

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **12 March 2021**

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 “Defence Request for an Extension of Time to File its Sentencing Brief due to the Registrar’s Violation of Mr Ongwen’s Fair Trial Rights”, filed on 12 March 2021

Source: Defence for Dominic Ongwen

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

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Appeals Chamber

I. INTRODUCTION

1. Pursuant to Regulation 35 of the Regulations of the Court ('RoC'), the Defence for Dominic Ongwen ('Defence') requests from Trial Chamber IX ('Chamber') that the due date for its sentencing brief be moved from 1 April 2021 to 26 April 2021. The Defence does not object to the Chamber moving the due date for the Prosecution, Legal Representative for Victims and Common Legal Representatives for Victims.
2. The Defence avers that a change in the due date of the sentencing brief is warranted as the Registrar has needlessly and recklessly failed to give the Defence additional funds to pay most of its original staff from trial. As of the submission of this request, the Defence has not received an answer to its 4 February 2021 Regulation 83(3) of the RoC request for additional funds ('RoC 83 Request') and only has funds to remunerate three (3) full time persons on the Defence.
3. The Registrar's failure to answer the Defence in a timely manner violates Mr Ongwen's fair trial rights pursuant to Articles 67(1)(b) and (d) of the Rome Statute. As such, the Defence requests that the Chamber allow the Defence to submit its sentencing brief on 26 April 2021 to lessen the prejudice incurred by the Defence. The Defence has no objections to making this date the same for all Parties and Participants.
4. The filing of this motion does not waive the Defence's objections that Mr Ongwen's fair trial right to translation is violated because he has no Acholi translation; and that, even assuming such a translation was prepared in a timely manner, Mr Ongwen is a mentally disabled person and requires additional time to read and review material because of his disabilities.

II. CONFIDENTIALITY

5. Pursuant to Regulations 23*bis* of the RoC, this request is filed as confidential as it contains materials about the Defence's budget. [REDACTED]. A public redacted version is filed contemporaneously.

III. URGENCY

6. Pursuant to Regulation 35 of the RoC, the Defence requests that any response to this request be filed on or before 16 March 2021. The Defence avers that good cause exists as the deadline

for the Parties and Participants sentencing brief is 1 April 2021. Considering that the Defence is still working with a “skeleton crew” on the largest case ever prosecuted at the ICC, a quick decision by the Chamber would allow the Defence to allocate its minimal resources as efficiently as possible while still endeavouring to meet deadlines put forth by the Chamber and Appeals Chamber.

IV. PROCEDURAL HISTORY

7. On 4 February 2021, the Chamber passed judgment on Dominic Ongwen, convicting him of 61 counts of crimes against humanity and war crimes.¹
8. On 4 February 2021, after the issuance of the Trial Judgment and as instructed by the Counsel Support Section (‘CSS’), the Defence filed the RoC 83 Request with the Registrar through CSS.² The email stated:

[REDACTED].
9. On 16 February 2021, the Defence wrote to CSS requesting to know the status of the RoC 83 Request.³ [REDACTED]. A registry representative wrote back to the Defence on 17 February 2021 stating, “[REDACTED].”⁴
10. On 1 March 2021, the Defence again wrote to CSS requesting to know the status of the RoC 83 Request.⁵ The Defence informed the CSS that the delay in its answer would be brought to the attention of the Appeals Chamber.⁶
11. On 2 March 2021, a Registry representative replied to the Defence and told the Defence, “[REDACTED].”⁷

¹ Trial Chamber IX, *Trial Judgment*, ICC-02/04-01/15-1762.

² Email from [REDACTED] to CSS and [REDACTED], *D26 – Regulation 83(3) Request or Appeals Phase*, sent 4 February 2021 at 16h11 CET.

³ Email from [REDACTED] to CSS and [REDACTED], *Re: D26 – Regulation 83(3) Request or Appeals Phase*, sent 16 February 2021 at 19h59 CET.

⁴ Email from [REDACTED] to [REDACTED], *Re: D26 – Regulation 83(3) Request or Appeals Phase*, received 17 February 2021 at 10h33 CET.

⁵ Email from [REDACTED] to CSS and [REDACTED], *Re: D26 – Regulation 83(3) Request or Appeals Phase*, sent 1 March 2021 at 19h03 CET.

⁶ Email from [REDACTED] to CSS and [REDACTED], *Re: D26 – Regulation 83(3) Request or Appeals Phase*, sent 1 March 2021 at 19h03 CET.

⁷ Email from [REDACTED] to [REDACTED], *Re: D26 – Regulation 83(3) Request or Appeals Phase*, received 2 March 2021 at 07h37 CET.

12. On 5 March 2021, the Defence received an email from a Registry representative stating, “[REDACTED].”⁸
13. At the time of the submission of this request, the Defence has not received an answer to its RoC 83 Request from the Registrar. Thirty-four (35) days have passed since submitting the RoC 83 Request.

V. SUBMISSIONS

14. At the outset, the Defence notes that this is not the first time it has brought to the Chamber’s attention that the Registry has delayed its response to a Defence request for additional funds.⁹ The Defence is at a critical juncture again and awaiting a response to have more than three (3) full time persons working again. It is shameful that at this stage, the Defence must bring this motion before the Chamber to ensure Mr Ongwen’s fair trial rights.
15. Trial Chamber II outlined factors to be considered when determining whether to overturn or adjust a decision on financial aid given by the Registrar. It stated:

The Chamber must assess (a) whether the Registrar has abused [his] [...] discretion; (b) whether the Registrar's decision is affected by a material error of law or fact; and (c) whether the Registrar's decision is manifestly unreasonable. The Chamber will only intervene if counsel can show that the Registrar's decision falls foul of one or more of these criteria.¹⁰

16. The Defence asserts that the Registrar, in failing to give a decision in a timely manner, has abused his discretion and caused harm to Mr Ongwen which is manifestly unreasonable. The failure to render a timely decision on the Defence’s RoC 83 Request violates Mr Ongwen’s fair trial right to have adequate time and facilities to prepare his case for sentencing (and appeal)¹¹ and his fair trial right to have legal assistance paid for by the Court.¹²

⁸ Email from [REDACTED] to [REDACTED], *Re: D26 – Regulation 83(3) Request or Appeals Phase*, received 5 March 2021 at 16h48 CET.

⁹ Trial Chamber IX, *Defence Submissions in Advance of the 23 May 2016 Status Conference*, ICC-02/04-015-439-Conf, para. 21.

¹⁰ Trial Chamber II, *Decision on the Urgent Requests by the Legal Representatives of Victims for Review of Registrar’s Decision of 3 April 2012 regarding Legal Aid*, ICC-01/04-01/07-3277, para. 9.

¹¹ Article 67(1)(b) of the Rome Statute.

¹² Article 67(1)(d) of the Rome Statute.

A. The Registrar's failure to render a timely decision is manifestly unreasonable, and an abuse of discretion, causing harm to Mr Ongwen and violating his fair trial rights pursuant to the Rome Statute

17. Mr Ongwen currently receives funds for his legal team to retain Counsel, two Assistants to Counsel and a Case Manager at 30%.¹³ During the month of February 2021, the Registrar also approved the use of investigation funds provisionally granted to the Defence in March 2020 to fund a resource person to aid in the collection of material for sentencing. No other funds are available to the Defence to use for the sentencing or the appellate proceedings.
18. The Registrar has known since 12 November 2020 that the Article 74 Judgment was forthcoming.¹⁴ The case against Mr Ongwen is the largest ever before the International Criminal Court, where 70 charges and nine (9) modes of liability were confirmed against a single defendant. While the Registrar could not have known the outcome of the decision beforehand, he should have been at least minimally prepared to handle the RoC 83 Request. Preparedness is important, especially considering the expeditious nature of the proceedings following a conviction or acquittal.
19. Rule 150(1) of the Rules requires the notice of appeal of a conviction or acquittal to be filed 30 days from the Article 74 judgment. A conviction on a single count would trigger the Defence's right to file such notice. Considering the number of charges alleged against Mr Ongwen, it would have been reasonable for the Registry to be prepared for guilty convictions on some of the charges, and to draw up different contingency plans. This is not the first Article 74 judgment at the ICC, and not even the first by this Registrar. Had the Defence not received a 45-day extension to file its notice of appeal, the deadline would have passed without the Defence even receiving a decision on funding. This is not a reasonable action by the Registrar.
20. Similarly, a reasonable person would have prepared contingency plans based on a conviction related to the new sentencing recommendation for the Court. The 2019 edition of the Chambers Practice Manual advises the Judges to issue a sentence upon conviction within four (4) months of the Article 74 judgment.¹⁵ The Judges of the Court passed this recommendation with efficiency and expedience as a priority.¹⁶ These priorities can only be achieved,

¹³ [REDACTED].

¹⁴ Trial Chamber IX, *Order Scheduling the Delivery of the Judgment*, ICC-02/04-01/15-1754. See also Trial Chamber IX, *Decision on the Postponement of the Delivery Date of the Judgment*, ICC-02/04-01/15-1759.

¹⁵ Chambers Practice Manual, para. 89.

¹⁶ *Ibid*, para. 86.

however, if the Registrar exercises the same diligence when seized of the RoC 83 Request. It was not the case here.

21. When determining whether the Registrar acted reasonably, the Chamber should weigh heavily the fact that a stringent timeline was proclaimed for sentencing in this case.¹⁷ The Chamber required the Parties and Participants to request submission of evidence by 26 February 2021 for sentencing and responses to any such requests by 10 March 2021.¹⁸ The Registrar was notified pursuant to Regulation 31 of the RoC about these deadlines, and reminded by the Defence of these deadlines on 4 February 2021.¹⁹ Two of the deadlines set by the Chamber have passed without a decision by the Registrar on the Defence's RoC 83 Request. This is not a reasonable, efficient or expedient manner in which to operate.
22. Furthermore, the failure of the Registrar to pass a decision on the Defence's RoC 83 Request violates Mr Ongwen's fundamental fair trial rights to have adequate time and facilities to prepare his arguments for sentencing and appeal, and denies him the right to have adequate legal assistance to prepare his case. And of course, all of this is happening at the same time his legal team is required to explain to Mr Ongwen a 1,077-page judgment for his sentencing and appeals proceedings. Should the Defence allocate the meagre resources it has to prepare for the bifurcated proceedings, or should it allocate them to explain to Mr Ongwen the longest judgment in ICC history? No defendant should have this to face, yet the Registrar is denying him these fundamental rights with his failure to issue a decision on the Defence's RoC 83 Request.
23. Finally, the Registrar's failure to issue a decision on the Defence's RoC 83 Request is an abuse of discretion. As noted above, the Registrar is aware of the time constraints faced by the Defence. The Registrar also knows that:
 - a. Mr Ongwen is a mentally disabled person;
 - b. Mr Ongwen understands and speaks one language according to the legal texts of the Court; and

¹⁷ See Trial Chamber IX, *Decision scheduling a hearing on sentence and setting the related procedural calendar*, ICC-02/04-01/15-1763.

¹⁸ *Ibid*, para. 6.

¹⁹ Email from [REDACTED] to CSS and [REDACTED], *D26 – Regulation 83(3) Request or Appeals Phase*, sent 4 February 2021 at 16h11 CET (see para. 8 above).

- c. Mr Ongwen will not have a translated copy of the Trial Judgment before his sentencing or appellate proceedings are scheduled to be completed, seriously violating Mr Ongwen's fair trial rights and causing further strain on his Defence Team's resources.
24. The Defence will not hypothesise why this decision is taking so long, and why the Registrar is allowing the Chamber's second deadline imposed in Decision 1763 to pass without a decision. The Defence cannot state whether there is a valid reason **as no reason has been relayed to the Defence as to why it is taking so long, in light of the stringent timeline, to answer the RoC 83 Request**. While the Registrar has the discretion to determine what funds are necessary for an effective defence, failure to supply an answer to the Defence's RoC 83 Request is an abuse of said discretion.
25. For the reasons stated above, the Defence requests Trial Chamber IX to reschedule the due date of the sentencing brief until 26 April 2021 for the Parties and Participants to possibly lessen the prejudice caused by the Registrar's unreasonable delay in deciding upon the Defence's RoC 83 Request.

B. The rescheduling of the due date of the sentencing briefs meets the standards outlined in Regulation 35 of the Regulations of the Court.

26. The Defence asserts that the requested rescheduling of the due date of the sentencing briefs meets the requirements of the of Regulation 35 of the RoC as good cause is shown by the lack of funds allocated by the Registrar for Mr Ongwen's defence, violating Articles 67(1)(b) and (d) of the Rome Statute. Because of the failure to fund Mr Ongwen's case promptly and properly, the exceptional rescheduling of the sentencing briefs is warranted under the Regulations of the Court and as advised in the Chambers Practice Manual.²⁰
27. As noted above, the Defence is working with a proverbial "skeleton crew". Three (3) members of the Defence are properly funded, and one person at 30% remuneration. [REDACTED]. Finally, a sixth person is remunerated €100 per month so she could gain access to confidential files for the purpose of preparing for the appellate proceedings because the ICC, by request of the Government of the Netherlands, cancelled the pro-bono member position on external teams during the summer of 2016. [REDACTED].
28. The Office of the Prosecutor has two teams working on this case. It has an appellate division, led by Senior Counsel Helen Brady, and a trial team [REDACTED]. Both teams have a

²⁰ See *general Chambers Practice Manual*, para. 86.

complement of legal personnel for the sentencing and appellate proceedings. The Defence has three (3) full time persons and one (1) part time person for both. With the bifurcated system at the ICC, the “skeleton crew” of persons on the Defence and the lack of an interpretation of the 1,077-page Trial Judgment places serious strains on the allocation of resources on the Defence team. This failure to fund the Defence properly violates Mr Ongwen’s fundamental right of equality of arms.

29. The vacuum caused by the Registrar’s failure to issue a decision on the Defence’s RoC 83 Request violates Mr Ongwen’s right to have adequate legal funds for his defence.²¹ This failure to fund properly Mr Ongwen’s defence prejudices Mr Ongwen as it does not allow him and his Defence adequate time to prepare the sentencing brief **and** notice of appeal.²² Both violations of the Mr Ongwen’s fundamental fair trial rights, not to mention the violation of equality of arms, warrants a rescheduling of the due date of the sentencing briefs.
30. For the reasons stated above, the Defence requests Trial Chamber IX to reschedule the due date of the sentencing brief until 26 April 2021 for the Parties and Participants to possibly lessen the prejudice caused by the Registrar’s unreasonable delay in deciding upon the Defence’s RoC 83 Request.

VI. RELIEF

31. For the abovementioned reasons, the Defence respectfully requests Trial Chamber IX to reschedule the due date for the sentencing brief to 26 April 2021.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

²¹ Article 67(1)(d) of the Rome Statute.

²² Article 67(1)(b) of the Rome Statute.

Dated this 12th day of March, 2021

At Gulu, Uganda