

**Cour
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Internationale**

**International
Criminal
Court**



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

Date: **25 April 2018**

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

Confidential

Prosecution's Response to "Confidential Redacted Version of 'Defence Request for a Deadline Extension', filed on 18 April 2018", ICC-02/04-01/15-1232-Conf

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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Introduction

1. The Defence should remain obliged to file witness and evidence lists, together with associated protective measures and rule 68 applications, no later than 31 May 2018. These should be complete save for those items which may result from the execution of outstanding requests for assistance ("RFAs"). In particular, the Defence must state whether Mr Ongwen will give sworn evidence and identify the precise nature of the expert evidence on which they will be relying.
2. The Prosecution accepts that the Defence should be permitted to continue its investigations, and thus potentially to add further witnesses and items of evidence to its lists, after 31 May. The Prosecution also accepts that the Government of Uganda's cooperation may be important in facilitating these investigations. The Prosecution submits, however, that the making of an order by the Chamber in this respect would currently be premature and potentially offensive, thus creating the possibility of poorer, rather than better, cooperation. Other measures should be attempted first.
3. Above all, there should be no delay to the commencement of the Defence's evidence presentation. The Defence has already identified 44 individuals that it proposes to call as witnesses. The timetable for the presentation of this and any other evidence that the Defence can identify by 31 May should not be set back.

Confidentiality

4. The Prosecution files this response confidentially pursuant to regulation 23*bis* of the Regulations of the Court because it responds to a confidential filing of the Defence. The Prosecution will file a public redacted version of this filing once the Defence files a public redacted version of its Request.

Background

5. On 13 October 2017, the Chamber ordered the Defence to submit its final lists of witnesses and evidence, together with related protective measures and rule 68

applications, within three weeks of the Prosecution's formal notice of conclusion.¹ That notice was filed on 13 April,² thus the Defence deadline would originally have fallen due on 4 May.

6. On 14 December 2017, the Defence submitted its provisional list of 44 witnesses.³ The Defence then estimated that it would call 20 additional witnesses.⁴

7. On 6 March 2018, the Chamber granted the Defence further time to submit its final lists and related applications, by no later than 31 May 2018.⁵

8. On 18 April 2018, the Defence requested the Chamber to extend the 31 May deadline citing cooperation issues in relation to seven RFAs, as well as to order the Government of Uganda to comply with the Defence's RFAs ("Request").⁶ On 23 April, pursuant to the Chamber's email order,⁷ the Defence filed an addendum with the seven RFAs and associated materials.⁸

Submissions

The Prosecution does not oppose modifications to the Defence's lists of witnesses and evidence after 31 May, where justified by cooperation difficulties

9. The Prosecution accepts that the Defence should be permitted to add witnesses and evidence to its lists, and submit related protective measures and rule 68 applications, where justified by cooperation difficulties identified in the Request, after 31 May. The Prosecution knows from its own experience that cooperation difficulties can complicate trial preparations. The Prosecution successfully applied to add both witnesses and evidence to its lists, after the expiry of the 6 September 2016 deadline, where good cause existed. The same opportunity should be available to the Defence.

¹ ICC-02/04-01/15-1021, para. 7.

² ICC-02/04-01/15-1225.

³ ICC-02/04-01/15-1107; ICC-02/04-01/15-1107-Conf-Exp-AnxA.

⁴ ICC-02/04-01/15-1107, para. 9.

⁵ ICC-02/04-01/15-1199-Conf, para. 84.

⁶ ICC-02/04-01/15-1232-Conf.

⁷ Email from the Trial Chamber IX to the Defence, Prosecution, and Legal Representatives of Victims sent on 19 April 2018 at 13:15.

⁸ ICC-02/04-01/15-1236 + Conf-Anxs A~F-Red + Anx H.

The 31 May deadline should be maintained for all other witnesses and evidence

10. That said, the Chamber should maintain the 31 May 2018 deadline for the Defence's lists of witnesses and evidence, together with related protective measures and rule 68 applications, to the extent that such witnesses and evidence are currently available to the Defence and unaffected by the identified cooperation challenges. The Defence has not demonstrated good cause to delay the submission of these witness and evidence lists and related applications, given that the pending RFAs concern a limited number of witnesses and materials. Indeed, pursuant to the Chamber's order, the Defence notified its provisional list of 44 witnesses more than six months ago.⁹ This provisional list indicated examination time estimates, testimony mode, protective measures, rule 74 measures, and witness types.¹⁰ The Defence has disclosed or had in its possession witness statements, interview transcripts, and associated materials for a significant number of its provisional witnesses.¹¹

11. The list of witnesses to be served on 31 May should therefore include all witnesses unaffected by the outstanding RFAs, in particular all fact witnesses, experts, and Mr Ongwen himself, should he choose to give evidence at trial. Likewise, the list of evidence, together with related rule 68 and protective measures applications, should cover all materials unaffected by the pending RFAs.

12. Postponing the 31 May deadline based on the alleged cooperation difficulties would be disproportionate and disruptive. The Defence's cooperation difficulties are limited in nature.

13. The Defence received a negative response regarding its first two RFAs¹² in August 2016. This is more than 20 months ago. No complaint or request for the Chamber's assistance has, to the best of the Prosecution's knowledge, been made until now. Besides, in refusing its active cooperation, the Government of Uganda did

⁹ ICC-02/04-01/15-1021.

¹⁰ ICC-02/04-01/15-1107-Conf-Exp-AnxA.

¹¹ The Defence has so far disclosed 339 items of evidential material totalling 3831 pages in eCourt.

¹² ICC-02/04-01/15-1236-Conf-AnxA-Red; ICC-02/04-01/15-1236-Conf-AnxB-Red.

not bar the Defence from contacting and interviewing the private citizens identified in the RFAs directly.¹³

14. While it took nine months, the third RFA¹⁴ was answered in 2017. Arguably, these materials did not require a formal cooperation request and could have been collected through other, less formal channels.

15. The fourth¹⁵ and fifth RFAs,¹⁶ submitted in October 2017 and February 2018, remain unanswered. The fifth RFA concerns certain individuals that the Prosecution dropped as witnesses more than three months before the RFA was made.¹⁷

16. The sixth and seventh RFAs¹⁸ were submitted on 12 April 2018, six days prior to the Defence's Request, and as conceded by the Defence, it is unreasonable to expect them to have been answered this soon. Notably, the seventh RFA concerns records from the CMI, ISO, and UPDF. It is made late in time and it should have been anticipated and submitted earlier, given the looming deadlines. The above examples taken together, as well as each of them individually, cannot justify significant delays in trial proceedings at this juncture.

17. Cognisant of the issues outlined in the Request, the Prosecution is prepared to assist the Defence insofar as reasonable. The Prosecution exceptionally agrees to a notification of additional witnesses and disclosure of associated materials affected by the pending RFAs, if any, no later than two weeks prior to the commencement of the respective witness testimony. Importantly, any evidence disclosure should take place on a rolling basis.

The Prosecution supports additional measures to execute the RFAs, but cooperation orders are not justified

18. The Prosecution supports the Defence in taking additional measures to enable the execution of the outstanding RFAs in good faith and in an expeditious manner.

¹³ ICC-02/04-01/15-1232-Conf, para. 42.

¹⁴ ICC-02/04-01/15-1236-Conf-AnxC-Red.

¹⁵ ICC-02/04-01/15-1236-Conf-AnxD-Red.

¹⁶ ICC-02/04-01/15-1236-Conf-AnxE-Red.

¹⁷ Email from the Prosecution to the Trial Chamber IX, Defence, and Legal Representatives of Victims sent on 31 October 2017 at 13:22; ICC-02/04-01/15-1048-Conf, para. 11.

¹⁸ ICC-02/04-01/15-1236-Conf-AnxF-Red.

The Prosecution undertakes to use its contacts within the Government of Uganda to facilitate the timely execution of the Defence's RFAs where appropriate. Before the Chamber issues orders requiring cooperation, it would be more appropriate to first take steps to obtain cooperation through less coercive means. The Prosecution offers to discuss possible strategies with the Defence and the Registry, should the Defence so desire.

The starting date of the Defence case should remain unchanged

19. Irrespective of the Chamber's decision regarding the requested deadline extension, the commencement of the Defence's case presentation should remain unchanged. This will ensure that the trial is continued in a fair and expeditious manner, with due regard to the interests of victims, and allowing for an efficient trial preparation by the parties, participants, and judges.

Conclusion

20. The Prosecution does not oppose a reasonable extension of time for the Defence to add witnesses and evidence to its lists, and submit related protective measures and rule 68 applications, where justified by cooperation difficulties, after 31 May. For all other witnesses and evidence, the Chamber should maintain the deadline of 31 May 2018. Above all, the Defence's evidence presentation should commence without delay.

21. The Prosecution supports an expeditious execution of the pending RFAs. Where appropriate, the Prosecution offers to confer with the Defence and Registry regarding possible solutions with a view to enabling the timely execution of the Defence's RFAs.



Fatou Bensouda, Prosecutor

Dated this 25th day of April 2018
At The Hague, The Netherlands