itself cause psychological harm or other distress to victims who are likely already to be harmed by their abduction and treatment at the hands of the LRA over many years.[12] This would make the testimony of such witnesses at the eventual trial less likely to be complete and reliable.[13] In this respect, the Prosecution invites the Pre-Trial Chamber to rely upon the report of Dr Lamothe.

13. Dr Lamothe notes that for victims of sexual and gender based crimes, *"[l]e risque en général de voir les victimes maintenues dans le milieu où elles ont été agressées exposées à des pressions, intimidations ou menaces, est toujours présent, mais il est particulièrement élevé ici du fait de l'ancienneté des faits par rapport à l'ouverture de la procédure"*.[14] In particular, he notes that *"Le risque de pression sur les victimes ayant le courage de faire une déposition augmente au fur et à mesure que leur témoignage intervient plus tardivement, avec le risque de les voir se rétracter ou banaliser les faits."*[15]

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[11] [REDACTED].

[12] Resick P (1987) 'Psychological Effects of Victimization: Implications for the Criminal Justice System', Crime & Delinquency 33(4), 468–78 found that one year after rape, rape victims indicated that the thought of having to testify in court and not being believed by judge and jury was the most fear-inducing factor (p.475). See also UN Women: Virtual knowledge centre to end violence against women and girls. http://www.endvawnow.org/en/articles/893-specialized-courts-and-procedures-positively-change-the-way-cases-are-handled.html retrieved 12/06/15. See also Nowrojee B (2005) *Your justice is too slow: will the ICTR fail Rwanda's rape victims?* Geneva: United Nations Research Institute for Social Development.

[13] Paragraphs 26.161-26.188 ALRC (Australian Law Reform Commission) report 114 https://www.alrc.gov.au/publications/26.%20Reporting,%20Prosecution%20and%20Pre-trial%20Processes/pre-recorded-evidence#_ftnref229 retrieved 12/06/15.

[14] Report of Dr Lamothe (Annex D) p.1/6 Unofficial English translation: "The risk in general of seeing victims remaining in the milieu where they were attacked, exposed to pressure, intimidation or threats, is always present, but it is particularly raised here as a result of the antiquity of the events in comparison with the opening of the proceedings".

[15] Report of Dr Lamothe (Annex D) p.1/6 Unofficial English translation: "The risk of pressure on the victims having the courage to make a deposition grows in direct proportion to the delay with which their testimony is received, with the risk of seeing them retracting or diluting their evidence."

Prosecution submissions on the facts

14. The Prosecution submits that an episode such as that described at paragraphs 6 to 8 above demonstrates the pressure that the victims of alleged sexual crimes by Dominic Ongwen are facing. In addition to hampering the Prosecution's ongoing investigation into Dominic Ongwen's alleged criminal activities, this pressure may render the witnesses unwilling or unable to testify freely before the Court. This would deprive the relevant Chamber of the opportunity to make a determination of the truth of the matter based on all available evidence.

15. The reported events adversely affect the evidence in different ways: 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. Subjecting potential witnesses to intrusive questioning and express or implied suggestions that the proceedings against Dominic Ongwen were unfairly preventing his return "home" puts improper pressure and may lead to the witnesses' reluctance to give evidence contrary to these suggestions.[16]

16. Facilitating a telephone call between Dominic Ongwen and the witnesses during the course of the gathering could not have been better calculated to instill a feeling in them that it would not be in their interests to provide evidence which might be to his detriment. Bearing in mind that many such potential witnesses have had violent and damaging experiences at the hands of the combatants during the armed conflict in northern Uganda, and the

[16] [REDACTED].

strong impact of society and purported family ties, such calls are likely to deter potential witnesses from giving an independent and truthful account.

17. The Prosecution submits 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 [REDACTED].[17] There is a significant likelihood that the result of such events will be that intrusive protection measures have to be put in place to safeguard these witnesses. The recurrence of such events will inevitably result in a risk that the witnesses will no longer be willing to testify, or will do so in accordance with what they feel is the wishes of influential members of the society around them. It is for these reasons that the test set out in article 56(1) of the Statute is fully met.

The law

18. The law governing this application is contained in articles 56, 68 and 69 of the Statute and rules 68, 112 and 114 of the Rules of Procedure and Evidence ("the Rules").[18]

[17] Furthermore, the period of waiting may in itself cause psychological harm and otherwise simply blight their lives, which have already been severely damaged by their abduction and treatment at the hands of the LRA over many years.
[18] These provisions are set out in full in Annex E to this application, together with domestic and international legislation and case law referred to below.

Submissions on the proper construction of the law

Article 56 of the Statute: applicability to vulnerable witnesses

19. The Prosecution submits that "Article 56(1)(a)…offers a tool to take and to test evidence early in the process and to 'transport' the result to the trial stage."[19] Article 56(1) reflects powers available to the Court common in civil law jurisdictions.[20] The rationale underlying the powers which this provision confers upon the Pre-Trial Chamber is that, where the Prosecution considers that evidence or testimony may not be available by the time of the trial, it may be appropriate to take extraordinary preservation measures while still enabling the parties, particularly the Defence, to test that evidence or testimony.

20. The most obvious examples of situations where article 56 of the Statute is applicable are where the Court is dealing with transitory physical evidence, or a witness who is mortally ill. However, the Preparatory Commission drafting the Rules also discussed the question of whether article 56 should be applicable to preserve the testimony of vulnerable victims, whose willingness and ability to testify at the trial without damage to their well-being might be in question. This issue was ultimately left undetermined.[21] Where there has been current and prospective interference, such as in this case, the Prosecution submits that the requirements of article 56(1) are fully met, when it is likely that that interference will result in the witnesses not attending to testify at trial or testifying in an inhibited or incomplete manner.

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[19] C. Kress, *The Procedural Law of the International Criminal Court in Outline: An Anatomy of a Unique Compromise*, JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 607 (2003). http://jicj.oxfordjournals.org/content/1/3/603.full.pdf retrieved 15/06/15.

[20] They are sometimes referred to as relating to "definitive and unrepeatable acts" or the so called "anticipated taking of evidence" - see F. Guariglia and G. Hochmeyer, in Triffterer (ed.) *Commentary on the Rome Statute of the International criminal Court: Observers' Notes, Article by Article,* Nomos Verlag: Baden-Baden, 2008 p.1109.

[21] H. Friman, *The Rules of Procedure and Evidence in the Investigative Stage*, in H. Fischer/C.Kress/S.R. Lueder (eds.), INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW 196 (2001).

21. The rationale behind article 56 of the Statute is reflected in other international jurisdictions. In the *Muvunyi* et al. case the International Criminal Tribunal for Rwanda found that the interests of justice required the deposition of testimony[22] considered by the Tribunal to be "highly important" to the Prosecution's case due to the witness's eyewitness capacity and also because the witness's status made him a special witness.[23] At the Special Tribunal for Lebanon, rule 123 of the Tribunal's Rules of Procedure and Evidence provides explicitly for the taking of depositions upon the order of the Pre-Trial Judge, where there is reason to believe that the evidence of a potential witness may otherwise become unavailable.

National jurisdictions

22. In civil law jurisdictions, if the evidence of one or more vulnerable witnesses may be degraded by the passage of time and by pressures which may come to bear upon those witnesses, the prosecutor or the investigating magistrate (if any) is entitled to trigger a procedure whereby vulnerable witnesses, often victims of sexual or gender-based crimes, are questioned in advance of trial, typically in the presence of defence counsel or *ad hoc* counsel appointed for those purposes.[24] Such a procedure will not prevent the eventual trial judge from causing that witness to appear at the trial if the interests of justice so dictate. Should there be no such need, vulnerable and/or traumatised witnesses would have concluded their participation much earlier than would

[22] See rule 71*bis* of the Tribunal's Rules of Procedure and Evidence governing the preservation of evidence by special deposition for future trials. See, in particular, the requirements of exceptional circumstances and interests of justice.
[23] Decision on the Prosecutor's extremely urgent motion for the deposition of Witness QX, *Prosecutor v. Muvunyi*, ICTR-2000-55-I, 11 November 2003, §10. Similarly, in the present case the Prosecution submits that the evidence of the potential witnesses referred to in this application is highly important to the establishment of the truth not least due to their direct experience of Ongwen's immediate inner circle.
[24] Included in that questioning are matters of importance to the defence which may cast doubt on the accuracy or veracity of the witnesses. A comprehensive record of the witness's examination is compiled, from which the eventual trial chamber will make its determination of the truth.

otherwise be the case, thus diminishing potential secondary victimisation through reliving their experiences when giving evidence at trial.

23. In the recent notorious trial of Josef Fritzl in Austria, the court applied §165 of the Austrian Code of Criminal Procedure, which permits video-testimony of a victim of a sexual or gender-based crime in advance of trial, if requested by the victim or the prosecution.[25] The court also acknowledged that the protection of the witness and finding the truth, both recognized functions of this procedure,[26] were at stake, *inter alia*, because the victim, Fritzl's daughter, would have had to confront the man who had raped and abused her for many years again in court. For this reason, the court received testimony at the trial in March 2009 which had been taken and video-recorded in July 2008.[27] This testimony was effectively the principal evidence upon which the Prosecution based their case.

24. Other civil law jurisdictions feature comparable measures. The Italian Code of Criminal Procedure allows for taking a witness's testimony in advance of trial, if there are reasonable grounds to believe that the witness might be subjected to violence, threat, bribery or other forms of intimidation.[28] The Dutch Criminal Procedure Code provides for testimony in advance of trial where there are reasonable grounds to believe that the witness will not be able to appear in court, or that the health or well-being of a witness will be endangered by testifying in court, and where the prevention of this danger

[25] Landesgericht St. Pölten, *Fritzl judgment*, AZ 20HV1282008Z. The Prosecution has contacted the court in St. Pölten, Austria and requested the formal record of this decision. The reply submitted by Andrea Humer, the Vice-President of the court, confirming the application of the provision in this case is to be found in Annex E to this filing.
[26] http://www.parlament.gv.at/PAKT/VHG/XXII/I/I_00025/imfname_001986.pdf, retrieved 19/06/2015.
[27] The provision includes a right in the Defence to ask the witness questions through the judge.
[28] See Section 392(1)(b). This provision was informally translated by the Prosecution. The original Italian text is available in the list of authorities at Annex E.

outweighs the need to have the witness questioned in court.[29] The German Code of Criminal Procedure provides for similar measures.[30]

25. Common law jurisdictions have traditionally been more reluctant to permit testimony gathered outside the trial to become part of the evidence on which the ultimate trier of fact makes its determination.[31] However, more recent developments, for example in England and Wales, demonstrate a growing recognition that practices akin to those envisaged under article 56 of the Statute may indeed offer the best way of establishing the truth at trial. The Youth Justice and Criminal Evidence Act of 1999 introduced a system whereby vulnerable witnesses, particularly those whose evidence may be affected by their "social and cultural background",[32] may be questioned by both Prosecution and Defence, in advance of the trial, so as to conclude their active participation in proceedings as soon as possible. Similarly, Israel's Criminal Procedure Law empowers the courts to authorise taking testimony in advance of the trial where there are reasonable grounds to assume that "pressure, threat, intimidation, force or promise of benefit would deter the witness from giving true testimony during the trial".[33]

Article 56 of the Statute: the Prosecution's duty

26. It is noteworthy that the power under article 56(1)(b) is expressed as being capable of being exercised by the Chamber either at the request of the

[29] See article 187(1). This provision was informally translated by the Prosecution. The original Dutch text is available in the list of authorities at Annex E.
[30] See section 247a. The original German text is available in the list of authorities at Annex E.
[31] In serious cases the trier of fact is often a jury, rather than a bench of professional judges. This is likely to have deterred the development of such procedures.
[32] Youth Justice and Criminal Evidence Act 1999, s.17 http://www.legislation.gov.uk/ukpga/ 1999/23/section/17 retrieved 10/06/15.
[33] Section 117 (A) of Criminal Procedure Law [Consolidated Version], 1982. A related provision regarding human trafficking (including sex-trafficking) imposes strict deadlines for deciding on requests to take testimony in advance of trial – see Section 117 (B) of Criminal Procedure Law [Consolidated Version], 1982. This latter provision highlights the special relevance of evidence-preservation measures for vulnerable victims.

Prosecutor or "on its own initiative".[34] The deployment of this provision is not just a tactical option in the hands of the Prosecution. Rather, article 56(1) establishes a *duty* on the Prosecutor to inform the Pre-Trial Chamber of the existence of facts which mean that evidence "may not be available subsequently for the purposes of a trial" and that as a result "a unique opportunity to take testimony" exists, upon which the Chamber should act.

27. Academic writing[35] suggests that, in combination with article 68 of the Statute, the Court can and should deploy the powers provided by article 56 of the Statute to protect vulnerable victims of and witnesses to sexual crimes, where this is necessary to prevent the risk of their traumatisation capable of leading to the effective unavailability of their testimony at trial. In the Situation in Darfur, an *amicus,* Professor Antonio Cassese, having been invited to participate by the Pre-Trial Chamber, submitted that article 56 should be used for taking the testimony of victims of rape "which may not be available subsequently at trial either (i) because the victims is [sic] likely to be harassed or intimidated by other persons including militias or State officials, or (ii) because the victims' account is most likely gradually to fade or blur with the passage of time, or (iii) because the possible further deterioration of the security conditions […]."[36] Thus, it is suggested that, under article 56, vulnerable victims and witnesses would give their testimony and be cross-examined by the Defence as close as possible to when they have first given their accounts.

[34] Article 56(3)(a) of the Statute.
[35] Donald K. Piragoff , 'Evidence' in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article by Article* (Baden-Baden: Nomos 1999),pp. 889–916, at pp. 901–902. See also C. Kress. *Witnesses in Proceedings Before the International Criminal Court: An analysis in the light of Comparative Criminal Procedure*, in H. Fischer/C.Kress/S.R.Lueder (eds.), INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW 309, 362 *et seq.* (2001).
[36] Antonio Cassese, Observations on issues concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur, ICC-02/05-14, 25 August 2006.

Article 69 of the Statute

28. Ultimately, the determination of whether testimony gathered in accordance with article 56 of the Statute will be admissible at the trial will be one for the Trial Chamber, applying article 69. Article 69(2) makes specific reference to the power of that Chamber to permit the giving of "recorded testimony of a witness by means of video or audio technology". This power is expressly stated to be applicable only where it is not "prejudicial to or inconsistent with the rights of the accused". The Trial Chamber in Dominic Ongwen's case (if charges against him are confirmed) will determine whether his rights have been adequately respected.

29. The Prosecution submission is that, in the circumstances of this application, Dominic Ongwen's rights can be respected in full. He is in custody in The Hague. He is represented by Counsel of his choice. There is no bar to his giving clear and complete instructions concerning the allegations made in the statements of witnesses P-0226 and P-0227. Cross-examination in the near future will be no more or less effective than cross-examination at any eventual trial. If, contrary to reasonable expectations, by the time of trial, there are further important matters upon which the Defence genuinely had no opportunity to ask questions in the course of taking testimony under the provisions of article 56 of the Statute, it will be open to the Defence to make submissions to the Trial Chamber to this effect and to request to it be given the opportunity to ask further questions so as to ensure fairness to the accused.

Rule 112 of the Rules: a clear indicator

30. Rule 112 is an important indicator of the approach the Court should take. Its principle application is to persons who are suspected of having committed a crime within the jurisdiction of the Court. It requires the Prosecution to make

an electronic (audio or video) recording of the questions asked of and the answers given by such persons. However, rule 112(4) permits the Prosecution to make such recordings with other potential witnesses as well, and indicates that this will be particularly appropriate where to do so "could assist in reducing any subsequent traumatization of a victim of sexual or gender violence…in providing their evidence".

31. Rule 112(4) of the Rules concludes with this sentence: "The Prosecutor *may* make an application to the relevant Chamber." The meaning of this sentence is not immediately apparent. The preceding words of the sub-rule appear to make it plain that the Prosecution has the discretion to make recordings of witnesses without any need for an application. Furthermore, the use of the permissive "may" (italicised above) is inappropriate if the making of an application is required by the Rules before the Prosecution can exercise the discretion apparently given by the first part of rule 112(4).

32. It is submitted that the nature of the application referred to in the last sentence of rule 112(4) is elucidated in rule 112(5) of the Rules, which specifically states that, "in pursuance of article 56, paragraph 2", the Pre-Trial Chamber may order that the questioning of a person shall be audio (or video) recorded in accordance with the procedure in rule 112(1).

33. The mere electronic recording of the questioning of the victim of sexual or gender violence would, in and of itself, be of no effect in reducing that person's subsequent traumatisation. Indeed, the added formality of the procedure set out in rule 112(1) of the Rules would be likely to add to that traumatisation. In order for rule 112(4) to have any realistic positive effect, there would have to be a genuine prospect that the audio (or video) recording so produced would mark an end of that person's active involvement in the

giving of testimony, so that they would no longer be faced with the ordeal, at a later stage, of reliving the events about which they have spoken. The only reasonable conclusion is that the term "the application" as used in the last sentence of rule 112(4) must include an application for the power conferred on the Pre-Trial Chamber by rule 112(5) to be exercised and for the measures set out in article 56(2) to be applied to the person in question. Rule 112 thus links the needs of traumatised victims of sexual or gender violence with the exercise by the Pre-Trial Chamber of its powers under article 56 of the Statute, thereby recognising that such needs could give rise to the unique investigative opportunity foreseen in that article.

Rule 68 of the Rules

34. The Prosecution further submits that the provisions of rule 68 militate in favour of the use of article 56 of the Statute to take the testimony of the relevant witnesses now. Under that rule, their statements might be introduced into evidence in any event, without the Defence ever having the chance to challenge the contents. The language of rule 68(1) specifically mentions article 56, thus underlining the desirability of taking measures to preserve evidence during the pre-trial phase of the case, instead of waiting for potential issues to arise later on in the proceedings. Rule 68(2)(d) permits the introduction into evidence of "prior recorded testimony" or "documented evidence of such testimony" where the witness concerned has failed to attend or give evidence at the trial with respect to a material matter because of improper interference, which may relate to the witness's psychological or other interests.

35. If this application is unsuccessful, and, at trial, one or other of the two witnesses fails to attend or gives an incomplete account of her victimisation, the Trial Chamber may have to consider whether this results from societal interference with her psychological state or other improper interference. If it

did so decide then the introduction of her statement under rule 68 of the Rules, at that stage, without the Defence having had any possibility of challenging it would be a distinct possibility. This would be an undesirable outcome in a case where, at a much earlier stage, this very possibility had been foreseen and the opportunity had arisen for her testimony to be taken and challenged in cross-examination. It would, however, be difficult for the Defence to be heard to oppose such an application, if it was their resistance to the adoption of measures under article 56 of the Statute which had contributed to the Pre-Trial Chamber's decision to reject them.

36. Article 56 of the Statute itself emphasises that the measures available to the Pre-Trial Chamber should be utilised not only to ensure the efficiency and integrity of the proceedings but, in particular, to protect the rights of the Defence. It is submitted that the potential application of rule 68(2) of the Rules, as outlined above is a significant reason to favour the implementation of article 56 measures at this stage.

Article 68 of the Statute: specific protection for victims of sexual violence

37. All of the forgoing has to be seen in the light of the duty upon the Court under article 68 to protect the "safety, physical and psychological well-being, dignity and privacy of victims and witnesses….in particular…where the crime involves sexual or gender violence". The most obvious and most effective way of giving the words of article 68 practical effect in respect of the two witnesses to which this application refers is for the Pre-Trial Chamber to implement measures under article 56 of the Statute.

Conclusion

38. In summary a finding that article 56 of the Statute was applicable in these circumstances and that appropriate measures should be taken would achieve the following material benefits:

i. Prevent any further occurrences such as those set out in detail in Annex B from deterring the individuals in question from giving evidence;

ii. Prevent the evidence eventually given at trial being coloured or tainted by fears or expectations which may develop between now and that time;

iii. Enable the Pre-Trial Chamber, at the Confirmation hearing, to consider not just a summary of the witnesses' statements to the OTP, but the video recording of a full examination in chief and cross-examination, thus enabling a much fuller assessment of this portion of the evidence than would normally be the case.

iv. Decrease the likelihood of further traumatisation of individuals waiting to give evidence at a potential trial likely to be months or years in the future, as contemplated in rule 112(4).

Relief requested

39. For the reasons set out above, the Prosecution submits that the Pre-Trial Chamber should find that article 56(1) is applicable to the situation described in this filing and order that the following measures are taken pursuant to article 56(2)(a)–(f) of the Statute:

a) That provision be made for witnesses P-0226 and P-0227 to give testimony, on oath pursuant to rule 66 of the Rules *via* video link from Uganda or in

person in The Hague,[37] before all three Judges of the Pre-Trial Chamber as soon as possible;

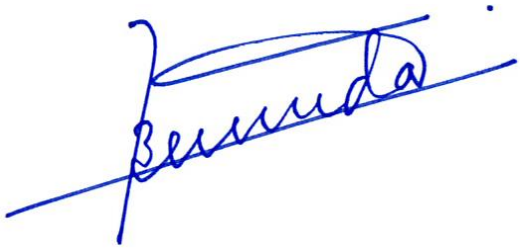
b) That the testimony be video recorded and a written transcript made;

c) That consideration be given to the appointment of an expert to assist the Pre-Trial Chamber in its taking of testimony;

d) That Counsel for Dominic Ongwen be authorised to participate in the taking of testimony from these witnesses, in particular by being permitted to explore and challenge their accounts in cross-examination;

e) That a Single Judge of the Pre-Trial Chamber be appointed to direct, observe and make recommendations or further orders regarding the preparations for the taking of testimony and to deal with any issues arising from it subsequently;

f) That the Registrar be directed to make all the necessary arrangements to facilitate the conduct of the proceedings, any protective measures which may be necessary to ensure the safety of the witnesses and or any other action as may be necessary to collect or preserve evidence.



Fatou Bensouda,
Prosecutor

Dated this 27th day of May 2016
At The Hague, The Netherlands

[37] If the upheaval, potential distress and expense of such a procedure is thought to be outweighed by the desirability of the Pre-Trial Chamber and the Parties seeing the witnesses face-to-face.