



Original: **English**

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

Date: **22 June 2018**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

Public

With Public Redacted Annex I and

Confidential Annex II

Public Redacted Version of “Registry’s Observations on a Judicial Site Visit”

16 June 2017 (ICC-02/04-01/15-881-Conf)

Source: Registry

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart
Mr Benjamin Gumpert

Counsel for the Defence

Mr Krispus Ayena Odongo

Legal Representatives of Victims

Mr Joseph Akwenyu Manoba
Mr Francisco Cox
Ms Paolina Massidda

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

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Registry hereby submits its preliminary assessment on the feasibility of a judicial site visit ("JSV") in the Republic of Uganda ("Uganda"), as per the order of Trial Chamber IX ("Chamber") dated 19 May 2017 ("Order"). The Chamber ordered the Registry to provide observations on a possible JSV, requested by the Office of the Prosecutor ("Prosecution") in the "Prosecution Submissions in Accordance with the Scheduling Order of 4 May 2016" dated 18 May 2016 ("May 2016 Submissions").¹
2. Considering the information currently available as set forth below, the Registry considers the JSV to the proposed locations feasible and has the capacity to support the visit. If the Accused is to be present during the JSV, the Registry stands ready to undertake a more detailed feasibility assessment. An additional reconnaissance mission should be conducted closer to the time of the JSV in order to update the current preliminary assessment.
3. Annex I contains practical information for the members of the delegation on their stay in Uganda, and Annex II provides photos of the four proposed sites.

II. Procedural History

4. In the May 2016 Submissions, in which the Prosecution suggested holding the opening of the *Ongwen* trial in Gulu, Uganda, the Prosecution also invited the judges to consider a site visit to Pajule, Odek, Lukodi and Abok.²

¹ Trial Chamber IX, "Order Inviting Observations on a Judicial Site Visit", 19 May 2017, ICC-02/04-01/15-834-Conf; Prosecution, "Prosecution Submissions in Accordance with the Scheduling Order of 4 May 2016", 18 May 2016, ICC-02/04-01/15-438, paras. 26-28.

² May 2016 Submissions, para. 27.

5. On 16 July 2016, in its “Decision Concerning the Requests to Recommend Holding Proceedings In Situ and to Conduct a Judicial Site Visit in Northern Uganda” (“July 2016 Decision”), the Chamber considered that a determination of whether to conduct a JSV would be made at a later stage.³
6. Following up on its July 2016 Decision, according to the Order the Chamber is inclined to visit the four sites suggested by the Prosecution in its May 2016 Submissions soon after the conclusion of the Prosecution’s case.⁴

III. Classification

7. Pursuant to regulation 23 *bis*(2) of the Regulations of the Court (“RoC”), these observations and their annexes are classified confidential as they refer to the Order with that same classification.

IV. Applicable law

8. The following provisions are of particular relevance to the present observations: articles 48, 64 and 69 of the Rome Statute (“Statute”); rule 137 of the Rules of Procedure and Evidence (“RPE”); regulations 97 and 99 of the RoC; regulations 40, 66, 175 and 184 of the Regulations of the Registry (“RoR”); the Agreement on Privileges and Immunities of the Court (“APIC”); and the Memorandum of Understanding Between the Government of the Republic of Uganda and the Office of the Registrar of the International Criminal Court (“MOU”).

³ Trial Chamber IX, “Decision Concerning the Requests to Recommend Holding Proceedings *In Situ* and to Conduct a Judicial Site Visit in Northern Uganda”, 18 July 2016, ICC-02/04-01/15-499, para. 4.

⁴ Order, para. 2.

V. Submissions

Political Context

9. Uganda has a stable political situation and its president, Mr Yoweri Museveni, most recently re-elected in February 2016, has been in power since 1986. President Museveni and his party, the National Resistance Movement, have managed to stabilize the country and obtain international support.
10. [REDACTED].
11. [REDACTED].
12. It is essential that a JSV be conducted with the full support of the government, most importantly regarding security matters. Based on the relationship and collaboration between the Registry and the Ugandan Government thus far, the Registry does not expect any significant obstacles in this regard.

Security Situation

13. The security situation across Uganda is presently calm. The current level of risk in Entebbe and Kampala ranges from low to high for the five general threats: armed conflict, terrorism, crime, civil unrest and hazards. However, with appropriate security measures put in place and support from the host government, all risks can be mitigated and brought to an acceptable level.
14. The current level of risk in Gulu, Pajule, Odek, Abok and Lukodi ranges from low to high for different categories of risks. In addition to the Court's own arrangements, external support from the host government and from the United Nations Department of Safety and Security ("UNDSS") can be

provided, reducing the residual risk to a level that would allow the organisation of such a visit.

15. Due to the infrastructure and environment, a certain element of unpredictability related to hazards (disease, physical exhaustion, road traffic accidents) will remain. However, those may be managed and reduced to a low level security risk provided that travellers respect the advice given by the Medial Unit and on-site paramedics.
16. The weather conditions can delay or otherwise affect the operations. Statistically, the highest level of precipitation has been recorded from April to October (the highest month was August). The lowest level of precipitation has been recorded from December to March (January with the lowest level).
17. Presently, the influx of refugees into northern Uganda, mostly from South Sudan, is a challenge for the host government and the United Nations Agencies providing assistance. Although 2000 refugees have been registered crossing the Ugandan border each day since the beginning of 2017, which has led to overcrowding of refugee settlements in the north, only a few minor security incidents have occurred in some of the camps. Presently, this situation does not affect the sites to be visited. The closest refugee camp to the JSV locations is one that is located approximately 80 km from Pajule.
18. The small-scale armed attacks that have occurred over the last two years in the northern region, connected with the presence of small arms within the local population and the kidnapping of youths for training in South Sudan, might indicate the very beginning of a rebellion process.

19. [REDACTED]. Although there is a general positive feeling toward the Court amongst the population in northern Uganda, a few local and religious leaders still believe that other locally practiced traditional justice and reconciliation processes can play supplementary roles in bringing about social harmony and communal healing.

20. From a security perspective, a JSV is therefore feasible with a low level of risk. This low risk can be prevented or mitigated if the following recommendations are implemented:

- i. There should be no media or public appearances prior to or during the visit;
- ii. full support of the mission should be obtained by the Ugandan Government as well as by UNDSS;
- iii. arrangements with the Ugandan Police should be made for the provision of a police leading vehicle, convoy escort, perimeter security on site visits, hotel security, a quick response force, and a close protection team for the elected officials;
- iv. all road movements should be done in convoy with a police leading vehicle and an escort provided by the host government;
- v. there should be continuous monitoring of the security situation in the relevant areas;
- vi. all ICC elected officials should move in armored vehicles;
- vii. movement should be restricted during the JSV such that the entire delegation should move as a single body;
- viii. in addition to a paramedic from the Court who will accompany the delegation, each member should receive an early medical briefing and carry all personally required medication.

Record of the Site Visit

21. Pursuant to rule 137 of the RPE and regulation 40 of the RoR, the Registry recommends that a Courtroom Officer from the Court Management Section (“CMS”) is present during the site visit to, *inter alia*, prepare confidential minutes of what is discussed during the JSV and prepare a detailed report of the visit.⁵ The Court Officer may, as necessary, collect evidence and ensure the preservation of the integrity of the item(s) in accordance with the applicable rules and practices. The Registry could also film the visit, should the Chamber so order, for inclusion in the case record or for review by the Accused, the parties, and the participants, as the case may be. CMS would require the identification of a “safe location” in which to store any recordings of the visit (AV materials) as well as any evidence that may be produced or collected during the visit.

Public Information and Outreach

22. Should the Chamber decide on the need for filmed material, the Public Information and Outreach Section (“PIOS”) could offer to send an AV production crew for outreach purpose and to produce two videos (one for internal and one for publicity purpose). It is advisable, for security reasons, for the judges, the parties, and the participants to avoid contacting the press during the JSV. Filmed material could be made available to the media after the visit. Should the Chamber agree, PIOS recommends filming interviews with the presiding judge in the field and making it available to the media (both local and international) after the JSV.

Technical Considerations

⁵ For an example of such a report, see *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Confidential Annex to the Enregistrement au dossier du procès-verbal du transport judiciaire en République démocratique du Congo, 3 February 2012, ICC-01/04-01/07-3234-Conf-Anx.

23. While the mobile phone networks are acceptable in the main towns (3G mobile data), the networks are unreliable at best outside these towns. Therefore, depending on the locations visited, all members of the mission may need to carry satellite phones, which have enhanced communication security. Regarding any evidence produced or collected, the Kampala field office has a fast and reliable internet connection where such material can be uploaded.

24. If the Accused is absent from the JSV, direct communication between him and his counsel during the JSV could be arranged.

Interpretation

25. Should the parties and participants require interpretation from and into Acholi and English, this would be provided by locally based, former Court-employed Acholi interpreters who have been accredited by the Language Services Section. Two interpreters would be recruited to provide either consecutive or *chuchotage* (whispering) interpretation, as per regulation 66 of the RoR.⁶ Depending on the type of interpretation used, the interpreters could work for a maximum of two blocks of two hours per day. Should more time be required, the Registry recommends that an additional interpreter be recruited, implying further costs.

Legal Considerations

26. It is imperative that while on Ugandan territory, the judges, the Court's staff, counsel, and persons assisting counsel can fully implement their functions without any interference and in full independence. This must be ensured through a legal regime that confers privileges and immunities in favour of the Court and the aforementioned categories of persons. Likewise, the judges and

⁶ The cost for hiring a local freelance interpreter is approximately 590 euros per day.

anyone else associated with the Court in Uganda must enjoy immunity from legal process, as well as from arrest and detention.

27. The privileges and immunities of the Court, including those applied to judges during a site visit, are laid out in article 48 of the Statute. Additionally, article 15(1) of APIC specifies that “[t]he judges ..., when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions...”. Article 15(2) of APIC further mandates, *inter alia*, that when on journeys in connection with the exercise of their functions, judges of the Court are accorded, in all States Parties through which they may have to pass, “all the privileges, immunities and facilities granted by States Parties to diplomatic agents in similar circumstances under the Vienna Convention”. Staff members of the Court enjoy privileges and immunities by virtue of article 16 of APIC; counsel and persons assisting defence counsel by virtue of article 18 of APIC.

28. As Uganda is a State Party to both the Statute and to APIC, subject to confirmation of domestic implementing legislation these treaties form the legal framework with the Ugandan authorities in relation to conducting a site visit. Privileges and immunities for judges, the staff of the Registry and the staff of the Office of the Prosecutor, counsel, and persons assisting counsel are also provided for in the cooperation agreement entitled “Memorandum of Understanding between the Government of the Republic of Uganda and the Office of the Registrar of the International Criminal Court” (“MOU”), which the Court and Uganda concluded on 20 August 2004.⁷

Additional Considerations Should the Accused be Present

⁷ Memorandum of Understanding Between the Government of the Republic of Uganda and the Office of the Registrar of the International Criminal Court, 20 August 2004.

29. When it comes to the Accused, it is imperative that he remain in the exclusive custody and control of the Court at all times during the JSV. A comprehensive analysis would need to be done to ensure that the legal regime applicable to the JSV would cover all possible scenarios, including an escape. Such an analysis would include the Court's legal framework, APIC, and the MOU, as well as the possibility of concluding an additional bilateral agreement between the Court and Uganda. Should the conclusion of such a supplemental agreement be required, sufficient time would be needed for its negotiation before the JSV could take place.

30. As to the Accused's continued detention in Uganda, the Registry Detention Section would need to delineate the legal framework covering the identification of a suitable detention facility, transportation and other security and logistical support. An assessment and physical survey in terms of security and safety, of custodial areas to be used during the JSV, would also need to be carried out. This would allow for: i) identifying relevant risk mitigation measures and implementing any necessary structural modifications to the local custodial areas, ii) guaranteeing the entitlements of the detained person as per regulation 99 of the RoC, unless such entitlements could be waived by the Accused for the duration of the site visit, and iii) identifying any restrictions necessary for the maintenance of the security and good order of the custodial areas. Further, if the Accused were to be present during the JSV, the Chamber may wish to consider how the active monitoring regime currently in place could be implemented.⁸

⁸ Pre-Trial Chamber II, "Order concerning a request by the Prosecutor under regulation 101(2) of the Regulations of the Court", 8 June 2015, ICC-02/04-01/15-242, p.5 ; Pre-Trial Chamber II, "Decision concerning the restriction of communications of Dominic Ongwen", 3 August 2015, ICC-02/04-01/15-283, p. 8; Trial Chamber IX, "Decision on the Review of Dominic Ongwen's Detention and on the Restriction on Communication", 21 July 2016, ICC-02/04-01/15-503.

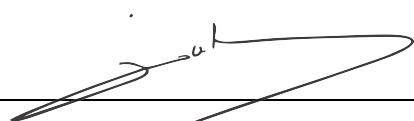
31. If the Accused is present at the JSV, the heightened security will mean that radio communication will be required between ICC security personnel. Therefore, a survey would need to be done of the sites to be visited to ensure that they have UN VHF radio coverage.

32. Should the Defence request the presence of Acholi interpreters during the mission, the Registry stands ready to send a separate team of interpreters in order to ensure the Accused's right to communicate fully with his counsel.⁹

⁹ See article 67(1)(b) of the Statute and regulation 97 of the RoC.

VI. Conclusion

33. The JSV is feasible from a political and security perspective as per the current situation in Uganda. If the Chamber decides that the Accused should be present, a much more detailed feasibility assessment will need to be conducted, including in particular with regard to any supplemental agreements concluded pursuant to the MOU. No detailed cost estimate can be provided to the Chamber at this early stage for either scenario – with or without the presence of the Accused. However, once parameters for the JSV are further specified, including the number of persons within the delegation, the length of time of the visit, and the presence of the Accused, the Registry will be able to carry out a cost analysis.



Marc Dubuisson, Director, Division of Judicial Services,
on behalf of
Peter Lewis, Registrar

Dated this 22 June 2018

At The Hague, the Netherlands