

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 11 August 2015

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN UGANDA

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

Confidential

Decision on the "Defence Request for Leave to Appeal Decision ICC-02/04-01/15-277"

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

The Office of the Prosecutor

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Krispus Ayena Odongo

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Cuno Tarfusser, Single Judge exercising the functions of the Chamber in the present case, issues this decision on the "Defence Request for Leave to Appeal Decision ICC-02/04-01/15-277" filed on 3 August 2015 (ICC-02/04-01/15-284-Conf, "Request").

1. On 26 June 2015, the Prosecutor filed an application under article 56 of the Statute with regard to the taking of the testimony of witnesses P-0226 and P-0227 (ICC-02/04-01/15-256-Conf).

2. In its response filed on 3 July 2015 (ICC-02/04-01/15-259-Conf), the Defence submitted that the Prosecutor's application should be rejected as "it violates: a. Mr Ongwen's rights to know the charges before him, pursuant to Articles 61(4) and 67(1)(a) because the Prosecution has not proffered new counts pursuant to Article 58(6) of the Statute; b. Mr Ongwen's rights to have adequate time to prepare for trial, pursuant to Article 67(1)(b); c. Article 101 of the Statute; and d. Article 56, when interpreted by Article 21, of the Statute".

3. On 27 July 2015, the Single Judge granted the Prosecutor's application (ICC-02/04-01/15-277-Conf, "Decision"), rejecting, *inter alia*, the Defence argument that recourse to measures under article 56 of the Statute is not possible prior to "new counts", additional to those on the basis of which the warrant of arrest against Dominic Ongwen was issued, being formally "requested". The Single Judge found that the matter at issue concerned measures aimed at collecting evidence in the presence of a risk that it would not be subsequently available and that it was irrelevant whether any such evidence would eventually be used in the present proceedings or, potentially, in any separate proceedings. The Single Judge considered that the taking of testimony of the two witnesses was not prejudicial to the rights of Dominic Ongwen and that "the Defence, having been provided with the written statements of the two witnesses collected by the Prosecutor, which are short,

linear and clear as to the facts on which the two witnesses would testify, will be in a position to participate meaningfully in the taking of the testimony”.

4. In the Request, the Defence is requesting leave to appeal the Decision with regard to the two following issues:

- a. *The Single Judge erred when he determined that two statements would be enough information for the Defence to participate meaningfully in the taking of testimony of persons which are testifying completely to alleged actions which are in no way described in the Prosecution's application for an arrest warrant or the arrest warrant (“First Issue”);*
- b. *The Single Judge erred when he did not consider whether the proper conduct for the Prosecution should have been to seek the advice of the ICC's experts on victims and witnesses, to wit, the Victims and Witnesses Unit before granting the Prosecution's request (“Second Issue”).*

5. The Defence further requests an interim stay of the scheduled testimony pursuant to the decision until such time as the Appeals Chamber can decide whether to grant suspensive effect if the Defence is granted leave to appeal.

6. In her response filed on 7 August 2015 (ICC-02/04-01/15-285-Conf), the Prosecutor submits that the Request should be dismissed with the issues not being appealable as the First Issue misstates the Decision, the Second Issue misapprehends its scope, and both issues merely disagree with the Decision and rehearse earlier rejected submissions. Further, the Prosecutor submits that the Request fails to show any impact on the fairness and expeditiousness of the proceedings, or the outcome of the trial, and that the intervention of the Appeals Chamber is not necessary at this stage. The Prosecutor also submits that the Defence fails to justify its request for an interim stay of the Decision.

Single Judge's determinations

7. The Single Judge notes article 82(1)(d) of the Statute, rule 155 of the Rules of Procedure and Evidence, and regulation 65 of the Regulations of the Court, as well as the established case law of the Court in the matter of interlocutory appeals pursuant to article 82(1)(d) of the Statute.

8. More specifically, the Single Judge recalls (i) that only an issue emanating from the ruling of the decision concerned, which does not merely represent an abstract question, a hypothetical concern or a mere disagreement, may constitute an "appealable issue" for the purposes of the granting of leave to appeal pursuant to article 82(1)(d) of the Statute, and (ii) that the cumulative nature of the requirements set forth in the provision makes it unnecessary, once a proposed issue is found lacking in one respect, to proceed to the analysis as to the presence of any other of the additional requirements.

As to the First Issue

9. The Single Judge notes that, in paragraph 13 of the Request, the Defence submits that "[t]he First Issue affects the fairness of the proceedings because the Defence cannot be expected to conduct meaningful examinations of witnesses unless it knows which alleged counts the witnesses intend to testify to". This statement reproduces, almost to the word, the one contained in the second sentence of paragraph 19 of the Defence's response to the Prosecutor's application. It simply reiterates the reading made by the Defence of article 56 of the Statute, which reading had already been considered – and rejected – by the Single Judge in the Decision. The Decision held that article 56 of the Statute is "applicable at any stage of the investigation"; as such, and by virtue of its very nature of provisional measure, its application can occur prior to and independently from the formulation of any "count". Now, as then, the Single Judge considers that the Defence, having been provided with the

written statements, and since it will receive, as ordered by the Single Judge, the documents, if any, the Prosecutor intends to use during the examinations by 17 August 2015, is in a position to meaningfully participate in the taking of the testimony as authorised, without prejudice to its right to challenge such testimony at a later stage, including at trial, in the event that the Prosecutor were to make use of it.

10. None of the additional elements brought forward by the Defence in the Request is suitable to make the First Issue an appealable one. This is apparent, in particular, in respect of those statements aiming at inferring the purported impact of the First Issue on fairness which are either indeterminate in content or of a hypothetical, speculative nature. It is the case, in particular, for the reference to (otherwise unspecified) “complexities” of conducting cross-examination on the basis of “little information”, or to the fact that “questioning as to the witnesses’ veracity will be highly limited” in the absence of “other meaningful evidence or explanation of the supposed counts”. As regards the argument that the Defence would be able to properly examine the witnesses only by “disclos[ing] evidence, and thus part of its case theory, in advance of the Confirmation Hearing to the Prosecution”, the Single Judge notes that it appears not only vague in content and speculative in nature, but also in contradiction with the Defence’s fundamental line of argument, *i.e.* that the scope of the testimony to be taken should be defined by the counts, in respect of which – it is to be presumed – the Defence will prepare and define its own case theory. Finally, similar flaws affect the submission that the taking of the testimonies “requires the Defence to alter its investigations and strategy based on testimony being given about allegations not yet defined by the Prosecution”: whether this will, or will not, be the case, will only be seen once the taking of the testimony will have occurred.

11. Other arguments aimed at affirming the impact of the First Issue on the fairness of the proceedings appear based on a misrepresentation of the nature and purpose of the activity authorised by the Decision. The taking of testimony at this stage is by no means aimed at or suitable to hinder the Defence's ability "to conduct comprehensive investigations on the alleged crimes", in due course and as required. Neither is it meant as the unique and final opportunity for the Defence to highlight any discrepancies or other shortcomings which might affect the testimony taken in these circumstances at the appropriate stages of both the pre-trial and the trial proceedings.

12. Finally, the fact that the taking of the testimony will require the Defence to organise its own work so as to be able to properly discharge the various tasks and responsibilities arising in connection with it cannot *per se* amount to an impact on expeditiousness within the meaning and for the purposes of article 82(1)(d) of the Statute. The prioritisation of work, in accordance with the evolving scenario and the emerging requirements of ongoing proceedings, falls squarely within the abilities required from professional lawyers entrusted with legal representation in any given case.

13. In light of the above, the Single Judge finds that the First Issue is to be construed as mere disagreement with the Decision and an attempt to having the issue re-litigated before the Appeals Chamber on an interlocutory basis. Accordingly, in the absence of the conditions required by article 82(1)(d) of the Statute, leave to appeal on this issue cannot be granted.

As to the Second Issue

14. As stated by the Applicant, the Decision did not address the issue as to whether "the proper course of conduct for the Prosecution would be to seek the advice and counsel from the VWU instead of the outside opinion of a professional located in Uganda". This, in itself, is tantamount to

acknowledging that the Second Issue does not arise from the Decision for the purposes of article 82(1)(d) of the Statute and is therefore not appealable. Moreover, there is no such thing in the Decision as granting the Prosecutor “the ultimate decision on whether to refer a witness to the VWU or to apply to the Chamber for a unique investigative opportunity under Article 56 of the Statute”.

15. In light of this, the Second Issue does not constitute an appealable issue for the purposes of article 82(1)(d) of the Statute. For the sake of clarity, however, the Single Judge wishes to point out that the argument underlying the Second Issue appears to rely on a fundamental misconstruction of the role and responsibilities vested in the VWU by the statutory texts. These responsibilities, as enshrined in article 43(6) of the Statute and further defined in rules 16 to 19 of the Rules of Procedure and Evidence, relate and are limited to the provision of “protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses”. In other words, these responsibilities are vested in the VWU for the benefit of the victims and witnesses themselves, so that their “safety, physical and psychological well-being, dignity and privacy” may be preserved pursuant to article 68(1) of the Statute. Determining the appropriateness or necessity of investigative steps under article 56 of the Statute, or making assessments of the type submitted by the Prosecutor in her request under that provision, relating to the testimony of the witnesses, including as regards the likelihood of their availability or their reliability, clearly fall outside the scope of the mandate entrusted to the VWU.

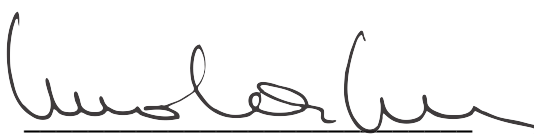
16. Since none of the issues raised by the Defence satisfies all the cumulative requirements set forth under article 82(1)(d) of the Statute, the related request for interim stay of the Decision until such time that the Appeals Chamber can

decide on the Defence's request for suspensive effect of the appeal becomes moot and must accordingly be dismissed.

FOR THESE REASONS, THE SINGLE JUDGE

REJECTS the Request.

Done in both English and French, the English version being authoritative.

A handwritten signature in dark ink, appearing to read 'Cuno Tarfusser', is written over a horizontal line.

Judge Cuno Tarfusser
Single Judge

Dated this 11 August 2015

At The Hague, The Netherlands