

**Cour
Pénale
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**International
Criminal
Court**

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Date: **26 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

Public

**Prosecution's Response to the Defence Urgent Request for Delay in Opening of
LRV and CLRV Cases**

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. Article 64(2) requires criminal trials before this Court to be “fair and expeditious”. Giving effect to this fundamental principle requires parties to raise issues that threaten to disrupt trial proceedings as soon as practicable. In addition, this Court has held that interruptions to fair and expeditious proceedings can only be sanctioned if it is in the interests of justice.¹

2. The Prosecution submits that the “Defence’s Urgent Request for Delay in Opening of LRV and CLRV Cases” (“Request”) fails to establish that it is in the interests of justice to delay trial proceedings by *at least* one month. On the contrary, the Request is an affront the principle of expeditiousness. This is evidenced by the fact that it was filed 20 days after the Defence received the material that underlies its claims. No reason for this delay has been advanced.

3. The Request further fails to establish reasons justifying a delay. Specifically, the contention that the amount of materials received by the Defence is too voluminous to process in advance of 1 May 2018 is unreasonable. The suggestion that the Defence requires further time to consider whether it *may* wish to “communicate the disclosed items to experts who can assist the Defence”² is similarly without merit and speculative.

4. In the absence of a substantiated and supported basis capable of satisfying the Court that a postponement is in the interest of justice, this trial should continue on 1 May 2018 as ordered by the Trial Chamber on 6 March 2018.³ Failure to do so impinges Mr Ongwen’s right to a fair and expeditious trial as well as the right of victims and witnesses in this case.

¹ ICC-01/09-02/11-981.

² ICC-02/11-01/11-1239, para. 20.

³ ICC-02/04-01/15-1199-Red.

Law

5. Rule 132(1) of the Rules of Procedure and Evidence (“the Rules”) provides that “The Trial Chamber, on its own motion, or at the request of the Prosecutor or the defence, may postpone the date of the trial”.

6. The Trial Chamber in *Kenyatta* determined that “(i) an adjournment 'is a discretionary remedy arising from the Chamber's responsibility to control the conduct of the proceedings in a fair and expeditious manner'; (ii) the Chamber's determination will be based on a 'weighing of the interests of justice in this case, including the rights of the Accused and the interests of victims'; and (iii) any further adjournment must be compatible with the Chamber's obligations under articles 64(2) and 67 of the Statute, as well as its obligation under article 21(3) of the Statute to interpret and apply the law in a manner consistent with internationally recognised human rights”.⁴

Submissions

Interests of Justice

7. A request to delay trial proceedings should not be acceded to lightly. This is because such delays have the potential to impact the rights of an accused as well as victims and witnesses.

8. A party requesting such a postponement must show that it is in the interests of justice.⁵ Under certain circumstances, disclosure of material during trial proceedings may warrant postponement of proceedings. This is not the case here.

⁴ ICC-01/09-02/11-981, para. 43.

⁵ ICC-01/09-02/11-981, para. 43.

Timing of the Defence Request

9. The Defence received the final tranche of LRV and CLRV material on 3 and 5 April 2018.⁶ Despite this, the Defence did not file the Request until 20 days later. The Defence fails to advance an explanation for this delay.

10. The Prosecution submits that filing a request under such circumstances—late, without an explanation, and five days before witnesses are due to give their evidence—is unacceptable. This is because it: i) unfairly inconveniences witnesses who have likely already made arrangements to assist the Court; ii) negatively impacts the right of Mr Ongwen and the victims to a fair and expeditious trial; and iii) unfairly impedes the Prosecution’s and the Victims Representatives’ ability to respond to and the Chamber’s ability to decide on the Request.⁷

Volume of material

11. The Defence’s claim that it is unable to process the 1,275 pages in the time available is unreasonable. First, the Defence fails to specify what progress it has made since receiving the materials on 3 and 5 April 2018. The absence of such information deprives the Chamber of its ability to assess the approach to disclosure review that the Defence has adopted.

12. Second, the Request is inaccurate in so far as it claims that all the material disclosed to it on 3 and 5 April 2018 is new. Four items (CV’s)⁸ amounting to 137 pages were disclosed to the Defence on 2 February 2018.⁹

13. Third, assuming that the number of pages to be reviewed is 1,275, a mathematical approach to the issue demonstrates the unreasonableness of the

⁶ ICC-02/11-01/11-1239, para. 5.

⁷ See email “RE: Shortening of Response Deadline for ICC-02/04-01/15-1239”, sent by Trial Chamber IX Communications, 24 April 2018, 17:34.

⁸ UGA-PCV-0001-0006; UGA-PCV-0001-0298; UGA-PCV-0002-0005; and UGA-PCV-0003-0005.

⁹ ICC-02/04-01/15-1165-Red (with accompanying confidential annexes 2, 3, 4 and 6).

matter. The Request submits that it is overly burdensome to expect the Defence, as a team, to read and process 75 pages a day in 17 days.¹⁰ It argues that it is similarly burdensome to read 47 pages a day were it to be given 27 days to process the material.¹¹ The Prosecution submits that the Defence's contention cannot be seriously maintained.

Potential consultation of experts

14. The Defence's assertion that it *may* require additional time to "identify" material and consider whether it is "necessary to ... communicate the disclosed items to experts who can assist the Defence"¹² is speculative and without merit.

15. Not only does that Request fail to provide a tangible basis for such an assertion but the Defence also fails to acknowledge that it was made aware of the name and area of expertise of several of the experts well in advance of 3 and 5 April 2018. Specifically, the Defence was made aware of the names of at least three of the experts on 29 December 2017, when the LRV and CLRV filed their provisional list of witnesses.¹³ The Defence was also provided details relating to all experts the Legal Representatives intended on calling on 2 February 2018 when they filed their final list of witnesses.¹⁴ Materials provided to the Defence on 2 February 2018 included detailed CV's of the experts and a list of publications. This material was considered by the Defence in advance of drafting its 15 February 2018 "Defence Response to the LRV and CLRV Requests to Present Evidence and Views and Concerns of Registered Victims". In light of the above, it is untenable for the Defence to now claim that it is

¹⁰ ICC-02/11-01/11-1239, para. 19.

¹¹ ICC-02/11-01/11-1239, para. 19.

¹² ICC-02/11-01/11-1239, para. 20.

¹³ ICC-02/04-01/15-1106 (with accompanying confidential annexes); ICC-02/04-01/15-1125 (with accompanying confidential annexes). The Defence was informed that Professor Michael Wessells; Professor Reicherter and Teddy Atim were potential experts.

¹⁴ ICC-02/04-01/15-1165-Conf (with accompanying confidential annexes); ICC-02/04-01/15-1166-Conf (with accompanying confidential annexes).

unable to consider whether it needs to consult other individuals before cross-examining the Legal Representatives' experts.

16. The Defence's assertion is also untenable given that the nature and scope of evidence to be given by the Legal Representatives' experts is limited and unrelated to "the elements of the crimes charged or Mr Ongwen's role in their commission".¹⁵

Conclusion

17. For the reasons set forth above, the Defence Request fails to establish that a delay in trial proceedings is in the interests of justice. As such, it should be rejected.



Fatou Bensouda, Prosecutor

Dated this 26th day of April 2018
At The Hague, The Netherlands

¹⁵ ICC-02/04-01/15-1199-Red, para. 23.