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PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN UGANDA

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

Public redacted

Decision on the “Second Prosecution application to the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute”

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

The Office of the Prosecutor

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
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**The Office of Public Counsel for
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REGISTRY

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Defence Support Section

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Nigel Verrill

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 “Second Prosecution application to the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute” (ICC-02/04-01/15-310-Conf and annexes A-H), filed on 2 October 2015.

1. On 27 July 2015, the Single Judge granted (ICC-02/04-01/15-277-Conf) the first request of the Prosecutor to preserve evidence and take measures under article 56 of the Rome Statute (the “Statute”) (ICC-02/04-01/15-256-Conf, filed on 26 June 2015). Pursuant to that decision, Witnesses P-226 and P-227 gave testimony, on oath pursuant to rule 66 of the Rules of Procedure and Evidence (the “Rules”), on 15, 16, 18 and 19 September 2015 (ICC-02/04-01/15-T-8-CONF-ENG, -T-9-CONF-ENG, -T-10-CONF-ENG, -T-11-CONF-ENG).

2. The Prosecutor now submits that for generally the same reasons, the testimony of six further witnesses (██████████ – P-99, ██████████ – P-101, ██████████ – P-198, ██████████ – P-214, ██████████ – P-235 and ██████████ – P-236) should be taken pursuant to article 56 of the Statute. Specifically, the Prosecutor argues that there is a risk that the evidence of these witnesses may not be available at trial due to: (i) the pressure they face in their environment; (ii) the potential secondary victimisation they endure through the public, media and legal proceedings; and (iii) the potential for their changed perception of the perpetrator to pollute their testimony.

3. The Defence responded on 8 October 2015 (ICC-02/04-01/15-314-Conf-Exp and annexes –Conf-Exp-AnxA and –Conf-Exp-AnxB), arguing that: (i) the “wide-sweeping” measures requested are beyond the scope of article 56 of the Statute and violate Dominic Ongwen’s rights; (ii) the factual basis upon which the request is based is without merit; and (iii) the Prosecutor had the opportunity to request these same measures as part of her first request. The

Defence thus argues principally that there is no unique investigative opportunity under article 56 of the Statute, and, alternatively, that, if the Chamber decides to take measures under article 56 of the Statute, any such hearings should take place after the confirmation of charges hearing.

4. The Single Judge previously expressed concern over certain recent developments in Uganda which could result in the creation of pressure on witnesses in the present case. Particularly significant among these was a meeting held in early June in Uganda under the auspices of a Ugandan non-governmental organisation, during which proceedings in the present case were discussed, including opinion as to the guilt or innocence of Dominic Ongwen and the collaboration of participants with the Court. The Single Judge considered previously that there was “reasonable suspicion that the meeting in question was not innocuous but was held with a view to exercising some form of influence on persons who possess information relevant to the case” (ICC-02/04-01/15-254). The Single Judge notes that according to the available information (UGA-OTP-0237-0034), Witness P-214 helped in organising and attended this meeting. There is indication that during this meeting the participants, former “wives” of Dominic Ongwen, some of whom have born his children, were made to understand that the proceedings before the Court were unfairly preventing him from returning to Uganda and providing for his children.

5. The Single Judge notes the Defence argument that organisations such as the NGO in question “have been working in northern Uganda for years and their output is appreciated by the affected women and society at large”, but considers that while this general observation may be true, it has no bearing on the specific indications available as to the risk for the evidence of the witnesses subject to the request becoming unavailable. Similarly, in light of the specific information available as to the subject-matter of the discussions at

the meeting with the witnesses in early June, the Single Judge does not attach any relevance to the Defence's interpretation of said meeting as "group therapy".

6. The Single Judge also notes with concern the information provided by the Prosecutor in the request, to the effect that the same NGO recently published an update on its activities, stating that "extensive consultations with women connected to Dominic Ongwen's case at the International Criminal Court" were conducted and that respondents include "women who had a close affinity to him during captivity", and announcing the publication of a "situational brief" informed by "[t]he findings of this research" (see ICC-02/04-01/15-310-Conf-AnxD). The Single Judge considers these to be specific and concrete indications of a risk of indirect pressure on witnesses, in spite of the arguments of the Defence to the contrary.

7. Further, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

8. In light of these recent occurrences, ostensibly triggered by Dominic Ongwen's surrender to the Court and the commencement of criminal proceedings in his case, the Single Judge also considers unpersuasive the Defence argument that, as the passage of time since the alleged crimes has had no negative effect until now, there exists no reason to suggest that these witnesses' testimony could be impaired if not obtained within the context of article 56 of the Statute.

9. To the contrary, in the view of the Single Judge, the circumstances demonstrate that there is a risk that the testimony of the witnesses who are former "wives" of Dominic Ongwen, including Witnesses P-99, P-101, P-198,

P-214, P-235 and P-236, “may not be available subsequently for the purposes of a trial”, within the meaning of article 56 of the Statute. In this regard, as already found in the decision of 27 July 2015, the Single Judge is of the view that not only physical conditions may pose a risk to the subsequent availability of a testimony, but that any such risk may equally result from interference on the part of third persons causing a witness not to attend when called to testify at trial or to testify incompletely or insincerely.

10. In these circumstances, in order to preserve the potentially relevant evidence of these witnesses, it is warranted to provide for their testimony under oath before the Single Judge, in the presence of the Prosecutor and the Defence. The testimony will be video recorded and written transcripts will be made. The video recording and transcripts will then be available for any future trial.

11. The Single Judge notes the Defence objection to this course of action on the ground that it is excessive and affects “nearly 10% of [the Prosecutor’s] witnesses”, but considers this fact irrelevant, as measures under article 56 of the Statute to preserve evidence may be taken whenever necessary. Insofar as the pre-conditions for the application of this provision are met, which is indeed the case in the present instance, the “exceptional” nature of the measures to be taken is not affected by the fact that eight, rather than two, witnesses’ testimony will be taken. By the same token, the fact that the Prosecutor first approached the Chamber with a request concerning two witnesses, and only later with respect to further six, has no bearing on the question whether the taking of measures under article 56 of the Statute is at present justified.

12. The Single Judge also reiterates, as stated in the decision of 27 July 2015, that article 68(1) of the Statute, which obliges the Court to take appropriate

measures for the protection of, *inter alia*, the psychological well-being, dignity and privacy of victims and witnesses, read together with article 69(2) of the Statute, which makes an exception for this purpose to the requirement that the testimony at trial shall be given in person, provides an additional legal basis for the present decision. Indeed, it is evident from the statements of the witnesses that they may require specific protective measures as a result of the nature of their victimisation. In particular, there may be benefit in completing their 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. The present decision is therefore taken also with a view to making it possible for the eventual Trial Chamber to consider not calling the six witnesses to testify in person.

13. The testimony will be taken following the same procedure as with respect to Witnesses P-226 and P-227, which was laid out in a decision issued on 18 August 2015 (ICC-02/04-01/15-293-Conf). In particular, there will be no witness preparation and no meetings between the witnesses and the parties prior to the taking of testimony. The Victims and Witnesses Unit is instructed to conduct a witness familiarisation procedure and allow the witnesses to review their prior statements. The Victims and Witnesses Unit shall also ensure that witnesses are available to testify consecutively without undue loss of time between successive witnesses.

14. The taking of testimonies will commence on 2 November 2015, and continue, as necessary, on 3, 4, 5, 6, 9, 10, 11, 16, 17, 18 and 19 November 2015. The times of the sessions and precise order in which the witnesses will appear will be communicated to the parties in due course.

15. The Single Judge considers that this course of action is not prejudicial to Dominic Ongwen's rights. His counsel will have the opportunity to

participate in the taking of testimony, including by conducting his questioning of the six witnesses after the Prosecutor. The statements that the Prosecutor has obtained from the witnesses have been disclosed to the Defence sufficiently in advance prior to the scheduled date of the taking of testimony, namely on 15 May 2015 (Witness P-101), 6 July 2015 (Witness P-214), 11 September 2015 (Witness P-99, first statement of P-198 and P-235) and 2 October 2015 (draft second statement of Witness P-198 and draft statement of Witness P-236). The anticipated subject-matter of the testimony of the witnesses is also straightforward. Moreover, the ability of the Defence to meaningfully participate in the taking of testimonies – which was already not impaired during the examination of Witnesses P-226 and P-227 – will be further facilitated by the Prosecutor’s provision of notice of intended charges against Dominic Ongwen, filed on 18 September 2015 (ICC-02/04-01/15-305-Conf) and supplemented, with respect to Witness P-236, on 5 October 2015 (ICC-02/04-01/15-311-Conf).

16. In addition, the Single Judge reiterates that also the taking of testimony of these six further witnesses will be done for the purpose of preserving their evidence, without prejudice to the eventual use of that evidence in the proceedings. Indeed, article 56(4) of the Statute states that the admissibility and weight of the evidence taken under article 56 of the Statute shall be ruled on at any eventual trial by the relevant Trial Chamber. More specifically, in accordance with article 69(2) of the Statute, the use at trial of recorded testimony of a witness by means of video technology is permitted only insofar as the Trial Chamber considers that this is not prejudicial to or inconsistent with the rights of the accused. Accordingly, if charges are confirmed, the recorded testimony of Witnesses P-99, P-101, P-198, P-214, P-235 and P-236 will be admitted by the Trial Chamber only if the latter is satisfied that this would not prejudice Dominic Ongwen’s statutory rights. In the view of the

Single Judge, this constitutes an additional guarantee for the rights of the defence and militates in favour of obtaining testimony of these additional witnesses pursuant to article 56 of the Statute already at this stage. If the evidence is sought to be presented at the confirmation of charges hearing, this Chamber will be bound by essentially the same rules as concerns the guaranteeing of defence rights.

17. The Single Judge notes that the Defence has been in contact with Witnesses P-214, P-235 and P-236. At least one witness (P-235) has been contacted after the notification to the Defence of the Prosecutor's request to have the witnesses testify before the Chamber. It appears from the information provided by the Defence (ICC-02/04-01/15-314-Conf-Exp-AnxB) that the purpose of the meeting was to ascertain whether the witness was willing to testify for the Prosecutor or for the Defence. Considering that no substantial difference exists in this Court between witnesses who come to testify "for" one or the other party, and in particular considering that the Single Judge is currently seized of the question whether the witnesses should be called to testify formally before the Court, the conduct of the Defence is inappropriate. Such is also the scheduling of an interview with Witness P-214 for 8 October 2015 (the same day on which this information has been communicated to the Single Judge), knowing that, on that date, the Single Judge would not have made any order in this regard waiting for the Defence response to the Prosecutor's request under consideration.

18. In order to preserve the judicial process and to accord to the witnesses the maximum protection, the Single Judge finds it necessary to order the Defence to refrain from contacting any of the witnesses subject to the present decision. The Defence will suffer no prejudice from this order, as it will be able to participate in the taking of testimony from the witnesses.

19. Finally, the Single Judge notes that the Defence has filed its response as “confidential, *ex parte*”, but considers that although it discusses “Defence work-product and investigations”, no reasons exist to withhold from the Prosecutor this information, which was put on the record voluntarily and, in any case, essentially concerns contacts between the Defence and three of the witnesses who will be called to testify in accordance with the present decision. The response shall therefore be reclassified as “confidential”.

FOR THESE REASONS, THE SINGLE JUDGE

FINDS that there exists a unique investigative opportunity with respect to witnesses ██████████ (P-99), ██████████ (P-101), ██████████ (P-198), ██████████ (P-214), ██████████ (P-235) and ██████████ (P-236);

DECIDES that, subject to their willingness, witnesses ██████████ (P-99), ██████████ (P-101), ██████████ (P-198), ██████████ (P-214), ██████████ (P-235) and ██████████ (P-236) will give testimony, commencing on 2 November 2015 and continuing as specified at paragraph 14 above, on oath pursuant to rule 66 of the Rules of Procedure and Evidence, by video link, in closed session, in the presence of the Prosecutor and the Defence;

DECIDES that the Defence of Dominic Ongwen, if it so wishes, will be permitted to question the witnesses after the questioning by the Prosecutor;

DECIDES that the testimony shall be video recorded and a written transcript be made;

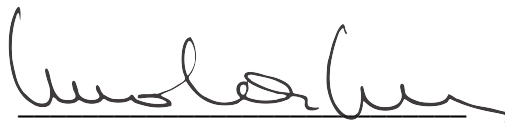
ORDERS the Prosecutor and the Defence to inform the Chamber and the opposing party, no later than 23 October 2015, of the documents, if any, they intend to use during the examination of each witness;

ORDERS the Defence to refrain from contacting, directly or indirectly, any of the witnesses subject to the present decision;

ORDERS the Registrar to make any necessary arrangements, including those that may be necessary to ensure the safety of the witnesses; and

ORDERS the Registrar to reclassify documents ICC-02/04-01/15-314-Conf-Exp, ICC-02/04-01/15-314-Conf-Exp-AnxA and ICC-02/04-01/15-314-Conf-Exp-AnxB as “confidential”.

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

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

Judge Cuno Tarfusser
Single Judge

Dated this 12 October 2015

At The Hague, The Netherlands