

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 23 November 2015

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN UGANDA

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

Confidential with Confidential Annexes A and B

**Defence Request for Review Pursuant to Regulation 83(4) of the Regulations of the
Court**

Source: Defence for Dominic Ongwen

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Fatou Bensouda, Prosecutor

Benjamin Gumpert, QC

Counsel for the Defence

Krispus Ayena Odongo

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

Applicants

(Participation/Reparation)

**The Office of Public Counsel for
Victims**

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

Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman Von Hebel

Counsel Support Section

Esteban Peralta Losilla

Pieter Vanaverbeke

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') requests review for the Registrar's decision denying the Defence reasonable expenses pursuant to Regulation 83(3) of the Regulations of the Court ('RoC') for the second Article 56 proceedings.

II. CONFIDENTIALITY LEVEL

2. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court, the Defence files this request confidential. The Defence will file a public redacted version in due course.

III. PROCEDURAL HISTORY

3. On 22 October 2015 at 01h26, the Defence filed mission request forms for Counsel and Assistant to Counsel for the Article 56 Proceedings, scheduled from 9 November 2015 through 27 November 2015 ('Article 56 Proceedings').¹ In the same email, the Defence filed a formal request for additional funds for the Article 56 Proceeding pursuant to Regulation 83(3) of the Regulations of the Court ('Request').²
4. On 22 October 2015 at 07h28, CSS responded stating that the section would look into the request and get back to the Defence at the earliest possible opportunity.
5. On 3 November 2015 at 13h25, the Defence emailed CSS reminding them of the pending Request, and whilst the Defence was told verbally that tickets would be arranged, the Defence required written confirmation of the Request.
6. On 5 November 2015 at 11h56, CSS responded to the Defence Request, confirming that the flights, food and accommodations would be covered by the €3,000 per month expense budget, but that only €800 per person could be used for accommodations. CSS

¹ The Defence notes that it filed similar requests on 19 October 2015 for the original dates.

² See Confidential Annex A.

also notified the Defence that it only had €3,400 in its expense account through the end of November 2015.³

7. On 5 November 2015 at 13h23, the Defence replied to CSS, requesting written confirmation that the Request was denied.
8. On 9 November 2015 at 10h35, CSS responded to the 5 November 2015 Defence inquiry, stating: "Please be informed that the mission in the Hague in the framework of the Article 56 Hearing scheduled on 9-27 November 2015, doesn't have any connection with the Request for additional means pursuant to Regulation 83(3)." Furthermore, in what can only be described as a reversal of its previous decision, CSS informed the Defence that its request for additional funds for the proceedings in mid-September were never approved.⁴
9. On 10 November 2015, the Defence brought the issue to the Chamber's attention, to which the Single Judge requested the Defence to file a motion about the issue.
10. On 17 November 2015, the Defence had a meeting with Mr Pieter Vanaverbeke from CSS in which he advised the Defence that it is a settled policy of the Court that only €800 could be reimbursed in terms of rental costs.

IV. LAW

11. Article 43(1) and (2) of the Rome Statute creates the Registry and Registrar.
12. Article 52 of the Rome Statute requires the Judge of the Court to create the RoC. The Judges adopted the RoC on 26 May 2004, and amendments were officially adopted on two subsequent occasions.

³ This was the first time that the Defence found out that CSS did not honour its apparent agreement to the first Regulation 83(3) request for the first Article 56 proceedings.

⁴ For the first Article 56 proceeding, the Defence requested additional funds for Thomas Obhof and Philip Adonga. Fifty-eight minutes after sending the request on 19 August 2015 for additional funds pursuant to Regulation 83(3) to the head of CSS, he responded "Dear Tom, It will be fine. Just send the normal request saying that it is to attend a hearing and I will approve it. Best. E". See Confidential Annex B.

13. Regulation 83(1) of the RoC requires the legal assistance programme to “cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence....”
14. Regulation 83(3) of the RoC allows persons receiving legal assistance to apply for additional means.
15. Regulation 83(4) of the RoC grants the relevant Chamber the power to review a decision by the Registrar under Regulation 83 of the RoC.
16. The Registry's single policy document on the Court's legal aid system (Legal Aid Policy) was adopted by the Twelfth session of the Assembly of States Parties. Paragraphs 139 – 145 describe the expense budget ('Expense Budget') granted to each defence team.
17. The standard for review “involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached.”⁵

V. SUBMISSIONS

18. The Defence notes that its Counsel and Assistant to Counsel are based in Uganda, only the former having privilege to use money out of the Expense Budget for missions to The Hague without pre-approval of CSS.⁶
19. Immediately after Judge Tarfusser changed the start date of the Article 56 Proceedings because of a request from the Defence, the Defence filed its renewed Request with CSS.

⁵ See ICC-ASP/12/3, fn. 49.

⁶ Counsel and Assistant to Counsel are based in Uganda. Counsel runs his law practice and is a Member of Parliament in the Ugandan Government and Assistant to Counsel is aiding in investigations. Under the Court's Legal Aid Policy, only Counsel and Co-Counsel may use the expense budget without approval from the Registrar.

The Defence requested flights, €1,000 per person for food and €1,000 per person for accommodations.

20. The cost to stay at the Movenpick, the standard hotel used by the Court, during the time period would be €2,583 per person.⁷ Ibis Hotel in the city centre advertises a rate of €69 per day, equating to €1,449 per person for the time period.⁸
21. Counsel and Assistant to Counsel, being guided by Principle 5 of the Legal Aid Policy and Regulation 83(1) of the RoC, searched for monthly apartment rentals for €1,000 or less, a cost that would be reasonable for a 21 day stay in The Hague. Assistant to Counsel found an apartment for that amount on 28 October 2015; Counsel found one for about the same amount on 8 November 2015.⁹
22. Considering the cost of stay at the Court recommended hotel, the Defence finds it unconscionable and highly unreasonable that CSS would find that €800 per person was reasonable given the prevailing hotel rates and rental rates in The Hague.¹⁰
23. Furthermore, the Defence made the Request because of the extraordinary nature of these types of proceedings. To the Defence's knowledge, no other such proceedings with witnesses have ever been conducted before the Court.
24. These expenses are extraordinary and unique. Counsel and Assistant to Counsel have been in The Hague for five of the last eleven weeks for the combined Article 56 proceedings, totalling seven return flights.¹¹ It is the Defence's considered opinion that it would be entirely reasonable to receive additional funding outside of the Expense Budget defined in paragraphs 139-145 of the Legal Aid Policy. The Defence further

⁷ The cost to stay at Movenpick is €123 per night. The Defence was required to arrive, at the latest, on 8 November 2015. The Article 56 Proceedings are scheduled to end on 27 November 2015. The Defence is booked to leave The Hague on 29 November 2015. If one person were to stay 21 nights at €123 per night, the above cost of €2,583 would have been charged for the stay per person.

⁸ The Defence sought this option, but could not book a room for 21 consecutive days.

⁹ The Defence notes that it used several different agencies and local persons to try to find an apartment for €1,000 or less.

¹⁰ See Confidential Annex B. One price for a flat was €2,493.12, and another was €1,500.00.

¹¹ The Defence includes the ticket purchased for Mr Philip Adonga for the first Article 56 proceedings.

views that no reasonable administrator properly applying his or her mind to the issue would arrive at a contrary position.

25. If it were only once, the Defence might concede that such costs would be reasonable under the policy. However, in the instant case, the number of time Counsel and Assistant to Counsel were compelled to come to The Hague, sometimes at very short notice, outside the normally expected regime, warrants the granting of additional funds pursuant to Regulation 83(3).

26. It should also be noted that the pre-financing of the ICC activities dictated by the ICC policy of reimbursing expenses met by members of the Defence Team, quite often after months of submission of Mission Reports and Accountability, imposes extra, albeit unnecessary and avoidable burden on the Defence Team. In our humble view, this further warrants the granting of additional funds pursuant to Regulation 83(3).

VI. RELIEF

27. The Defence respectfully requests Judge Tarfusser to order the Registrar to pay for Counsel's and Assistant to Counsel's expenses for the Article 56 Proceedings pursuant to the Request, and not from the Expense Budget.

28. Furthermore, the Defence requests that the Judge alter the amount of money allowable for accommodations from €800 per person to €1,000 per person.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 23rd day of November, 2015

At Den Haag, Netherlands