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

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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 Prosecution's Response to Defence Observations on the Chamber's Preliminary Directions and Request for Guidance (ICC-02/04-01/15-1029-Conf), ICC-02/04-01/15-1048-Conf, dated 1 November 2017

Source: The Office of the Prosecutor

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

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Introduction

1. The Prosecution opposes the Defence's requests for the trial's sitting schedule to be delayed and for the Chamber to issue guidance on a 'no-case-to-answer' motion.

Confidentiality

2. This Response is classified as "Confidential", as it refers to a filing ('Defence Request') of the same designation. The Prosecution will file a public redacted version.
3. The Prosecution submits that all of the matters canvassed in the Defence Request can and should be made public (with the possible exception of REDACTED¹ REDACTED).² While specific information about Dominic Ongwen's own health, or that of members of his Defence team would be properly protected by medical confidentiality, generalised assertions about the possibility of the court calendar having an adverse medical effect, or about the side effects of various medicines are not.

Submissions

Scheduling

4. The Chamber has published a schedule for present and future sittings of this trial ('current schedule') as set out in the box below:

Activity	Start date	End date	Working days
Court sitting	30 October 2017	1 December 2017	25
Court recess	4 December 2017	12 January 2018	25 (<i>allowing 5 days of holiday over the festive period</i>)

¹ REDACTED.

² ICC-02/04-01/15-1029-Conf, fn. 29.

Court sitting	15 January 2018	2 February 2018	15
<i>Court recess</i>	<i>5 February 2018</i>	<i>12 February 2018</i>	6
Court sitting	13 February 2018	2 March 2018	14
<i>Court recess</i>	<i>5 March 2018</i>	<i>9 March 2018</i>	5
Court sitting	12 March 2018	28 March 2018	13
<i>Court recess</i>	<i>29 March 2018</i>	<i>6 April 2018</i>	5 (<i>allowing 2 days of holiday over the spring/easter break</i>)
Court sitting	9 April 2018	26 April 2018	14

5. The sum of the concrete proposals for a revised schedule in the Defence Request is that the recess periods in italics above should each be 10 days long, thus totalling 30 days, rather than the total of 16 days in the current schedule.
6. The Prosecution opposes the revisions requested by the Defence. The current schedule contains periods of recess proportionate to the periods of court sitting. Under article 64(2) the Chamber has a duty not only to consider the concerns of the Defence about fairness and the rights of the Accused in terms of time for preparation, but also to ensure that the trial is expeditious.
7. The Defence also proposes unspecified changes to the deadline for the provision of a list of Defence witnesses and other ‘arduous’ deadlines and asks that they be reconsidered.³ In the absence of concrete proposals the Prosecution cannot make any useful reply.
8. The Defence advances two linked arguments in favour of the revised schedule. Firstly they say that the current schedule does not permit adequate preparation time for Dominic Ongwen to receive a fair trial, and secondly they say that if the Chamber does proceed on the current schedule it will harm the Accused’s health and that of those representing him.

³ ICC-02/04-01/15-1029-Conf, para. 46.

Adequate Preparation Time

9. The Defence has had a solid basis from which to understand the nature of the case against Dominic Ongwen for over two years, since the detailed 'Notice Document'⁴ which the Prosecution filed on 18 September 2015. The precise shape of the Prosecution's case and the witnesses the Prosecution intend to call to prove that case have been well known at the very least since the filing of the Prosecution Pre-Trial Brief⁵ on 6 September 2016. Between that time and the filing of the Defence Request about 14 months elapsed, during which the Chamber heard evidence on 92 days.
10. Concerning Dominic Ongwen's own contribution to the work of his Defence team, the Prosecution has ensured that he has had access to Acholi translations of statements and transcripts at least three months in advance of a witness' anticipated testimony, giving him ample time to instruct his Counsel.
11. Furthermore, of the seven witnesses (P-0028, P-0048, P-0105, P-0200, P-0209, P-0224 and P-0258) whom the Defence cites as being particularly burdensome in terms of the time required for preparation, the Prosecution will now be calling only one (P-0200) to give evidence; the others will no longer be called to testify by the Prosecution.
12. The Prosecution is sympathetic to the Defence in respect of some of the challenges described in the Defence Request. Nonetheless arguments that there has been (or will be) insufficient time for reasonable preparation under the current schedule are untenable.

Ill Health

13. If the Defence want to make an argument for a revised schedule based upon the Accused's lack of mental capacity they need to rely upon evidence more

⁴ ICC-02/04/01/15-305-Conf.

⁵ ICC-02/04-01/15-533.

substantial than an assertion that his 'health challenges [...] are known to the Trial Chamber' and the hearsay report REDACTED, the accuracy and usefulness of which was doubted by the very expert witness, Professor de Jong, who noted its existence.⁶

14. The Chamber has appointed this expert to report to it on the Accused's mental fitness to stand trial. There is nothing in Professor de Jong's report to suggest that a court schedule involving sittings on about two thirds of the working days theoretically available to the Chamber would be bad for the Accused's mental health. On the contrary Professor de Jong speaks⁷ of Dominic Ongwen having a good attention span and maintaining his concentration after hours of interviewing.

15. Arguments based upon the Accused's future ill health (or that of his legal representatives) which would have the effect of delaying justice for the victims (and for the Accused himself) need to be supported by medical evidence of direct relevance to the issue at hand. The Defence provides none.

No case to answer

16. The Defence asks the Chamber to devise and promulgate a procedure whereby a 'no-case-to-answer' motion for Mr Ongwen's acquittal of some or all of the charges against him may be filed, responded to, considered by the Chamber and ruled upon.

17. The Prosecution opposes the promulgation of any such procedure. The Defence is not yet certain that such a motion is appropriate; they inform the Chamber that they *intend* to file a no-case-to-answer motion,⁸ but in the same paragraph

⁶ ICC-02/04-01/15-702-Conf-AnxII, fn. 4.

⁷ ICC-02/04-01/15-702-Conf-AnnxII, p. 4.

⁸ ICC-02.04-01/15-1029-Conf, para. 29.

state that such a motion *may potentially* be filed, depending on ‘an evaluation of the Prosecution evidence as a whole’.

18. As the Defence recognises,⁹ appellate case law dictates that the Chamber has a discretion as to whether to conduct a ‘no-case-to-answer’ procedure at all. This discretion “must be exercised on a case-by-case basis in a manner that ensures that the trial proceedings are *fair* and *expeditious*”¹⁰ (emphasis added).
19. In short the Chamber will be balancing the risk that a refusal to conduct a ‘no-case-to-answer’ procedure in respect of any particular charge will cause unfairness to the Accused against the risk that permitting such a procedure will cause disproportionate delay. The Prosecution submits that this balance will come down in favour of conducting such a procedure primarily in those cases where the evidence considered by the Pre-Trial Chamber as amounting to “substantial grounds to believe that [the accused] committed the crime[s] charged” has not come up to proof at the trial.
20. With the Defence itself unsure how it will proceed, and in the absence of even outline submissions as to how a refusal to conduct such a procedure will cause unfairness to the Accused, the Chamber is not yet in a position to exercise its discretion. To devise and promulgate a procedure now, as requested by the Defence, would be premature.

⁹ ICC-02.04-01/15-1029-Conf, para. 31.

¹⁰ ICC-01/04-02/06-2026, para. 44.

Conclusion

21. The Prosecution opposes the Defence Request. There has been adequate time to prepare the case, and the possible adverse health impacts alluded to in the Defence Request are not substantiated. With regard to a possible no-case-to-answer procedure, the Defence themselves have not yet made a decision, and there is insufficient information at the moment for the Chamber to properly exercise its discretion. The Defence Request should be denied.



Fatou Bensouda , Prosecutor

Dated this 3rd day of January 2018
At The Hague, The Netherlands