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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 - H

Public redacted version of "Second Prosecution application to the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute", 2 October 2015, ICC-02/04-01/15-310-Conf

Source: The Office of the Prosecutor

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Introduction

1. The notice of intended charges against Dominic Ongwen¹ filed by the Office of the Prosecutor ("Prosecution") contains the evidence of seven women against whom Dominic Ongwen allegedly directly committed sexual and gender based crimes ("SGBC"). Charges include forced marriage as an inhumane act, sexual slavery, rape, enslavement, torture, outrages upon personal dignity and forced pregnancy. Two of these victims² have already testified pursuant to article 56 of the Rome Statute ("Statute") ("article 56 proceedings"). The Prosecution requests the Pre-Trial Chamber to take the testimony of the five remaining victims³ under article 56 of the Statute, to preserve it for trial.
2. In addition the Prosecution has, in the very recent past, taken a statement from an eighth woman⁴ who has made very similar allegations. The Prosecution requests that she too be the subject of article 56 proceedings.
3. As noted by the Single Judge in his decision granting the Prosecution's first application to preserve evidence under article 56 ("first application"), the passage of time in combination with pressure exerted on the witnesses may have an impact on their willingness to testify in the proceedings or on the genuineness of their testimony.⁵ The circumstances are no different with respect to the six remaining victims identified above. Their evidence goes directly to Dominic Ongwen's acts and conduct and, thus, the negative consequences of delaying their testimony are heightened in this case, where their evidence is crucial to establish the truth.

¹ ICC-02/04-01/15-305-Conf.

² [REDACTED] (P-0226) and [REDACTED] (P-0227).

³ [REDACTED] (P-0099), [REDACTED] (P-0101), [REDACTED] (P-0198), [REDACTED] (P-0214) and [REDACTED] (P-0235).

⁴ [REDACTED] (P-0236).

⁵ ICC-02/04-01/15-277-Conf, para. 14.

4. The six victims who form the subject matter of this request are highly vulnerable, subject to distress resulting from societal pressure, and face a high risk of traumatic secondary victimisation if they testify potentially years from now. This may impact on their willingness to testify or their ability to give a complete account of their experience. Thus, their current (or in the case of P-0236, recent) willingness to give evidence represents a unique opportunity to obtain and preserve evidence which may not be available subsequently for the purposes of a trial.

Procedural Background

5. On 26 June 2015, the Prosecution submitted its first application to preserve the evidence of Witnesses P-0226 and P-0227 under article 56 of the Statute.⁶
6. On 3 July 2015, the Defence objected to the Prosecution's request.⁷
7. On 27 July 2015, the Single Judge granted the Prosecution's application, ordering that Witnesses P-0226 and P-0227, subject to their willingness, should give testimony, pursuant to rule 66 of the Rules of Procedure and Evidence ("Rules"), in closed session, in the presence of the Prosecution and the Defence ("decision on the first application").⁸ The Single Judge ordered that the testimony be video recorded, a written transcript produced and the Defence be given the opportunity to question the witnesses.
8. Pursuant to the decision on the first application, Witnesses P-0226 and P-0227 testified in closed session in the presence of the Single Judge, the Defence and the

⁶ ICC-02/04-01/15-256-Conf.

⁷ ICC-02/04-01/15-259-Conf.

⁸ ICC-02/04-01/15-277-Conf.

Prosecution between 15 and 19 September 2015.⁹ The witnesses' accounts were led by the Prosecution and challenged by the Defence in cross-examination.

9. On 18 September 2015, the Prosecution filed its notice of intended charges against Dominic Ongwen, including charges of SGBC directly committed by Dominic Ongwen against five of the victims subject to this application.¹⁰ The Prosecution had not, by this date, taken a statement from Witness P-0236.¹¹

Level of confidentiality

10. This application, any further written pleadings it may generate, and any order made by the Pre-Trial Chamber should be classified as confidential, at least until any procedures under article 56 of the Statute are completed. Preferably, they should remain confidential until testimony taken under article 56 of the Statute is considered by the Trial Chamber for admission into evidence during trial, should the charges against Dominic Ongwen be confirmed.
11. If the identity of the witnesses mentioned in this application or the fact that Dominic Ongwen is alleged to have directly perpetrated SGBC crimes were publicly known, it is likely that it would attract the attention of the community the witnesses live in, as well as potentially that of the national and international media, which may result in further victimisation or interference with the witnesses' evidence. That the Prosecution is taking steps to defeat pressures exercised against those witnesses would likely heighten this scrutiny.
12. A further reason for confidentiality is the expert report of [REDACTED].¹²
[REDACTED].¹³

⁹ P-0226, ICC-02/04-01/15-T-8-CONF-ENG ET and ICC-02/04-01/15-T-9-CONF-ENG ET; P-0227, ICC-02/04-01/15-T-10-CONF-ENG ET and ICC-02/04-01/15-T-11-CONF-ENG ET.

¹⁰ ICC-02/04-01/15-305-Conf.

¹¹ P-0236's statement was taken between [REDACTED] 2015.

¹² The Prosecution refers to the report annexed to ICC-02/04-01/15-256-Conf-AnxC.

Victims who are the subject of this application

13. The Prosecution has interviewed six witnesses other than P-0226 and P-0227 who allege that they are victims of SGBC directly perpetrated by Dominic Ongwen. These are P-0099, P-0101, P-0198, P-0214, P-0235, and P-0236. These victims have said that they were abducted at a young age by the Lord's Resistance Army ("LRA"), brought to Dominic Ongwen, and made to serve as his forced exclusive conjugal partner by performing domestic duties and submitting to repeated rape for a period of years. These women were kept under guard and subjected to harsh forms of discipline by Dominic Ongwen and his subordinates. These women also have direct knowledge of his inner circle of fighters.¹⁴

The law

14. The law governing this application is contained in articles 56, 68, 69 of the Statute and rules 68, 112, 114 of the Rules.

Submissions on the law

15. The Prosecution relies on the legal submissions made at paragraphs 18 to 37 of its first application,¹⁵ which are by reference incorporated herein.

Article 56 of the Statute is applicable to vulnerable witnesses under article 68 of the Statute¹⁶

16. The Single Judge concluded in his decision on the first application that "the identified risk in the present case is that the passage of time, with possible recurrence of episodes in which witnesses [...] are put under pressure, may

¹³ 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 a Trial Chamber considers testimony taken under article 56 of the Statute for admission into evidence. *See also* the submissions made in the first application, ICC-02/04-01/15-256-Conf, para. 5.

¹⁴ The statements of these witnesses are to be found in Annex C.

¹⁵ ICC-02/04-01/15-256-Conf.

¹⁶ *See* the submissions made in the first application, ICC-02/04-01/15-256-Conf, para. 19-27.

adversely impact on their willingness to testify in the proceedings or on the genuineness of their testimony”.¹⁷ These circumstances equally apply with respect to the six victims subject to this application.

17. The Prosecution has a duty to inform the Pre-Trial Chamber of the existence of evidence which “may not be available subsequently for the purposes of a trial” and for which “a unique opportunity to take testimony” exists.¹⁸ The facts, as described below, demonstrate such an opportunity.

18. The Single Judge reasoned in the decision on the first application that completing the testimony of vulnerable witnesses as soon as possible is preferable “so as not to force them to keep reliving their victimisation for a long period of time”.¹⁹ The Prosecution and the Court have an obligation under article 68 of the Statute 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”.²⁰ The Prosecution submits that the most effective way of protecting the victims who are the subject of this application is for the Pre-Trial Chamber to implement measures under article 56 of the Statute. These measures will help these victims of SGBC to achieve closure from their traumatic past. Furthermore, it avoids the secondary victimisation caused by their participation as witnesses in trial proceedings, potentially years hence.

Article 69 of the Statute

19. The application of article 56 of the Statute is not prejudicial to the rights of Dominic Ongwen.²¹ As the Single Judge observed, the “taking of testimony of

¹⁷ See ICC-02/04-01/15-277-Conf, para. 14.

¹⁸ Article 56(1)(a) of the Statute.

¹⁹ See ICC-02/04-01/15-277-Conf, para. 10. See also P-0226, ICC-02/04-01/15-T-8-CONF-ENG ET, p. 2, l. 20-24.

²⁰ Article 68(1) of the Statute.

²¹ See the submissions made in the first application, ICC-02/04-01/15-256-Conf, para. 28-29.

[...] witnesses will be done for the purpose of preserving their evidence, without prejudice to the eventual use of that evidence in the proceedings”.²² In the previous article 56 proceedings, the Defence was able to participate in the examination of Witnesses P-0226 and P-0227. This ability will be facilitated further by the Prosecution’s provision of notice of intended charges against Dominic Ongwen.

Rules 68 and 112 of the Rules

20. Rules 68 and 112 of the Rules also militate in favour of the use of article 56 of the Statute to take the testimony of the witnesses of sexual or gender violence as soon as possible, in order to reduce any subsequent traumatising.²³

Submissions on the facts

21. The present situation represents a unique opportunity to preserve the evidence of the six victims who are the subject of this application. There is a risk that their evidence, or parts of it, would not be available at trial due to (i) the pressure these witnesses face in their environment, (ii) the potential secondary victimisation these witnesses endure through the public, media and legal proceedings, and (iii) the potential for these victims’ changed perception of the perpetrator to pollute their testimony.

(i) Environment of pressure

22. The Single Judge indicated in the recent article 56 proceedings that an “environment of pressure [...] could result in the witness being no longer able and willing to testify freely before the Court or in the genuineness of their testimony being tainted”,²⁴ which warranted the application of article 56 of the

²² See ICC-02/04-01/15-277-Conf, para. 12. See also P-0226, ICC-02/04-01/15-T-8-CONF-ENG ET, p. 3, l. 9-12, p. 3, l. 19-23.

²³ See the submissions made in the first application, ICC-02/04-01/15-256-Conf, para. 30-36.

²⁴ P-0226, ICC-02/04-01/15-T-8-CONF-ENG ET, p. 2, l. 13-16.

Statute. The Prosecution submits that various recent incidents, described below, show how exposed to such an environment the victims who are the subject of this application are.

(i)(a) Pressure caused by third parties

23. [REDACTED]²⁵ [REDACTED]²⁶

24. [REDACTED]

25. [REDACTED]²⁷

26. [REDACTED]²⁸ [REDACTED]²⁹ [REDACTED]

27. [REDACTED]³⁰ [REDACTED]³¹ [REDACTED]³² [REDACTED]³³ [REDACTED]³⁴

28. [REDACTED]³⁵ [REDACTED]³⁶ [REDACTED]

29. [REDACTED]³⁷ [REDACTED]

30. This environment of pressure is further demonstrated by the recent behaviour of Witness P-0236, who, during her interview with the Prosecution, and contrary to her initial indication, stated that she was not willing to be a witness because her parents did not wish it.³⁸

²⁵ [REDACTED]. A hard copy of the [REDACTED] is to be found in Annex D.

²⁶ ICC-02/04-01/15-256-Conf, para. 7-8, 14-17.

²⁷ [REDACTED] is to be found in Annex E.

²⁸ [REDACTED] is to be found in Annex F.

²⁹ [REDACTED]

³⁰ See ICC-02/04-01/15-256-Conf-AnxB, p. 14. See also [REDACTED]

³¹ [REDACTED]

³² See ICC-02/04-01/15-256-Conf-AnxB, p. 4, p. 11, p. 14, p. 16, p. 17.

³³ ICC-02/04-01/15-256-Conf-AnxB, p. 16.

³⁴ See ICC-02/04-01/15-276-Conf-AnxA-Corr, p. 4-5 (phone call on 2 June 2015, Nr.100256785191071).

³⁵ See ICC-02/04-01/15-256-Conf-AnxB, p. 14.

³⁶ See, ICC-02/04-01/15-256-Conf-AnxB, p. 13-14.

³⁷ The relevant investigation note is to be found in Annex G.

³⁸ The relevant investigation note is to be found in Annex H.

31. Finally, the societal pressures these witnesses face were demonstrated during the witness familiarisation meeting between Witness P-0226 and Defence Counsel prior to the article 56 proceedings. Counsel addressed the witness in her native Acholi, repeatedly reminding her that she was testifying against her “brother”. This statement, according to the Victims and Witnesses Unit, caused distress to the witness. The Single Judge himself noted during the article 56 proceedings that such pressure would not be tolerated.³⁹ The deep-seated nature of the perception of a quasi-family bond which is asserted to exist between individuals of Acholi ethnicity is apparent from the opening words of Counsel on the first day of the article 56 proceedings, when he introduced his client as a “brother”.⁴⁰

(i)(b) Pressure caused by senior wives

32. In northern Ugandan society, the longer-standing forced wives who spend more time in captivity with an LRA fighter exercise control over more “junior” forced wives. This hierarchy is maintained even after the women return to their communities. As in its first application, the Prosecution relies on the expert report of [REDACTED]⁴¹ [REDACTED]⁴²

33. This hypothesis has been substantiated in the case of Dominic Ongwen’s forced wives. [REDACTED]⁴³

34. Such meetings with senior forced wives, for example the meeting with [REDACTED], are aimed at aligning the narrative in the case against Dominic Ongwen and at suggesting that the proceedings against him were unfairly preventing his return to Uganda to support his children. This puts improper

³⁹ See P-0226, ICC-02/04-01/15-T-8-CONF-ENG ET, p. 5, l. 11-19.

⁴⁰ See P-0226, ICC-02/04-01/15-T-8-CONF-ENG, p. 2, l. 1-2: “I’m being assisted by Mr Thomas Obhof and Abigail and Philip Adonga. The accused brother Dominic Ongwen is in court.”

⁴¹ See ICC-02/04-01/15-256-Conf-AnxC.

⁴² See ICC-02/04-01/15-256-Conf-AnxC, p. 6.

⁴³ See ICC-02/04-01/15-276-Conf-AnxA-Corr, p. 6 (phone call on 2 June 2015, Nr.100256784776303).

pressure on junior wives and interferes with the collection and presentation of their truthful evidence.

35. These incidents described are just examples of the pressure to which the victims subject to this application may be exposed in the environment they live in. Further, certain sections of Acholi society do not support the trial against Dominic Ongwen.⁴⁴ Individuals willing to testify against Dominic Ongwen may fear being regarded as “traitors” and exclusion from their community. In light of the prolonged elapse of time before these witnesses will be able to testify at trial, there is a risk that the recurrence of similar events and the exposure of the witnesses’ identities to the public and media may cause further pressure upon the witnesses.

36. There is a significant likelihood that such pressure will result in: (i) the witnesses being unwilling to testify freely; (ii) the witnesses’ testimony becoming tainted in accordance with wishes of members of the society in which they live; and (iii) the need for intrusive protection measures to be put in place to safeguard these witnesses. This would deprive the relevant Chamber of the opportunity to make a determination of the truth based on all available evidence.

(ii) Secondary victimisation

37. The environment described above not only exposes the victims to pressure which may impact on their decision to testify, it could also result in further psychological harm through secondary victimisation. Secondary victimisation

⁴⁴ See, e.g., UGA-OTP-0233-1416 at 1420. See also, New Vision, “Don’t punish Ongwen twice – clerics”, available at <http://www.newvision.co.ug/news/664131-don-t-punish-ongwen-twice-clerics.html> [Last accessed 30/09/15]; New Vision, Ongwen a victim of LRA war - former abductee, available at <http://www.newvision.co.ug/news/663839-ongwen-a-victim-of-lra-war-former-abductee.html> [Last accessed 30/09/15]; Daily Mail, ‘Uganda: Victims back leniency for LRA chief but trial awaits’, available at <http://www.dailymail.co.uk/wires/ap/article-2975184/Uganda-Victims-leniency-LRA-chief-trial-awaits.html> [Last accessed 30/09/15]; Radio One FM, “Agago LC 5 chairman wants Ongwen pardoned”, available at <http://radioonefm90.com/agago-lc-5-chairman-wants-ongwen-pardoned> [Last accessed 30/09/15].

occurs when victims are frequently forced to re-live and confront their traumatic past through the re-telling of their story to the public, whether in investigations, legal proceedings or in the media.

38. The occurrences listed above demonstrate such further traumatisation. [REDACTED]⁴⁵ coupled with the filing of the notice of charges document by the Prosecution is likely to result in increased attention and significant interest by the media and other third parties. The expected consequence will be to force the victims to deal with their traumatic past on a daily basis. Although the Prosecution has redacted the direct perpetration charges from the public version of the notice of intended charges, third parties located in the affected communities, which are close knit, may speculate that the redacted charges involve the direct perpetration of SGBC on identified individuals and seek to “fill in the blanks”. No fool-proof solution to this process of secondary traumatisation is available. The simplest and most practicable palliative is for the victims who are the subject of this application to give their testimony as soon as is possible, thereby increasing the likelihood that their active involvement in proceedings can be brought to an end.⁴⁶

39. Furthermore, it is submitted that the distress caused by the prolonged lapse of time between the making of the complaint of the SGBC committed against them and the eventual trial, alone, even without the intervention of any other third party, will likely cause further psychological harm to the victims who are already harmed by their abduction and treatment at the hands of the LRA over many years.⁴⁷

⁴⁵ [REDACTED] is to be found in Annex F.

⁴⁶ See also P-0226, ICC-02/04-01/15-T-8-CONF-ENG ET, p. 2, l. 20-24.

⁴⁷ See Resick, P., ‘Psychological Effects of Victimisation: Implications for the Criminal Justice System’, *Crime & Delinquency* 33(4) (1987), p. 468-478 found that one year after 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-waycases->

40. Finally, secondary victimisation is caused by criminal proceedings and ultimately through the victim's experience at trial. The expert psychiatric witness relied upon by the prosecution, Dr Pierre Lamothe, has detailed in his report, attached to the Prosecution's first application, how secondary victimisation caused by the proceedings tends to decrease victims' interest in participating in the proceedings the longer these last, generating the risk that these witnesses will not be available at trial.⁴⁸ He also notes the risk that, where such witnesses do give evidence at the eventual trial, that evidence may be tainted by post-traumatic memory difficulties, caused by secondary traumatisation during the trial.⁴⁹

(iii) Changed perception of perpetrator

41. The victims' evidence may also become unavailable or polluted due to the victims' changed perception of Dominic Ongwen. Dr Lamothe has pointed out that victims' accounts may be accompanied by a "psychological survival process" that leads to a paradoxical seeking of protection from the perpetrator (known as "Stockholm syndrome"), as victims perceive him to be the ultimate guarantor of maintaining resources and access to life's essential goods.⁵⁰

42. The victims subject to this application were abducted at a very young age and for a long time depended on Dominic Ongwen to provide for them. Thus, there is a significant risk that these victims will indeed protect him, due to a contorted perception of him as the sustainer of their "family". Their accounts may hence be polluted by the fact that they regard him, or at least his clan, as a potential means of financial security, in particular with regard to their children. A number of the victims who are the subject of this application demonstrate an interest in the

are-handled.html [Last accessed 30/09/15]. See also Nowrojee, B., 'Your justice is too slow: will the ICTR fail Rwanda's rape victims?' Geneva: United Nations Research Institute for Social Development (2005).

⁴⁸ The Prosecution refers to the report annexed in ICC-02/04-01/15-256-Conf-AnxD, p. 6.

⁴⁹ See ICC-02/04-01/15-256-Conf-AnxD, p. 7.

⁵⁰ See ICC-02/04-01/15-256-Conf-AnxD, p. 4.

provision of education and medical care for their children, that they consider that they are unable to provide on their own. In this particularly vulnerable position, there is a risk that these victims of SGBC may be tempted to exculpate Dominic Ongwen in order to accelerate his return.

43. The above phenomenon can be seen in the accounts of Florence Ayot, who was abducted at the age of nine. She has stated in various media interviews that Dominic Ongwen should be pardoned. She emphasised that Dominic Ongwen has many children and if he was released that would enable him “to take care of them”.⁵¹ She also wondered whether Dominic Ongwen, once released, “might help pay their children’s school fees if he returned to Uganda”.⁵² She admitted almost committing suicide as she could not bear failing to provide for her children.⁵³

Conclusion

44. Article 56 of the Statute is applicable in the present circumstances. Taking appropriate measures under this provision would:

- i. Reduce the likelihood of further traumatising of these victims of sexual and gender violence, waiting to give evidence at a potential trial likely to be months or years in the future, as contemplated in rule 112(4);
- ii. Protect the witnesses from societal pressure to avoid secondary victimisation;
- iii. Protect the witnesses from societal pressure which may deter them from giving any evidence at all;

⁵¹ See UGA-OTP-0233-1430 at 1432; UGA-OTP-0233-1416 at 1418; UGA-OTP-0233-1427 at 1428 (media articles).

⁵² See UGA-OTP-0233-1444 at 1444 (media article).

⁵³ See UGA-OTP-0233-1427 at 1428 (media article).

- iv. Prevent the evidence eventually given at trial from being coloured or tainted by fears, expectations or changed perceptions which may develop between now and that time, or by post-traumatic memory troubles;
- v. Enable the Pre-Trial Chamber, at the Confirmation hearing, to consider the video recording of a full examination in chief and cross-examination, thus enabling a much fuller assessment of this evidence than would normally be the case.

Relief requested

45. For the reasons set out above, the Prosecution requests the Pre-Trial Chamber to find that a unique investigative opportunity exists with respect to Prosecution Witnesses P-0099, P-0101, P-0198, P-0214, P-0235 and P-0236, and order that measures similar to those in the first article 56 proceedings are taken. Pursuant to article 56(2)(a)-(f) of the Statute, the Prosecution requests that:

- a) Provision be made for Witnesses P-0099, P-0101, P-0198, P-0214, P-0235 and P-0236 to give testimony, on oath pursuant to rule 66 of the Rules *via* video link from Uganda or in person in The Hague,⁵⁴ as soon as possible;
- b) The testimony be video recorded and a written transcript made;
- c) Consideration be given to the appointment of an expert to assist the Pre-Trial Chamber in its taking of testimony;
- d) Counsel for Dominic Ongwen be authorised to question the witnesses after the questioning of the Prosecution in cross-examination;
- e) The Pre-Trial Chamber direct, observe and make recommendations or further orders regarding the preparations for the taking of testimony, the conduct of that proceeding and to deal with any issues arising from it subsequently;

⁵⁴ If the Pre-Trial Chamber considers that the potential distress and expense of such a procedure is outweighed by the desirability of the Pre-Trial Chamber and the Parties seeing the witnesses face-to-face.

- f) 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 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