

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/04-01/15**
Date: **29 January 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 redaction version of Filing No. ICC-02/04-01/15-1154-Conf
**Common Legal Representative's Request for an extension of time to file her final
list of witnesses**

Source: Office of Public Counsel for Victims

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

Ms Fatou Bensouda
Mr Benjamin Gumpert

Counsel for the Defence

Mr Krispus Ayena Odongo
Mr Chief Charles Achaleke Taku

Legal Representatives of the Victims

Ms Paolina Massidda
Ms Jane Adong
Mr Joseph Akwenyu Manoba
Mr Francisco Cox

Legal Representatives of Applicants**Unrepresented Victims****Unrepresented Applicants
(Participation/Reparation)****The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Mr Orchlon Narantsetseg
Ms Caroline Walter

**The Office of Public Counsel for the
Defence****States' Representatives****Amicus Curiae****REGISTRY**

Registrar

Mr Herman von Hebel

Counsel Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations
Section****Other**

I. INTRODUCTION

1. The Common Legal Representative¹ requests an extension of time to submit her final list of witnesses until 16 February 2018.

2. The Common Legal Representative submits that, for the below mentioned reasons beyond her control, she is unable to file her final list of all witnesses by 2 February 2018 as previously ordered by the Chamber. Indeed, while being able to provide the Chamber with the final list of names of the experts on this initial deadline, she is currently unable to provide the names of the other three fact-witnesses she intends to call because [REDACTED].

II. PROCEDURAL BACKGROUND

3. On 13 July 2016, the Single Judge of Trial Chamber IX (respectively, the “Single Judge” and the “Chamber”) issued the “Initial Directions on the Conduct of the Proceedings” and ruled, *inter alia*, that victims may present evidence after the close of the Prosecution case.²

4. On 13 October 2017, the Single Judge issued the “Preliminary Directions for any LRV or Defence Evidence Presentation” (the “Preliminary Directions”) and instructed, *inter alia*, the Legal Representatives to: (i) provide their preliminary list of witnesses and time estimates of their witness examination by 14 December 2017, and;

¹ See the “Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, p.19; the “Decision on issues concerning victims’ participation” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; the “Second decision on contested victims’ applications for participation and legal representation of victims” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-384, 24 December 2015, pp. 20-22; and the “Decision on the ‘Request for a determination concerning legal aid’ submitted by the legal representatives of victims” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-445, 26 May 2016, para. 13.

² See the “Initial Directions on the Conduct of the Proceedings” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-497, 13 July 2016, para. 9.

(ii) provide their final lists of witnesses by 2 February 2018, along with their justifications for why leave should be granted to present evidence.³

5. On 13 December 2017, the Common Legal Representative filed her preliminary list of witnesses.⁴ On 14 December 2017, the Legal Representatives of Victims filed their preliminary list of witnesses.⁵ On 15 December 2017, the Defence filed a request (the “Defence’s Request”) seeking, *inter alia*, the full disclosure of the names of the witnesses that the Legal Representatives wish to call.⁶ On 18 December 2017, the Legal Representatives of Victims⁷ and the Common Legal Representative⁸ responded to the Defence’s Request. On 22 December 2017, the Chamber partially granted the Defence’s Request and instructed the Common Legal Representative to disclose the names of its four expert witnesses.⁹ Accordingly, the Common Legal Representative proceeded with the disclosure of the names of four experts on 22 and 29 December 2017.¹⁰

³ See the “Preliminary Directions for any LRV or Defence Evidence Presentation” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1021, 13 October 2017, paras. 3-4 (the “Preliminary Directions”).

⁴ See the “Common Legal Representative Preliminary List of Witnesses Provided Pursuant to the ‘Preliminary Directions for any LRV or Defence Evidence Presentation’”, No. ICC-02/04-01/15-1105-Conf. (A public redacted version of the document was notified on 19 December 2017. See No. ICC-02/04-01/15-1105-Red.)

⁵ See the “Victims’ preliminary list of witnesses”, No. ICC-02/04-01/15-1106, 14 December 2017.

⁶ See the “Defence Request for Orders Regarding ICC-02/04-01/15-1105-Conf, ICC-02/04-01/15-1106 and ICC-02/04-01/15-1106-Conf-Anx”, No. ICC-02/04-01/15-1109-Conf, 15 December 2017 (Pursuant to Trial Chamber IX’s Decision, dated 22 December 2017, this document is reclassified as “Public”).

⁷ See the “Victims’ response to “Defence Request for Order Regarding ICC-02/04-01/15-1105-Conf, ICC-02/04-01/15-1106 and ICC-02/04-01/15-1106-Conf-Anx”, No. ICC-02/04-01/15-1112-Conf, 18 December 2017.

⁸ See the “Common Legal Representative Response to ‘Defence Request for Orders Regarding ICC-02/04-01/15-1105-Conf, ICC-02/04-01/15-1106 and ICC-02/04-01/15-1106-Conf-Anx’”, No. ICC-02/04-01/15-1113-Conf, 19 December 2017. (Pursuant to Trial Chamber IX’s Decision, dated 22 December 2017, this document is reclassified as “Public”).

⁹ See “Decision on Defence Request for the Identities of Potential Witnesses on the Legal Representatives of Victims’ Preliminary Lists of Witnesses” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1117, 22 December 2017.

¹⁰ See email to the Chamber, parties and participants sent by the Common Legal Representative on 22 December 2017 at 11:41 and the “List of Experts Provided Pursuant to the ‘Decision on Defence Request for the Identities of Potential Witnesses on the Legal Representatives of Victims’ Preliminary Lists of Witnesses’”, with Confidential Annex A, No. ICC-02/04-01/15-1125, 29 December 2017.

6. Pursuant to regulation 23bis(1) of the Regulations of the Court, this document is filed confidential since it refers to information not to be known by the public at the present stage considering its preliminary nature.

III. REQUEST FOR EXTENTION OF TIME

7. Regulation 35(2) of the Regulations of the Court states that *“the Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.”*

8. Accordingly, the Chamber has the discretionary power to determine whether the grounds on which the variation of time limit is sought by an applicant show the existence of good cause for it to be granted.¹¹ The Appeals Chamber held that *“good cause in this context imports the existence of valid reasons for non-compliance with the procedural obligations of a party to the litigation. [...] Such reasons as may found a good cause are necessarily associated with a party’s duties and obligations in the judicial process. A cause is good, if founded upon reasons associated with a person’s capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations.”*¹² Thus, in the established jurisprudence of the Court, the Chambers consider various reasons constituting such good causes,

¹¹ See the “Decision on the ‘Defence Application for Extension of Time to Submit Information on Viva Voce Witnesses to be Called at the Confirmation Hearing’ (Single Judge, Pre-Trial Chamber II)”, No. ICC-01/09-01/11-176, 11 July 2011, para. 12.

¹² See the “Reasons for the ‘Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007’ issued on 16 February 2007 (Appeals Chamber)”, No. ICC-01/04-01/06-834 OA8, 21 February 2007, para. 7.

covering situations which do not solely depend on the applicant alone,¹³ despite its diligent efforts,¹⁴ including but not limited to lead counsel's illness,¹⁵ heavy burden of work confronting counsel in preparing for judicial proceedings,¹⁶ the necessity to conduct counsel's work in the field country,¹⁷ and the need to receive as elaborate, clear and relevant submissions as possible¹⁸ on the important and complex issues at stake¹⁹ which, by their nature, will impact the interest of the applicant.²⁰ The Chamber may also take into consideration other unforeseen circumstances that are inherent in a criminal trial.²¹

¹³ See the "Order on the Prosecutor's Application for an Extension of Time (Regulation 35 of the Regulations of the Court) (Trial Chamber II)", No. ICC-01/04-01/07-978-tENG, 07 September 2009, para. 5. See also the "Decision on the disclosure of evidentiary material relating to Witness 219", (Trial Chamber II) No. ICC-01/04-01/07-1364, 13 August 2009, para. 12.

¹⁴ See the "Decision on the joint defence request for extension of time (Trial Chamber V)", No. ICC-01/09-01/11-650, 14 March 2013, para. 5.

¹⁵ See the "Reasons for the 'Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007' issued on 16 February 2007 (Appeals Chamber)", No. ICC-01/04-01/06-834 OA8, 21 February 2007, para. 7.

¹⁶ See the "Reasons for the 'Decision on the 'Application for Extension of Time Limits Pursuant to Regulation 35 of the Regulations of the Court to Allow the Defence to Submit its Observations on the Prosecutor's Appeal regarding the Decision on Evidentiary Scope of the Confirmation Hearing and Preventative Relocation' (Appeals Chamber)", No. ICC-01/04-01/07-653 OA7, 27 June 2008, para. 5. See also the "Decision on Mr Ngudjolo Chui's request for an extension of time (Appeals Chamber)", No. ICC-01/04-02/12-84, 07 June 2013, para. 9 and the "Order on the Request by the Registry for the Extension of a Time Limit (regulation 35 of the Regulations of the Court) (Trial Chamber II)", No. ICC-01/04-01/07-826-tENG, 06 August 2009, para. 3.

¹⁷ See the "Decision on the application by Counsel for Mr. Thomas Lubanga Dyilo to extend the time limit for the filing of the response to the Prosecutor's document in support of the appeal (Appeals Chamber)", No. ICC-01/04-01/06-190 OA3, 11 July 2006, para. 4.

¹⁸ See the "Decision on the Prosecutor's application for an extension of time to file submissions on the legal re-characterisation pursuant to article 25(3)(d) of the Statute, (Trial Chamber II)", No. ICC-01/04-01/07-3340-tENG, 23 January 2013, para. 8.

¹⁹ See the "Decision on the application by Counsel for Mr. Thomas Lubanga Dyilo to extend the time limit for the filing of the response to the Prosecutor's document in support of the appeal (Appeals Chamber)", No. ICC-01/04-01/06-190 OA3, 11 July 2006, para. 5.

²⁰ See the "Decision on Mr Ngudjolo's request for translation and suspension of the time (Appeals Chamber)", No. ICC-01/04-02/12-60 A, 11 April 2013, para. 12. See also the "Decision on the Request of the Defence for Germain Katanga for an Extension of Time for its Observations on the Summary of Charges (Regulation 35 of the Regulations of the Court) (Trial Chamber II)", No. ICC-01/04-01/07-1619-tENG, 24 August 2010, para. 7.

²¹ See the "Decision on the Prosecution Motion for leave to disclose and add the investigator's report concerning Witness P-268 to the List of Incriminating Evidence (Trial Chamber II)", No. ICC-01/04-01/07-2325-Red, 27 September 2010, para. 17.

9. As for the length of the extension of the time limit, the Chambers consider the *reasonableness* of the request under the relevant circumstances;²² in particular, whether the newly proposed time limit appears to be *not excessive*²³ in other words, *the proposed new deadline is not significantly later than the initial time limit originally imposed by the Chamber.*²⁴

10. The presentation of the final list of witnesses to be called by the Common Legal Representative is a critical juncture of the proceedings by virtue of which the victims represented by her will have a rare opportunity to greatly contribute to the establishment of the truth. Therefore, while possessing limited resources and time,²⁵ the Common Legal Representative marshalled her utmost efforts to identify suitable witnesses to be called.

11. However, as indicated in her previous submissions,²⁶ the process of looking for potential witnesses, engaging with them, explaining the purpose of their eventual testimonies, securing their consent to appear as witnesses, and making practical arrangements demand substantial amount of time, effort and logistics. Moreover,

²² See the “Decision on the “Prosecution’s Motion to File Partial Table of Incriminating Evidence and Related Material, Confidential - Ex Parte, available to the Prosecution Only, on 4 May 2009 - Regulation 35 (Trial Chamber II)”, No. ICC-01/04-01/07-1095, 04 May 2009, para. 3.

²³ See the “Decision on the application by Counsel for Mr. Thomas Lubanga Dyilo to extend the time limit for the filing of the response to the Prosecutor’s document in support of the appeal (Appeals Chamber)”, No. ICC-01/04-01/06-190 OA3, 11 July 2006, para. 5. See also the “Decision on joint defence request for extension of time (Trial Chamber V)”, No. ICC-01/09-01/11-497, 06 December 2012, para. 2 and the “Decision on requests to extend the time limit for observations on the victims’ applications transmitted on 18 and 19 November 2015 (Single Judge, Pre-Trial Chamber II)”, No. ICC-02/04-01/15-347, 25 November 2015, para. 4.

²⁴ See the “Decision on the Prosecution’s Application for Extension of Time Limit to Submit a Table of Incriminating Evidence and Related Material, (Trial Chamber II)”, No. ICC-01/04-01/07-1017, 02 April 2009, para. 6. See also the “Order on the Request by the Registry for the Extension of a Time Limit (regulation 35 of the Regulations of the Court) (Trial Chamber II)”, No. ICC-01/04-01/07-1087-tENG, 14 August 2009, para. 6.

²⁵ The Common Legal Representative, along with her team members, is also appointed in several other cases and situations at the Court.

²⁶ See the “Common Legal Representative Preliminary List of Witnesses Provided Pursuant to the ‘Preliminary Directions for any LRV or Defence Evidence Presentation’”, *supra* note 4; and see the “Common Legal Representative Response to ‘Defence Request for Orders Regarding ICC-02/04-01/15-1105-Conf, ICC-02/04-01/15-1106 and ICC-02/04-01/15-1106-Conf-Anx’”, *supra* note 8.

proper consultation with her clients had to be undertaken in order to identify the potential witnesses taking into account their views and concerns.

12. As indicated in the previous submissions, as of December 2017, the Common Legal Representative had not yet been able to conclusively identify the potential witnesses. Because of the difficulties in tracing back individuals who had interacted with former abductees [REDACTED] during the period of time covered by the charges and who then left [REDACTED], it has been impossible to complete the task of identifying, meeting and assessing the potential witnesses in only six weeks, despite of her best efforts. Therefore, the Common Legal Representative is understandably not in a position to file her final list of witnesses. While having identified *potential* witnesses, the Common Legal Representative has still been unable to verify whether said persons are best placed to provide evidence because no substantive discussions have taken place so far. Indeed, [REDACTED]. Consequently, the Common Legal Representative has not had a chance to discuss in details the extent of their possible testimonies and evaluate their knowledge of the relevant facts which is essential to her determination whether to call them as witnesses in this case.

13. As a result, despite her best efforts, the Common Legal Representative finds it impossible to submit her final list of all the witnesses by the initial deadline imposed by the Chamber. The Common Legal Representative reiterates the fact that filing her request to lead evidence on behalf of the victims she represents is a particularly important phase of the proceedings. Therefore, an adequate time should be afforded for identifying and presenting witnesses who could make a genuine contribution to the establishment of the truth.

14. The Common Legal Representative submits that the newly proposed extension of time is reasonable under the circumstances and will not impact the expeditiousness of the proceedings and the rights of the parties.

15. Finally, the Common Legal Representative informs the Chamber that she is able to comply with the Preliminary Directions in relation to the experts she requests to call. Therefore, should the Chamber so prefer, she could file the final list of experts by 2 February 2018 and an Addendum to the list of fact-witnesses by 16 February 2018.

IV. CONCLUSION

16. For the foregoing reasons, the Common Legal Representative respectfully requests the Chamber to grant an extension of time until 16 February 2018 to file her final list of all the witnesses. In the alternative, the Common Legal Representative respectfully requests to be allowed to file her final list of the experts by 2 February 2018 and an Addendum for the remaining fact-witnesses by 16 February 2018.

17. Should the Chamber grant the extension, the Common Legal Representative has of course no objection to the other Legal Representatives' team to be afforded the same deadline.

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style and is underlined.

Paolina Massidda

Dated this 29 day of January 2018

At The Hague (The Netherlands)