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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

Public redacted version of “Prosecution’s submissions on the conduct of proceedings pursuant to decision ICC-02/04-01/15-277”, 30 July 2015, ICC-02/04-01/15-282-Conf

Source: The Office of the Prosecutor

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

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Other

Introduction

1. The Office of the Prosecutor (“Prosecution”) submits, for the Chamber’s consideration, a number of proposals for the taking of testimony of witnesses P-0226 and P-0227. In particular, the Prosecution proposes the following:
 - a) The proceedings during which the testimony of witnesses P-0226 and P-0227 will be taken should be conducted by video-link, with the Chamber sitting in The Hague and the witnesses on camera from Kampala, Uganda.
 - b) The two days which the Chamber has allotted for these proceedings may be insufficient. The Prosecution submits that they should be scheduled to take place over three days, 15, 16 and 17 September 2015.
 - c) The conduct of these proceedings should be guided by the principles set out in the recent (2 June 2015) “Decision on the conduct of proceedings” in the case of *The Prosecutor v. Bosco Ntaganda* (“Ntaganda decision”).¹
 - d) The Chamber should authorise a witness preparation session in respect of each of the witnesses identified above, which will be conducted in accordance with the principles set out in the recent (16 June 2015) “Witness preparation protocol” (“Ntaganda protocol”)² adopted in the *Ntaganda* case.
 - e) The Chamber should order the Office of Public Counsel for Victims to appoint Counsel to represent the interests of potential victims in much the same manner as (where there has not yet been an arrest) Counsel may, under article 56(2)(d) of the Rome Statute (“Statute”), be appointed to represent the interests of the Defence.

¹ ICC-01/04-02/06-619.

² ICC-01/04-02/06-652-Anx.

Procedural history

2. On 26 June 2015 (ICC-02/04-01/15-256-Conf, “filing 256”), the Prosecution applied to the Pre-Trial Chamber for orders under article 56 of the Statute.
3. On 3 July 2015 (ICC-02/04-01/15-259-Conf, “filing 259”), the Defence opposed that application.
4. On 27 July 2015 (ICC-02/04-01/15-277-Conf, “the decision”), the Single Judge, exercising the functions of the Pre-Trial Chamber, granted the Prosecution application and ordered that P-0226 and P-0227, subject to their willingness, should give testimony, on oath pursuant to rule 66 of the Rules of Procedure and Evidence (“Rules”), in closed session, in the presence of the Prosecution and the Defence on 16 and 17 September respectively and that this testimony should be video recorded and a transcript made. The Single Judge also decided that the Defence should be permitted to question the witnesses after questioning by the Prosecution. Lastly, the Single Judge ordered the Registrar to make any necessary arrangements for these proceedings including those necessary to ensure the safety of the witnesses.

Confidentiality

5. Pursuant to regulation 23*bis* of the Regulations of the Court, the Prosecution files this application as “confidential” for the reasons set out at paragraphs 3 and 4 of filing 256.

Submissions

Kampala rather than The Hague

6. The Prosecution understands, following discussion between its Protection Strategies Unit and the Victims and Witnesses Unit, that if the witnesses were to travel to The Hague, [REDACTED].
7. The Prosecution submits that, on balance, the upheaval, potential distress and expense of the witnesses coming to The Hague, as well as the potentially adverse security implications, outweigh the desirability of the Chamber and the Parties being physically present in the same courtroom as the witnesses.
8. Both witnesses will be testifying that they are victims of repeated rape and were subjected to a prolonged period of sexual slavery. The recounting of this evidence will inevitably be traumatic. Experience in other jurisdictions suggests that this trauma can best be minimised by avoiding vulnerable witnesses' physical presence in the formal setting of a courtroom.
9. Both witnesses, particularly P-0227, have stated that they are concerned about the possibility of their cooperation with the Court becoming publicly known. [REDACTED] This would have significant logistical implications.
10. Both the Prosecution's Protection Strategies Unit and the Registry's Victims and Witnesses Unit maintain that security surrounding the witnesses' potential exposure as a result of their testimony can be significantly better managed if they were to give evidence from Kampala rather than coming to The Hague.
11. The Prosecution also submits that the high value which might normally be attached to the witnesses being physically present before the Chamber is lessened

in these circumstances. The ultimate trier of fact will be the Trial Chamber, if there is to be a trial. If that Chamber makes a decision under article 69 to admit the recorded testimony of these witnesses then wherever the witnesses may have been when they gave their testimony, that Chamber will be watching a video recording rather than being in the physical presence of the witness.

12. The Prosecution has sought the views of the two witnesses as to whether they would rather give their evidence from Kampala, *via* video-link, or travel to The Hague for that purpose. They were both informed of the time scale involved with each location and of the views summarised in paragraph 10 above.
13. P-0227 expressed concern that she might feel overwhelmed in a courtroom in The Hague and stated that she would prefer to give evidence from Kampala (by video-link) as this would be more convenient and less unsettling for her. She also repeated concerns about the possibility of her participation becoming known by local people.
14. P-0226 stated that she is willing to give evidence in either location, but expressed a preference to travel to The Hague.
15. The witnesses' views, it is submitted, should not be ignored, but cannot be decisive. It was made plain to them that this was a decision that would be taken by the Chamber. Both witnesses have confirmed that they are willing to give testimony whichever location might be chosen.

Three days, not two

16. The Prosecution is concerned that the single day allocated to each witness may be insufficient, particularly if unexpected difficulties (witness distress or illness, technical difficulties or other matters) arise.

17. Recent experience in the *Ruto and Sang* case establishes that no more than four and a half hours sitting can be achieved on one day when the evidence is being given over video-link. Even in “live” court proceedings with the witnesses present in the courtroom not very much more sitting time than that may be achieved. Assuming that as much as an hour may be taken up with oath taking, witness comfort questions, potentially questions from Counsel for the victims, questions from the bench and re-examination to clarify doubtful answers, if the time were split equally for Prosecution and Defence this would permit no more than an hour and forty-five minutes each for examination in chief and cross examination.
18. The pace of the proceedings will be slowed by the fact that all of the questions and the answers will have to be interpreted into or out of Acholi. [REDACTED]. Breaks will need to be arranged to accommodate this.
19. The Prosecution submits that the prudent course would be to allow a day and a half, or about six hours forty-five minutes, for the full reception of the testimony of each witness, thus permitting each party a little less than three hours.
20. The Prosecution submits that, in order best to facilitate travel plans for the witnesses, the extra day should be Tuesday, 15 September 2015.

Conduct of proceedings: the Ntaganda decision

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

Ntaganda decision. This is the most recent decision on the subject of the conduct proceedings and was arrived at after consultation with the Parties, Legal Representatives of Victims and Registry.

Witness preparation: the Ntaganda protocol

22. It is submitted that the Prosecution lawyers who are to question the witnesses in court should be permitted to conduct witness preparation sessions in respect of each of the witnesses. The purpose of these sessions would be to help ensure that the questioning of the witnesses during the proceedings is as focused, efficient and effective as possible, that the witnesses give relevant, accurate and structured testimony, and to help ensure the well-being of the witnesses. The sessions would be conducted in accordance with the Ntaganda protocol. Again, this is the most recent decision on the subject of the witness preparation and was arrived at largely by agreement between the Parties in the *Ntaganda* case, and it also reflects the practical experience accumulated by the Court thus far on the issue of witness preparation.

Counsel for victims

23. There are, as yet, no victims registered in this case. There is no Legal Representative of Victims, as there would be if P-0226 and P-0227 were giving evidence at the trial of this matter rather than under the provisions of article 56 of the Statute. Article 56 makes no specific provision for the appointment of Counsel to represent the interest of potential victims who may later be registered, but article 56(1)(b) empowers the Chamber to take such measures as may be necessary to ensure the integrity of the proceedings, and article 56(2)(a) empowers the Chamber to make orders regarding procedures to be followed.
24. The Prosecution submits that, acting under these powers, it would be desirable for the Chamber to order the Office of Public Counsel for Victims to appoint

Counsel to represent the interests of potential victims in much the same manner as (where there has not yet been an arrest) Counsel may, under article 56(2)(d) of the Statute, be appointed to represent the interests of the Defence.

Relief requested

25. For the reasons set out above, the Prosecution submits that the Single Judge should order:

- a) That the proceedings during which the testimony of witnesses P-0226 and P-0227 will be taken should be conducted by video-link, with the Chamber sitting in The Hague and the witnesses on camera from Kampala, Uganda.
- b) That these proceedings be scheduled to take place over three days, 15, 16 and 17 September 2015.
- c) That the conduct of these proceedings should be guided by the principles set out in paragraphs 20 to 51 of the Ntaganda decision.
- d) That a witness preparation session may be carried out by the Prosecution lawyer who is to conduct the questioning in court in respect of each of P-0226 and P-0227, in accordance with the principles set out in the Ntaganda protocol.
- e) That the Office of Public Counsel for Victims should appoint Counsel to represent the interests of potential victims when the testimony of witnesses P-0226 and P-0227 is taken and that Counsel be provided with all the material available to the Parties which are relevant to their testimony.



Fatou Bensouda,
Prosecutor

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