

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-02/04-01/15  
Date: 10 August 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**

**Decision on Request to Admit Evidence Preserved Under Article 56 of the  
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 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**

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**Registrar**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Trial Chamber IX** ('Chamber') of the International Criminal Court ('Court') issues the following 'Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute', in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 56, 57(2), 64(2), 67, 68, and 69 of the Rome Statute ('Statute'), Rules 63, 64, 75, 114, and 137(2) of the Rules of Procedure and Evidence ('Rules'), and Regulations 21 and 23 *bis*(3) of the Regulations of the Court ('Regulations').

### **A. Background and Submissions**

1. In September and November 2015, the Single Judge of Pre-Trial Chamber II ('PTC Single Judge'), pursuant to Article 56 of the Statute, heard witnesses P-99, P-101, P-214, P-226, P-227, P-235 and P-236 ('Witnesses') via video-link.<sup>1</sup>
2. On 13 June 2016, the Office of the Prosecutor ('Prosecution') requested ('Request') that the Chamber admit the transcripts and audio-visual recordings of the Witnesses' testimonies, as well as related items used during their examinations ('Article 56 Evidence').<sup>2</sup> It submits that the Article 56 Evidence is relevant,<sup>3</sup> probative, and reliable,<sup>4</sup> and its admission causes no prejudice,<sup>5</sup> would expedite the proceedings,<sup>6</sup> and is consistent with the Chamber's obligation to protect vulnerable witnesses.<sup>7</sup>
3. On 4 July 2016, the Legal Representatives of Victims ('LRVs') jointly responded, submitting that admission of the Article 56 Evidence is not prejudicial, enhances

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<sup>1</sup> P226 and P227 testified between 15 and 19 September 2015. *See* ICC-02/04-01/15-T-8-Conf; ICC-02/04-01/15-T-9-Conf; ICC-02/04-01/15-T-10-Conf; ICC-02/04-01/15-T-11-Conf. Between 9 and 17 November 2015, P-99, P-101, P-214, P-235 and P-236 testified. *See* ICC-02/04-01/15-T-13-Conf; ICC-02/04-01/15-T-14-Conf; ICC-02/04-01/15-T-15-Conf; ICC-02/04-01/15-T-16-Conf; ICC-02/04-01/15-T-17-Conf. For the audio-visual recordings of these hearings, *see* ICC-02/04-01/15-351-Conf-Anx1; ICC-02/04-01/15-351-Conf-Anx2; ICC-02/04-01/15-354-Conf-Anx1; ICC-02/04-01/15-354-Conf-Anx2; ICC-02/04-01/15-355-Conf-Anx1; ICC-02/04-01/15-358-Conf-Anx1; ICC-02/04-01/15-358-Conf-Anx2; ICC-02/04-01/15-356-Conf-Anx1; ICC-02/04-01/15-357-Conf-Anx1; ICC-02/04-01/15-352-Conf-Anx1.

<sup>2</sup> Prosecution's request to admit evidence preserved under article 56 of the Statute, ICC-02/04-01/15-464, with two public annexes.

<sup>3</sup> Request, ICC-02/04-01/15-464, paras 12-14.

<sup>4</sup> Request, ICC-02/04-01/15-464, paras 15-18.

<sup>5</sup> Request, ICC-02/04-01/15-464, paras 19-22.

<sup>6</sup> Request, ICC-02/04-01/15-464, para. 22.

<sup>7</sup> Request, ICC-02/04-01/15-464, paras 23-26.

the efficiency and expeditiousness of the proceedings, and ensures the Witnesses' protection under Articles 64(2) and 68(1) of the Statute.<sup>8</sup>

4. On 6 July 2016, the Defence for Mr Ongwen ('Defence') responded, submitting that (i) the Request should be rejected or, alternatively, (ii) a decision on admission should be deferred until the end of the presentation of evidence ('Response').<sup>9</sup> The Defence submits that the Article 56 Evidence is 'prior recorded testimony', not 'standard trial testimony', which the PTC Single Judge was not authorised to take.<sup>10</sup> It further submits that there is no legal mechanism for admission of the Article 56 Evidence.<sup>11</sup> In any event, the Defence claims that the prejudice of admission outweighs any probative value because (i) it did not have timely notice of the charges or evidence, and was therefore unlawfully forced to waive its right to remain silent;<sup>12</sup> and (ii) the PTC Single Judge did not notify the Witnesses of their rights under Rule 75 of the Rules.<sup>13</sup>
5. The Defence submits, pursuant to Article 69(7) of the Statute, that the collection of the Article 56 Evidence violated the Statute for the following three reasons, in addition to alleged violations of Mr Ongwen's rights under Article 67(1) of the Statute.<sup>14</sup> First, it claims that the relevant criteria under Article 56 of the Statute were not met because the PTC Single Judge did not (i) find that there was a prospect of 'imminent interference' demonstrating a 'unique investigative opportunity',<sup>15</sup> (ii) articulate or apply any criteria or standard for the requirement that the evidence be 'subsequently unavailable'<sup>16</sup> or (iii) specify the power in Article 56(2) of the Statute enabling the PTC Single Judge to take the

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<sup>8</sup> Joint Victims' Response to the "Prosecution's request to admit evidence preserved under article 56 of the Statute", ICC-02/04-01/15-488, paras 1, 3, 7-17.

<sup>9</sup> Defence Response to "Prosecution's request to admit evidence preserved under article 56 of the Statute", ICC-02/04-01/15-492, with three public annexes.

<sup>10</sup> Response, ICC-02/04-01/15-492, paras 7-14.

<sup>11</sup> Response, ICC-02/04-01/15-492, paras 14-19.

<sup>12</sup> Response, ICC-02/04-01/15-492, paras 22-26.

<sup>13</sup> Response, ICC-02/04-01/15-492, para. 27.

<sup>14</sup> Response, ICC-02/04-01/15-492, para. 29.

<sup>15</sup> Response, ICC-02/04-01/15-492, para. 32.

<sup>16</sup> Response, ICC-02/04-01/15-492, para. 34.

Witnesses' testimony.<sup>17</sup> Second, the Defence submits that Article 68 does not provide an independent legal basis for collection of evidence.<sup>18</sup> Third, it claims that the collection of 'standard trial testimony' requires a panel of three judges.<sup>19</sup>

## **B. Analysis**

6. Article 56(4) of the Statute provides that the admissibility of the Article 56 Evidence is governed at trial by Article 69 of the Statute. Under Article 69(2), the Court may permit the recorded testimony of a witness, as well as the introduction of transcripts, subject to the Statute and Rules.<sup>20</sup> Article 69(3) permits the parties to submit relevant evidence, while Article 69(4) provides that the Court may rule on the admissibility of any evidence. The Chamber therefore dismisses, at the outset, the Defence submission that there is no statutory avenue for the admission of the Article 56 Evidence.
7. In line with its general rule, the Chamber addresses below the Defence objections relevant to Article 69(7) of the Statute and otherwise defers its assessment of the relevance and probative value of the Article 56 Evidence until deliberating its judgment pursuant to Article 74(2) of the Statute.<sup>21</sup> In conducting an enquiry under Article 69(7) of the Statute, the Chamber must first determine whether evidence was obtained in violation of the Statute or internationally recognised human rights. If no such violation is established, the Chamber need not consider the criteria under Article 69(7)(a) or (b) of the Statute.
8. By the plain language of Article 57(2) of the Statute, the PTC Single Judge could exercise the functions of the Pre-Trial Chamber set out in Article 56(1)-(2) of the Statute. The PTC Single Judge specified the Article 56(2) measures enabling him

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<sup>17</sup> Response, ICC-02/04-01/15-492, para. 33.

<sup>18</sup> Response, ICC-02/04-01/15-492, paras 36-39.

<sup>19</sup> Response, ICC-02/04-01/15-492, paras 7-13, 29.

<sup>20</sup> Notably, Rule 68 of the Rules does not apply to evidence collected under Article 56 of the Statute. *See* Rule 68(1) of Rules.

<sup>21</sup> Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497, paras 24-26.

to take the Witnesses' testimony.<sup>22</sup> Pursuant to Article 56(1)(a) of the Statute, he found a unique investigative opportunity to take the Witnesses' testimony in light of a risk that it may not be available subsequently for the purposes of a trial.<sup>23</sup> In so finding, he considered specific meetings, publications and other events with the potential to taint the Witnesses' evidence, in conjunction with the risks inherent in the passage of time, in particular, the possible recurrence of events with the potential to taint the Witnesses' evidence.<sup>24</sup>

9. The Defence does not substantiate its submissions that Article 56 of the Statute requires a finding of 'imminent interference'.<sup>25</sup> Insofar as it challenges, without more, the decisions of the PTC Single Judge as being 'at best speculative',<sup>26</sup> the Defence fails to appreciate that any decision as to whether evidence '*may* not be available *subsequently* for the purposes of a trial'<sup>27</sup> necessarily involves some level of speculation and prediction. Further, in support of its submission that the PTC Single Judge had to specify a standard or criteria for the 'subsequently unavailable' requirement in Article 56(1) of the Statute, the Defence incorrectly asserts that the PTC Single Judge based his decision only on the risks inherent in the passage of time.<sup>28</sup> As set out above, this factor was considered in light of specific incidents with the potential to taint the Witnesses' evidence and the possible recurrence of similar events.<sup>29</sup>

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<sup>22</sup> Decision on the "Prosecution application for the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute", 27 July 2016, ICC-02/04-01/15-277-Red, para. 3 ('Among the non-exhaustive list of possible measures, article 56(2) of the Statute explicitly mentions "[d]irecting that a record be made of the proceedings", "[a]uthorizing counsel for a person who has been arrested [...] to participate" and, in general, "[t]aking such other action as may be necessary to collect or preserve evidence").

<sup>23</sup> ICC-02/04-01/15-277-Red, para. 8; Decision on the "Second Prosecution application to the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute", 12 October 2015, ICC-02/04-01/15-316-Red, para. 9.

<sup>24</sup> ICC-02/04-01/15-277-Red, paras 5-7, 14; ICC-02/04-01/15-316-Red, paras 4-9.

<sup>25</sup> Response, ICC-02/04-01/15-492, para. 32.

<sup>26</sup> Response, ICC-02/04-01/15-492, para. 32. *See also* para. 34.

<sup>27</sup> Article 56(1)(a) of the Statute (emphasis added).

<sup>28</sup> Response, ICC-02/04-01/15-492, para. 34.

<sup>29</sup> ICC-02/04-01/15-277-Red, paras 5-7, 14; ICC-02/04-01/15-316-Red, paras 4-9.

10. The Chamber therefore dismisses Defence objections under Article 69(7) of the Statute in relation to the PTC Single Judge's findings on the Article 56(1) requirements, as well as his authority to hear the Witnesses' testimony.
11. As to submissions concerning Rule 75 of the Rules,<sup>30</sup> the Chamber notes that, unlike Rule 74 of the Rules, there is no express requirement that a Chamber notify a witness of the Rule 75 provisions before his or her testimony. Even if Rule 75 of the Rules were understood as being violated, the Chamber fails to see how this violation casts any doubt on the reliability of the evidence or damages the integrity of the proceedings.<sup>31</sup> These witnesses were called by the Prosecution and were unlikely to invoke the privilege afforded by Rule 75 if formally notified of its existence. Insofar as the Defence considered such notification appropriate or necessary, it had the opportunity to request it before and during the Witnesses' testimonies. It did not do so.
12. Defence submissions that the Article 56 Evidence was preserved in violation of Mr Ongwen's rights under Article 67(1) of the Statute are also unsupported. As found by the PTC Single Judge, there is no requirement that Article 56 measures be taken at any particular time, for example, after notification of the charges or disclosure of evidence.<sup>32</sup> Further, the Defence does not substantiate its assertion that it was 'unlawfully forced' to waive the right to remain silent.<sup>33</sup> The Defence's exercise of Mr Ongwen's right to examine witnesses under Article 67(1)(e) of the Statute before notification of the charges and completion of disclosure cannot, without more, indicate a violation of Mr Ongwen's right to remain silent under Article 67(1)(g) of the Statute.

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<sup>30</sup> Rule 75 of the Rules governs incrimination by family members. Rule 75(1) provides: 'A witness appearing before the Court, who is a spouse, child or parent of an accused person, shall not be required by a Chamber to make any statement that might tend to incriminate that accused person. However, the witness may choose to make such a statement'.

<sup>31</sup> See Article 69(7)(a)-(b) of the Statute.

<sup>32</sup> ICC-02/04-01/15-277-Red, para. 4.

<sup>33</sup> Response, ICC-02/04-01/15-492, para. 23.

13. Further, the Chamber notes that, as observed by the PTC Single Judge,<sup>34</sup> the Defence, at the time of the Witnesses' testimonies, (i) had the Witnesses' prior statements, which provided notice of the nature and content of the Witnesses' prospective testimonies, and (ii) had information on the nature and scope of the relevant charges that the Prosecution intended to bring against Mr Ongwen.<sup>35</sup> The Article 56 Evidence predominantly concerns alleged sexual and gender based crimes committed directly by Mr Ongwen. The Chamber is not persuaded that the Defence could be reasonably misled as to how evidence of this nature would support the charges ultimately brought by the Prosecution.
14. As the Defence has not demonstrated any statutory violation in the collection of the evidence under Article 56 of the Statute, the primary legal basis relied upon by the PTC Single Judge, the Chamber need not address Defence submissions concerning Article 68 of the Statute, which the PTC Single Judge relied upon as an 'additional legal basis'.<sup>36</sup>
15. Accordingly, the Chamber finds that the Article 56 Evidence was not obtained by means of a violation of the Statute. The Defence does not allege any violation of internationally recognised human rights, nor is any apparent to the Chamber.
16. Finally, the Chamber notes that the records of the Witnesses' testimonies are confidential. It therefore orders the Prosecution to review the transcripts of the Witnesses' testimonies, proposing any redactions or requesting reclassification on a rolling basis and, in any event, no later than 30 September 2016. Within 10 days of receiving any proposed lesser redacted versions, the other participants may raise any objections. Should no objections to the proposed lesser-redacted version be made, the Registry shall file the transcript(s) in the record of the case.

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<sup>34</sup> ICC-02/04-01/15-277-Red, para. 11; ICC-02/04-01/15-316-Red, para. 15.

<sup>35</sup> ICC-02/04-01/15- 191-Anx-Red, page 3; ICC-02/04-0-15-305-Conf; ICC-02/04-01/15-311-Conf.

<sup>36</sup> ICC-02/04-01/15-277-Red, para. 10; ICC-02/04-01/15-316-Red, para. 12.



**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

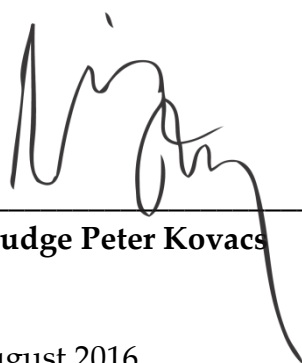
**RECOGNISES** the Article 56 Evidence, as listed in ICC-02/04-01/15-464-AnxA and ICC-02/04-01/15-464-AnxB, as formally submitted;

**ORDERS** the parties and participants to review the transcripts of the Witnesses' testimonies in accordance with the instructions given in paragraph 16 above; and

**DEFERS** the assessment of the relevance and probative value of the Article 56 Evidence until deliberating its judgment pursuant to Article 74 of the Statute.

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

  
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**Judge Bertram Schmitt, Presiding Judge**

  
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**Judge Peter Kovacs**

  
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**Judge Raul C. Pangalangan**

Dated 10 August 2016

At The Hague, The Netherlands