

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: **4 May 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**

**Public Redacted Version of “Confidential Redacted Version of “Defence Request for a  
Deadline Extension”, filed on 18 April 2018”**

**Source:** Defence for Dominic Ongwen

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

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**Registrar**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Other  
Section**

## **I. INTRODUCTION**

1. Pursuant to Regulation 35 of the Regulations of the Court, the Defence for Dominic Ongwen ('Defence') hereby requests Trial Chamber IX ('Chamber') to extend the deadline by which the Defence must submit its final list of witnesses, final list of evidence, Rule 68(2)(b) requests, bar table motion and request for protective measures.
2. The current date of 31 May 2018 is untenable. The Defence respectfully requests for a deadline of 31 August 2018 to submit its final lists of witnesses and evidence, Rule 68(2)(b) requests, bar table motion and request for protective measures.
3. The Defence submits this request because the Government of the Republic of Uganda ('Government') has failed to cooperate with the Defence under the Rome Statute pursuant to Articles 86, 93(1)(a), 93(1)(b) 93(1)(i) and 93(1)(l). The Defence hopes that this request shall hasten the Government's responses to the Defence's requests for assistance. The Defence asserts that it would violate Mr Ongwen's fair trial rights to require the Defence to submit its final lists of witnesses and evidence, Rule 68(2)(b) requests, bar table motion and request for protective measures until these critical issues are complied with by the Government and investigated by the Defence.
4. Finally, the Defence requests an order from the Chamber to the Government to comply with the Rome Statute and fulfil its obligations *vis-à-vis* the outstanding requests for assistance and the first two requests for assistance.

## **II. CONFIDENTIALITY**

5. Pursuant to Regulation 23 *bis*(1) of the Regulations of the Court, the Defence files this request as confidential *ex parte* as it discusses issues related to pending requests for assistance. A confidential version is filed concurrently, and a public redacted version shall be filed as soon as practicable.

### III. BACKGROUND

6. On 6 June 2016, the Defence sent a Request for Assistance ('RFA') to the Government, [REDACTED].<sup>1</sup>
7. On 21 July 2016, the Defence sent an updated RFA to the Government, requesting assistance [REDACTED].<sup>2</sup>
8. On 11 August 2016, the Defence received an email from External Relations about the two RFAs sent in June and July 2016.<sup>3</sup> The Defence received copies of the official correspondence from the Government on 29 August 2016.<sup>4</sup>
9. On 6 December 2016, the trial in *The Prosecutor vs Dominic Ongwen* opened.
10. On 12 December 2016, the Defence sent an RFA to the Government, requesting assistance with securing official copies of Hansards of the Parliament of Uganda.<sup>5</sup>
11. On 16 January 2017, the Prosecution called its first witness.
12. On 13 October 2017, the Defence sent an RFA to the Government requesting assistance to arrange an interview with [REDACTED].<sup>6</sup>
13. On 13 October 2017, the Chamber issued the "Preliminary Directions for any LRV or Defence Evidence Presentation",<sup>7</sup> ordering the Defence to submit a provisional list of witnesses by 14 December 2017.<sup>8</sup> The Chamber also ordered the Defence to submit its final list of witnesses, list of evidence, Rule 68(2)(b) requests, bar table motion and

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<sup>1</sup>Email from the Defence to Counsel Support Section, entitled "Request for Assistance," sent on 6 June 2016 at 10h24 CET.

<sup>2</sup>Email from Defence to Counsel Support Section, entitled "Updated Request for Assistance Letter", sent 21 July 2016 at 14h15 CET.

<sup>3</sup>Email from External Relations to the Defence, entitled "Reply of the Uganda authorities – facilitation of meetings," received on 11 August 2016 at 16h52 CET.

<sup>4</sup>Email from External Relations to the Defence, entitled "RE: Updated Request for Assistance Letter Ongwen," received 29 August 2016 at 16h57 CET.

<sup>5</sup>Email from Defence to Counsel Support Section, entitled "Request for Assistance – Defence Team for Dominic Ongwen," sent 12 December 2016 at 10h48 CET.

<sup>6</sup>Email from Defence to Counsel Support Section, entitled "[REDACTED]" sent on 13 October 2017 at 13h28 CET.

<sup>7</sup> ICC-02/04-01/15-1021.

<sup>8</sup>*Ibid.*, para. 3.

request for protective measures three weeks after the official notification of the closing of the Prosecution's case-in-chief.<sup>9</sup>

14. On 31 October 2017, the Prosecution gave notice that it would no longer call eight witnesses to testify.<sup>10</sup>
15. On 6 November 2017, the Defence requested the Chamber to change the date in which it must submit its final list of witnesses, final list of evidence, Rule 68(2)(b) requests, bar table motion and request for protective measures to 1 June 2018.<sup>11</sup>
16. On 16 November 2017, the Chamber issued Decision 1074, denying the Defence's request for an alteration of the deadline delineated on 13 October 2017, but stated that "in exceptional circumstances and with sufficient cause, the Defence may request to extend the deadline for their lists of witnesses and evidence and other related information...".<sup>12</sup>
17. On 15 February 2018, the Defence sent a RFA to the Government requesting assistance to arrange interviews with [REDACTED].<sup>13</sup>
18. On 6 March 2018, the Chamber altered the deadline for the Defence to submit the materials required in paragraph 7 of Order 1021 to 31 May 2018.<sup>14</sup>
19. On 12 April 2018, the Defence sent two RFAs to the Government. The Defence requested (1) [REDACTED] and (2) [REDACTED].<sup>15</sup>
20. On 14 April 2018, the Prosecution officially closed its case-in-chief.<sup>16</sup>

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<sup>9</sup>*Ibid.*, para. 4.

<sup>10</sup> Email from the Office of the Prosecutor to the Chamber, Parties and Participants, entitled "171031 – Prosecution's updated list of witnesses – November 2017", received on 31 October 2017 at 13h21 CET.

<sup>11</sup> ICC-02/04-01/15-1064-Conf, paras 23-26.

<sup>12</sup> ICC-02/04-01/15-1074, para. 27.

<sup>13</sup> Email sent from the Defence to Counsel Support Section, entitled "D26 – Request for Assistance," sent on 15 February 2018 at 11h11 CET.

<sup>14</sup> ICC-02/04-01/15-1199-Red, para. 84.

<sup>15</sup> Email sent from the Defence to Counsel Support Section, entitled "D26 – Request for Assistance Letters for the Government of Uganda," sent on 12 April 2018 at 12h03 CET.

<sup>16</sup> ICC-02/04-01/15-1225.

#### IV. SUBMISSIONS

##### *a) Legal Standard and the Law*

21. Regulation 35(1) of the Regulations of the Court grants the Chamber the power to vary time limits “as ordered by the Chamber” when applications are made orally or in writing.
22. Regulation 35(2) of the Regulations of the Court requires the moving Party or Participant to show good cause for the request of the variation of the time limit.
23. Article 64(2) of the Rome Statute requires the Chamber to ensure that the “trial is fair and expeditious and is conducted with full respect for the rights of the accused...”.
24. Article 67(1)(b) of the Rome Statute grants Mr Ongwen the right “[t]o have adequate time and facilities for the preparation of [...] [his] defence...”, which includes adequate time to conduct investigations.
25. Article 67(1)(e) of the Rome Statute grants Mr Ongwen the right, in full equality, “to obtain the attendance and examination of witnesses on his...behalf under the same conditions as witnesses against him...”.
26. Article 86 of the Rome Statute requires State Parties to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”
27. Article 93(1), subparagraphs (a), (b), (i) and (l) of the Rome Statute require State Parties to aid the Court in the collection of evidence, notably the identification and whereabouts of persons,<sup>17</sup> the taking of sworn testimony,<sup>18</sup> the collection of records and documents<sup>19</sup> and any other forms of assistance not prohibited by the laws of the State Party.<sup>20</sup>

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<sup>17</sup>Article 93(1)(a) of the Rome Statute.

<sup>18</sup>Article 93(1)(b) of the Rome Statute.

<sup>19</sup>Article 93(1)(i) of the Rome Statute.

<sup>20</sup>Article 93(1)(l) of the Rome Statute.

*b) The extremely slow response time of the Government of the Republic of Uganda in answering Defence RFAs and its legally unjustified denial of access to potential witnesses has significantly hindered the Defence's investigations and preparation of its case*

28. During the past two years, the Defence transmitted seven RFAs to the Government. Of those seven RFAs, the Government has rejected two, spent nine months to answer the third, has not responded to two, and the final two being sent on 12 April 2018. The Government has effectively cut-off from [REDACTED], and has failed its duty pursuant to Articles 86, 93(1)(a), (b) and (l) of the Rome Statute to facilitate interviews of [REDACTED].
29. Furthermore, as discussed below, the Defence [REDACTED]. [REDACTED] and has stunted the Defence's investigations.
30. In the Defence's first two RFAs, it was requested to meet with [REDACTED]. The Government responded to the Defence on 11 August 2016.<sup>21</sup> In its responses, the Government [REDACTED] were never members of the LRA, and that there is no reason to believe that they have any information about the LRA.<sup>22</sup>
31. Importantly, the Defence never alleged – and it is not a requirement under the law for the Defence to allege – that [REDACTED] but only that they may have information about the conflict in Northern Uganda which may assist the Defence case. [REDACTED].<sup>23</sup>
32. In violation of its duties under the Rome Statute, the Government obstructed a legal RFA to access [REDACTED]<sup>24</sup> ([REDACTED]) and [REDACTED].<sup>25</sup> In our humble opinion, under the law, it is not open to a State Party to determine for the Defence what they consider is [REDACTED].
33. In relation to [REDACTED].<sup>26</sup> From the nature of the response, the Government made no attempt to contact the potential witnesses on behalf of the Defence as required by the Rome Statute. [REDACTED].

<sup>21</sup> See UGA-D26-0017-0001 and UGA-D26-0017-0002.

<sup>22</sup> UGA-D26-0017-0001, p. 0001 and UGA-D26-0017-0002, pp 0002-0003.

<sup>23</sup> [REDACTED].

<sup>24</sup> UGA-D26-0017-0002, p. 0003.

<sup>25</sup> UGA-D26-0017-0001, p. 0001.

<sup>26</sup> UGA-D26-0017-0002, p. 0002.

34. In the Defence's third RFA, it requested certified copies of public documents, namely Ugandan Parliament Hansards. The documents, whilst supposedly available publicly online, were not available online. It took the Government nine months to comply with the RFA, even though not every public document requested was delivered. In particular, [REDACTED].
35. In the Defence's fourth RFA, it requested to meet with [REDACTED].<sup>27</sup> In the RFA, the Defence also requested [REDACTED]. The RFA was sent six months ago and it is still unanswered. As such, the Government is in violation of Article 86, Article 93(1)(a), Article 93(1)(b) and Article 93(1)(i) of the Rome Statute.
36. In the Defence's fifth RFA, it requested to meet with four individuals whom the Defence knows to have information related to the case. Three of the persons [REDACTED].<sup>28</sup> The fourth person [REDACTED]. The Defence notes that [REDACTED].
37. The Defence's sixth and seventh RFAs were submitted on 12 April 2018. The sixth RFA requested [REDACTED].<sup>29</sup> The seventh RFA requested [REDACTED]. As these requests are new, it is reasonable that the Government has not replied as it just received them.
38. As stated above, [REDACTED]. With the Prosecution's withdrawal of several witnesses, the Defence has now been at a loss [REDACTED].<sup>30</sup> As shown above, the Government does not respond quickly to Defence RFAs, even when the RFA is less complex.
39. [REDACTED].<sup>31</sup> Currently, the Defence is not receiving the same cooperation, in full equality, as the Prosecution receives from the Government, in violation of Mr Ongwen's fair trial rights pursuant to Article 67(1), Article 86 and Article 93(1) of the Rome Statute.
40. Moreover, the Government, unlike it has done with Prosecution interview requests, has assessed the alleged viability of persons whom the Defence wished to interview.

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<sup>27</sup> [REDACTED].

<sup>28</sup> [REDACTED].

<sup>29</sup> [REDACTED].

<sup>30</sup> [REDACTED].

<sup>31</sup> [REDACTED].

Article 93(1) of the Rome Statute requires State Parties to comply with lawful RFAs. In the case at bar, the Government did not allege that interviews [REDACTED] could compromise state secrets or security.<sup>32</sup> The Government instead wished to make an independent assessment about each person's viability in violation of Article 93(1). Furthermore, had the Government considered state interests (*i.e.* security or national secrets) to be the actual issue, it was free to request [REDACTED].<sup>33</sup>

41. [REDACTED].<sup>34</sup> [REDACTED].<sup>35</sup> [REDACTED].<sup>36</sup> [REDACTED].<sup>37</sup> This is not how the Government handled the Defence RFA [REDACTED].

42. When the Defence requested assistance from the Government with [REDACTED], it handled the request quite differently. The Government responded that it:

[REDACTED].<sup>38</sup>

43. [REDACTED]. Unlike as it is required pursuant to Articles 93(1)(a), 93(1)(b) and Article 93(1)(l) of the Rome Statute, the Government failed its obligations to the Defence and the ICC.

44. The Defence respectfully submits that the Chamber has the obligation pursuant to Article 64(2) of the Rome Statute to ensure that the trial is fair and conducted with full respect to the rights of Mr Ongwen. Specifically, the Defence further respectfully submits that Mr Ongwen, other than the rights listed above pursuant to Articles 86 and 93(1), has the fair trial right to adequate time to prepare his defence and to call witnesses in his defence *in the same manner in which the Prosecution called witnesses*.

45. The Defence respectfully reiterates its position that, whereas the Prosecution has had a much longer time for its case preparation dating back to 2005; and has disproportionate resources, personnel and material, at its disposal, the Defence finds itself boxed into a situation of an extensive number of counts, a much shorter time and a comparably much less resources to complete, more or less, the same amount of work

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<sup>32</sup>See Article 93(4) of the Rome Statute.

<sup>33</sup>See UGA-OTP-0279-0385, p. 0385-0386 (“[REDACTED].”).

<sup>34</sup>[REDACTED].

<sup>35</sup>*Ibid.*, [REDACTED].

<sup>36</sup>*Ibid.*, [REDACTED].

<sup>37</sup>*Ibid.*, [REDACTED].

<sup>38</sup>UGA-D26-0017-0002, p. 0002.

as the Prosecution. As in common parlance, it is often easier to start and complete a new building than to renovate a dilapidated building.

46. The Defence has been persistent in its investigations. Once the Prosecution removed the witnesses from its list of witnesses, the Defence immediately began searches for several of the key personalities from those eight persons. [REDACTED], the process has been slow.
47. Knowing that the Prosecution did not generally receive such slow turnarounds with its RFAs when requesting to meet with identified persons, the Defence cannot speculate as to the reason or reasons why the Government is not treating the Defence in the same manner.<sup>39</sup>
48. The Defence notes a similar situation alleged by the Office of the Prosecutor in the case of *The Prosecutor vs Uhuru Muigai Kenyatta*.<sup>40</sup> The Prosecution alleged that the Government of the Republic of Kenya failed to comply with its duties under Article 93(1) of the Rome Statute.<sup>41</sup> In order to investigate further, the Prosecution requested an adjournment of the proceedings for three months.<sup>42</sup> On 23 January 2014, Trial Chamber V(B) vacated the commencement of the trial “[i]n order to give thorough consideration to the requests pending before it,” which included the pending Article 87(7) request which alleged a violation of Article 93(1) by the Government of the Republic of Kenya.<sup>43</sup>
49. The Defence alleges the same problems. Whilst the Defence is not allowed to contact the Government directly like the Prosecution, the Defence has sent numerous emails to Counsel Support Section to check on the status of the outstanding RFAs. The Defence seriously ponders on whether the Government intends to respond, and whether the Government hopes that the Defence shall not complain about the lack of compliance. Regardless, the Government is seriously impeding the Defence’s ability to conduct its investigations and, in effect, violating Mr Ongwen’s right to a fair trial,<sup>44</sup> the

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<sup>39</sup> For example, [REDACTED].

<sup>40</sup> See ICC-01/09-02/11-866 and ICC-01/09-02/11-875, paras 18-19.

<sup>41</sup> See ICC-01/09-02/11-866.

<sup>42</sup> See ICC-01/09-02/11-875, paras 17-20 (The Prosecution requested the adjournment to further investigate, to allow the Chamber to adjudicate the Article 87(7) request in hopes of getting the Government of Kenya to comply with its obligations and re-interview a witness.).

<sup>43</sup> ICC-01/09-02/11-886, para. 6.

<sup>44</sup> Article 64(2) of the Rome Statute.

Defence's ability to prepare his defence<sup>45</sup> and the Defence's ability to interview and call witnesses.<sup>46</sup>

50. Finally, the Defence asserts that it would violate Mr Ongwen's rights to require the Defence to submit its final lists of witnesses and evidence, Rule 68(2)(b) requests, bar table motion and request for protective measures until these critical issues are investigated by the Defence.
51. The [REDACTED] material is crucial to the Defence's case. The [REDACTED].
52. The alleged [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED],<sup>47</sup> [REDACTED].<sup>48</sup> Finally, the Defence still asserts that the personalities it requested facilitation to meet [REDACTED].
53. Requiring the Defence to submit its lists and requests, regardless of the ability to amend such lists and requests during its case-in-chief, violates Mr Ongwen fair trial rights as it seriously impedes his right to have adequate time and facilities to prepare his defence, which includes the Defence investigations, and blocks the Defence from calling witnesses on Mr Ongwen's behalf in the same manner as the Prosecution. Whilst important information as described directly above has not been explored and reviewed by the Defence, it cannot possibly be expected to outline its case-in-chief and begin its presentation without knowing the full truth. To do so amounts to a violation of Mr Ongwen rights to a fair trial, especially when the Government is blocking Mr Ongwen and the Defence from potential witnesses and evidence, unlike its actions when dealing with the Prosecution.
54. At this point in time, the Defence requests the Chamber to alter the deadline for the Defence to submit its final list of witnesses, final list of evidence, Rule 68(2)(b) requests, bar table motion and request for protective measures from 31 May 2018 to 31 August 2018 in the hope that this extra time shall be sufficient for the Government to be encouraged to respond to the Defence's outstanding RFAs. Should the Government not comply, the Defence reserves the right to request further postponements and other remedies it deems necessary and just.

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<sup>45</sup>Article 67(1)(b) of the Rome Statute.

<sup>46</sup>Article 67(1)(e) of the Rome Statute.

<sup>47</sup>From Defence investigations.

<sup>48</sup>[REDACTED].

c) *The Defence requests an order from the Chamber to the Government to fulfil its responsibilities under the Rome Statute*

55. As outlined above, the Government has failed to fulfil its duty under the Rome Statute to aid the Defence pursuant to Articles 86 and 93(1) of the Rome Statute. As such, the Defence requests an order from the Chamber to the Government requiring it to comply in good faith and in an expeditious manner with the RFAs sent by the Defence to the Government, including the first two RFAs.

## V. RELIEF

56. The Defence respectfully requests the Chamber to:

- (1) Extend the deadline by which the Defence must submit its final list of witnesses, final list of evidence, Rule 68(2)(b) requests, bar table motion and request for protective measures from 31 May 2018 to 31 August 2018 and
- (2) Order the Government of the Republic of Uganda to comply with the Defence's outstanding RFAs and first two RFAs described in paragraphs 30-33 above.

Respectfully submitted,



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Hon. Krispus Ayena Odongo  
On behalf of Dominic Ongwen

Dated this 4<sup>th</sup> day of May, 2018  
At Gulu, Uganda