

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/04-01/15
Date: 28 February 2020

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

**Victims' Response to "Defence Request for Remedies in Light of Prosecution
Disclosure Violations"**

Source: Legal Representatives of Victims

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

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**Victims Participation and Reparations
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Other

I. INTRODUCTION

1. The Legal Representatives of Victims ("LRVs") hereby respond to the "Defence Request for Remedies in Light of Prosecution Disclosure Violations" ("the Request"). These submissions are submitted pursuant to the email sent by Trial Chamber IX ("the Chamber") on 14 February 2020.
2. The LRVs largely oppose the Request. The threshold for granting a stay of proceedings is extremely high. It must be demonstrated (with particularity) that an egregious violation of the Accused's rights renders a fair trial *impossible*. The Chamber ultimately retains discretion to consider the appropriateness of the remedy in the specific circumstances of the case.
3. In this instance the Defence has failed to demonstrate *any* prejudice, let alone one which reaches the high threshold required for a stay. Moreover the request has been filed with substantial delay, and at a time when the victims are eagerly anticipating the imminent conclusion of the trial. The request for a stay must therefore be rejected. The alternative request for a different remedy is unclear and unsubstantiated. It should also be rejected.
4. However the LRVs do agree that disclosure should, where possible, be made in compliance with the E-court Protocol, and request that they be granted access to material which was disclosed to the Defence and not to the victims' legal representatives. They also request that the Chamber order the filing of public redacted versions of the Request and responses to it, so that this important matter can be dealt with transparently.

II. PROCEDURAL HISTORY

5. On the 13 April 2018, the Presiding Judge issued directions for closing briefs and closing statements.¹ Subsequently, the deadline for closing briefs was modified

¹ Directions on Closing Briefs and Closing Statements, ICC-02/04-01/15-1226, 13 April 2018.

three times, first to 26 February 2020,² then to 19 February 2020³ and finally to 24 February 2020.⁴

6. During October 2019 the Prosecution responded to requests from the Defence for disclosure by disclosing three categories of documents.⁵
7. On 29 November 2019 the last Defence witness appeared and concluded his testimony.
8. On 29 November 2019 the Chamber by email communication directed the Defence that it had until 6 December 2019 to file a notice regarding the closure of its presentation of evidence.⁶
9. On 5 December 2019 the Defence emailed the Chamber and the other participants to inform them that on 8 October 2018 the Prosecution had disclosed three databases to the Defence containing seemingly new material, apparently seeking to reserve a right to submit material from these databases after the closure of its case⁷
10. On the 6 December 2019 the Defence of Mr. Dominic Ongwen submitted a notification of the closure of presentation of its case.⁸ The notification referred to the three databases and indicated that the Defence was reviewing them and may still make a "timely request" for the admission of material contained in them into evidence.
11. On 12 February 2020 the Defence filed its Request.

² Modification of Deadline Regarding Closing Briefs and Setting of Dates for Closing Statements, ICC-02/04-01/15-1645, 23 October 2019.

³ Decision on Defence Request to Reconsider the Date of the Closing Statement, ICC-02/04-01/15-1691, 04 December 2019

⁴ Annex C of the Decision on Defence Request to Extend the Deadline for the Filing of the Closing Briefs, ICC-02/04-01/15-1715, 5 February 2020.

⁵ Defence Request for Remedies in Light of Prosecution Disclosure Violations, ICC-02/04-01/15-1718-Conf-AnxC, 12 February 2020.

⁶ Annex XVII to the Registry's Report Filing in the Record of the Case Decisions issued by way of email from June 2019 to January 2020, ICC-02/04-01/15-1714-AnxXVII, 04 February 2020.

⁷ Annex D of the Defence Request for Remedies in Light of Prosecution Disclosure Violations, ICC-02/04-01/15-1718-Conf-AnxD, 12 February 2020.

⁸ Defence Announcement on Closure of Presentation of its Evidence, ICC-02/04-01/15-1694 6 December 2019.

12. On 14 February 2020 the Chamber, by email communication, extended the deadline for responses to the Request to 28 February 2020.⁹

13. On the 24 February 2020 closing briefs were filed by the Prosecution,¹⁰ the LRVs,¹¹ the Office of Public Counsel for Victims¹² and the Defence.¹³

III. CLASSIFICATION

14. Pursuant to regulation 23bis(2) this filing is submitted with a confidential classification because it responds to a document which is classified as confidential.

15. The LRVs note that although the Request was filed more than two weeks ago, no public redacted version of it has been filed. The LRVs note the publicity of proceedings, as recognized in Article 64 (7) of the Statute, is a fundamental procedural principle in international criminal trials.¹⁴ A request for a stay of proceedings is a matter that is of great concern to the Victims and their communities. They deserve to be made aware that this request has been made. In the intervening period since the Request, the LRVs have been on mission to meet their clients, and were unable to inform them of this significant issue due to the continued confidential classification of the filing. The LRVs request that the Chamber fix a short deadline for the filing of a public redacted version of the Request, as well as responses to it.

⁹ Email, 14 February 2020 at 14h19, Subject 'RE: decision on Prosecution Request for Extension of Deadline to File Responses to ICC-02/04-01/15-1718-Conf.

¹⁰ Office of the Prosecutor Closing Brief, ICC-02/04-01/15-1719-Conf 24 February 2020.

¹¹ Legal Representatives for Victims Closing Briefs, ICC-02/04-01/15-1721-Conf 24 February 2020.

¹² Common Legal Representative for Victims Closing Brief, ICC-02/04-01/15-1720-Conf 24 February 2020.

¹³ Defence for Dominic Ongwen Closing Briefs, ICC-02/04-01/15-1722-Conf 24 February 2020

¹⁴ ICTY, *Prosecutor v Kunarac et al.* (Foca) (Order on Defense Motion Pursuant to Rule 79) IT-96-23&23/1-T (22 March 2000, para. 5. The Trial Chamber held that public proceedings facilitate public knowledge and understanding and may have a general deterrent effect, the public should have the opportunity to assess the fairness of the proceedings. Justice should not only be done, it should also be seen to be done.

IV. SUBMISSIONS

Preliminary issue

16. The Request relates to two categories of material:

- (a) One set of material which was disclosed to the defence in October 2019. The Defence claims that this disclosure was late, and that prejudice resulted to it.
- (b) Further materials which the Defence claims to have requested but not yet received from the Prosecution.

17. The LRVs note that they have not been privy to all of the relevant *inter partes* discussions concerning the disclosed and requested materials. Perhaps even more significantly, material falling within the first category is said to have been disclosed to the Defence outside the regular system established under the E-court Protocol which requires the disclosure of evidence electronically through Ringtail,¹⁵ and instead provided on a CD-ROM. The LRVs have not received a copy of this material. In principle the LRVs agree with the Defence that it is unacceptable for the Prosecution to circumvent the system of disclosure through Ringtail that is required by the E-court Protocol, unless compliance with that Protocol is in fact technically impossible. Where material is provided by other means for unavoidable practical reasons it should nonetheless be provided to all the participants in the proceedings. The LRVs note moreover that though the trial is completed, this material may still prove relevant to proceedings in respect of sentencing or reparations. Given that the material has been disclosed already to the Defence it should also now be made available to the LRVs and the OPCV in order to ensure that any relevant material can be relied on at those later stages of the proceedings in the event of a conviction.

¹⁵ Annex 1 to the Decision Setting the Regime for Evidence Disclosure and Other Related Matters, ICC-02/04-01/15-203-Anx1, 27 February 2015. The continued application of this protocol during the trial phase was ordered by the Chamber in its Order Scheduling First Status Conference and Other Matters, ICC-02/04-01/15-432, 4 May 2016, para. 4.

18. The fact that the LRVs have not seen the material which was disclosed to the Defence in October 2019, and that they have not been party to the relevant correspondence concerning this and other requested disclosures, means that they are not well placed to assess whether the Prosecution has breached its disclosure obligations or not. Consequently the LRVs are not in a position to make submissions to the Chamber on the question of the alleged disclosure violations.
19. However the LRVs oppose, in any event, the relief which is sought in the Request. Even if there has been a violation of disclosure obligations, the Request fails to demonstrate anything even approaching the requirements for the imposition of a stay of proceedings. The Request does not demonstrate any specific prejudice to the defence, much less that a fair trial has been rendered impossible. The Request was also filed with substantial delay, and should be dismissed for this reason.
20. The alternative request for another unspecified "appropriate remedy in the judgment or sentencing in the case of conviction" should also be rejected.

Requirements for a stay of proceedings

21. The Court has an inherent power to stay proceedings.¹⁶ However this procedural step is to be used extremely sparingly: it is a "drastic remedy"¹⁷ which "might appear contradictory to the object and purpose of the Court."¹⁸

*Not every infraction of the law or breach of the rights of the accused in the process of bringing him/her to justice will justify stay of proceedings. The illegal conduct must be such as to make it otiose, repugnant to the rule of law to put the accused on trial.*¹⁹

¹⁶ *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on the defence request for a temporary stay of proceedings, ICC-02/05-03/09-410, 26 October 2012, para.74.

¹⁷ *Ibid.* para.80.

¹⁸ *Ibid.* para.79. See also para.80.

¹⁹ *Prosecutor v Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, 14 December 2006, para. 30.

Accordingly, a stay is a measure which should be “sparingly exercised”,²⁰ and only be imposed in circumstances which are “exceptional”, where fair trial violations are so egregious as to render it “unacceptable for justice to embark on its course.”²¹ This high threshold for the imposition of a stay has been distilled by the Court into a simple test: namely whether a fair trial has become “impossible”.²²

22. The impossibility of a fair trial must be established clearly²³ through facts which are “properly substantiated.”²⁴ This means that the matters which make a fair trial impossible must be “identified with sufficient specificity”.²⁵

23. In any event, the grant of a stay is a discretionary remedy.²⁶ It is to be determined on a case-by-case basis, in light of the Trial Chamber’s intimate knowledge of the proceedings.²⁷

No prejudice to the Defence has been shown, let alone the impossibility of a fair trial

24. In the present case the LRVs submit that the Request falls considerably short of approaching the requirements for the imposition of a stay.

25. Indeed the Request merely asserts that the alleged disclosure violations have caused prejudice to the defence. The claimed impact on the Accused’s fair trial rights remains vague and entirely unparticularised.

26. It is striking that at the time of the Request, the Defence had been in possession of the three disclosed databases for more than four months. Yet the Defence is unable to identify even a single instance where it demonstrably would have been

²⁰ *Ibid.* para.31.

²¹ *Ibid.* para. 31.

²² *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on the defence request for a temporary stay of proceedings, ICC-02/05-03/09-410, 26 October 2012, paras 78, 79, 80, 81.

²³ *Ibid.*, para.82.

²⁴ *Ibid.*, para. 90.

²⁵ *Ibid.*, paras 93-4.

²⁶ *Ibid.*, paras 86-87.

²⁷ *Ibid.*, paras 86-86.

assisted by relying on this material during trial, or where even the outcome of a single charge might have been affected.

27. Instead the Request claims that the material would have “potentially” facilitated credibility challenges.²⁸ It is asserted that this could be the case “if the information suggests something different from what is contained in disclosures or their testimony,”²⁹ implying that in four months of possessing the material the Defence has not been able to identify any such inconsistency. Similarly, the Request states that the Defence “might” have been able to obtain more useful information from the material disclosed.³⁰

28. Only three slightly more specific examples are given by the Defence of how the material could have assisted in its case:

- (i) An assertion that “following from the Prosecution’s statement that Mr Ongwen is only listed as the commanding officer for one individual and that only 11 individuals are listed under Sinia in the new information, this *may* show that Mr Ongwen was not an important commander as alleged”.³¹ [emphasis added] The logic behind this argument is so fraught that even the Defence could not go further than attempting to claim that this material “may” be used to challenge Mr Ongwen’s level of command.
- (ii) Information said to be included in the database which relates to an individual with the same name as witness P-379.³² Not only is it unclear whether this person actually is P-379 or simply a person who shares his name; there is not even a suggestion that any of the newly disclosed material would have been adverse to P-379’s credibility.

²⁸ Request, paras 35, 43.

²⁹ Request, para.43.

³⁰ Request, para.44.

³¹ Request, para.45.

³² Request, para.46.

- (iii) Information which is a “seeming” record for P-28.³³ Again, it is unclear whether this individual is P-28 and no indication is given of how the newly disclosed material would have assisted the Defence in any way if it had been known earlier. No suggestion is made that the material has any bearing on P-28’s credibility or the substance of P-28’s evidence.

29. Accordingly, the LRVs submit that the Request does not even begin to approach the requirements for a stay under the Court’s established case law. An exceptional remedy such as a stay requires a certainty much higher than a mere undetermined possibility. Very far from demonstrating an egregious violation of the Accused’s rights which would render a fair trial “impossible”, the Request does not even demonstrate *any* single identifiable prejudice to the Defence. The Request essentially rises no higher than a speculative assertion the material received on 8 October 2019 might have been useful to the Defence, and therefore there is a theoretical possibility earlier receipt of such information could have been useful.

30. This is a sizeable distance from the requirements contained in the jurisprudence (set out above) that prejudice be “properly substantiated” and “identified with sufficient specificity.” It is lightyears from the deliberately high threshold of demonstrating that such exceptional harm to the Defence has occurred that a fair trial has become “impossible”.

The Request is untimely

31. Additionally, as set out above, a stay is a discretionary remedy. The LRVs note that there are factors in the present case which would support the refusal of a stay in any event. The first of these considerations is that the Request was filed with considerable delay.

32. The Defence received the three databases on 8 October 2019, two months before it closed its case and four months before the Request was filed. Further material

³³ Request, para.46.

which is sought in the Request appears to have been known to the Defence since August 2018.³⁴

33. In yet another example of what has become commonplace from this Defence, absolutely no explanation is given as to why the Request has been made so late.
34. In this instance the delay is particularly problematic. Not only have months passed during which matters relating to the three databases could have been raised; perhaps more significantly, the Defence actually *closed its evidence* during this time. The Prosecution, victims, and Ugandan public were entitled to rely on the fact that – short of some drastic new development – the evidence in the case had been concluded. In fact, the Prosecution and victims teams have drafted their closing briefs and begun preparing for closing arguments on this very basis. The Defence itself has also submitted its closing brief.
35. The Request appears to suggest that the submission on 6 December of a notice closing the Defence's case should be treated as without prejudice to the present application simply because of the email which was sent on 5 December and referred to in the 6 December notice. The LRVs contest this. The closure of evidence in a case cannot be done partially: a case cannot be closed subject to the possibility of submitting more evidence later; if further evidence is to be submitted, the case is simply not closed. If the Defence considered that there was a possibility that it may need to submit further evidence, the appropriate course of action was to request an extension of time for filing the notice of the closure of its case. If it thought that this additional work would require a delay in the submission of its closing brief so that the work could be properly undertaken, it should have made a request for an extension of time for the filing of closing briefs with this as its rationale. It did neither of these things.
36. Even if the Defence's "caveat" was effective, the LRVs note that it makes no reference to the possibility of such drastic action as a request to stay the

³⁴ Request, para.61.

proceedings. Instead the Defence notice simply indicated that it may request the inclusion of the material into evidence.³⁵

37. It is telling that in the latter part of trial proceedings in this case the Defence has provided enthusiastic in the filing of numerous motions which allege the infringement of the Accused' fair trial rights. Had such infringements been perceived in respect of the questions of disclosure now raised in the Request, it is surprising that the Defence did not consider it worthy of an immediate filing. The LRVs can only consider that if a matter was truly of such importance as to warrant such an exceptional measure as a stay of proceedings, the Defence would not have waited at least four months to put the issue before the Chamber, and at that point in time provide no explanation whatsoever for the delay. The Appeals Chamber has already had the opportunity in the present case to emphasize the importance of providing a clear justification when discretionary remedies are sought out of time and with considerable delay.³⁶

A stay would cause unjustified prejudice to the victims

38. A further consideration also exists which the LRVs request the Chamber to consider as relevant to the exercise of its discretion is the impact that a stay would have on the victims of the crimes charged against the Accused.

39. Victims with status before the Court have waited since 2004 to today to see justice done. The LRVs have been undertaking their best efforts with limited resources to keep the victims informed about the proceedings, including that the trial has been approaching its conclusion and that the evidence has closed, with final arguments to be made in March. As indicated above, the LRVs have been unable to inform their clients about the Request because it remains confidential.

³⁵ ICC-02/04-01/15-1694, paras 2-3.

³⁶ Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision' ICC-02/04-01/15-1562, 17 July 2019, para 146 - 153.

40. A change at this stage which would involve potentially reopening the evidence and causing further delay would cause confusion and frustration. Victims have patiently waited throughout the trial. They have finally reached a moment where the judges would begin deliberations; to tell them now that this is not the case would be devastating.
41. While there may be circumstances in which such a drastic measure may be justified, the present circumstances are very far from that. In effect the Defence requests to reopen its case, thereby causing entirely predictable disappointment and disillusionment to the victims, simply on the basis of a *possibility* that this may assist it. Sadly this approach continues to reflect a disregard by the Defence for the fact that the Accused is only one person affected by these proceedings; thousands of others are also desperately awaiting the outcome and their need for certainty and transparency should be respected.

Alternative remedies should also be refused

42. Finally, the LRVs note that the Request seeks an alternate form of relief, if a stay is refused, namely that: "the Trial Chamber make the disclosure violation order and apply the appropriate remedy in the judgment or sentencing in the case of a conviction."³⁷
43. No guidance is provided as to what this "appropriate remedy" might be. No legal basis is cited. The LRVs note that the Chamber has previously had cause, albeit in a slightly different context, to remind the Defence that it must "describe clearly and comprehensively what it requests from the Chamber when formulating its relief sought".³⁸ A failure to do so not only creates difficulties for the Chamber, it also means that the participants are required to speculate about the nature of the relief sought in order to respond to it. There is a risk that this deprives the

³⁷ Request, para.38.

³⁸ Decision on Defence Request for Disclosure and Remedy for Late Disclosure, ICC-02/04-01/15-1351, 28 September 2018, para.7.

participants of their right to be heard on the matters which the Chamber is determining.

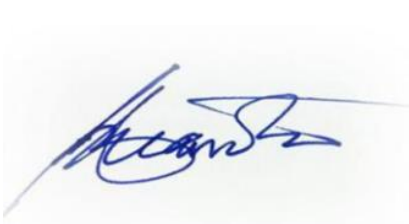
44. In the present instance the LRVs are left perplexed as to how the alleged disclosure violation(s) by the Prosecutor would be relevant to conviction or sentencing. In the absence of any explanation the LRVs are left to speculate as to whether the Defence sought to suggest that the Prosecution should be “punished” for a breach of disclosure obligations through some mitigation to the Accused’s convictions or sentence. Such an approach cannot be countenanced. The purpose of a conviction or sentence is to reflect the conduct of the Accused, not that of the Prosecution. Proposing adjustments based on the conduct of the Prosecutor would disregard the interests of the victims, who are intended as the primary beneficiaries of this Court’s work, and who have no control over the conduct of the Prosecutor.

V. CONCLUSION AND RELIEF SOUGHT

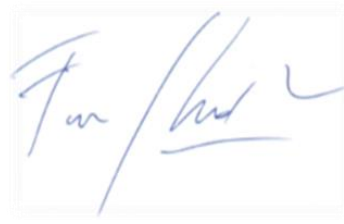
45. The LRVs therefore request that:

- (a) The Prosecution be ordered to disclose the material described by the Defence as “the two Amnesty Commission databases and the CHARMS database” through Ringtail in compliance with the E-court Protocol, including to the LRVs and OPCV;
- (b) The remainder of the Request be dismissed; and
- (c) A short deadline be set for the filing of a public redacted version of the Request, and the responses to it.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Manoba', with a stylized flourish at the end.

Joseph A. Manoba

A handwritten signature in blue ink, appearing to read 'Francisco Cox', with a stylized flourish at the end.

Francisco Cox

Dated this 28th day of February 2020
At Gulu, Uganda and at Santiago, Chile