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**International
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Date: **22 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 Document

**Victims' Joint Response to "Defence Request for Findings of Fair Trial Violations
and Remedy, Pursuant to Articles 67 and 64 of the Rome Statute"
(ICC-02/04-01/15-1127)**

Source: Legal Representatives of Victims
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 Charles Achaleke Taku

Legal Representatives of the Victims

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

Legal Representatives of the 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. Counsel representing the Victims authorised to participate in the present case (the “Counsel”) jointly submit their response opposing the “Defence Request for Findings on Fair Trial Violations and Remedy, Pursuant to Articles 67 and 64 of the Rome Statute” (the “Defence Request”).¹

2. Counsel submit that the Defence Request fails to meet its burden for showing any violation of the fair trial rights of the Accused. Even if a violation of fair trial rights had arisen, a stay of proceedings is not an appropriate remedy at this juncture. Moreover, the Defence Request has not been made in a timely fashion.

3. The relief requested for findings on the fair trial violations and a stay of proceedings are unjustified and inappropriate in light of the advanced stage of the Prosecution case, and should thus be rejected.

II. BACKGROUND

4. On 11 December 2017, the Defence filed its “Observations on Fair Trial and Request for Orders on Prosecution resources and Additional Defence Resources” (the “Defence Request for Additional Resources”).²

5. On 19 December 2017, Trial Chamber IX issued its “Decision on Request for Reports on the Resources of the Parties to the Case and Order for Additional Resources to the Defence.”³

6. On 8 January 2018, the Defence filed the Defence Request and, pursuant to the instructions of the Trial Chamber, submitted its ‘Addendum to the Defence Request

¹ ICC-02/04-01/15-1127 (including the Addendum to the Defence request - ICC-02/04-01/15-1129).

² ICC-02/04-01/15-1098.

³ ICC-02/04-01/15-1114.

for Findings on Fair Trial Violations and Remedy’ (the “Addendum”) on 10 January 2018.⁴

7. On 17 January 2018, the Prosecution submitted the “Prosecution Response to ‘Defence Request on Fair Trial Violations and Remedy, Pursuant to Articles 67 and 64 of the Rome Statute’” (the “Prosecution Response”).⁵

III. SUBMISSIONS

a) The Defence Request fails to demonstrate a violation of fair trial rights

8. Article 67(1) of the Rome Statute states that an Accused has a right to “be informed promptly and in detail of the nature, cause and content of the charge, in a language which [he/she] fully understands and speaks.” Counsel concur with the Prosecution Response⁶ and submit that the Accused has had adequate notice of the charges against him in a language that he understands.

9. In fact, this very matter has been settled by the Pre-Trial Chamber in the 29 April 2016 Decision on the Defence Request for leave to appeal the decision on the confirmation of charges.⁷ In that decision the Pre-Trial Chamber held that the facts and circumstances of the charges brought against Mr Dominic Ongwen and confirmed by the Chamber are clearly stipulated in the operative part of the Confirmation Decision, “*which reproduces verbatim the charges presented by the Prosecutor in the document containing the charges of 21 December 2015*”.⁸

⁴ ICC-02/04-01/15-1129.

⁵ ICC-02/04-01/15-1140.

⁶ *Idem.*

⁷ ICC-02/04-01/15-428.

⁸ *Ibid*, emphasis added, para. 25 (The Acholi translation of the Document Containing Charges as notified on 21 December 2015 as an annex to the Prosecution submission of the document containing charges, the pre-confirmation brief, and the list of evidence – ICC-02/04-01/15-375-Conf-AnxB).

10. The Pre-Trial Chamber further emphasized that:

*“...it is only the charges as reproduced in the operative part of the Confirmation Decision which are binding to the proceedings in that they delineate the facts and circumstances setting the parameters of the charges for which Dominic Ongwen is committed to trial. No binding effect (whether on factual or legal matters) is instead attached to the reasoning provided in the Confirmation Decision by which the Chamber explains how it reached its final determination under article 61(7) of the Statute...”*⁹

11. Counsel note that the Defence has raised no concern about the adequacy of the Acholi translation of the Document Containing Charges (DCC). As recalled above, the operative part of the Confirmation Decision is a near *verbatim* reproduction of it.

12. The Defence thus has failed to demonstrate any flaw in the Pre-Trial Chamber’s determination on this matter as set out above. In these circumstances, the Defence also has failed to explain how the translation of the DCC would be insufficient to ensure the fair trial rights of the Accused. The Defence Request therefore fails to substantiate its claim regarding inadequate notice and translation.

13. Moreover, the Defence Request fails to demonstrate how the lack of the Acholi translation of the Confirmation Decision has significantly undermined the ability of the Accused to comprehend the charges and the modes of liability contained therein.

14. On this point, Counsel recall in particular the finding of the Trial Chamber in the *Bemba et al* case which articulated that:

“The translation of a given document is a right for the accused only insofar as it can be held that, without the translation of that particular document in a language that he or she fully understands and speaks, the accused (who is, as clarified by the Appeals

⁹ *Ibid*, para. 26.

Chamber, the exclusive 'subject of understanding') would not be able to understand the nature, cause and content of the charge and thus to adequately defend himself or herself, thereby prejudicing the fairness of the proceedings".¹⁰

15. Considering that the Defence Request makes no argument demonstrating how the lack of the Acholi translation affects the Accused's understanding of nature, cause and content of the charges against him, Counsel contend that the Defence Request fails to show a violation of the fair trial rights of Mr Ongwen.

b) A stay of proceedings would not be an appropriate remedy

16. In any event, even if the Defence did demonstrate a violation of the Accused's fair trial rights, it has failed to demonstrate that a stay of proceedings – a relief not provided for in the legal texts of the Court and one that the practice of this Court has shown is to be applied in exceptional circumstances when stringent criteria are met - is necessary and appropriate in the circumstances.

17. In the *Prosecutor vs Banda and Jerbo*, the Trial Chamber noted, regarding the standard of proof on a request for a stay of proceedings that the facts supporting the application need to be "properly substantiated", observing that: "*The Chamber needs to analyse whether the defence claim [...] is sufficiently substantiated to meet the high threshold for a stay of proceedings.*"¹¹

18. The Chamber held in the *Banda and Jerbo* case that even national jurisdictions are careful to avoid granting applications of stay of proceedings on grounds of speculative or vague claims suggesting impeded defence investigations. In this regard, the Chamber noted that:

¹⁰ *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on the "Defence request for an order requiring the translation of evidence" - ICC-01/05-01/13-177, para. 7.

¹¹ ICC-02/05-03/09-410, para. 90.

“The analysis requires scrutiny of what exactly the defence is impeded from advancing in light of the detail of the particular charges. With regard to missing evidence, allegations need to be specific as opposed to vague speculations [...], and the Court should then critically examine how important the missing evidence is in the context of the case as a whole. [...] Mere speculation for which there is no evidential support falls short of that mark.”¹²

19. Without sufficient detail showing the concrete manner in which the lack of the Acholi translation significantly impeded the contribution of the Accused to his defence, Counsel submit that the generic assertions in the Defence Request are vague and speculative.

20. Furthermore, the victims participating in these proceedings have expressed strong views against any stay of proceedings in this case. The alleged crimes committed took place almost fourteen years ago and the victims are strongly in favour of an expeditious trial process and proper conclusion to this case. For these reasons, Counsel submit that a stay of proceedings is not required at this juncture.

c) The Defence Request has not been made in a timely manner

21. Moreover, after having actively participated in a full year of trial hearings where the majority of the Prosecution witnesses have been examined by the parties and participants, the Defence must be in a position to illustrate the prejudice to the Accused in a more substantial manner.

22. In this respect, Counsel note that the Defence have actively engaged in trial proceedings. The Defence has also given its notice of defences on which it intends to rely and has consistently engaged in the cross-examination of the Prosecution witnesses. Indeed, for the majority of the court hearings in 2017, during which the

¹² *Ibid*, para. 95.

Defence had occasion to cross-examine over half the Prosecution witnesses, the Defence did not raise any concern to the effect that the absence of an Acholi translation of the entire Confirmation Decision was a significant impairment to its preparations.

23. The Defence Request claims that it has “*repeatedly requested an Acholi translation of the complete CoC, dating back to after the March 2016 CoC Decision was issued.*”¹³ However, the only document cited in support of this assertion is a Defence Filing from 11 December 2017, in which the question of a translation of the decision was mentioned in a footnote.¹⁴ Subsequently the Defence attempts to obfuscate the belated nature of the Request by stating that it has “[m]ost recently” raised fair trial violations in October and December 2017.¹⁵ This misses the point. The Defence fails to address why it is only now, almost two years after the Confirmation Decision was issued and more than one year into the Prosecution case, that the lack of an Acholi translation constitutes a fair trial violation of the Accused rights such that the trial cannot proceed.

24. Counsel contend that the belated nature of the Request is itself reason to reject the relief sought. The Defence has, due to its failure to timely raise the matter before the Trial Chamber, effectively given its agreement that the trial should proceed normally.

¹³ Defence Request, para. 2.

¹⁴ See footnote 21, ICC-02/04-01/15-1098.

¹⁵ Defence Request, para. 6.

IV. CONCLUSION

25. For the foregoing reasons, Counsel respectfully request the Chamber to dismiss the Defence Request.



Joseph Manoba



Francisco Cox



Paolina Massidda

Dated this 22nd day of January 2018

At The Hague (The Netherlands) and Santiago (Chile)