

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-02/04-01/15**
Date: **15 December 2017**

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

Prosecution's response to "Defence Observations on Fair Trial and Request for Orders on Prosecution Resources and Additional Defence Resources", ICC-02/04-01/15-1098

Source: The Office of the Prosecutor

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

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Introduction

1. The Prosecution does not dispute Mr Ongwen's right to a fair trial and equality of arms as one of its features under article 67 of the Statute. However, the equality of arms does not mean equality of resources. Rather, Mr Ongwen must have a reasonable opportunity to defend his interests under conditions that do not place him at a substantial disadvantage *vis-à-vis* the Prosecution. Mr Ongwen has failed to demonstrate a violation of his fair trial rights.

2. Further, Mr Ongwen is not entitled under the Statute or the Rules to information about the Prosecution's budget, resources, or other aspects of its internal organisation. Finally, Mr Ongwen should direct reasoned requests for support, information, or additional resources to the Registrar.

Submissions

The principle of equality of arms refers to a procedural equality between parties

3. The principle of equality of arms refers to a procedural equality between parties.¹ It does not require material equality in terms of financial and human resources.² Instead, it requires that each party be given a reasonable opportunity to present their case under conditions that do not place them at a substantial disadvantage *vis-à-vis* their opponent.³ This translates into an opportunity to receive

¹ *Prosecutor v. Kupreškić et al.*, IT-95-16-AR73.3, Decision on appeal by Dragan Papić against ruling to proceed by deposition, 15 July 1999, para. 24.

² *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Appeal Judgement, 28 November 2007, para. 220; *Prosecutor v. Kalimanzira*, ICTR-05-88-A, Appeal Judgment, 20 October 2010, para. 34.

³ *Prosecutor v. Prlić et al.*, IT-04-74-AR73.9, Decision on Slobodan Praljak's appeal against the Trial Chamber's decision of 16 May 2008 on translation of documents, 4 September 2008, para. 29 ("substantial disadvantage"). See also ECHR, *Foucher v. France*, 22209/93, "Judgement", 18 March 1997, para. 34 ("disadvantage"); ECHR, *Bulut v. Austria*, 17358/90, "Judgement", 22 February 1996, para. 47 ("disadvantage"); ECHR, *Bobek v. Poland*, 68761/01, "Judgement", 17 July 2007, para. 56 ("substantial disadvantage"); ECHR, *Klimentyev v. Russia*, 46503/99, "Judgement", 16 November 2006, para. 95 ("substantial disadvantage").

and respond to submissions, opportunity to present and give evidence, equal status of witnesses, and other procedural equalities.⁴

4. Article 67 of the Statute contains a number of safeguards to ensure the procedural equality between parties. In addition, judges presiding over the pre-trial and trial proceedings in this case put in place measures to ensure a fair and expeditious trial. The additional measures include ordering an advance notice of charges,⁵ status conferences,⁶ provisional and final lists of evidence and witnesses, witness summaries, pre-trial disclosure and other timelines,⁷ directions on the conduct of proceedings,⁸ and victim participation modalities.⁹

5. The Prosecution has taken a number of measures to ensure Mr Ongwen's fair trial rights. The Prosecution disclosed the materials in its possession on a rolling basis. It is sorted into incriminating, exonerating or rule 77 material, and further sub-categorised and identified according to live issues in the case. Recognising that the intercept evidence is voluminous, the Prosecution made available to the Defence several internal work products that are otherwise not subject to disclosure under rule 81(1) of the Rules.

6. In relation to Mr Ongwen's assertions about disproportionate resources, the Prosecution notes that the parties have different roles and responsibilities. The Prosecution bears the burden of proving each element of 70 charged crimes beyond a reasonable doubt. Mr Ongwen bears no such burden. Besides, the parties have

⁴ ECHR, *Borgers v. Belgium*, 12005/86, 30 October 1991, "Judgment", paras. 26-29; ECHR, *Zhuk v. Ukraine*, 45783/05, "Judgment", 21 October 2010, para. 35; ECHR, *Bonisch v. Austria*, 8658/79, "Judgment", 6 May 1985, para. 32; ECHR, *Brandstetter v. Austria*, 11170/84, 12876/87, 13468/87, "Judgment", 28 August 1991, para. 45; ECHR, *Kuopila v. Finland*, 27752/95, "Judgment", 27 April 2000, para. 38; ECHR, *Makhfi v. France*, 59335/00, "Judgment", 19 October 2004, paras. 33, 40-41.

⁵ ICC-02/04-01/15-T-6-ENG; ICC-02/04-01/15-318-Conf; ICC-02/04-01/15-305-Conf; ICC-02/04-01/15-318-Red.

⁶ ICC-02/04-01/15-T-6-ENG; ICC-02/04-01/15-432.

⁷ ICC-02/04-01/15-449; ICC-02/04-01/15-453; ICC-02/04-01/15-548-Conf; ICC-02/04-01/15-1099.

⁸ ICC-02/04-01/15-497; ICC-02/04-01/15-817; ICC-02/04-01/15-1021; ICC-02/04-01/15-1074.

⁹ ICC-02/04-01/15-299; ICC-02/04-01/15-369.

disproportionate investigation and disclosure obligations. For instance, the Defence has limited disclosure obligations under rules 78 and 79 of the Rules.

7. The Prosecution uses Ringtail version 8.3.014 that does not provide a significant advantage compared to the earlier version available to the Defence. The Defence's description of the purported disadvantages is speculative.¹⁰

8. Mr Ongwen's arguments about the Prosecution's investigations are inaccurate.¹¹ For the most part since the initiation of the investigation into the Situation in Uganda in 2004, which resulted in five arrest warrants, the case has been dormant¹² because the suspects were at large. Most staff members working on the five-suspect case had left the Court long before Mr Ongwen's transfer to the Court, when new staff members were re-assigned from other cases. Notably, 63 of 70 charged offences are new, and were investigated in 2015-2016.¹³

9. Finally, Mr Ongwen's arguments about cumulative charges and alternative modes of liability¹⁴ amount to a motion for reconsideration of a matter that is *res judicata*.¹⁵ This attempt to re-litigate the matter should be dismissed.

10. Mr Ongwen's assertions about the equality of arms¹⁶ are incorrect.

¹⁰ ICC-02/04-01/15-1098, paras. 17-19.

¹¹ ICC-02/04-01/15-1098, paras. 9-14.

¹² ICC-02/04-01/15-T-6-ENG, p. 4.

¹³ ICC-02/04-01/15-T-6-ENG, pp. 6-7 ("We are engaged in investigations with a view to bringing charges beyond those relating to the single attack, the attack on Lukodi, which is contained within the warrant for Mr Ongwen's arrest."). The 70 offences charged by the Prosecution represent a selection of crimes that were investigated and considered in the Situation in Uganda.

¹⁴ ICC-02/04-01/15-1098, paras. 30-37.

¹⁵ ICC-02/04-01/15-422-Conf, paras. 29-33 (on cumulative charging of crimes) and 34-45 (on alternative charging of modes of liability).

¹⁶ ICC-02/04-01/15-1098, paras. 9-28.

Mr Ongwen is not entitled to information about the Prosecution's internal organisation

11. Mr Ongwen's request to order the Prosecution to produce a catalogue of its resources, budgetary information, supplemental and ancillary resources within the Court's Office of the Prosecutor and the Government of Uganda¹⁷ has no legal basis.

12. The Statute and the Rules do not entitle Mr Ongwen to information on the Prosecution's internal organisation.¹⁸ The requested information is not disclosable under article 67(2) of the Statute or rule 77 of the Rules.

13. Mr Ongwen's interpretation of international cooperation and judicial assistance between the Office of the Prosecutor and the Government of Uganda as the Prosecution's "supplemental or ancillary resources" is incorrect.¹⁹ While the Prosecution relies on States Parties for international cooperation and judicial assistance under Part 9 of the Statute in the absence of its own enforcement component, the Prosecution is an independent organ of the Court. International cooperation in criminal matters is standard practice in domestic and international jurisdictions. Staff members of the Office of the Prosecutor cannot seek or act on instructions from any external source, and *vice versa*.

Mr Ongwen should direct requests for information and additional resources to the Registrar

14. In his request, Mr Ongwen asks the Chamber to order the Registrar to provide a report on Defence resources, and order additional Defence resources, including personnel, budget, time and facilities.²⁰ However, Mr Ongwen provides no legal basis or reasons for directing his request to the Chamber, and not the Registrar.

¹⁷ ICC-02/04-01/15-1098, para. 40(a).

¹⁸ A number of documents related to structure and prosecutorial policies are publicly available.

¹⁹ ICC-02/04-01/15-1098, paras. 3, 15, 40(a).

²⁰ ICC-02/04-01/15-1098, para. 40(b) and (c).

Indeed, pursuant to rule 20 of the Rules and Chapter 4 of the Regulations of the Registry, the Registrar holds primary responsibility for supporting, assisting, and providing information to defence teams. Mr Ongwen should therefore approach the Registrar directly for the purposes of seeking the information he considers pertinent.

Conclusion

15. The Defence's request should be rejected.



Fatou Bensouda, Prosecutor

Dated this 15th day of December 2017
At The Hague, The Netherlands