

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: 18 May 2016

Date: 7 August 2020

**TRIAL CHAMBER IX**

**Before: Judge Bertram Schmitt, Single Judge**

**SITUATION IN UGANDA**

**IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN***

**PUBLIC with Public Annex A and Confidential *Ex Parte* Annexes B-D**

**Second Public Redacted Version of "Defence Submissions in Advance of the 23 May 2016 Status Conference", filed on 18 May 2016**

**Source: Defence for Dominic Ongwen**

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

**The Office of the Prosecutor**  
 Fatou Bensouda, Prosecutor  
 James Stewart, Deputy Prosecutor  
 Colin Black

**Counsel for the Defence**  
 Krispus Ayena Odongo  
 Chief Charles A. Taku

**Legal Representatives of the Victims**  
 Joseph Manoba  
 Francisco Cox

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
 (Participation/Reparation)**

**The Office of Public Counsel for Victims**  
 Paolina Massidda

**The Office of Public Counsel for the  
 Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**  
 Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
 Section**

**Other**

## I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby submits observations on His Honour Judge Bertram Schmitt's ('Single Judge') "Order Scheduling First Status Conference and Other Matters."<sup>1</sup>

## II. CONFIDENTIALITY LEVEL

2. Pursuant to Regulation 23bis(1) of the Regulations of the Court, the Defence files these observations as confidential *ex parte* Defence and Registrar only as it contains information about ongoing investigations into defences pursuant to Article 31(1) of the Rome Statute which are not yet disclosable pursuant to Rule 79 of the Rules of Procedure and Evidence and it contains notifications about some possible Defence strategies. Furthermore, the Defence requests the same confidentiality level for Annexes B-D because they deal with confidential work-product of the Defence which is required under the Regulations of the Court to disclose to a third party for the purpose of obtaining additional funds under the Legal Aid Policy. A confidential version is filed concurrently because of the content within the section dealing with protected witnesses. A public redacted version is filed concurrently.

## III. SUBMISSIONS

3. The Defence makes these submissions in preparation for the 23 May 2016 status conference. The Defence respectfully reserves the right to comment on these and other topics during the status conference should its views change based upon written or oral submissions of the other party and participants or if it wishes to expound upon these submissions.

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<sup>1</sup> ICC-02/04-01/15-432.

Disclosure of Materials

4. The Defence requests the immediate disclosure of all remaining materials in the Uganda Collection which the Prosecutor referred to in ICC-02/04-01/15-191-Anx-Red, page 5/19, "Disclosure" (Question 4). As of 17 May 2016, the Prosecutor has disclosed 63,567 of the 94,620 pages referred to in the aforementioned annex. The Defence expects the disclosure to include not only materials allegedly relating to Mr Ongwen, but materials allegedly relating to all suspects, possible suspects and investigations into the UPDF, NRM and the Government of Uganda. The Defence also requests the immediate disclosure of any outstanding material which the Prosecutor collected after Mr Ongwen surrendered. The Defence requests that the above materials be disclosed no later than 180 days before the start of trial.
  
5. Following the criteria outlined by Trial Chamber I in *Gbagbo and Blé Goudé*, the Defence requests that all material be disclosed six months before the start of trial due to the extraordinary nature of the case, particularly its complexity, volume of disclosed material and the lack of resources available to the Defence.<sup>2</sup> In support of this request, the Defence notes that:
  - a. Mr Ongwen faces 70 charges, the most charges ever for an Accused before any international court or tribunal.
  - b. There are nine different types of modes of responsibility in the charges.
  - c. The Prosecutor has disclosed 79,543 pages of material and 491 hours of original audio "intercept" material as of 17 May 2016.
  - d. In addition to the original audio "intercept" material, the Prosecutor is re-releasing 73 hours, 56 minutes and 2 seconds of enhanced audio in the near future.<sup>3</sup>

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<sup>2</sup> See ICC-02/11-01/15-58, para. 16.

<sup>3</sup> The Defence notes that the purpose of the re-release is that when the WAV files were converted to WMA files, the conversion caused the enhanced qualities to be destroyed. Mr Gumpert of the Office of the Prosecutor notified Mr Ayena Odongo of this problem by official letter on 4 May 2016. Mr Gumpert emailed Mr Obhof on the morning

- e. The Defence was informally told that it would receive around 30,000-40,000 more pages of disclosure post-Confirmation.<sup>4</sup>
  - f. The Prosecutor has disclosed or referenced 204 witnesses or potential witnesses as of 17 May 2016. She presented 108 witnesses for the Confirmation of Charges Hearing,<sup>5</sup> and the Defence expects that she will call more at trial.
  - g. The Registrar appears to be refusing to allot monies for the Defence to conduct investigations with an investigator.<sup>6</sup>
6. Furthermore, the 180 day request is consistent with the actual practices of recent trial chambers of the Court, which is annexed as Public Annex A. Not a single Article 5 trial chamber started trial on the original date as planned. There has been a consistent gap of six or more months from the Prosecutor's final disclosure date to the start of trial. The Defence wishes to forgo litigious filings in the future and plan accordingly, especially in consideration of paragraphs 4-5 above.

Presentation of Evidence

7. The Defence has no substantive comments for this section at this time.

Witness Protection Issues

8. [REDACTED]
- [REDACTED] As for the rest of paragraph 3(b),<sup>7</sup> the Defence has no substantive comments at this time.

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of 18 May 2016 to reassure the Defence that the Office of the Prosecutor was working on the issue and the Defence would receive the audios as soon as possible.

<sup>4</sup> The figure in paragraph 5(b) includes 8,816 pages of material disclosed post-Confirmation.

<sup>5</sup> The actual number was 109, but the Defence removed P-0198 from the total count as P-0198 evidence is no longer relied upon by the Prosecutor.

<sup>6</sup> The Defence cannot substantiate this statement with written material. The Defence has only be told informally that it will not be receiving funds to pay a full time investigator. The Defence is still awaiting a final decision on its application under Regulation 83(3) of the Regulations of the Court.

<sup>7</sup> ICC-02/04-01/15-432, para. 3(b).

Languages

9. Pursuant to Article 64(3)(b), the Defence requests that the official language of the case be English. The Defence expects that the languages of English, Acholi, Langi, Ateso and Kiswahili will be used by its witnesses, but cannot certify this statement until such time that the Defence has completed its investigations.

Opening Statements

10. The Defence shall not be in a position to comment on the proposed length of its opening statements until such time that the Prosecutor discloses all materials described above in paragraphs 4. In any event, the Defence requests that at a minimum, it receives at least equal time given to the Prosecutor.

Prosecutor's List of Evidence, List of Witnesses and Pre-Trial Brief

11. The Defence respectfully requests the Single Judge to follow the exemplary practice of Trial Chamber VI and require the Prosecutor to file a provisional list of witnesses and provisional list of evidence six months before the start of trial.<sup>8</sup> Following that, the Defence requests that the Prosecutor's Official Pre-Trial Brief, Official List of Evidence and Official List of Witnesses be filed no later than 90 days before the start of the trial.

Victim Applications for Participation

12. The Defence has no substantive comments for this section at this time.

Start Date of Trial

13. The Defence cannot comment at this time about a start date for trial since the Prosecutor has not stated when she shall finish disclosure. The Defence refers the

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<sup>8</sup> ICC-01/04-02/06-382, para. 9(a). The difference in this case than in previous ones is that a confidential redacted version was ordered to be filed.

Single Judge to its arguments above in paragraphs 5-6 for the timing of the start of trial in relation to the culmination of the Prosecutor's disclosure obligations.

Rule 76(3) Material

14. Pursuant to Rule 76(3) of the Rules of Procedure and Evidence, the Defence requests the expeditious disclosure of Acholi translations of all statements and transcripts of witnesses which the Prosecutor intends to call to testify at trial or attempt to present as evidence.<sup>9</sup>
  
15. Additionally, the Defence requests the revocation of former Judge Trendafilova's order in paragraphs 35-36 of ICC-02/04-01/15-203. This is a different stage of the proceeding, and Mr Ongwen has the undeniable right to Acholi translations of all statements made by witnesses which the Prosecutor intends to call at trial or to attempt to present as evidence.
  
16. Finally, the Defence notifies the Single Judge that the Defence and Prosecution are currently discussing ways to expedite the translation of statements. An update will be given during the Status Conference.

Article 31

17. The Defence requests a confidential *ex parte* hearing with the Single Judge to discuss this topic. Furthermore, the Defence considers it highly unfortunate that the Prosecutor felt it necessary to submit Filing 435, especially knowing that the proper forum, a Regulation 54 status conference, was ordered by the Single Judge.<sup>10</sup>

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<sup>9</sup> The Defence confirms that transcripts which contain **complete** interpretations of the conversations of the proposed witness and representative of the Prosecutor fulfils this requirement.

<sup>10</sup> Regulation 54 of the Regulations of the Court.

Expert Witnesses

18. The Defence requests that this topic be discussed during the confidential *ex parte* hearing requested above in paragraph 17. The Defence also requests that the Single Judge order the Registrar to send a representative to the *ex parte* hearing for the purpose of this section. For a working list of proposed experts, the Defence refers the Single Judge to Confidential Ex Parte Annex C, pages 9-10.

In Situ Proceedings

19. The Defence has not changed its position from filing ICC-02/04-01/15-265. At a minimum, the opening statements should be held in Gulu, Uganda. If the International Crimes Division of the Uganda Courts can hold Thomas Kwoyelo's trial in Gulu, the ICC can hold the opening statements there too.

Evidence-Based Charts

20. The Defence requests that evidence-based charts, as currently done in the *Bemba et al.* case, be implemented in this case. With the voluminous amount of evidence and the overwhelming amount of charges, the Defence deems these types of charts necessary for the expeditious and fair conduct of the proceedings.

Legal Aid Granted to the Defence under the Legal Aid Policy

21. The Defence filed a request pursuant to Regulation 83(3) of the Regulations of the Court with the Registrar in the evening of 11 April 2016. A representative from the Registrar met with a Defence representative several times on this issue, but as of 18 May 2016 at 14h00, the Defence has not received a formal response. The Defence requests that the Single Judge order the Registrar to send a representative to the hearing for the purpose of commenting on this section. Confidential *ex parte* Annexes B-D are attached to this filing to inform the Single Judge of the Defence's request.

Disclosure of Requests for Assistance

22. The Defence wishes to raise the issue of the disclosure of all requests for assistance made by the Prosecutor, former Prosecutor and representatives of both during its investigation into the Situation in Uganda. The Defence has not brought this specific issue to the attention of the Prosecutor, and will be contacting the Prosecution before the status conference to have an *inter partes* discussion in advance of the status conference.

Identities of Persons having Victim-Participant Status

23. The Prosecutor has disclosed material which allegedly contains the names of persons residing in the IDP camps in question at the alleged times outlined in the Document Containing the Charges. Maintaining redactions does not protect the identity of the applicants like the Pro-Bono Legal Representatives for Victims would have one believe.<sup>11</sup> It is merely a façade. Mr Ongwen has the right to know the identities of his accusers.

#### IV. CONCLUSION

24. The Defence submits the above observations in advance of the 23 May 2016 status conference as ordered by the Single Judge for the purpose of facilitating the expeditious conduct of the status conference.

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<sup>11</sup> ICC-02/04-01/15-433, paras 30-31.

Respectfully submitted,



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Hon. Krispus Ayena Odongo  
On behalf of Dominic Ongwen

Dated this 7<sup>th</sup> day of August, 2020

At Gulu, Uganda