

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **18 May 2016**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Peter Kovacs
Judge Raul C. Pangalangan

SITUATION IN UGANDA

IN THE CASE OF

THE PROSECUTOR v. DOMINIC ONGWEN

Public

Prosecution Submissions in Accordance with the Scheduling Order of 4 May 2016

Source: The Office of the Prosecutor

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 James Stewart
Mr Benjamin Gumpert

Counsel for Dominic Ongwen

Mr Krispus Ayena Odongo

Legal Representatives of Victims

Mr Joseph Akwenyu Manoba
Mr Francisco Cox
Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

Amicus Curiae

States Representatives

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. In preparation for the Status Conference scheduled for 23 May 2016, the Prosecution hereby responds to the Chamber's Order of 4 May 2016 that the participants make submissions on potential agenda items.

Commencement Date of the Trial

2. The Prosecution notes that the Chamber is resolved to start this trial before the end of 2016. In accordance with this resolve the Prosecution submits that, for reasons elaborated below, Monday 5 December 2016 is the earliest practicable date for the commencement of the trial.

Prosecution Disclosure

Discloseable material and proposed deadlines

3. In correspondence between the Parties of which the Chamber is already aware¹ the Defence expressed its expectations with regard to the Prosecution's disclosure obligations thus: "The Defence expects the Prosecutor's disclosure obligations to extend to the disclosure of exculpatory material, any material which might aid in the Defence's investigations and any material that might mitigate charges against Dominic Ongwen from its ongoing investigations." The Prosecution accepts that this is a useful working description of the criteria it has been applying to the material which it has been reviewing for disclosure.

4. The same letter from the Defence goes on thus: "The Defence also expects disclosure from prior investigations against other suspects, potential suspects, the UPDF and the Government of Uganda." The Prosecution's position is that *all* the material in the Prosecution's possession with regard to its investigations in the Uganda Situation is being reviewed for disclosure. Material which may suggest that some other person has committed crimes within the jurisdiction of the Court, but

¹ ICC-02/04-01/15-435, Annexes A and B.

which has no bearing upon the crimes alleged to have been committed by Dominic Ongwen, and which do not fit the disclosure criteria under the Rome Statute (“Statute”) and the Rules of Procedure and Evidence (“Rules”), will not be disclosed.

5. The Prosecution is currently in possession of approximately 49,000 pages of material, which remain to be reviewed for disclosure to the Defence. Approximately 4,500 further pages are likely to be generated from sound recorded interviews with potential witnesses which are still awaiting transcription. Supplementary investigations continue and are scheduled to cease on 30 June 2016, save where important existing lines of inquiry require a small amount of further time to be completed. These inquiries will continue to create further items for review and potential disclosure.

6. The Prosecution has been dealing with its disclosure task as speedily as possible within the constraints imposed by available resources and other aspects of case preparation. To date, it has disclosed to the Defence 7,718 items amounting to 79,611 pages. Disclosure has been on a monthly rolling basis.

7. The Prosecution is taking steps to ensure that, with the exception set out in the following paragraph, it will have met its disclosure obligations for trial by 5 September 2016, three months before the date proposed for the commencement of the trial. The Prosecution will notify the Chamber, the Parties and participants if circumstances change so as to imperil this.

8. The Prosecution proposes, at the trial of this matter, to rely on, and to have available to the Defence, representatives of the victims and the Chamber, electronic visual representations of the four attack locations derived from the use of drone photography/video and three dimensional laser scanning. Not all of this material is

yet in existence. Technical unavailability of the necessary resources and climatic conditions mean that this material may not be in the hands of the Prosecution until November 2016. This material is not of primary evidential value. It does not go to the acts and conduct of the Accused or any other material aspect of the matters at issue in the trial. Realistically its disclosure will not generate any additional investigative burden on the Defence. The Prosecution requests the Chamber to permit its service no later than 10 working days before the commencement of the trial.

Translation and Transcription

9. Interviews with many of the witnesses on whom the Prosecution relies have been sound recorded in accordance with rule 112 of the Rules. The subsequent transcription of such interviews generates significant work and expenditure of time. The interviews have to be transcribed both in English and in the language in which the individual being interviewed has been speaking, through interpretation. The Prosecution has been working diligently to increase its capacity for such transcription work, but a significant bottleneck in capacity, particularly in Acholi transcription and translation, remains. This is added to by the requirement to translate the statements of other witnesses obtained pursuant to rule 111 of the Rules from English into Acholi (the language of the Accused). There is a relatively small number of persons upon whom the Prosecution is able to call with the necessary skills, training and availability to do such work.

10. Some transcripts and witness statements relied upon by the Prosecution, and disclosed to the Defence by the proposed disclosure deadline of 5 September, may not be available in Acholi (the working language of the Accused) by that date. The Prosecution submits that the legal obligation under rule 76(3) of the Rules to provide that material in Acholi would be adequately respected by a Prosecution undertaking

that where transcriptions or translations into Acholi are provided after the deadline, the witness concerned will not be called to give evidence at trial until the Defence has been in possession of the relevant material for a period of three months.

Estimated Number of Witnesses and Hours for Presentation of Evidence

11. The Prosecution intends to rely on the evidence of approximately 120 witnesses to prove its charges. Of those, the Prosecution currently intends to call up to 70 witnesses to give live testimony at trial, and to seek the introduction of previously recorded evidence under rule 68(2)(b) for approximately 45 witnesses. The Prosecution will apply for introduction of the testimony of seven witnesses examined in the course of article 56 proceedings into the trial record.

12. The Pre-Trial Chamber confirmed 70 charges for trial. These can be grouped into six areas: Pajule (Counts 1-10), Odek (Counts 11-23), Lukodi (Counts 24-36), Abok (Counts 37-49), Sexual and Gender Based Crimes (Counts 50-68), and Child Soldiers (Counts 69 and 70).

13. Almost all of the Prosecution's intended witnesses have made statements which are relevant to more than one area and which bear upon other issues that will be important at trial, such as Dominic Ongwen's place within the structure and hierarchy of the LRA, the interception of LRA radio communications, and the issue of duress, which the Defence has raised as a potential ground for excluding criminal responsibility.

14. The table below sets out the number of witnesses that the Prosecution currently intends should give live testimony relevant to these various charges and issues. In many cases the assignment of witnesses to a particular category is somewhat

artificial, since they could as easily have been assigned to two or three other categories.

Pajule (Counts 1-10)	9
Odek (Counts 11-23)	8
Lukodi (Counts 24-36)	7
Abok (Counts 37-49)	5
Sexual and gender-based crimes (Counts 50-68)	4
Child soldiers (Counts 69 and 70)	10
Interception of LRA radio communications	7
The structure of the LRA and Dominic Ongwen's position of authority	5
Duress	3

15. A further seven or so witnesses may be added to this total as a result of ongoing investigations.

16. The Prosecution estimates that it will take about 400 hours for the evidence of these witnesses to be adduced during questioning by Prosecution advocates. Allowing similar time for questioning by the Defence, and one hour per witness for questioning by the representatives of the Victims, the Chamber and re-examination, the total court time for the presentation of the Prosecution evidence would be about 865 hours. This is, of necessity, an approximate estimate and its accuracy is dependent upon events outside the Prosecution's control.

Documentary and Non-testimonial Evidence at Trial

17. As already foreshadowed, in addition to the witnesses who will give live evidence, the Prosecution intends to rely upon the evidence of approximately 45 witnesses who have made statements about matters other than the acts and conduct

of Dominic Ongwen. The Prosecution will, before Monday 13 June 2016, file an application to rely upon this prior recorded testimony under the provisions of rule 68(2)(b) of the Rules.

18. Furthermore the Chamber will be aware that seven individuals have already given sworn testimony in this matter, and been questioned by the Defence thereon, before the Pre-Trial Chamber in a procedure governed by article 56. The Prosecution will file an application for the Chamber's leave to admit into evidence the record of this testimony and the documents or items used by the Parties during their questioning, before Monday 13 June 2016.

19. The Prosecution will also rely upon the documentary evidence and items which were put before the Pre-Trial Chamber for the purposes of confirmation. This amounted to 1,002 items of radio intercept evidence (log books and other material), and 67 items such as NGO reports, photographs, notebooks provided by Prosecution witnesses, media/press articles. The Prosecution will supplement that evidence and rely upon other documents that have been or will be served upon the Defence in compliance with the disclosure deadline imposed by the Chamber. In particular the Prosecution has already disclosed a further 37 items of radio intercept evidence.

20. The Prosecution has drafted a schedule of facts with which it invites the Defence to agree. The document has been shared with the Defence and a response requested by 31 May 2016. This is a matter which the Prosecution respectfully submits can, at this stage, be left to negotiation between the Parties without the need for direction from the Chamber.

Protection Issues

21. The Prosecution expects that in-court protective measures will be applied for in respect of a number of the witnesses who give live testimony as part of its case. The categories of witness in respect of whom such applications are most likely to be made are witnesses who are the victims of sexual and gender-based crimes and others who may be vulnerable because of their particular circumstances. The Prosecution's Protection Strategies Unit is liaising with the Registry's Victims and Witnesses Section to ensure that information pertinent to these applications is gathered in a timely fashion so that it can be put before the Chamber when they are made.

22. There are no witnesses currently in the Court's witness Protection Program ("ICCPP") and the Prosecution does not anticipate any such referrals at present.

Languages to be used in the Proceedings

23. Most of the witness to be called to give live evidence by the Prosecution speak Acholi and will testify in this language. A small number of witnesses will give evidence in other languages. Present figures are as follows: Lango (currently five), Ateso (currently one) or English (currently eight). Prosecution advocates will use English during the course of the proceedings.

Estimated length of opening statements

24. The Prosecution estimates that it can open its case in the course of a normal sitting day. This will be made possible by the calling of a witness near the commencement of the trial to give an analytical overview of the voluminous and diverse evidence relating to the interception of LRA radio communications. This evidence impacts on every one of the charges and issues listed above. The calling of

such a witness will permit the Prosecution to deal with this evidence in a more cursory way in the course of its opening.

Pre-Trial Brief

25. The Prosecution's pre-trial brief will be an organic development of the existing pre-confirmation brief. Once investigations are largely completed at the end of June it will take approximately two months to finalise, so that it can be served no later than the proposed disclosure deadline of 5 September 2016.

Other Matters

Location of the opening statements and site visit

26. The Prosecution submits that the Chamber should consider holding the opening of the trial in Uganda, pursuant to articles 3, 4 and 62 of the Statute and rule 100 of the Rules, preferably in or near Gulu town which is the nearest large conurbation to the sites of the four attacks with which the trial will be concerned. During Prosecution outreach missions in 2015 and 2016 civil society, cultural and religious leaders and, in particular, the affected victims in northern Uganda have made repeated requests to have a hearing locally.

27. The Prosecution invites the Judges to consider taking advantage of their prospective presence in Uganda to conduct site visits of the four attack sites, namely Pajule, Odek, Lukodi, and Abok. This request is based on articles 64, 69, and 74 of the Statute. Combining the opening and the site visits would save costs. A site visit would give a better understanding of the evidence at trial. It would allow for an appreciation of the terrain, such as distances, landmarks, and views from observation points. It would permit the Chamber to anticipate and ask more informed questions during witness testimony.

28. The idea of holding proceedings locally has already been raised in relation to the confirmation of charges hearing.² Then, the Prosecution expressed its support for holding proceedings close to affected victim communities where this is feasible, provided that the Court can ensure the protection of victims, witnesses, Court staff, and Dominic Ongwen himself.³ The Prosecution adopts the same position with regard to the opening of the trial. Inconvenient timing and security considerations⁴ prevented the confirmation hearing taking place in Uganda. These considerations may no longer apply.

Defence Disclosure under rule 79 of the Rules

29. On Monday 16 May 2016 the Prosecution filed submissions regarding the application of rule 79 of the Rules. This filing followed correspondence between the Parties on the subject as referred to in paragraph 3 above. The Prosecution submits that the issues in that filing are significant in terms of the efficient preparation for and conduct of the trial and that they merit inclusion in the agenda for the Status Conference.

Request for clarification

30. Finally, the Prosecution seeks to clarify whether the orders of the Single Judge of the Pre-Trial Chamber on the deadlines for filing of responses and replies in the case continues to apply.

31. To allow for expeditious conduct of the proceedings, the Single Judge of the Pre-Trial Chamber on 19 May 2015 ordered that the Parties and participants in the proceedings leading to the confirmation of charges hearing respond to each other's

² ICC-02/04-01/15-300, para. 8; ICC-02/04-01/15-279-Conf, para. 10.

³ ICC-02/04-01/15-264, para. 3.

⁴ ICC-02/04-01/15-330, para. 27.

filings within 5 days⁵ as opposed to 21 days indicated by regulation 34 of the Regulations of the Court. Further, in a decision issued on 27 November 2015,⁶ the Single Judge of the Pre-Trial Chamber set a time limit of three days for the Prosecutor and the Defence to reply to a response filed by the legal representatives of victims.

32. The Prosecution notes that the Single Judge in his Scheduling Order of 4 May 2016 listed a number of matters for which the procedures adopted by the Pre-Trial Chamber remain in place,⁷ and that the continued application of the above deadlines is not amongst them. The Prosecution respectfully requests the Trial Chamber to clarify whether the above deadlines for filings imposed by the Pre-Trial Judge continue to apply. The Prosecution considers the shortened deadlines to be efficient and help avoid delays in litigation between the Parties and participants. Accordingly, the Prosecution supports their continued application.



Fatou Bensouda
Prosecutor

Dated this 18th day of May 2016
At The Hague, The Netherlands

⁵ ICC-02/04-01/15-T-6-ENG, p. 18, lns. 23-25 and p. 19, lns. 1-5.

⁶ ICC-02/04-01/15-350, para. 34.

⁷ ICC-02/04-01/15-432, para. 4.