

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 13 June 2016

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
with Public Annexes A and B**

Prosecution's request to admit evidence preserved under article 56 of the Statute

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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I. Introduction

1. Witnesses P-0099, P-0101, P-0214, P-0226, P-0227, P-0235 and P-0236 (“the seven witnesses”) gave testimony under oath, via video-link, before the Single Judge of Pre-Trial Chamber II (“Single Judge”) in September and November 2015. Their video-recorded testimonies and written transcripts were preserved for trial under article 56 of the Rome Statute (“Statute”).
2. Pursuant to articles 56(4) and 69(4) of the Statute, the Prosecution requests the Chamber to admit written transcripts and related items used during the seven witnesses’ examinations (“article 56 evidence”). The evidence is relevant, probative and will not prejudice a fair trial or fair evaluation of the testimony of witnesses.
3. Granting this request ensures an expeditious trial and protects vulnerable witnesses who are victims of sexual and gender-based crimes.

II. Applicable Law

4. Article 56(4) dictates that “the 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.” Article 69(4) provides that “the 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 Rule of Procedure and Evidence.”
5. Under article 64(6)(e) the Chamber “may, as necessary: provide for the protection of the accused, witnesses and victims.” In addition, article 68(1) imposes a duty upon the Court to “take appropriate measures 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.” Underlining the importance of this duty, rule 86 specifies that “a Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular ... victims of sexual or gender violence.”

III. Procedural background

6. On 26 June and 2 October 2015, the Prosecution requested the Pre-Trial Chamber to take measures under article 56 of the Statute to preserve the testimonies of the seven witnesses who form the subject of this request.¹
7. The Prosecution made factual submissions showing, *inter alia*, that the women were living in an environment of pressure and that they were vulnerable to psychological harm through re-traumatisation. The Prosecution argued, *inter alia*, that the application of article 56 measures would: reduce the likelihood of these witnesses’ further traumatisation; protect them from societal pressure to avoid re-traumatisation; protect them from societal pressure which may deter them from giving any evidence at all; prevent the evidence eventually given at trial from being coloured or tainted by fears, expectations or changed perception, or by post-traumatic memory troubles.²
8. The Single Judge granted the requests.³ He, *inter alia*, referred to articles 68(1) and 69(2) to highlight the benefit in completing the witnesses’ involvement with the Court as soon as possible.⁴ His intent in permitting article 56

¹ ICC-02/04-01/15-256-Conf, ICC-02/04-01/15-310-Conf.

² ICC-02/04-01/15-310-Conf paras. 21-44.

³ ICC-02/04-01/15-277-Conf, ICC-02/04-01/15-316-Conf.

⁴ ICC-02/04-01/15-277-Conf, para. 10, ICC-02/04-01/15-316-Conf, para. 12.

testimony was in part to preserve the testimony of these witnesses for possible use at trial.⁵ The Single Judge noted that the written statements of the witnesses were “short, linear and clear as to the facts on which the two witnesses would testify.”⁶ He noted that “the anticipated subject-matter of the testimony of the witnesses is also straightforward. Moreover, the Defence’s ability 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”.⁷

9. The witnesses testified before the Single Judge in September and November 2015, by video-link, in closed session, and in the presence of the Prosecution and the Defence. The witnesses’ testimonies were video-recorded and transcribed. The Defence participated throughout the taking of testimonies and conducted its own examination of the witnesses.
10. Annex A provides references to the transcripts and audio and video recordings related to the seven witnesses’ testimonies.⁸ Annex B lists the items used during their examinations. These items should be admitted as evidence for use by the Chamber and parties in order to ensure the completeness and full evaluation of the seven witnesses’ testimonies.

⁵ ICC-02/04-01/15-316-Conf, para. 12.

⁶ ICC-02/04-01/15-277-Conf, para. 11.

⁷ ICC-02/04-01/15-316-Conf, para. 15.

⁸ The hyperlinks of the audio and video recordings of the article 56 hearings that are provided in Annex A can only be opened with an application called *The Record Player*. This application can be requested from the IT section if it is not yet installed. The following steps are required to access the recording: (i) click on the hyperlink and an internet page would open, (ii) click on the title of the file and this would download the recording, and (iii) click on the downloaded file in order access to the folder containing the recordings.

IV. Submissions

11. The Prosecution submits that the Trial Chamber should admit the evidence which was preserved under the article 56 measures taken by the Pre-Trial Chamber. Pursuant to article 69(4) and the approach adopted by different Chambers in applying it, the Prosecution submits that this evidence is, *prima facie*, relevant and probative and causes no prejudice.⁹

i) *The article 56 evidence is relevant*

12. The article 56 evidence relates to matters to be considered in this case by the Chamber, the Parties and participants. This evidence is relevant for several aspects of the case and in particular counts 50-60 and 61-68.

13. Each of the testimonies is an account of the seven witnesses' direct victimisation by the Accused. They testified, *inter alia*, of the commission of the crimes of forced marriage, torture, rape, sexual slavery, enslavement, forced pregnancy or outrages upon personal dignity committed directly by the Accused against them as well as indirectly by him against other women held in the Sinia brigade. This evidence was taken and preserved for this trial pursuant to the provisions of the Statute and in accordance with the Rules.

14. With regard to the items used during the examination of the seven witnesses, the Prosecution submits that they are an integral part of their testimonies and, as such, they too are *prima facie* relevant. They should be admitted by the

⁹ The practice from the Trial Chambers, when dealing with the admissibility of evidence under article 69(4), requires consideration of three factors: (i) its *prima facie* relevance to the issues at trial – see, for example, ICC-01/04-01/06-1399-Corr, para.27; ICC-01/04-01/07-2635, section B; ICC-01/05-01/08-2012-Red, paras.1314; ICC-01/05-01/08-2299-Red, para.8; ICC-01/09-01/11-1353, para.15; (ii) its *prima facie* probative value – see, for example, ICC-01/04-01/06-1399-Corr, paras.28-30; ICC-01/04-01/07-2635, section C; ICC-01/05-01/08-2012-Red, paras.13 and 15; ICC-01/05-01/08-2299-Red, para.8; ICC-01/09-01/11-1353, para.15.; and (iii) its prejudicial effect as weighed against the probative value – see, for example, ICC-01/04-01/06-1399-Corr, paras.31-32; ICC-01/04-01/07-2635, section D; ICC-01/05-01/08-2012-Red, paras.13, 16-17; ICC-01/05-01/08-2299-Red, para.8; ICC-01/09-01/11-1353, para.16.

Chamber in order to aid it, and the Parties, in their full evaluation of the testimonies.

ii) *The article 56 evidence is probative and reliable*

15. The article 56 evidence establishes the commission of the crimes listed under counts 50-60 and 61-68 and proves them as charged. As advanced, the aim of the article 56 proceedings was to preserve the evidence of the seven vulnerable witnesses. Their testimonies were given under oath in front of a judge of this Court, following all applicable provisions from the Statute and the Rules.

16. The authenticity of the recordings and of the transcripts cannot be questioned. They are part of the ICC court records. The Registrar, pursuant to the Pre-Trial Chamber's order,¹⁰ filed a report on the article 56 proceedings for each witness, annexing the audio and video recording of each testimony and including the references to the relevant transcript.¹¹

17. The testimonies of these seven vulnerable witnesses are reliable. As the Pre-Trial Chamber II found in its confirmation decision, they "are clear and consistent not only internally with respect to each witness's individual story, but also in combination, as the witnesses describe similar facts in a consistent manner and, moreover, provide evidence not only of their own, but also of the other witnesses' victimisation."¹²

18. The items referenced in Annex B include witness statements, a photograph, audio recordings, and other files, notes or reports that were used during the examination of the seven witnesses. These items are an integral part of the reliable testimonies and, as such, are *prima facie* probative. To enable full

¹⁰ ICC-02/04-01/15-T-19-Conf.

¹¹ ICC-02/04-01/15-351; ICC-02/04-01/15-352; ICC-02/04-01/15-354; ICC-02/04-01/15-355; ICC-02/04-01/15-356; ICC-02/04-01/15-357; ICC-02/04-01/15-358.

¹² ICC-02/04-01/15-422-Conf, para. 103.

evaluation of the testimonies and for the reasons outlined below, the Chamber should admit these items.

iii) Admission of the article 56 evidence causes no prejudice

19. The Prosecution submits that admission of article 56 evidence will not prejudice a fair trial or a fair evaluation of the testimony of a witness. The Defence was provided with unredacted statements of each of the seven witnesses prior to their testimonies under article 56¹³ and the list of items to be used during the examinations.¹⁴ The Accused knew of the identity of each of these witnesses, the full content and the nature of the information provided by them and the nature and the content of the documents and items to be used during their examinations. The Defence also had adequate time to prepare for their examinations.

20. The witnesses testified by video link in the presence of the Accused and of the counsel of his choice, who made full use of the right to examine them. There was no bar to the Accused giving clear and complete instructions concerning the allegations made by the witnesses, all of whom he knew personally. Cross-examination by the Defence included use of the documents and other items listed in Annex B.

21. In addition, the veracity of the witnesses can be evaluated in the same manner as live testimony because the testimonies are video-recorded. Thus, the judges

¹³ P-0099's statement UGA-OTP-0165-0081 was disclosed on 11 September 2015 and UGA-OTP-0234-0049 was disclosed on 11 September 2015; P-0101's statements UGA-OTP-0165-0102, UGA-OTP-0173-0109 and UGA-OTP-0191-0265 were disclosed on 15 May 2015; P-0214's statement UGA-OTP-0234-0026, was disclosed on 6 July 2015; P-0227's statement UGA-OTP-0235-0125 was disclosed on 6 July 2015; P-0226's statement UGA-OTP-0235-0235 was disclosed on 6 July 2015 and UGA-OTP-0236-0583 was disclosed on 17 August 2015; P-0235's statement UGA-OTP-0240-0003 was disclosed on 11 September 2015 and P-0236's statement UGA-OTP-0244-3360 was disclosed on 26 October 2015.

¹⁴ ICC-02/04-01/15-292-Conf-AnxA-Corr pertains to items to be used during the examinations of P-0226 and P-0227. It was filed on 17 August 2015 and corrected on 3 September 2015. P-0226 testified from 15-19 September 2015; ICC-02/04-01/15-325-Conf-AnxA pertains to items to be used during the examinations of P-0099, P-0101, P-0214, P-0235 and P-0236. It was filed on 23 October 2015. P-0099, P-0101, P-0214, P-0235 and P-0236 testified from 24-27 November 2015.

of the Trial Chamber can observe and evaluate the demeanour of the seven witnesses in the same way that the single Judge did.

22. The admission also ensures a fair and expeditious trial. If the Chamber grants the request, it would mean that the witnesses do not have to come and testify again, saving approximately 10-15 days of court time.

iv) The Admission of the article 56 evidence is consistent with the Chamber's obligation to protect vulnerable witnesses pursuant to article 68

23. The admission of article 56 evidence protects the psychological well-being, dignity and privacy of the seven witnesses, who are victims of crimes of sexual or gender violence. If the Court admits their article 56 testimonies, there would be no need for them to be called to testify again and relive their victimisation through yet another rigorous testimony. Avoiding further appearances before the Court decreases the likelihood of further traumatisation as the witnesses can conclude their involvement with the Court instead of waiting to give evidence at trial.

24. In this regard, the Prosecution re-iterates its prior submissions¹⁵ and notes the Single Judge's ruling¹⁶ on the issue:

[...] 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

¹⁵ ICC-02/04-01/15-256-Conf, paras. 12-13, 22-25 and 27.

¹⁶ ICC-02/04-01/15-316-Conf, para. 12. See also ICC-02/04-01/15-277-Conf, para.10 with regard to P-0226 and P-0227.

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.

25. The Prosecution submits that, if the witnesses were to be called to testify again, the effect will be detrimental to their well-being. Having gone through the experience of answering lengthy and detailed questions about their brutal and direct victimisation by the Accused, they returned home with the hope that their testimonies were finished and that they did not have to relive their experiences.¹⁷

26. The Prosecution respectfully appeals to the Trial Chamber to decide on the admissibility of article 56 evidence. Speedy resolution of this issue will provide clarity to the seven witnesses on whether they may or may not be called to testify again and will also enable the Prosecution to plan its witness schedule and witness management accordingly.

¹⁷ See, e.g., ICC-02/04-01/15-T-9-Conf, pages 77-78: "It's now two days that you, Witness, you are being questioned with all sort of questions. Now it is finished. You can go home. And thank you very much for having been here. And, well, all wish you obviously all the best, and I wish you also not to have to relive again once again for another time what you have told us. Thank you very much."; ICC-02/04-01/15-T-11-Conf, page 48: "So, Madam Witness, I think you are happy that now you are -- you can go home and I hope for you that you have not to relive again what you have explained to us in these years you were abducted. Thank you very much."; ICC-02/04-01/15-T-17-Conf, page 71: "Madam Witness, I thank you very much for having come ... to testify. Your testimony is now finished. You can go home. I really and sincerely hope that you never again have to undergo questions on what happened to you in the time when you were in the bush. So thank you very much and all the best."; ICC-02/04-01/15-T-17-Conf, page 46: "Thank you very much, Madam Witness. You are -- now you can go home. I thank you for your testimony and I wish really all the best and to forget most things, to recover from your experience. Thank you very much."

V. Requested Relief

The Prosecution requests that article 56 evidence be admitted into evidence.



Fatou Bensouda,
Prosecutor

Dated this 13th day of June 2016
At The Hague, The Netherlands