

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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

**Decision on Defence Request for Deadline Extension and Cooperation from
Uganda**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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**Unrepresented Applicants for
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**The Office of Public Counsel for
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States Representatives

Competent Authorities of the
Republic of Uganda

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REGISTRY

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Counsel Support Section

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Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IX ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 57(3)(b), 61(11), 64(2) and 67(1)(b) of the Rome Statute ('Statute') and Regulation 35 of the Regulations of the Court, issues the following 'Decision on Defence Request for Deadline Extension and Cooperation from Uganda'.

I. Procedural history and relief sought

1. On 13 October 2017, the Chamber ordered that the defence for Mr Ongwen ('Defence') do the following within three weeks of notification of the Office of the Prosecutor's ('Prosecution') closure of its evidence presentation ('Defence Deadline'): (i) confirm its final lists of evidence and witnesses; (ii) certify that all necessary witness information forms have been completed and given to the Victims and Witnesses Unit ('VWU'); (iii) provide anticipated testimony summaries for all witnesses; (iv) complete disclosure of all items it intends to use during its evidence presentation (to the extent not already disclosed); and (v) request any protective measures or relief under Rule 68 of the Rules of Procedure and Evidence.¹ The Prosecution formally closed its evidence presentation on 13 April 2018,² but before this the Chamber extended the Defence Deadline to 31 May 2018.³
2. On 18 April 2018, the Defence filed a submission ('Request') requesting that the Defence Deadline be extended further to 31 August 2018.⁴ The Defence justifies this extension on grounds that the Government of the Republic of Uganda ('GoU') has failed to cooperate with a variety of Defence requests for assistance

¹ Preliminary Directions for any LRV or Defence Evidence Presentation, ICC-02/04-01/15-1021, paras 6-7.

² Notice of the Prosecution's completion of evidence presentation, ICC-02/04-01/15-1225.

³ Public Redacted Version of Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, 6 March 2018, ICC-02/04-01/15-1199-Red, para. 84.

⁴ Defence Request for a Deadline Extension, ICC-02/04-01/15-1232-Conf-Exp. A confidential-redacted version was filed on the same day, and a public redacted version on 4 May 2018, ICC-02/04-01/15-1232-Red2.

(‘RFAs’). The Defence further requests that the Chamber order the GoU to comply with the Defence’s RFAs.

3. On 23 April 2018, at the prompting of the Chamber,⁵ the Defence filed the RFAs in question and other correspondence relevant to the Request (‘Addendum’).⁶
4. On 25 April 2018,⁷ the Prosecution,⁸ the Legal Representative for Victims (‘LRV’) and the Common Legal Representative for Victims (‘CLRv’, together ‘Legal Representatives’)⁹ filed responses opposing the relief sought in the Request. As an alternative relief, the CLRv submits that only a very limited extension of time should be granted.¹⁰
5. As the Defence request to extend the Defence Deadline is premised on the need for the GoU’s compliance with Defence cooperation requests, the Chamber will assess the extent to which the Defence has justified such an order requiring compliance before assessing whether extending the Defence Deadline is warranted.

II. Requests for GoU compliance with Defence cooperation requests

6. In the Request, the Defence makes reference to seven RFAs at issue:
 - (1) An RFA of 6 June 2016 requesting assistance with securing an interview with a former Uganda People’s Defence Force (‘UPDF’) military officer

⁵ Order for Additional Details in Relation to Request 1232, Email from the Chamber to the participants on 19 April 2018, at 13:15.

⁶ Defence Addendum to Submission 1232, ICC-02/04-01/15-1236 (with eight annexes).

⁷ The response deadline was shortened to this date. Order Setting Response Deadline for Request 1232, Email from the Chamber to the participants on 18 April 2018, at 15:03.

⁸ Prosecution’s Response to “Confidential Redacted Version of ‘Defence Request for a Deadline Extension’, filed on 18 April 2018”, ICC-02/04-01/15-1232-Conf-Red, ICC-02/04-01/15-1243-Conf (‘Prosecution Response’).

⁹ Victims’ response to “Confidential Redacted Version of ‘Defence Request for a Deadline Extension’, filed on 18 April 2018”, ICC-02/04-01/15-1244-Conf; CLR Response to the “Confidential Redacted Version of ‘Defence Request for a Deadline Extension’”, filed on 18 April 2018”, ICC-02/04-01/15-1242-Conf.

¹⁰ ICC-02/04-01/15-1242-Conf, para. 17.

(‘First RFA’).¹¹ The Ugandan authorities responded on 11 August 2016, indicating that permission to interview the official was denied on grounds that the person was never a member of the Lord’s Resistance Army (‘LRA’) and that ‘[a]ccordingly, there is no basis for the belief by the Defence that he has any valuable information relating to the command structure of the LRA or any other matter concerning the internal workings of the organization. He is therefore not a competent witness, potential or otherwise, in the matter’.¹²

- (2) An RFA of 21 July 2016, requesting assistance to secure interviews with four other persons (‘Second RFA’).¹³ The GoU responded on 11 August 2016. As regards the person who was a sitting UPDF officer, the GoU gave the same response as for the person identified in the First RFA. For the other three persons, the GoU explained that these persons are ‘private citizens’ and that it is ‘not aware of anything which would impede the Defence [...] from initiating contacts and meetings with them if they have no objection’.¹⁴
- (3) An RFA of 12 December 2016, requesting assistance with securing official copies of Hansards of the Parliament of Uganda on a variety of specified dates (‘Third RFA’).¹⁵ The Defence notes that the GoU did comply with the RFA ‘even though not every public document requested was delivered’.¹⁶

¹¹ Annex A of the Addendum, ICC-02/04-01/15-1236-Conf-AnxA-Red, page 4.

¹² Request, ICC-02/04-01/15-1232-Red2, paras 6, 8, 30-32; GoU Response to First RFA, UGA-D26-0017-0001.

¹³ Annex B of the Addendum, ICC-02/04-01/15-1236-Conf-AnxB-Red, page 4.

¹⁴ Request, ICC-02/04-01/15-1232-Red2, paras 7-8, 30-33; GoU Response to Second RFA, UGA-D26-0017-0002.

¹⁵ Annex C of the Addendum, ICC-02/04-01/15-1236-Conf-AnxC-Red.

¹⁶ Request, ICC-02/04-01/15-1232-Red2, paras 10, 34.

- (4) An RFA of 13 October 2017, requesting certain information and permission to interview a certain individual ('Fourth RFA').¹⁷ The GoU has yet to respond to this RFA.
 - (5) An RFA of 15 February 2018, requesting assistance to arrange interviews with four specific individuals 'whom the Defence knows to have information related to the case' ('Fifth RFA').¹⁸ The GoU has yet to respond to this RFA.
 - (6) An RFA of 12 April 2018 requesting permission for a specific Defence witness to travel to The Hague to testify ('Sixth RFA').¹⁹ The GoU has yet to respond to this RFA.
 - (7) An RFA of 12 April 2018 seeking a specific recording ('Seventh RFA').²⁰ The GoU has yet to respond to this RFA.
7. The Chamber considers that, for any cooperation issue, the moving party must meet the essential pre-requisites for obtaining a cooperation request under Part 9 of the Statute. The moving party must make a showing that a cooperation request is sufficiently: (i) relevant, (ii) specific and (iii) necessary.²¹ A moving

¹⁷ Request, ICC-02/04-01/15-1232-Red2, paras 12, 35; Annex D of the Addendum, ICC-02/04-01/15-1236-Conf-AnxD-Red. *See also* Annex G of the Addendum, ICC-02/04-01/15-1236-Conf-Exp-AnxG.

¹⁸ Request, ICC-02/04-01/15-1232-Red2, paras 17, 36; Annex E of the Addendum, ICC-02/04-01/15-1236-Conf-AnxE-Red ('Fifth RFA').

¹⁹ Request, ICC-02/04-01/15-1232-Conf-Red, paras 19, 37; Annex F of the Addendum, ICC-02/04-01/15-1236-Conf-AnxF-Red, pages 3 and 4. *See also* Annex H of the Addendum, ICC-02/04-01/15-1236-Conf-AnxH.

²⁰ Request, ICC-02/04-01/15-1232-Conf-Red, paras 19, 37; ICC-02/04-01/15-1236-Conf-Exp-AnxF, pages 5 and 6.

²¹ Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Public redacted version of Decision on the 'Prosecution's Requests under Articles 64(6)(b) and 93 of the Rome Statute to Summon Witnesses', 3 December 2015, ICC-01/05-01/13-1343-Red, para. 18 (confidential version notified 6 October 2015); Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, ICC-01/09-01/11-1274-Corr2, para. 181; Trial Chamber V(B), *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, 31 March 2014, ICC-01/09-02/11-908, para. 100, n 216; Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on the third defence application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute, 12 September 2013, ICC-02/05-03/09-504-Red, para. 4.

party meets the essential pre-requisites upon making a sufficient showing under each of these three thresholds.

8. Considering all the information provided in the Request and the Addendum, the Chamber considers that the Defence has failed to make the requisite showing for any of its seven RFAs. The asserted need for cooperation can be distinguished from the cases referenced by the Defence where the moving party successfully made this showing.²²
9. As for relevance, the Chamber considers it insufficient for the Defence to identify persons it seeks to interview with reference only to their titles²³ and general indications that they have ‘information related to the case’ or ‘information about the conflict in Northern Uganda’.²⁴ Such indications do not meet the relevance threshold. The Defence does not have to lay bare its full strategy for why it seeks information, but the Chamber considers that, before taking further steps, it needs substantiation as to what kinds of information the Defence seeks and why the persons concerned may have this information. There is a similar problem when asking for transcripts of parliamentary hearings on specific dates without explaining why the Defence believes those sessions might reveal relevant information.²⁵ The Chamber will not go through the evidence record in an attempt to divine why the Defence considers a particular interview or parliamentary record to be relevant.

²² Request, ICC-02/04-01/15-1232-Red2, para. 48, *citing* to the *Kenyatta* case. *See generally* Trial Chamber V(B), *The Prosecutor v. Uhuru Muigai Kenyatta*, Second decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, 19 September 2016, ICC-01/09-02/11-1037 paras 26-27. (confirming a finding of State non-compliance only in relation to a revised cooperation request that was sufficiently relevant, specific and necessary).

²³ Second RFA, ICC-02/04-01/15-1236-Conf-AnxB-Red, page 4 (third full paragraph under sub-heading 1).

²⁴ Request, ICC-02/04-01/15-1232-Conf-Red, paras 31 (in relation to Second RFA), 36 (in relation to Fifth RFA).

²⁵ Third RFA. ICC-02/04-01/15-1236-Conf-Exp-AnxC, pages 6-7. The Defence explains in its request that it was ‘about its interest in matters discussed in the Parliament of Uganda regarding the creation and maintenance of the IDP Camps as well as the establishment of the auxiliary forces [...]’. Request, ICC-02/04-01/15-1232-Conf-Red, para. 34. The Third RFA itself makes no reference to any of these specific points, and the Defence nevertheless fails to explain why it believes these topics were discussed on the specific dates identified. The Defence does not even identify which records are outstanding given the GoU's compliance to date.

10. However, even for RFAs where the information sought is set out with sufficient relevance and specificity, the larger issue affecting all seven RFAs is the showing that intervention from the Chamber is necessary.
11. Firstly, in response to the Second RFA the GoU has informed the Defence that it may contact private individuals to set up interviews.²⁶ The Defence has given no indication that it has actually attempted to do so before filing the Request. The Defence instead argues that the GoU did more to facilitate the Prosecution's interviews with private individuals.²⁷ States can provide more cooperation than they are statutorily obligated to provide,²⁸ but the Chamber will not compel the GoU to do more to facilitate contacts with individuals they have already permitted the Defence to contact directly.
12. Secondly, the Defence similarly fails to explain why an authorisation of the GoU is necessary for the witness concerned in the Sixth RFA to be able to testify. According to the submissions of the Defence, this permission is merely sought because the witness requested that the GoU is consulted and provides its authorisation for him to travel. No showing of an actual need for such authorisation is provided. Further, the Defence makes no showing of seeking other measures to facilitate the testimony of the witness, including seeking assistance from the VWU²⁹ or seeking to have the witness testify via video-link.
13. Thirdly, the Defence sent the Fifth RFA two months before its Request³⁰ and two more (Sixth and Seventh RFAs) a mere six days prior to its Request.³¹ The Chamber does not consider it to be apparent that the GoU will not comply with

²⁶ GoU Response to Second RFA, UGA-D26-0017-0002.

²⁷ Request, ICC-02/04-01/15-1232-Red2, paras 40-44.

²⁸ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, ICC-01/05-01/13-2275-Red, A-A5, para. 319.

²⁹ *As requested by the Registry in Annex H of the Addendum*, ICC-02/04-01/15-1236-Conf-AnxH.

³⁰ Fifth RFA, ICC-02/04-01/15-1236-Conf-AnxE-Red.

³¹ Sixth and Seventh RFA, ICC-02/04-01/15-1236-Conf-AnxF-Red.

these RFAs in the natural course of events, making judicial involvement with respect of these three RFAs premature at this point.

14. Fourthly, in its Response the Prosecution undertakes to use its GoU contacts to facilitate the timely execution of the Defence's RFAs where appropriate.³² To the extent that the Defence has shared or is able to share the contents of its seven RFAs with the Prosecution,³³ the Chamber considers that such consultations may be fruitful.
15. In sum, the Defence has failed to justify judicial intervention for its outstanding RFAs in the Request. However, this does not mean that the GoU could not assist the Defence of its own accord. The Chamber invites the GoU to facilitate the Defence's investigation to the extent it considers appropriate.

III. Extension of the Defence Deadline

16. For the reasons provided in the previous section, the Defence has not justified any judicial intervention. The Chamber also emphasises that the Defence has failed to act with diligence in seeking an extension for many of these RFAs, noting that some were rejected years ago (to which relief could have been sought much earlier) or were sent in recent months or mere days ago (to which no compliance prior to the Defence Deadline could have been reasonably expected). The Chamber will not permit the Defence to condition its evidence presentation on cooperation requests it has not sufficiently justified by this advanced point in the proceedings. As no valid grounds for an extension are

³² Prosecution Response, ICC-02/04-01/15-1243-Conf, paras 18, 21.

³³ In this regard, it is noted that: (i) the part of the First RFA referenced in the Request is entirely accessible to the Prosecution and (ii) the unredacted parts of the Fourth RFA reveal that the information requested relates to ascertaining Mr Ongwen's location. *See* Fourth RFA, ICC-02/04-01/15-1236-Conf-AnxD-Red, page 3 ('[REDACTED] is particularly important for the Defence case because if Mr Ongwen's location can be reliably ascertained it has the potential to exonerate Mr Ongwen of certain alleged crimes brought forward by the Prosecution. Information that indicates [REDACTED] and has been provided to the Defence. This information results from [REDACTED]. The Defence seeks to confirm the reliability of this information and verify the process through which it was generated').

provided, there is no basis for the Defence's requested extension of time to 31 August 2018.

17. The Chamber emphasises that the Defence incurs no prejudice in complying with the Defence Deadline as currently set for 31 May 2018. The Defence itself notes that there is a possibility to seek amendments to its witness/evidence lists after this deadline.³⁴ Contrary to the Defence, the Chamber considers this possibility to seek extensions to be a meaningful way to address any subsequent information the Defence receives from the GoU in response to its RFAs. In this regard, the Chamber notes the Prosecution's undertaking that it will not oppose reasonable requests to add witnesses or evidence filed after the Defence Deadline which were affected by the outstanding RFAs.³⁵
18. The Defence's requested extension is therefore rejected. However, in order to assuage any Defence concerns that it will not have an adequate amount of time to prepare for its evidence presentation, the Chamber gives the assurance that the Defence will not be required to commence its evidence presentation until after the 2018 summer recess.

³⁴ Request, ICC-02/04-01/15-1232-Red2, para. 53.

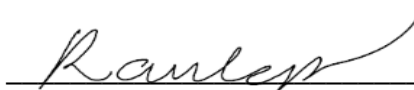
³⁵ Prosecution Response, ICC-02/04-01/15-1243-Conf, paras 17, 20.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

ORDERS the Prosecution and Legal Representatives to request reclassification or file a public redacted version of their respective submissions within 10 days of notification of the present decision: ICC-02/04-01/15-1242-Conf, ICC-02/04-01/15-1243-Conf, ICC-02/04-01/15-1244-Conf.

Done in both English and French, the English version being authoritative.


Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

Dated 4 May 2018

At The Hague, The Netherlands