Cour
Pénale
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International
Criminal
Court

Original: **English**

No.: **ICC-02/04-01/15**
Date of original: **18 August 2015**
Date of public redacted version: **23 March 2016**

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 "Prosecution's submissions on the conduct of proceedings pursuant to 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
Fatou Bensouda
James Stewart
Benjamin Gumpert

Counsel for the Defence
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, issues this decision on the "Prosecution's submissions on the conduct of proceedings pursuant to decision ICC-02/04-01/15-277" filed on 30 July 2015 (ICC-02/04-01/15-282-Conf).

1. On 26 June 2015, the Prosecutor filed an application under article 56 of the Statute (ICC-02/04-01/15-256-Conf), requesting that the testimony of witnesses P-0226 and P-0227 be taken as soon as possible.

2. The Defence opposed the application in its response filed on 3 July 2015 (ICC-02/04-01/15-259-Conf).

3. On 27 July 2015, the Single Judge granted the Prosecutor's application (ICC-02/04-01/15-277-Conf), and decided that subject to their willingness, witnesses P-0226 and P-0227 would give testimony under oath, in closed session, in the presence of the Prosecutor and the Defence, that the testimony should be video recorded and a written transcript be made, and that the Defence would be permitted to question the witnesses after the questioning by the Prosecutor. The date for the testimony was set as 16 and 17 September 2015.

4. The Defence's request for leave to appeal this decision (ICC-02/04-01/15-284-Conf) was rejected on 11 August 2015 (ICC-02/04-01/15-287-Conf).

5. The Prosecutor now submits that: (i) the testimony of witnesses P-0226 and P-0227 should be conducted *via* video-link; (ii) the testimony should be scheduled for three instead of two days; (iii) the conduct of the proceedings should be guided by principles set out in the case of *The Prosecutor v. Bosco Ntaganda*; (iv) a witness preparation session should be authorised for the lawyer in the Office of the Prosecutor who will conduct the questioning of the witnesses in court, in accordance with principles developed in the case of *The*

Prosecutor v. Bosco Ntaganda; and (v) the Office of Public Counsel for Victims should be ordered to appoint a counsel to represent the interests of potential victims during the testimony of witnesses P-0226 and P-0227.

6. In its response filed on 10 August 2015 (ICC-02/04-01/15-286-Conf), the Defence agrees that the testimony take place by video-link and proposes that Defence staff be permitted to be in Uganda during the testimony. The Defence concurs that two days may be insufficient for the testimony, but states that in total four days should be allotted. Further, the Defence does not oppose the use of the guidelines set out in the *Ntaganda* case, with the exception of some points. As to witness preparation sessions, the Defence submits that they are not warranted at this stage, and that if authorised, the protocol to be followed should be that adopted in the *Ruto and Sang* case, with the exception of some aspects. The Defence also opposes the Prosecutor's request that the Office of Public Counsel for Victims be ordered to appoint counsel to represent the interests of potential victims during the testimony. Finally, the Defence requests that the Registrar be ordered to secure standby counsel for the witnesses.

7. On 14 August 2015, the Prosecutor filed a request for leave to reply to two matters raised in the response of the Defence (ICC-02/04-01/15-289-Conf). The Defence filed a response to the Prosecutor's request for leave to reply on 17 August 2015 (ICC-02/04-01/15-291-Conf), asking that the request be rejected.

Preliminary matter

8. At the outset, the Single Judge is of the view that having considered the submissions of both parties, he is in possession of sufficient information to determine the matters at hand, which makes it unnecessary to receive further submissions from the Prosecutor on the two discrete matters raised in the request for leave to reply.

Testimony via video-link

9. With regard to the Prosecutor's request for the testimony to be conducted by video-link from Kampala, the Single Judge is of the view, having taken into consideration in particular the Prosecutor's submission concerning the potential security implications if the witnesses were to testify in The Hague, the Defence's submission agreeing with the testimony to take place by video-link, as well as the views of the witnesses as expressed in the Prosecutor's submission, that the different interests at stake, including above all the necessity to ensure the safety and security of the witnesses, are best served by the witnesses testifying *via* video-link, with the witnesses present in Kampala and the Chamber sitting in The Hague.

10. Taking note of the proposal of the Defence that the Defence staff be present in Uganda during the taking of testimony, the Single Judge considers that the Defence staff shall not be present at the same location as the witnesses during the taking of testimony while the Chamber and Prosecutor are present in The Hague. In this regard, the Single Judge emphasises, also taking into account the logistical implications the taking of testimony by video-link would have if it were to involve three different locations, that the organisation of the Defence work is an internal matter which cannot be an argument for it not to be able to attend the taking of testimony in The Hague, the seat of the Court, especially considering that the date of the testimony has been made known to the parties significantly in advance.

Duration of testimony

11. In relation to the Prosecutor's request that the testimony of the witnesses be scheduled for three instead of two days, and the submission of the Defence that the testimony should be scheduled for four days, the Single Judge notes that the dates for the testimony were set taking due regard of the length and

content of the witnesses' statements as well as the potential content of the witnesses' testimony, based on the assumption that the witnesses would testify in The Hague. Bearing in mind the prior assessment of the appropriate time to be allotted, as well as the consideration that the taking of testimony by video-link may potentially require more time due to possible transmission or other technical difficulties, the Single Judge considers that the testimony of witnesses P-0226 and P-0227 should be scheduled for three days, while at the same time providing for the possibility of extension for one additional day if circumstances so require.

Conduct of the proceedings

12. Concerning the Prosecutor's request that the proceedings in the taking of testimony of the witnesses follow the guidelines recently set out in the case of *The Prosecutor v. Bosco Ntaganda*, the Single Judge considers that the specific circumstances of the testimony of only two witnesses to be taken under article 56 of the Statute are to be distinguished from trial proceedings in which any established guidelines apply to the hearing of evidence over longer periods of time and of potentially numerous witnesses, and is thus of the view that it is not necessary in the particular circumstances at hand to adopt specific guidelines for the conduct of proceedings.

13. In addition, the Single Judge observes that a number of matters laid out in the principles suggested by the Prosecutor should be self-evident in the specific circumstances at issue, for example that in the instant case the witnesses will first be questioned by the Prosecutor, to be followed by the Defence; that the Chamber will ensure the efficiency, focus and relevance of the examination by both parties; that the Chamber may authorise that the witnesses' memory be refreshed; that re-examination may be authorised; or that the parties may show pertinent documents to the witnesses with a view

to eliciting comments. In general, the Single Judge will conduct the proceedings of the taking of testimony of witnesses P-0226 and P-0227 as appropriate and required by the circumstances at the time of the testimony.

Witness preparation sessions

14. As regards the Prosecutor's request that witness preparation sessions be authorised, and if so, follow the principles recently set out in the case of *The Prosecutor v. Bosco Ntaganda*, the Single Judge reiterates the view expressed above that the specific circumstances of the taking of testimony under article 56 of the Statute in the present case are different from trial proceedings, and is of the view that such preparation sessions are not called for in the circumstances at hand, either to ensure the efficiency of the testimony or the well-being of the witnesses. This is the case in particular bearing in mind that it is for the parties to prepare their questioning in a way and with a view to ensuring that the examinations are efficient, focussed and relevant, thereby triggering accurate, focussed and relevant answers by the witnesses. The Single Judge also notes the problematic issue of witness preparation sessions in general, but does not consider it necessary for the determination of the matter at hand to take any position at this stage.

15. The Single Judge further notes that the witnesses provided statements to the Prosecutor on 29-31 May and 3-4 June 2015, respectively, while the taking of testimony is scheduled for mid-September 2015, so that there is no significant lapse of time between the latest statement and the testimony which could serve as a justification to authorise witness preparation sessions. At the same time, the Single Judge is of the view that giving the witnesses the possibility to read their prior statements in advance may assist in the taking of testimony being as efficient as possible, and that therefore the Victims and Witnesses Unit should provide the witnesses with copies of their statements

together with any interpretation or translation assistance that may be necessary for the witnesses to review their prior statements. For this purpose, the Prosecutor should provide the Victims and Witnesses Unit with copies of the statements.

Counsel for potential victims

16. The Prosecutor suggests that the Chamber order the Office of Public Counsel for Victims to appoint a counsel to represent the interests of potential victims during the taking of testimony "in much the same manner as […] Counsel may, under article 56(2)(d) of the Statute, be appointed to represent the interests of the Defence".

17. To date, no victims have been admitted to participate in the present proceedings. The Single Judge is of the view that the main purpose of the measure as foreseen in article 56(2)(d) of the Statute is to ensure the protection of the rights of the defence, and considers that it is not necessary for a counsel to be appointed to represent the interests of any potential victims in the taking of testimony of witnesses P-0226 and P-0227.

Standby counsel for witnesses

18. Finally, as concerns the submission of the Defence that the Registrar should be ordered to secure standby counsel for the witnesses, the Single Judge considers that advising the witnesses as to where to obtain legal advice for the purpose of protecting their interests forms part of the functions of the Victims and Witnesses Unit in accordance with rule 17(b)(i) of the Rules of Procedure and Evidence, and that in addition the Registry should take any necessary measures to be in a position to provide counsel for the witnesses if the need arises in the course of their testimony.

19. Moreover, and in any event, the Single Judge is of the view that in relation to the taking of testimony of witnesses P-0226 and P-0227 in accordance with article 56 of the Statute, as already ordered in the previous decision, it is for the Registrar to make all necessary arrangements, including to take any measures appropriate to ensure the safety and well-being of the witnesses.

FOR THESE REASONS, THE SINGLE JUDGE

GRANTS the Prosecutor's request in part;

DECIDES that the testimony of prosecution witnesses [redacted] (P-0226) and [redacted] (P-0227) will take place by video-link from Kampala, Republic of Uganda, with the Chamber and parties present in The Hague;

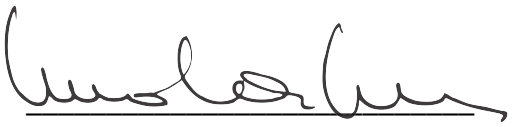
SETS the dates for the testimony of prosecution witnesses [redacted] (P-0226) and [redacted] (P-0227) as 15, 16 and 17 September 2015, with the possibility of extension to 18 September 2015, with the testimony of witness P-0226 to start on 15 September 2015, followed by the testimony of witness P-0227;

ORDERS the Prosecutor to provide copies of the written statements of witnesses P-0226 and P-0227 to the Victims and Witnesses Unit;

ORDERS the Registrar to make any necessary arrangements for purposes of the testimony of witnesses P-0226 and P-0227, including those that may be necessary to ensure the safety and well-being of the witnesses; and

REJECTS the remainder of the requests of the Prosecutor and the Defence.

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



Judge Cuno Tarfusser
Single Judge

Dated this 18 August 2015

At The Hague, The Netherlands