

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 25 April 2018

Date of submission: 11 June 2019

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

**Public redacted version of "Victims' response to "Confidential Redacted Version of
'Defence Request for a Deadline Extension'", 18 April 2018,
ICC-02/04-01/15-1244-Conf**

Source: Legal Representatives of Victims

I. INTRODUCTION

1. The Legal Representatives for Victims ("LRVs"), respectfully request the Trial Chamber IX ("Chamber") refuse the "Confidential Redacted Version of 'Defence Request for a Deadline Extension', filed on 18 April 2018", ("Defence Request") for orders relating to the extension of the deadline by which the Defence must submit its final list of witnesses.¹
2. The LRVs recognize the fair trial rights of the Accused, in particular, the right to have adequate time and facilities for the preparation of his defence as well as the right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. However, the Defence Request fails to demonstrate that any evidence sought and not received in a timely fashion is sufficiently critical to its case so as to justify the extension requested. This is also substantiated by the considerable delay by the Defence in raising its concerns about compliance with Requests For Assistance ("RFAs"), despite the timeline for submission of lists of evidence and witnesses set out by the Chamber.
3. Furthermore, the LRVs submit that Defence Request, if granted, may lead to subsequent delays of the proceedings. Victims participating in this case have waited many years for justice to be done and to see the truth told concerning atrocities committed by the Lord's Resistance Army ("LRA") in Northern Uganda. Many victims the LRVs have spoken to and even lamented the slow pace of these proceedings.
4. Therefore, the LRVs consider it feasible for the Defence to disclose by 31 May 2018 its current lists of witnesses and evidence, Rule 68(2)(b) requests, bar table motion and requests for protective measures which are not related to the RFAs concerned. Should the Chamber be mindful to grant the Defence request for

¹ Confidential Redacted Version of 'Defence Request for a Deadline Extension', filed on 18 April 2018, ICC-02/04-01/15-1232-Conf-Red, 18 April 2018, para. 56 ("Defence Request").

8. On 18 April 2018, the Chamber ordered that any responses to the Defence Request must be filed by 16:00 on Wednesday, 25 April 2018.⁶
9. On 23 April 2018, the Defence filed its "Defence Addendum to Submission 1232" ("Addendum") which included confidential *ex parte* and confidential redacted annexes.⁷

III. CONFIDENTIALITY

10. Pursuant to Regulation 23bis (2), the LRVs submit this response as confidential as it is made in response to a confidential filing.

IV. SUBMISSIONS

A. The impact of the alleged non-compliance has not been demonstrated

11. The Defence has not demonstrated that non-compliance with RFAs has, or will have a critical impact on their ability to disclose their entire list of evidence and witnesses by 31 May 2018, thereby justifying the extension sought.
12. The Defence claims that the request in question was precipitated by a lack of cooperation by the Government of the Republic of Uganda ("Government"). It is therefore necessary at the outset to establish what the extent of any non-compliance might be. The Defence Request refers to seven RFAs. They are:
 - (i) An RFA of 6 June 2016, requesting assistance with securing an interview with [REDACTED] ("RFA 1");
 - (ii) An RFA of 21 July 2016, requesting assistance with securing interviews with [REDACTED]
[REDACTED] ("RFA 2");

⁶ Email from Trial Chamber IX sent on 18 April 2018 at 15:03.

⁷ Public with Confidential *Ex Parte* Annexes A-G Trial Chamber IX and Defence Only and Confidential Annex H and Confidential Redacted Annexes A-F Defence Addendum to Submission 1232, 23 April 2018, ICC-02/04-01/15-1236.

provide every document requested by the RFA has prevented the Defence from accessing those documents for the preparation of its case.

16. Regarding RFA 1 and RFA 1 the Defence complains that these RFAs were, in its view, wrongly rejected by the Government. However, it is clear from the Defence Request that this rejection was made by the Government on 11 August 2016. From what has been disclosed to the LRVs in the Defence Request, the Defence appear to have allowed more than 20 months to pass before bringing this matter before the Chamber. It is surprising that although the Defence has taken some 20 months to raise its concerns about RFA 1 and RFA 2 with the Chamber, it apparently expects the Government to action its RFAs within a two month period even without follow-up. At the same time, LRVs recognize the Defence's concerns (if the assertions made in the Defence Request are entirely accurate) as to the reasons given by the Government to refuse these RFAs.¹² It is not for a government of a State Party to make assessments as to the viability and competence of potential defence witnesses or evidence and to refuse compliance with RFAs on the basis of such assessment. If the Government has legitimate reasons not to implement RFA 1 and RFA 2, the matter should be resolved through relevant procedure laid out in the Statute.
17. Regarding RFA 4 and RFA 5 the Defence complains that no response has been received to these RFAs. However the Defence Request makes clear that RFA 4 was made on 13 October 2017, approximately 6 months before the Defence Request was filed; while RFA 5 was made on 15 February 2018, only around two months before the Defence Request was filed. The Defence Request gives no details regarding steps taken since these RFAs were delivered. It asserts only, but without reference to any dated correspondence, that it has sent "numerous" emails to the Counsel Support Section to confirm with an office within the Court that no response to the RFAs had been received.¹³ The LRVs

¹² *Ibid.*, paras. 32-33.

¹³ *Ibid.*, para. 49.

corroborative; or whether it can be reasonably obtained from alternative sources.

21. Precisely for this reason the Defence comparisons to the *Kenyatta* case are inapposite. The Defence Request alleges that a similar situation occurred in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, where the Prosecutor requested a finding of non-compliance pursuant to Article 87(7) against the Government of Kenya.¹⁴ In the *Kenyatta* case, the RFAs related to financial records which formed the core component of the Prosecution's case against the Accused. In the present case, the Defence Request fails to substantiate how non-execution of the RFAs outlined would affect the Accused's case preparation to such a degree as to justify delaying production of the entire lists of witnesses and evidence. Indeed, quite to the contrary, the Defence's own conduct prior to filing the Defence Request suggests that this is not the case. Had the Defence considered that material sought through RFA 4 and RFA 5 was essential, it could be expected that steps would have been taken to actively follow up those RFAs. Likewise, if the Defence considered that the material sought via RFA 1 and RFA 2 were of significant importance to its case preparation, it could be expected to have raised a question of non-compliance within 20 months of receiving the Government's rejection of those RFAs.
22. In failing to demonstrate how the material sought through the RFAs was significant to the preparation of the defence, the Defence Request fails to elucidate how non-compliance with the RFAs could be prejudicial to Mr Ongwen's rights. The LRVs agree that there may be situations in which a fair trial is not possible because evidence central to a defence case is unobtainable as a result of obstructionist efforts of a State. However the situation outlined in the Defence Request is not one of these cases.

¹⁴ *The Prosecutor v. Uhuru Muigai Kenyatta*, Public with confidential, ex parte, Annex A Notification of removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date, 19 December 2013, ICC-01/09-02/11-875-Red.

between 2002 and 2005. Many victims represented by the LRVs were abducted as children and were ordered to commit atrocities by the leadership of the LRA. An extension of deadline requested in the Defence Request, if granted, may have the effect of delaying the commencement of the Defence case. Such a delay of this trial is likely to have negative impact on victims' legitimate interests to see those responsible for the crimes committed being held accountable. In the view of the LRVs, delays arising after the commencement of proceedings are far more troubling to the victims than those which preceded the arrest of the Accused. Once the trial has begun victims' anxieties increase and they have a legitimate expectation that proceedings will occur in a timely fashion.

27. During LRVs' meetings with their clients victims have repeatedly expressed concerns that the trial process is taking too long. Some have pointed out that many of the victims are not in good health and may not see the conclusion of the trial if there are delays. They therefore appeal to the Chamber that the proceedings be handled expeditiously.

28. Further, any potential delay in these proceedings will affect any possible reparations proceedings should the Accused be found guilty. Many hundreds of victims are yet to receive psycho-social support or financial assistance despite the operation of the Trust Fund for Victims ("TFV") in Northern Uganda. For these victims a delay in potential reparations proceedings is wholly unjustified.

C. The defence request for an order requiring cooperation

29. As set out above, the LRVs do not consider that they are in a position to assess whether the Government has complied with its cooperation obligations in respect of the four RFAs in question. No submissions are made on this point. However in the event that the Chamber does make a finding that the Government has failed to meet its cooperation obligations, the LRVs do not