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TRIAL CHAMBER IX

Before:

**Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul C. Pangalangan**

SITUATION IN UGANDA

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

Public

**Joint Victims' Response to the "Prosecution's request to admit evidence preserved
under article 56 of the Statute"**

**Source: Office of Public Counsel for Victims
 Legal Representatives of Victims**

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

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I. INTRODUCTION

1. Counsel¹ representing the victims authorised to participate in the present case (“Counsel”)² jointly submit their observations on the “Prosecution’s request to admit evidence preserved under article 56 of the Statute” (the “Prosecution’s Request”)³.

2. As a preliminary matter, Counsel note that they were unable to take part in the article 56 proceedings by virtue of the fact that those proceedings were classified confidential *ex parte* Prosecution and Defence only. In this regard, Counsel note that the Pre-Trial Chamber should have issued a decision on participation of victims already known to the Court or, at least, appointed counsel to represent the general interests of victims in the proceedings. This is particularly so, given that the interests of victims are undoubtedly affected by the testimony of the seven witnesses concerned. Accordingly, victims should have been allowed to exercise their rights effectively, including eventually requesting authorisation to question the witnesses heard under article 56.

3. This being said, Counsel support the Prosecution’s Request. It is submitted that the admission of written transcripts of the witness testimonies and related items is not prejudicial to the Accused. Indeed the admission of this material ensures the protection of those witnesses pursuant to articles 64(2) and 68(1) of the Rome Statute; and enhances the efficiency and expeditiousness of the proceedings.

¹ The term “Counsel” refers to both teams of counsel representing the interests of participating victims in the case.

² See the “Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, p. 19; the “Decision on issues concerning victims’ participation” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; and the “Second decision on contested victims’ applications for participation and legal representation of victims” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 24 December 2015, pp. 20-22.

³ See the “Prosecution’s request to admit evidence preserved under article 56 of the Statute”, with Public Annexes A and B, No. ICC-02/04-01/15-464, 13 June 2016 (the “Prosecution’s Request”).

II. PROCEDURAL HISTORY

4. On 26 June and 2 October 2015, the Prosecution requested Pre-Trial Chamber II to take measures under article 56 of the Rome Statute to preserve the testimonies of seven witnesses.⁴ Public redacted versions of these requests were filed on 27 May 2016.⁵ On 27 July and 12 October 2015, the Single Judge of Pre-Trial Chamber II granted the requests.⁶ Public redacted versions of these decisions were filed on 27 May 2016.⁷

5. The witnesses in question gave testimony before the Single Judge of the Pre-Trial Chamber in September and November 2015. Victims were not represented at the relevant hearings because, at the time, no decision on victims' participation had been issued.

6. On 13 June 2016, the Prosecution filed its Request seeking the admission of written transcripts of and related items used during the testimonies of seven

⁴ See the "Prosecution application for the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute", with Confidential Annexes A – F, No. ICC-02/04-01/15-256-Conf, 26 June 2015 and the "Second Prosecution application to the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute", with confidential annexes A – H, No. ICC-02/04-01/15-310-Conf, 02 October 2015.

⁵ See the "Public redacted version of 'Prosecution application for the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute', with Confidential Annexes A – F, 26 June 2015, ICC-02/04-01/15-256-Conf", No. ICC-02/04-01/15-256-Red, 27 May 2016 and the "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", with confidential annexes A – H, No. ICC-02/04-01/15-310-Red, 27 May 2016.

⁶ See the "Decision on the 'Prosecution application for the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute'" (Pre-Trial Chamber II, The Single Judge), No. ICC-02/04-01/15-277-Conf, 27 July 2015 ("The First Article 56 Decision") and the "Decision on the 'Second Prosecution application to the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute'" (Pre-Trial Chamber II, The Single Judge), No. ICC-02/04-01/15-316-Conf, 12 October 2015 ("The Second Article 56 Decision").

⁷ See the "Decision on the 'Prosecution application for the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute'" (Pre-Trial Chamber II, The Single Judge), No. ICC-02/04-01/15-277-Red, 23 March 2016 and Decision on the "Second Prosecution application to the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute" (Pre-Trial Chamber II, The Single Judge), No. ICC-02/04-01/15-316-Red, 23 March 2016.

witnesses, namely P-0099, P-0101, P-0214, P-0226, P-0227, P-0235 and P-0236, which were conducted pursuant to article 56 of the Rome Statute.⁸

III. SUBMISSIONS

7. Article 56(4) of the Rome Statute provides that “[t]he admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber”. It has been noted in this regard that:

“[d]iscussions at the Rome Conference regarding the need to make provisions for preservation of evidence for trial led to the conclusion that evidence taken in accordance with article 56 could be presented at subsequent stages of the proceedings. At the same time, delegations were not willing to infringe upon the Trial Chamber’s right to determine the admissibility of any evidence in accordance with article 69. Hence, paragraph 4 of article 56 was introduced to preserve the Trial Chamber’s right to rule upon the admissibility of evidence collected for trial”.⁹

8. It has also been observed that

“[i]n an important decision, delegations decided not to specify the relative weight to be attached to evidence taken under article 56, but rather to leave the determination of its probative value as well as its admissibility to the Trial Chamber under the principles established in article 69. This is consistent with the rationale underpinning article 56 which is to ensure efficiency, integrity and fairness in the collection of evidence, but not to create ‘sacred’ evidence that may not be subsequently challenged or tested at trial as used to happen in many civil law systems with the evidence collected by the juge d’instruction. Accordingly, the Trial Chamber is free to rule on the admissibility and relevance of evidence obtained pursuant to article 56, subject to the criteria set forth in article 69, para. 4 and in the Rules of Procedure and Evidence [...]”.¹⁰

⁸ See the Prosecution’s Request, *supra* note 3.

⁹ See FRIMAN (H.), *Investigation and Prosecution* in LEE (R.S.) (Ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, N.Y., Transnational Publishers, 2001, p. 507.

¹⁰ See GUARIGLIA (F.) & HOCHMAYR (G.), *Article 56* in TRIFFTERER (O.) (Ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd edition, C.H. Beck, 2008, p. 1115.

9. Article 69(4) of the Rome Statute states that “[t]he Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence”.

10. In practice, Chambers have established “a three stage approach” with regard to the admission of evidence which is to be applied on a case-by-case basis; and which implies the assessment of its relevance; its probative value; and the lack of any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness.¹¹

11. Counsel submit that there is no dispute among the parties as to the relevance and probative value of the written transcripts of and related items used during the testimonies of the seven witnesses. Thus, Counsel contend that the Chamber should limit its analysis of the material to be admitted to the last prong of the admissibility test referred to *supra* – namely whether admission of the material would have a prejudicial effect on the Accused’s statutory rights.¹²

¹¹ See the “Corrigendum to Decision on the legal representative’s application for leave to tender into evidence material from the ‘bar table’ and on the Prosecution’s Application for Admission of three documents from the Bar Table Pursuant to Article 64 (9)” (Trial Chamber I), No. ICC-01/04-01/06-2694-Corr, 9 March 2011, para. 12. See also, the “Decision on the admissibility of four documents” (Trial Chamber I), No. ICC-01/04-01/06-1399, 13 June 2008, paras. 27-31 (“[in examining evidence] [f]irstly, the Chamber must ensure that the evidence is *prima facie* relevant to the trial, in that it relates to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims. [...] Second, the Chamber must assess whether the evidence has, on a *prima facie* basis, probative value. [...] Third, the Chamber must, where relevant, weigh the probative value of the evidence against its prejudicial effect. Whilst it is trite to observe that all evidence that tends to incriminate the accused is also ‘prejudicial’ to him, the Chamber must be careful to ensure that it is not unfair to admit the disputed material, for instance because evidence of slight or minimal probative value has the capacity to prejudice the Chamber’s fair assessment of the issues in the case”).

¹² See the First Article 56 Decision, *supra* note 6, para. 12.

12. Such an evaluation is always “*a fact-sensitive decision*”.¹³ Indeed, the extent to which the evidence is relevant and may cause prejudice depends on its nature and on the circumstances in which it is submitted.¹⁴

13. Counsel contend that the rights of the Accused will not be prejudiced by the admission of the evidence taken pursuant to article 56 of the Rome Statute. Indeed, the Defence had adequate time for its preparation¹⁵ and counsel for Mr Ongwen had the opportunity to participate in said proceedings, including by conducting his questioning of the witnesses, following the Prosecutor’s questioning.¹⁶

14. Moreover, Counsel contend that granting the Prosecution’s Request ensures the expeditiousness of the proceedings. Indeed, the *rationale* behind affording a unique investigative opportunity under article 56 of the Rome Statute is to ensure efficiency of the trial proceedings. In this regard, Pre-Trial Chamber II held that:

“[t]he risk that evidence might disappear, be destroyed or otherwise deteriorate, and therefore cease to be available or useful within the

¹³ See the “Decision on the admissibility of four documents”, *supra* note 11, para. 32.

¹⁴ See the “Judgment pursuant to Article 74 of the Statute”, Trial Chamber I, No. ICC-01/04-01/06-2842, 14 March 2012, para. 108. See also the “Decision on the Prosecutor’s Bar Table Motions (Trial Chamber II)”, No. ICC-01/04-01/07-2635, 17 December 2010, paras. 37-40, and 41-65. (*Once the probative value of a particular item of evidence has been determined, the Chamber must weigh this against the potential prejudice, if any, that its admission might cause. [...] As with probative value, it is not possible to define the meaning of prejudice exhaustively. However, when addressing issues of prejudice, the Chamber will consider two questions: (a) what causes the prejudice; and (b) what suffers the prejudice. [...] In relation to the second question, article 69(4) mentions prejudice caused to the fairness of the trial and prejudice to the “fair evaluation of the testimony of a witness”. Article 69(7), which deals specifically with evidence obtained in violation of the Statute or of internationally recognized human rights, protects similar, but not identical, values. They are the “reliability of evidence” and the “integrity of the proceedings”. Although article 69(7) is *lex specialis* in respect of the general admissibility test contained in article 69(4), which is broader in scope with regard to the possible forms of prejudice, the Chamber is of the view that both paragraphs, for the most part, protect the same two key values: firstly, the Statute protects the accuracy and reliability of the Court’s fact-finding by requiring that evidence of questionable credibility be excluded; secondly, the Statute safeguards the moral integrity and the legitimacy of the proceedings by requiring that the process of collecting and presenting evidence is fair towards the accused and respects the procedural and human rights of all those who are involved in the trial. The existence and extent of prejudice must be ascertained on a case-by-case basis, taking into consideration the specific characteristics of the item of evidence and the nature of the alleged prejudice.*)

¹⁵ See the Second Article 56 Decision, *supra* note 6, para. 13.

¹⁶ See the First Article 56 Decision, *supra* note 6, para. 11 and the Second Article 56 Decision, *supra* note 6, para. 15

context of the investigation and prosecution of the relevant crimes represents a major threat to the efficiency of proceedings. The Statute addresses this risk, in particular by providing for a procedure aimed at preserving a 'unique investigative opportunity' under article 56 [...]".¹⁷

15. Furthermore, Counsel submit that granting the Prosecution's Request will be in line with the Trial Chamber's duty to ensure that the trial is not only fair and expeditious, but is also conducted with due regard for the protection of victims and witnesses pursuant to article 64(2) of the Rome Statute. Pursuant to article 68(1) of the Rome Statute, the Trial Chamber shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, while having regard to all relevant factors, including age, gender and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.

16. When deciding to adopt the procedure for a unique investigative opportunity in this case, the Single Judge of the Pre-Trial Chamber emphasised the fact that the seven witnesses may be no longer willing to testify freely at trial and the genuineness of their testimony may become tainted due to the lengthy nature of the proceedings.¹⁸ Moreover, due to the nature of the victimisation of the witnesses, there may be benefits 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.¹⁹ Finally, the Single Judge noted that there is risk that potential interference on the part of third persons may cause witnesses not to attend when called to testify at trial or to testify incompletely or insincerely.²⁰ All these factors continue to be relevant to the Chamber's determination regarding the admissibility of the evidence obtained through the article 56 procedure.

¹⁷ See the "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06" (Pre-Trial Chamber II), No. ICC-02/04-101, 13 August 2007, para. 100.

¹⁸ See the First Article 56 Decision, *supra* note 6, para. 6.

¹⁹ *Idem*, para. 10 and the Second Article 56 Decision, *supra* note 6, para. 12.

²⁰ See the Second Article 56 Decision, *supra* note 6, para. 9.

IV. CONCLUSION

17. For the foregoing reasons, Counsel respectfully request the Chamber to grant the Prosecution's Request and admit written transcripts of witness testimonies obtained pursuant to article 56 of the Rome Statute, as well as related items used during those testimonies.



Paolina Massidda



Joseph A Manoba



Francisco Cox

Dated this 4th day of July 2016

At The Hague, The Netherlands, at Kampala, Uganda and at Santiago, Chile