

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **8 November 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

Public Redacted Version of “Defence Reply to Prosecution Response ICC-02/04-01/15-1048-Conf”, filed on 6 November 2017

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**

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I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby replies to ICC-02/04-01/15-1048-Conf.
2. The Defence limits its rely to issues directly related to the Prosecution's withdrawal of eight (8) witnesses from its list of witnesses.
3. The Defence asserts that this decision, [REDACTED], increases the workload of the Defence and its investigations. Now, instead of preparing to cross examine these eight (8) witnesses, the Defence must re-arrange its investigations to interview potentially all of the witnesses except P-0258.¹
4. As such, the Defence requests that:
 - a. The breaks between evidence blocks be altered such that there are three (3) weeks between each block for the purpose of sending personnel from The Hague to aid in the investigations through interviewing the withdrawn witnesses.
 - b. The Chamber give further directions on the due date of the Defence's final list of evidence and witnesses, setting the date of 1 June 2017 or three (3) weeks after the close of the Prosecution's case, whichever is later.

II. CONFIDENTIALITY

5. Pursuant to Regulation 23 *bis*(2) of the Regulations of the Court, the Defence files these observations and annexes as confidential as it contains information that is currently confidential or are internal communications between officers of the Court and the Defence. The Defence files a public redacted version contemporaneously, and shall file a lesser redacted version should the Chamber make such a request.

¹ [REDACTED].

III. BACKGROUND

6. On 13 July 2016, the Chamber issued the Initial Directions on the Conduct of Proceedings² which were supplemented by the additional guidance in the email from the Chamber on 23 August 2017³. In the directions, the Single Judge indicated that “[i]ssues left unaddressed in the present decision and which require intervention from the Chamber will be dealt with in the course of the trial.”⁴
7. On 6 October 2017, the Chamber, by way of email notified the parties and participants of the court schedule from January to April 2018.⁵
8. On 13 October 2017, the Chamber issued the Preliminary Directions for any LRV or Defence Evidence Presentation.⁶
9. On 27 October 2017, the Defence filed submissions for further directions for a no-case-to-answer motion and request for a schedule change of the January-April 2018 trial schedule.⁷
10. On 1 November 2017, the Prosecution responded to the Defence’s request, asking that all requests be denied.⁸
11. On 2 November 2017, the Defence requested permission for leave to reply to the Prosecution’s response in light of the Prosecution dropping eight (8) witnesses from its list of witnesses. The Prosecution responded to the request for leave to reply stating that it had no objections to the request.
12. On 3 November 2017, the CLRV and LRV jointly responded to the Defence’s request, also asking that all the Defence’s requests be denied, yet strangely enough, requesting more time to prepare its case.⁹

² ICC-02/04-01/15-497.

³ Email, sent 23 August 2017 at 15h16, subject line “Decision on Submitted Materials for P-189”.

⁴ ICC-02/04-01/15-497, para. 4.

⁵ Email, sent 6 October 2017 at 12h32, subject line “Early 2018 Hearing Dates”.

⁶ Preliminary Directions.

⁷ ICC-02/04-01/15-1029-Conf.

⁸ ICC-02/04-01/15-1048-Conf.

⁹ ICC-02/04-01/15-1056-Conf.

13. On 3 November 2017, by email,¹⁰ the Chamber granted leave to reply to the Prosecution's response so long as the reply is restricted to issues which related to the Prosecution's withdrawal of the eight (8) witnesses.

IV. SUBMISSIONS

14. The Defence submits these further observations based on the Prosecution's 31 October 2017 email where it informed the Chamber, Defence and Legal Representatives that it no longer will call eight (8) witnesses to testify.¹¹ The Prosecution announced that it would no longer call witnesses P-0028, P-0048, P-0105, P-0119, P-0146, P-0202, P-0224 and P-0258 ('Withdrawn Witnesses').

A. The Prosecution's withdrawal of eight witnesses does not change the Defence's need for longer breaks

15. The Defence still requires longer breaks between the evidence blocks. The Defence now requests three (3) weeks between each Prosecution evidence block during the 2018 calendar year. Whilst the Defence's arguments based on [REDACTED], fundamental rights, and the human rights of the individual Defence Team members are still valid and of concern, the Defence must now locate and interview the Withdrawn Witnesses.
16. With the end of the Prosecution's case in sight, the Defence is already stretched to its limits. The process has only recently begun to secure passports for its witnesses and complete required forms for the VWU. With the decision by the Prosecution to remove the Withdrawn Witnesses from its list of witnesses, this further increases the already full load of the Defence's investigatory capabilities.
17. The Defence requires time with the resources already availed to it by the Registrar to complete all tasks necessary before it begins its case-in-chief. The directions issued by the Chamber on 13 October 2017, considering the scheduling ordered issued by the Chamber on

¹⁰ Email from the Chamber to Prosecution, Defence, and Legal Representatives, 3 November 2017 at 14h20 CET, "RE: The Prosecutor v. Dominic Ongwen: ICC-02/04-01/15-1048-Conf - Prosecution's Response to Defence Observations on the Chamber's Preliminary Directions and Request for Guidance (ICC-02/04-01/15-1029-Conf)".

¹¹ Email from Prosecution to the Chamber, Defence, and Legal Representatives, 31 October 2017 at 13h22 CET, entitled "171031 – Prosecution's updated list of witnesses – November 2017".

6 October 2017, were a gruelling task to undertake before learning of the Prosecution's removal of the Withdrawn Witnesses.

18. The Defence estimates that it will interview five (5) of the eight (8) Withdrawn Witnesses for three (3) days each.¹² The Defence further estimates that it will spend one to two (1-2) days interviewing P-0202 and P-0258. Finally, the Defence intends to request from the LRVs pursuant to ICC-02/04-01/15-339-Anx, paragraph 28, to speak with P-0119. The Defence notes with caution that these estimates represent projected **days of interviews** and does not include the time necessary to locate each of the witnesses.¹³ [REDACTED].¹⁴
19. [REDACTED],¹⁵ [REDACTED]. The Chamber denied the Prosecution application pursuant to Rule 68(2)(b) for Witness P-0028 because he is one of the highest-ranking persons in the LRA to have been captured or escaped.¹⁶ [REDACTED].¹⁷ These are important witnesses which would help the Court determine the truth.
20. The Defence avers that this shall not alter the projected start time of the cases-in-chief of the LRVs and Defence. As illustrated below, the projected time-table for a site visit is June 2018, and the amount of witnesses left shall easily finish before the approximate time frame.
21. In order to meet and interview the Withdrawn Witnesses for the purpose of determining their viability of being Defence witnesses, the Defence respectfully requests the Chamber to schedule three (3) weeks between each evidence block during the Prosecution's case-in-chief during the 2018 calendar year.

B. Further directions on the date which the Defence must produce its final list of witnesses and evidence is warranted

22. The Defence avers that this shall not alter the timeline envisaged for the presentation of the cases-in-chief for the LRV or the Defence. [REDACTED].¹⁸ With the remaining witnesses scheduled to testify during the Prosecution's case-in-chief in 2018 being 15 witnesses (18

¹² P-0028, P-0048, P-0105, P-0146 and P-0224.

¹³ The Defence admits that it has the contacts of P-0258 from its previous interviews and knows how to contact P-0028, even though the Defence never has contacted that person.

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ ICC-02/04-01/15-596-Conf, paras 214-215.

¹⁷ [REDACTED].

¹⁸ ICC-02/04-01/15-1020-Conf, para. 7.

witnesses if P-0445, P-0446 and P-0447 are counted), the cases-in-chief for the LRVs and Defence will still start on time [REDACTED], even if longer breaks are scheduled between the evidence blocks to allow for Defence Team members to travel from The Hague to Uganda to aid in investigations.

23. This second Defence request, based on the 31 October 2017 email from the Prosecution is that, because of the hardships which the Defence shall face in locating and interviewing some of these witnesses, its final list of witnesses be due on 1 June 2018 or three (3) weeks after the Prosecution finishes its case, whichever is later.
24. Again, following the same reasoning above, this will not delay the case further [REDACTED]. Whilst the Defence's list of witnesses will be slightly later than ordered by the Chamber, the Defence argues that it is necessary in light of the Withdrawn Witnesses. The Defence cannot predict whether it will be able to contact and interview the Withdrawn Witnesses before the Prosecution's case is closed, especially because of individual circumstances listed above, and thus the newly requested date is warranted.
25. [REDACTED]. As noted in its original submissions on this issue, the Government of Uganda has not been as proactive with the Defence as it has been with the Prosecution.¹⁹ The Defence needs this additional time to ensure that it can meet with all the Withdrawn Witnesses, not merely some of them.
26. For the abovementioned reasons, the Defence respectfully requests that the Chamber issues further directions, in addition to those requested in Defence filing 1029-Conf, requiring the Defence to submit its final list of witnesses and evidence on 1 June 2018 or three (3) weeks after the Prosecution closes its case-in-chief, whichever is later.

V. RELIEF

27. The Defence respectfully requests the Chamber to modify the hearing schedule currently in place for January to April 2018 in accordance with the Defence original request and the modifications contained within this reply.

¹⁹ ICC-02/04-01/15-1029-Conf, para. 18.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, stylized 'K' followed by a horizontal line and a small flourish.

.....
Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 8th day of November, 2017
At The Hague, Netherlands