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No.: **ICC-02/04-01/15**
Date: **11 December 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

Defence Observations on Fair Trial and Request for Orders on Prosecution Resources and Additional Defence Resources

Source: **Defence for Dominic Ongwen**

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

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I. INTRODUCTION

1. The rights of an accused, mirroring those enshrined in international instruments,[1] are found in the Rome Statute, Article 67. The first sentence of the Article reads:

> *In the determination of any charge, the accused shall be entitled to a public hearing, having regard for the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equity.*

2. Here, in this case, where the Prosecution has charged, and Pre-Trial Chamber II has confirmed, 70 criminal allegations and 7 modes of liability,[2] the rights of Mr Ongwen have been violated by a severe inequality in resources between the Prosecution and the Defence.

3. To remedy, this violation of fair trial, the Defence requests that the Trial Chamber IX ('Chamber') order the Prosecution to produce a catalogue of its resources, including but not limited to, personnel named on the *Ongwen* Prosecution team, budgetary information, supplemental and ancillary resources which are available to the *Ongwen* Prosecution team within the Office of the Prosecutor ('OTP') as well as within the Ugandan government; and order additional resources for the Defence.

II. SUBMISSIONS

A. Article 67 is premised on full equality of the Defence with the Prosecution

4. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[3]

5. Article 67 indicates that the fair trial rights identified are minimum guarantees, to be implemented in full equality with the Prosecution. 'In full equality' has to be in relation to another entity; here that entity is the Prosecution. Thus – although the words 'the Prosecution' do not appear in Article 67 – the Article should be interpreted as meaning that an accused's rights should be implemented 'in full equality' with the Prosecution, for example, regarding

[1] UN Human Rights Committee, General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32; ICTR Statute, Article 20; ICTY Statute, Article 21.
[2] ICC-02/04-01/15-422 ('CoC Decision').
[3] United Nations, Vienna Convention on the Law of Treaties, Section 3, Article 31, para. 1.

adequate time and facilities. Within the object and purpose of the Article to provide a fair and impartial hearing, the provision 'in full equality' must be read broadly.[4]

6. The rights of Article 67 are interdependent: Article 67(1)(e) – the right to present a defence, depends, for example on Article 67(1)(b) – adequate time and facilities for preparation,[5] Article 67(1)(d) – right to counsel of defendant's choice and Article 67(1)(f) – the right to interpretation and translation.

7. The Defence avers that Article 67(1)(a) is listed first for a reason; it describes the right to be informed of the charges lodged against an accused – which procedurally triggers all other subsequent rights. The purpose of the notice requirement is to provide specific details to an accused, so she or he can defend the case against her or him.[6]

8. Article 67(1)(b) is listed second. Triggered by Article 67(1), it is the right to have the means to implement a defence against the charges and modes of liability for which notice is provided. The section identifies adequate time and facilities to prepare the defence, and confidential communication with counsel of an accused's choice. However, additional rights under Article 67, especially translation and interpretation in an accused's language, should also be included under "means".

B. The Decision on the Confirmation of Charges was rendered in the context of fair trial violations, and severe inequality of the Defence with the Prosecution

1. Investigations

9. When the Confirmation of Charges Decision ('CoC Decision') was rendered on 23 March 2016, the Prosecution had already been investigating the situation in Uganda since 2004 – more than a decade earlier – and with a specialized complement of professionals.

[4] ICC-01/04-01/06-1091, para. 18: (Article 67 encompasses the principle of equality of arms. This principle suggests that the minimum guarantees must be generously interpreted so as to ensure that the defence is placed insofar as possible on an equal footing with the prosecution, in order to protect fully the right of the accused to a fair trial); *see also* ICC-01/04-01/07-3436-tENG, para. 1572.
[5] ICC-01/04-01/07-3436-tENG, para. 1572
[6] Article 67(e) of the Statute.

10. The OTP 'Report on the Activities Performed During the First Three Years'[7] reveals that in Uganda:

    i. The Uganda joint team was recruited in early 2004. The team included a total of 15 professional staff drawn from the three Divisions of the OTP. The investigation was opened on 28 July 2004. In just ten months, Office investigators conducted over 50 missions to the field and collected sufficient information to successfully apply for five warrants of arrest against the top LRA commanders.[8]

    ii. Since February 2004, the Office conducted 20 missions to the field to meet with local and international stakeholders in order to understand the context and the interests of victims. In March and June 2006, the Office as part of a Registry outreach programme, held in-depth workshops with over 150 traditional leaders, over 120 NGOs, 50 local government representatives and 50 religious leaders from across Northern and Eastern Uganda.[9]

11. Moreover, this work was supported by additional, institutionalized resources within the OTP:

    i. Specifically, the Office is guided by strategic oversight provided by the Executive Committee, comprised of the Chief Prosecutor and the heads of the three divisions, which defines the Office policies and supervises the operations of the project-driven joint teams. Each of the joint teams – the core operational units of the Office – works on different cases (DRC, Northern Uganda, and Darfur) and is supported by the three divisions (Jurisdiction Cooperation and Complementarity Division, Prosecutions Division, and Investigations Division). The Divisions are responsible for maintaining specific knowledge, staff training, recruitment and consistent quality levels.[10]

12. More recently, the Report on the Activities of the International Criminal Court, submitted to the Assembly of State Parties, Sixteenth Session, indicates that in the one year period between 16

[7] The Office of the Prosecutor, Report on the Activities Performed During the First Three Years (June 2003 - June 2006), 12 September 2006.
[8] The Office of the Prosecutor, Report on the Activities Performed During the First Three Years (June 2003 - June 2006), 12 September 2006, p. 14-15.
[9] The Office of the Prosecutor, Report on the Activities Performed During the First Three Years (June 2003 - June 2006), 12 September 2006, p. 16.
[10] The Office of the Prosecutor, Report on the Activities Performed During the First Three Years (June 2003 - June 2006), 12 September 2006, p. 25.

September 2016 and 15 September 2017, the OTP conducted 31 missions in three countries for the case against Mr. Ongwen.[11]

13. In comparison, the Defence investigations did not commence until March 2015 when counsel, chosen by Mr Ongwen, accepted his position.[12] This was 11 years after the Prosecution commenced its investigations in this case.

14. By any calculation, the Prosecution had a qualitative head start of more than a decade on investigations, which caused prejudice to Mr Ongwen – who had a severe handicap. In particular, the Defence could not compete with the length of time or quantity of Prosecution resources, and could not conduct the kinds of investigations, with a limited budget, over a period of time which are necessary to protect fair trial rights. The Defence suggests that it is fair to conclude that the Prosecution's investigations budget, now going on 13 years, far exceeds the allotments to the Defence. This gross inequity prejudices the Accused because it limits the investigation, and is a violation of the Accused's fair trial rights.

15. Lastly, given the circumstances that the Situation in Uganda was a referral to the ICC by the Attorney General of Uganda on 16 December 2003,[13] the OTP also had access to a state apparatus with well-developed resources. In some ways, the government of Uganda is a silent partner with the Prosecution.

2. Trial Proceedings

16. The Prosecution and Defence teams in this case, as far as personnel on the teams as well as resources, are grossly unequal.

17. One of the inequalities in respect to resources is illustrated by the Defence's outdated Ringtail version, provided by the ICC. The Prosecution has been working with more advanced software than has been provided to the Defence for at least some years. Whereas the Defence is using

[11] ICC-ASP/16/9, 2 November 2017, p. 12, para 93.
[12] *See* ICC-02/04-01/15-201-AnxVI. The annex lists an official appointment date of 23 February 2015. Until meeting Mr Ongwen in March 2015, Counsel was unable to receive instructions from Mr Ongwen, and thus could not conduct investigation until after leaving The Hague in the end of March 2015.
[13] UGA-OTP-0132-0392.

software that is almost a decade old (circa 2008), the Prosecution has been using a version that dates from approximately 2012-2015.[14]

18. The Court is currently in the process of upgrading the Ringtail software through which disclosures and court room evidence presentation are handled, and evidence analysis is conducted. During a consultation meeting on 21 November 2017, members of the *Ongwen* Defence became aware that the Prosecution has been using a more sophisticated and updated version of Ringtail.

19. The resulting harm of out-moded technology for the Defence is that more time must be spent by the Defence on the same tasks of analysis involving documents than the Prosecution spends.[15] Coupled with the inequality in the number of personnel, this time factor compounds the fair trial violation in respect to an accused's right to adequate resources and facilities.

20. Based on observing the Courtroom presence, the *Ongwen* Prosecution team includes at least 13 personnel acting on behalf of the Prosecutor, who questions witnesses.

21. The Ongwen Defence team has four persons available at the seat of the court to do the same.[16]

22. The big inequality factor, however, is the unseen or hidden members of the *Ongwen* Prosecution team – those who do specialized work on the case, but may not appear in the Courtroom.

23. For example, the OTP 'Policy Paper on Sexual and Gender-Based Crimes' states that "[t]he Office will enhance its institutional capacity to investigate and prosecute sexual and gender-based crimes with the assistance of its Gender and Children Unit ("GCU") and the Special

[14] Version 8 was released on 31 January 2011, see http://www.ftitechnology.com/company/press-releases/ftilaunch-ringtail-8-e-discovery-software; the Defence understood that Prosecution is using approximately 8.5 or 8.6.
[15] Most software changes dramatically in 4 to 7 years (*see* press release: http://www.ftitechnology.com/company/press-releases/fti-launch-ringtail-8-e-discovery-software). The changes affect, for example, analysis tools, error free text searches, a more efficient interface, or simply a more responsive system (e.g. less waiting for pages and searches to load) – all of which must be equally available to the Defence.
[16] The Defence does not count persons who require leave of court to examine witnesses.

Gender Adviser to the Prosecutor."[17] In fact, at the time of the Policy Paper, two gender advisers had been appointed.[18]

24. These additional institutionalized resources of the OTP on SGBC are obviously critical to their investigation and prosecution of at least nine counts (60-68) against the defendant.

25. The report also identifies an infrastructure within the OTP to address witness issues.[19] These include its Prosecution Strategies Unit ('PSU'); Operations Support Unit ('OSU'); as well as the GCU and Planning and Operations Section ('POS').[20]

26. No such apparatus exists on the Defence side – either through the Office of Public Counsel for the Defence ('OPCD') and certainly not on the Defence team. Yet, it would be fair to assume that Defence witnesses, like Prosecution witnesses, face similar safety, physical and psychological well-being issues. The point is that the OTP resources are in addition to the Victims and Witness Unit ('VWU'). But, for Defence Witnesses, there are only the resources of the VWU, which is highly restricted in the assistance which it can provide to parties and participants.

27. It is obvious that the Defence has no resident, institutionalized advisers on SGBC, nor does it have the organized infrastructure.

28. In sum, the OTP has access to resources that are unavailable to the Defence, unless, a special request for 'x and y' is approved and granted by the Registry. It is the difference of being able to provide, as a routine matter, for example, advisers and resources on SGBC as opposed to the Defence which must essentially petition on an individual basis to get a resource person or some particular assistance for vulnerable witnesses.

C. The inequality of personnel and resources available to the Defence compounds the existing violation of notice in this case

29. Under Article 67(1), an accused has the right to "be informed promptly and in detail of the nature, cause and content of the charge, in a language the accused fully understands and speaks." To date, Mr Ongwen has not been provided with a complete translation in Acholi of

[17] The Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, June 2014, p. 7.
[18] The Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, June 2014, para. 113.
[19] The Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, June 2014, para. 85.
[20] The Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, June 2014, para. 85.

the Confirmation of Charges decision issued in March 2016. This is a blatant violation of Article 67(1).[21]

30. The Prosecution is expected to know its case before proceeding to trial and cannot mould the case against the accused during the course of trial depending on how the evidence unfolds.[22]

31. By confirming 70 charges and 7 modes of liability in a single-Accused case – based on the Prosecution's Document Containing the Charges ('DCC')[23] – the PTC II has endorsed the Prosecution's moulding of its case, based on the evidence as it unfolds in the proceedings. This is legally prohibited by existing *ad hoc* appellate jurisprudence.[24]

32. It is not for the Defence to guess against which conduct it must defend – which is the posture in which the Defence has been placed by the Prosecution and the Pre-Trial Chamber II.

33. In the *Ongwen* case, Mr Ongwen was not provided notice with a sufficient degree of specificity. Instead, the Prosecution provided a smörgåsboard of charges and modes of liability, with the idea that the Chamber would make a final determination of charges based on the evidence.

34. What is wrong with confirming the smörgåsboard approach is that the theory of the Prosecution's case is both unclear, and quite often, contradictory. For example, Mr Ongwen is charged with individual criminal liability and command responsibility in relation to many of the same alleged crimes: is the defendant culpable as an individual, or as a commander? The theories in support of each are distinct and both forms of liability require different elements. This means that the Defence must argue against each mode of liability, which can require different investigations, witnesses and evidence.

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[21] The Defence requested a complete Acholi translation after the March 2016 decision was issued. It is now almost 21 months later, and only some sections have been translated. The translation stops at para 145, and does not include the remaining paragraphs of the Decision, the confirmed Statement of Facts and Charges for the counts, or the Separate Opinion of J. de Brichambaut. The Defence has been informed that a complete translation will not be available until February 2018 – close to **two years after the Confirmation of Charges decision was issued**. This does not satisfy the requirement of being informed promptly.

[22] See *Muvunyi v. Prosecutor*, ICTR-00-55A-A, *Judgement*, 29 August 2008, para. 18; *Ntagerura v. Prosecutor*, ICTR-99-46-A, *Judgement*, 7 July 2006, para. 27; *Prosecutor v. Kvočka et al*., IT-98-30/1-A, *Judgement*, 23 February 2005, para. 31; *Prosecutor v. Kupreškić*, IT-95-16-A, *Appeal Judgement*, 23 October 2001, para. 92; *See also Pelissier and Sassi v. France*, Application no. 25444/94, *Judgment*, 25 March 1999, para. 52 available at: http://hudoc.echr.coe.int/eng?i=001-58226.

[23] ICC-02/04-01/15-375-AnxA.

[24] *See Muvunyi v. Prosecutor*, ICTR-00-55A-A, *Judgement*, 29 August 2008, para. 18; *Ntagerura v. Prosecutor*, ICTR-99-46-A, *Judgement*, 7 July 2006, para. 27; *Prosecutor v. Kvočka et al*., IT-98-30/1-A, *Judgement*, 23 February 2005, para. 31; *Prosecutor v. Kupreškić*, IT-95-16-A, *Appeal Judgement*, 23 October 2001, para. 92; *See also Pelissier and Sassi v. France*, Application no. 25444/94, *Judgment*, 25 March 1999, para. 52 available at: http://hudoc.echr.coe.int/eng?i=001-58226.

35. All this translates into a huge amount of financial and human resources, as well as time and facilities, which are required to satisfy Article 67(1)(b) – for the 70 charges and 7 modes of liability. Simply put, there is no "one size fits all" defence in this case.

36. Had Pre-Trial Chamber II more prudently confirmed the charges and modes of liability, a different CoC Decision may have been provided to the Defence, requiring less resources, time and facilities – but that is not the situation.

37. In sum, the CoC Decision confirmed this plethora of charges and modes of liability, and the Chamber is presiding over the trial of same. The Defence submits that the Chamber, pursuant to Article 64(2), also has the responsibility to ensure that there are fair trial guarantees in place, including in respect to time/scheduling, resources and facilities.

38. While the reality of equality of arms is yet to be realized for the Defence in the international courts and tribunals, it remains a fundamental right of fair trial.[25] This means that the ICC should strive to provide this fundamental fair trial right.

III. REMEDY SOUGHT

39. The severe inequalities violate the Accused's right to a fair trial and result in prejudice to the Accused, at both the pre-trial and trial stages.

40. For the reasons above, the Defence requests that the Chamber

a) ORDER the Prosecution to produce a catalogue of it resources, including but not limited to, personnel named on the *Ongwen* Prosecution Team, budgetary information, supplemental and ancillary resources which are available to the *Ongwen* Prosecution Team within the ICC Office of the Prosecutor as well as within the Ugandan Government;

b) ORDER a report on Defence resources to be provided by the Registry; and

[25] *Foucher v. France*, Application no. 22209/93, *Judgment*, 18 March 1997, para. 34, available at: http://hudoc.echr.coe.int/eng?i=001-58017, para. 34; *Bobek v. Poland*, Application no. 68761/01, *Judgment*, 17 July 2007, para. 56, available at: http://hudoc.echr.coe.int/eng?i=001-81677; *Klimentyev v. Russia*, Application no. 46503/99, *Judgment*, 16 November 2006, para. 95, available at: http://hudoc.echr.coe.int/eng?i=001-78031.

c) ORDER additional resources for the Defence, including personnel, budget, time and facilities to ensure that the Defence is treated in full equality with the Prosecution.

Respectfully submitted,

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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 11th day of December, 2017

At Gulu, Uganda