

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **24 April 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 with CONFIDENTIAL Annex A

**Defence Urgent Request for Delay in Opening of LRV and CLRV Cases, Pursuant to
Articles 67(1)(b) and 67(1)(e) of the Rome Statute**

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

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor
Benjamin Gumpert, QC

Counsel for the Defence

Krispus Ayena Odongo
Chief Charles Achaleke Taku
Beth S. Lyons

Legal Representatives of the Victims

Joseph Akwenyu Manoba
Francisco Cox

Common Legal Representative for Victims

Paolina Massidda
Jane Adong

Unrepresented Victims

**Unrepresented
(Participation/Reparation)**

Applicants

The Office of Public Counsel for Victims

Paolina Massidda
Orchlon Narantsetseg
Caroline Walter

States' Representatives

**The Office of Public Counsel for the
Defence**

Xavier-Jean Keita

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') objects to the start of the Legal Representatives of Victims ('LRV') and Common Legal Representative for Victims ('CLR') cases on 1 May 2018 and 14 May 2018, respectively. The Defence, accordingly, requests an extension of at least one month in order to afford adequate time to review the expert witness reports, scholarly articles and other related materials, and to confer with and receive instructions from Mr Ongwen about fact and expert witnesses in both cases.
2. The present request is necessary in order to protect and uphold Mr Ongwen's most fundamental fair trial rights as enshrined in Articles 67(1)(b) and 67(1)(e) of the Rome Statute ('Statute').

II. PROCEDURAL HISTORY

3. On 6 March 2018, the Trial Chamber IX ('Trial Chamber') issued 'Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests' and ruled "that it envisages to hear the testimony of the Legal Representatives' witnesses from 30 April 2018 to 16 May 2018."¹
4. On 27 March 2018, following the advance notice from the LRV and CLR about the availability of their witnesses, the Trial Chamber set the hearing schedule as follows: 1-9, 14-16 and 23-24 May 2018. The Trial Chamber also held that "these dates are to be understood as confirmed unless otherwise ordered."²
5. On 3 April 2018, the CLR disclosed to the Defence 23 items.³ These included five reports, three of which are expert reports,⁴ 10 scholarly articles,⁵ and eight other related items.⁶

¹ ICC-02/04-01/15-1199-Red, para. 82.

² Email from the Trial Chamber IX to the *Ongwen* case parties and participants, 'Hearing Schedule for LRV Evidence', 27 March 2018.

³ See ICC-02/04-01/15-1216; see also confidential Annex A.

⁴ UGA-PCV-0001-0020 (58 pages); UGA-PCV-0002-0076 (70 pages); UGA-PCV-0003-0046 (39 pages); UGA-PCV-0001-0095 (54 pages); UGA-PCV-0001-0149 (49 pages). These five reports total to 270 pages.

⁵ UGA-PCV-0001-0078 (17 pages); UGA-PCV-0001-0198 (10 pages); UGA-PCV-0001-0223 (7 pages); UGA-PCV-0001-0244 (12 pages); UGA-PCV-0002-0203 (58 pages); UGA-PCV-0002-0413 (10 pages); UGA-PCV-0003-0085 (123 pages); UGA-PCV-0003-0816 (14 pages); UGA-PCV-0004-0166 (9 pages); UGA-PCV-0004-0247 (30 pages). These 10 scholarly articles total to 290 pages.

⁶ UGA-PCV-0001-0001 (5 pages); UGA-PCV-0001-0006 (14 pages); UGA-PCV-0001-0298 (11 pages); UGA-PCV-0002-0001 (4 pages); UGA-PCV-0002-0005 (71 pages); UGA-PCV-0003-0001 (4 pages); UGA-PCV-0003-0005 (41 pages); UGA-PCV-0003-0208 (366 pages). These eight other related items total to 516 pages.

6. On 5 April 2018, the CLRV disclosed to the Defence three Acholi translations of witness summaries.⁷ On the same day, the LRV disclosed to the Defence 16 items.⁸ These included two reports,⁹ and 14 other related items.¹⁰
7. On 13 April 2018, the Prosecution notified the Trial Chamber that it has completed its presentation of evidence in the *Ongwen* case.¹¹

III. APPLICABLE LAW

8. Pursuant to Article 64(2) of the Statute, the Trial Chamber must ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused. The Appeals Chamber in the *Lubanga* case found that “the overall role ascribed to the Trial Chamber in article 64(2) of the Statute to guarantee that the trial is fair and expeditious and that the rights of the accused are fully respected.”¹² The Appeals Chamber also held that Article 64(2) of the Statute has to be interpreted and applied consistently with internationally recognized human rights, in accordance with Article 21(3) of the Statute.¹³
9. Under Article 67(1)(b) of the Statute, the accused is entitled to have adequate time and facilities for the preparation of the defence.¹⁴ The Trial Chamber in the *Katanga* case held that “[t]he right to adequate time and facilities for the proper preparation of the defence presupposes that the Defence team will have sufficient time to conceive, prepare and raise meaningful and effective grounds of defence which are tailored to its case.”¹⁵
10. The Human Rights Committee has held that “[w]hat counts as “adequate time” depends on the circumstances of each case” noting, further, that “[i]f counsel reasonably feel that the time for

⁷ See ICC-02/04-01/15-1221. UGA-PCV-0001-0309 (1 page); UGA-PCV-0002-0488 (1 pages); UGA-PCV-0003-1051 (1 page). These three items total to three pages; *see also* confidential Annex A.

⁸ See ICC-02/04-01/15-1220; *see also* confidential Annex A.

⁹ UGA-V40-0001-0010 (127 pages); UGA-V40-0001-0137 (12 pages). These two reports total to 139 pages.

¹⁰ UGA-V40-0001-0001 (9 pages); UGA-V40-0002-0001-R01 (4 pages); UGA-V40-0003-0001-R01 (6 pages); UGA-V40-0003-0007 (1 page); UGA-V40-0003-0008 (2 pages); UGA-V40-0004-0001-R01 (5 pages); UGA-V40-0005-0001-R01 (2 pages); UGA-V40-0005-0003-R01 (4 pages); UGA-V40-0005-0007-R01 (3 pages); UGA-V40-0006-0001-R01 (3 pages); UGA-V40-0006-0004-R01 (5 pages) UGA-V40-0006-0009-R01 (3 pages); UGA-V40-0006-0012-R01 (3 pages) UGA-V40-0006-0015-R01 (7 pages). These 14 other related items total to 57 pages.

¹¹ ICC-02/04-01/15-1225, para. 1.

¹² ICC-01/04-01/06-1486, para. 46.

¹³ ICC-01/04-01/06-1486, para. 76.

¹⁴ See Article 14(3)(b) of the International Covenant on Civil and Political Rights.

¹⁵ ICC-01/04-01/07-3436-tENG, para. 1572.

the preparation of the defence is insufficient, it is incumbent on them to request the adjournment of the trial.”¹⁶

11. Article 67(1)(e) of the Statute entitles the accused to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.¹⁷

IV. SUBMISSIONS

A. An extension of time to prepare for the LRV and CLRV cases is necessary to ensure Mr Ongwen’s most fundamental fair trial rights

12. The Defence needs, and is entitled to, adequate time to prepare for the LRV and CLRV cases before being required to exercise its right to examine, or have examined, the witnesses testifying in the case against Mr Ongwen. It has not had this. The Prosecution completed its presentation of evidence in the *Ongwen* case on 13 April 2018.¹⁸ The first LRV witness is set to testify on 1 May 2018. This gives the Defence approximately 17 days – including three weekends and one official holiday of the Court – to prepare. Even if the only Defence tasks during these 17 days were preparation for the LRV and CLRV cases, this time would not be adequate for the Defence to review the disclosed items and discuss them with Mr Ongwen.
13. Without the extension of at least one month, the proceedings will violate Mr Ongwen’s most fundamental fair trial rights, namely his right to adequate time for the preparation of his defence under Article 67(1)(b) of the Statute, and his right to examine, or have examined, the witnesses against him pursuant to Article 67(1)(e) of the Statute.
14. The Defence avers that Mr Ongwen’s right to adequate time is an absolute right – there can be no denial of this right on the grounds that it infringes on other countervailing rights. For this reason, any contention that the granting of extension of at least one month would constitute undue delay, somehow infringe upon the interests of other parties and participants, or will trespass on the LRV and CLRV witnesses’ schedule is deceptive.

¹⁶ Human Rights Committee, General Comment No. 32: Article 14, Right to equality before courts and tribunals and to a fair trial, 23 August 2007, CCPR/C/GC/32, para. 32, citing: Communication No. 1128/2002, *Morais v. Angola*, para. 5.6; Similarly, Communications No. 349/1989, *Wright v. Jamaica*, para. 8.4; No. 272/1988, *Thomas v. Jamaica*, para. 11.4; No. 230/87, *Henry v. Jamaica*, para. 8.2; Nos. 226/1987 and 256/1987, *Sawyers, Mclean and Mclean v. Jamaica*, para. 13.6.

¹⁷ See Article 14(3)(e) of the ICCPR.

¹⁸ ICC-02/04-01/15-1225, para. 1.

15. That Mr Ongwen's right to an expeditious trial has been jeopardised by the smörgåsbord of charged crimes and modes of liability, and the lengthy procedural history of this case is not his doing, does not and cannot constitute a reason to deny his fair trial rights. Since the right to adequate time to prepare is a non-derogable constituent of a fair trial, it cannot be legitimately usurped – by anything, including any interests of other parties or organs.
16. For the reasons stated above, a failure to grant an extension would be a violation of Mr Ongwen's fair trial rights.

B. The Defence is not in a position to review comprehensively the disclosed items and prepare for the LRV and CLRV cases by 1 May 2018

17. Under Article 64(2) and 21(3) of the Statute, the Trial Chamber is obliged to guarantee that the trial against Mr Ongwen is fair and his rights are fully respected. In accordance with international law, the Trial Chamber is also obliged to grant reasonable requests for additional time to prepare. This fundamental obligation is particularly important since Mr Ongwen faces the most serious criminal charges, and in view of the magnitude and complexity of the case.¹⁹
18. The Defence is under a strict ethical and professional duty to review comprehensively the items disclosed by both victims' teams for the purpose of their cases. Before exercising its right to examine the LRV and CLRV witnesses under Article 67(1)(e) of the Statute, the Defence must first complete a review of the disclosed items.
19. These disclosed items contain large quantities of information that cannot be – realistically – reviewed and familiarised within in 17,²⁰ 25,²¹ nor 27²² days. In particular, the disclosed items range across the variety of documents, such as lengthy expert reports, scholarly articles, one dissertation and other related materials. The quantity of the 42 disclosed items is a total of 1275 pages.²³

¹⁹ Human Rights Committee, General Comment No. 32: Article 14, Right to equality before courts and tribunals and to a fair trial, 23 August 2007, CCPR/C/GC/32, para. 32, citing: Communications No. 913/2000, *Chan v. Guyana*, para. 6.3; No. 594/1992, *Phillip v. Trinidad and Tobago*, para. 7.2; *see also* Prosecutor v. *Delali et al.*, IT-96-21-T, Decision on the applications for adjournment of the trial date, 3 February 1997.

²⁰ ICC-02/04-01/15-1225: The Defence has 17 days to prepare since the Prosecution's notification of completion of its presentation of evidence.

²¹ On 5 April 2018, the CLRV disclosed to the Defence three items, totaling three pages. On the same day, the LRV disclosed to the Defence 16 items, totaling 196 pages.

²² On 3 April 2018, the CLRV disclosed to the Defence 23 items totaling 1076 pages.

²³ *See above*, paras 5 and 6 of this filing; *see also* confidential Annex A.

20. The Defence is not in a position – by 1 May 2018 – to review comprehensively the materials disclosed by both victims’ teams. The Defence is bound to scrutinise the disclosed items to assess their substance, which places a great strain on the Defence’s limited resources. An effective and meaningful scrutiny also requires the Defence to determine whether it is necessary to identify and communicate the disclosed items to experts who can assist the Defence. Given the quantity of the disclosed items, the Defence has not had an opportunity to do this.
21. That said, without an extension of at least one month, there is no realistic expectation that the Defence will have adequate time to make all necessary preparations before the examination of the LRV and CLRV witnesses. Moreover, the examination of the last Prosecution expert witness on 11-12 April 2018, on-going investigations and preparations for the Defence case, and additional case complexity, have further consumed the meagre resources of an already over-stretched Defence team.

C. An extension of time is necessary for the Defence to confer with Mr Ongwen and receive instructions from him

22. The Defence is obliged to confer with, and carry out Mr Ongwen’s instructions during the upcoming LRV and CLRV cases. There are obvious impediments to this, including the very limited translation of only a few materials into Acholi,²⁴ and the limitations on time permitted for counsel to meet with Mr Ongwen within his organized daily regimen.
23. Mr Ongwen has very limited formal education, which was forcefully interrupted by his abduction by the LRA at an early age. This means that he is at a disadvantage to review much of the disclosed items, which may require – given the absence of adequate time and Acholi translation – the Defence to spend extended periods of time with him.
24. It is simply not possible, given the current short hiatus between the end of the Prosecution case and the beginning of the LRV and CLRV cases, for the Defence to receive the necessary input and instructions for it to do its job.
25. In sum, when assessing the adequacy of the Defence time to prepare for the LRV and CLRV cases, the Defence respectfully requests the Trial Chamber to take into consideration the

²⁴ See confidential Annex A where the CLRV disclosed one page summaries for each of their expert reports which total 167 pages.

circumstances set out above and grant the extension of at least one month to prepare for the LRV and CLRV cases.

V. RELIEF SOUGHT

26. For all the reasons stated herein, the Defence respectfully requests the Trial Chamber to:

- a) **GRANT** the extension of at least one month to prepare for the LRV and CLRV cases.



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 24th day of April, 2018

At Lira, Uganda