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No.: **ICC-02/04-01/15**
Date: **5 July 2018**

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 Request for Leave to File a No Case to Answer Motion and Application for Judgment of Acquittal

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 Defence for Dominic Ongwen ('Defence') seeks leave to file a no case to answer and judgment for acquittal motion ('Request') of the charges and modes of liability proffered against Mr Ongwen.

2. On 13 July 2016, Trial Chamber IX ('Trial Chamber') issued the Initial Directions on the Conduct of Proceedings[1] which were supplemented by email from the Trial Chamber on 23 August 2017.[2] 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."[3]

3. The Trial Chamber has the power to exercise "any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11." Rule 7 and Rule 132*bis* enable the Single Judge to take decisions for the whole Chamber. At the request of a party under Rule 7(3) or Rule 132*bis*(3)of the Rules of Procedure and Evidence ('RPE'), the Trial Chamber may decide that the functions of the Single Judge be exercised by the full Chamber. Given the inherent gravity of matters arising under request for no case to answer, the Defence respectfully requests that the decision be taken by a full Chamber, and not the Single Judge.

II. PROCEDURAL HISTORY

4. On 13 October 2017, the Trial Chamber issued the Preliminary Directions for any LRV or Defence Evidence Presentation.[4]

5. On 27 October 2017, the Defence filed observations on the Preliminary Directions and requested guidance on a procedure for a no case to answer motion.[5]

6. On 16 November 2017, the Trial Chamber issued its Decision on Defence Observations on the Preliminary Directions for any LRV or Defence Evidence Presentation and Request for Guidance on Procedure for No-Case-to-Answer Motion.[6]

[1] ICC-02/04-01/15-497.
[2] Email, sent 23 August 2017 at 15h16, subject line "Decision on Submitted Materials for P-189".
[3] ICC-02/04-01/15-497, para. 4.
[4] ICC-02/04-01/15-1021.
[5] ICC-02/04-01/15-1029.

7. On 13 April 2018, the Prosecution filed its certification of the close of its case[7] and on 24 May 2018, the Victims' Representatives concluded their evidence presentation.

8. On 5 June 2018, the Trial Chamber set out the schedule and dates for the commencement of the presentation of the Defence case.[8]

III. APPLICABLE LAW

9. Under Article 64(2) of the Rome Statute ('Statute'), the Trial Chamber has an obligation to ensure a fair and expeditious trial with full respect for the rights of the accused person and with due regard for the protection of victims and witnesses.

10. In addition, with regard to its functions and powers under Article 64(3)(a) of the Statute, the Trial Chamber shall confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings.

11. Under Article 64(6)(f) of the Statute, the Trial Chamber may rule on any relevant matters.

12. Rule 134 of the Rules of Evidence and Procedure ('RPE') provides for motions relating to trial proceedings. Specifically, Rule 134(3) of the RPE provides that:

> After the commencement of the trial, the Trial Chamber, on its own motion, or at the request of the Prosecutor or the defence, may rule on issues that arise during the course of the trial.

13. Article 66 of the Statute which pertains to the presumption of innocence also puts the onus of proof of an accused's guilt beyond reasonable doubt solely on the Prosecution.

14. Although the Statute does not expressly provide for a no-case-to-answer motion, a reading of Articles 64, 66, 67, together with 74(2) of the Statute demonstrate that such a motion is feasible under the legal framework. The Appeals Chamber in *The Prosecutor v Ntaganda* has held that a Trial Chamber "may decide to conduct such a procedure based on its power to rule on relevant matters pursuant to Article 64(6)(f) of the Statute and rule 134(3) of the Rules."[9]

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[6] ICC-02/04-01/15-1074.
[7] ICC-02/04-01/15-1225.
[8] ICC-02/04-01/15-1275.
[9] ICC-01/04-02/06-2026, para 44.

IV. SUBMISSIONS

Standard of Review

15. The Defence proposes that in evaluating this Request, the Trial Chamber should adopt and apply the test in the *The Prosecutor v. Ruto and Sang* where Trial Chamber V(A) said that the "…the test to be applied in determining a 'no case to answer' motion, if any, in this case is whether there is sufficient evidence on which a reasonable Trial Chamber *could* convict… The Chamber will not consider questions of reliability or credibility relating to the evidence, save where the evidence in question is incapable of belief by any reasonable Trial Chamber."[10]

16. The Defence seeks to make concise and focused submissions on specific legal and factual issues which in the Defence view, are insufficient to reasonably sustain a conviction and thus support an acquittal at this juncture. The Defence recalls the jurisprudence in the *Ruto and Sang* case where it was held that in trials of this nature, it cannot be the case that a Trial Chamber should only consider the quantity of the evidence, not the quality and that it would be against the interests of justice for a Trial Chamber to abstain from making a credibility assessment of the evidence at the no-case-to-answer stage where the evidence before it, at the end of the prosecution case, is of an isolated nature and the witness testimonies would cause significant gaps in the Prosecution's theory of the case to make it unlikely that a conviction in the case could ultimately follow. A Trial Chamber should make an evaluation to avoid the trial continuing for another couple of years without any real prospect of a conviction.[11]

17. The Defence further submits if the Chamber adopts this proposal, it should not limit itself to an assessment of the quantity of evidence presented but also to its *prima facie* quality, especially if some parts of the evidence appear to be at variance or contradict other parts of the Prosecution case. The Defence submits that this approach does not circumvent the Trial Chamber's previous decisions which have categorically stated that the consideration of relevance and admissibility of evidence shall be at the conclusion of hearing all the evidence in the case.[12] The Defence aligns itself with the recent Appeals decision in *The Prosecutor v. Bemba* where Judges Van den Wyngaert and Morrison stated that it is necessary to rule on the

[10] ICC-01/09-01/11-1334.
[11] ICC-01/09-01/11-2027-Red-Corr. Para. 144.
[12] ICC-01/04-01/15-1074, para 33.

admissibility of all evidence submitted by the parties sufficiently and rigorously to avoid crowding the case record with evidence of inferior quality.[13] As a matter of fact, this Trial Chamber has previously made findings on relevance and probative value, effectively ruling on the possible admissibility of proffered evidence by rejecting a disclosure request.[14] The Defence invites the Trial Chamber to apply this approach in granting this Request.

The Procedure is Appropriate and Necessary

18. With the conclusion of the presentation of evidence from the Prosecution and the representatives of the victims, the Defence requests leave to file a no case to answer motion and a judgment of acquittal. The Prosecution has failed to meet the legal standard of presenting sufficient evidence on which this Chamber could reasonably convict Mr Ongwen. The Defence has identified several legal and factual issues in the Prosecution theory of the case and testimonial record, and avers that resolving these issues at this stage will streamline the proceedings in a fair and expeditious manner and ensure the protection of Mr Ongwen's fair trial rights enshrined in the Statute.

19. The Defence is cognizant of the recent Appeals Chamber decision in *The Prosecutor v Ntaganda* case which confirmed that this procedure is discretionary to each Trial Chamber.[15] Whereas the Initial Directions on the Conduct of Proceedings and the Preliminary Directions are silent on the procedure, the Trial Chamber has previously taken no position on whether such a motion will be entertained.[16] The Defence notes that Trial Chamber I in *The Prosecutor v. Gbagbo and Blé Goudé* has recently adopted this procedure[17] and invites this Trial Chamber to follow suit for the reasons discussed below.

20. The Defence submits that granting this Request is appropriate because the specific circumstances of this case warrant this course of action. The Trial Chamber in this case arguably adopted a format that is adversarial in nature. With the conclusion of the presentation of inculpatory evidence, this is an appropriate juncture to evaluate the appropriateness of proceeding with the entire 70 counts and 7 modes of liability alleged

[13] ICC-01/05-01/08-3636-Anx2, para 18.
[14] ICC-02/04-01/15-1290, para 12.
[15] ICC-01/04-02/06-2026.
[16] ICC-01/04-01/15-1074, para 34.
[17] ICC-02/11-01/15-1174, para 10.

against Mr Ongwen. The Trial Chamber must ensure that the trial does not take longer than is needed and adopting a no case to answer procedure will contribute to a more focused trial.

21. Further, the facts and circumstances of this case are distinguishable from the *Ntaganda* case, not only because of the voluminous number of charges and modes of liability against Mr Ongwen, but also because of legal and factual issues peculiar to this case. Additionally, in the *Ntaganda* case, some important legal issues had been resolved on appeal at the time of rejecting the no case to answer motion.[18] Granting this Request will streamline the proceedings by weeding out unnecessary charges and modes of liability that Mr Ongwen need not defend against.

22. The Defence will now highlight a few examples that are not exhaustive of the issues that would be raised in the no case to answer motion should this Request be granted.

Lack of Notice

23. The Defence notes the holding in the recent Appeals Chamber decision in *The Prosecutor v Bemba et al.* which confirmed that the accused has the right to be duly informed of the "nature, cause and content" of each "charge" of the case pursuant to Article 67(1)(a).[19] The Appeals Chamber also confirmed that indeed the Prosecutor being the "charging entity" under the Court's legal framework, has the responsibility to clearly formulate the charges.[20] The Appeals Chamber further confirmed that whereas at the Pre-Trial stage, the document containing the charges serves as the authoritative statement of the charges, upon confirmation, however, this authority transposes to the confirmation decision issued by the Pre-Trial chamber.[21] The Defence avers that where notice is insufficient, as it is in this case, the Defence cannot present a defence. As highlighted in Judge Brichambaut's separate opinion, the Confirmation of Charges Decision is deficient because it does not explicitly define some of the charges and modes of liability and the supporting evidence of each charge is not identified.[22] This is not withstanding the Pre-Trial Chamber's duty to set out, clearly and precisely, definitions of each of the crimes charged against the accused, and supplement each definition with succinct description of the

[18] See ICC-01/04-02/06-1962 which was a second appeal decision on the question of jurisdiction for some of the charges against Mr Ntaganda.
[19] ICC-01/05-01/13-2275-Red, para 185.
[20] ICC-01/05-01/13-2275-Red, para 196.
[21] ICC-01/05-01/13-2275-Red, para 196.
[22] ICC-01/04-01/15-422-Anx-tENG, para 14.

main evidence it considers relevant to make out each of these crimes and each of the modes of liability ascribed to the accused.[23]

24. It is not for the Defence to guess against which conduct it must defend. Mr Ongwen has the right not to be called to answer a charge unless there is sufficient and credible evidence of his implication in the offences with which he is charged.[24]

25. The Defence cannot fully know the perceptions and leanings of the Trial Chamber. Despite doubts as to the legal solidity of particular charges, Counsel may still consider that the correct ethical course of action is to defend against all charges that might otherwise have no chance of success at the close of the deliberation stage. With the already stretched resources available to the Defence, retaining the charges not supported by sufficient evidence and with no prospect of conviction would be unfair and a breach of Mr Ongwen's rights under Article 67(1)(b).

26. Additionally, in a case with such a multitude of crimes and modes of liability charged, a no case to answer motion will guard against violations of Mr Ongwen's right not to be compelled to testify and to remain silent, without such silence being considered in the determination of guilt or innocence pursuant to Article 67(1)(g) of the Statute which extends the presumption of innocence in Article 66 of the Statute. This is true concerning the possibility of Mr Ongwen testifying in his own right, as well as the wider principle that emanates from the presumption of innocence as there is no statutory requirement for the Defence to call witnesses and present evidence.

Defective charges

27. The Defence has identified a number of charges that are not supported by sufficient evidence or no evidence at all, perhaps due to an erroneous understanding of the law by the Prosecution, or an attempt to expand the settled interpretation and clear intent contained in statutory provisions. As an example, Mr Ongwen is charged with four counts of pillaging under Article 8(2)(e)(v) of the Statute relating to the charged crime bases of Pajule, Odek, Lukodi, and Abok.[25] The Defence notes the jurisprudence of this Court and the ad hoc

[23] ICC-01/04-01/15-422-Anx-tENG, para 10.
[24] ICC-01/04-02/06-2026, para 46.
[25] Counts 9, 21, 34, and 47 respectively.

tribunals that requires that the property subject to the crime of pillaging belongs to an "enemy" or "hostile" party to the conflict.[26] The Prosecution has not brought evidence to demonstrate that the property allegedly pillaged from the IDP camps belonged to the Government of Uganda forces that were stationed **in** the camps or that the civilian population in the camps were enemies of, or hostile parties against the LRA. This legal issue, among others, is demonstrative of the need to grant this Request.

Modes of Liability

28. An example in this category of errors that need to be addressed at this juncture is the evidence to support crime base charges. The Defence submits that the Prosecution evidence in support of the charges pertaining to the Pajule IDP camp is insufficient and untenable to warrant the need for the Defence to adduce evidence in this regard. The Prosecution, in its Pre-Trial Brief affirmed that there was evidence to show that the Pajule attack resulted from a "common plan" that was "**conceived** (emphasis added) and implemented by Dominic Ongwen together with other senior commanders of the LRA, including Joseph Kony, Vincent Otti, Raska Lukwiya and Bogi Bosco ("Pajule co-perpetrators")."[27] The Prosecution further averred that a meeting was held where "senior LRA commanders **agreed** (emphasis added) on a common plan to attack Pajule IDP camp."[28] The Defence points out that in the Prosecution Pre-Trial Brief, some of the evidence in support of the Prosecution case is of witnesses that were neither called to testify, nor were their statements submitted into the record through other avenues.[29] Two of those witnesses were withdrawn even before testifying.[30]

29. Further, the Defence also notes that the Prosecution made representations clarifying to the Trial Chamber that it was "not actually relying on this witness with regard to the charged Pajule attack".[31] It is obvious that this was a disingenuous way to circumvent its good faith obligations not to pursue unsubstantiated charges. The conclusion that the Prosecution intended to rely on this witness but then abandoned this without acknowledging the same is supported by:- the witness' statement[32] that approximately had two pages focused on Pajule;[33]

[26] ICC-01/04-01/07-717 para. 329.
[27] ICC-01/04-01/15-533, para 206.
[28] ICC-01/04-01/15-533, para 208.
[29] See for example, P-0052's statement referenced in footnotes 605, 609, 610, and 620.
[30] P-0048 and P-0146 whose statements are referred to in the Pre-Trial Brief were withdrawn on 31 October 2017 via email titled "171031 – Prosecution's updated list of witnesses – November 2017".
[31] P-0448's testimony T-157 page 15 lines 14-16.
[32] UGA-OTP-0236-0557.

the summary of anticipated testimony provided by the Prosecution;[34] the line of questioning in this regard that was pursued and later aborted by the Prosecution; not to mention the fact that the witness is relied upon to support allegations of conscription of child soldiers from the charged Pajule.[35]

30. There is no technical evidence – in other words intercepts – to support the Prosecution theory that Mr Ongwen conceived or agreed on a common plan to attack Pajule. Neither is there witness testimony to demonstrate Mr Ongwen's contribution during the alleged meeting. Whereas both P-0309 and P-0330 who were allegedly in Mr Ongwen's household place Mr Ongwen at the meeting point and at the attack, both acknowledged that they did not hear Mr Ongwen say anything at that meeting.[36] There is no supporting documentation from the UPDF that Mr Ongwen was involved in that attack, apart from him traveling with Vincent Otti. It was Vincent Otti who reported the attack to Joseph Kony, according to Prosecution evidence[37]. This ground alone, the Defence submits, is sufficient to merit an acquittal even without analysing the credibility of Prosecution witnesses.

31. Another example is Mr Ongwen's alleged position as a senior commander in the LRA. Again, the Defence notes the Prosecution's withdrawal of eight testifying witnesses on 31 October, 2017, two of whom were senior members in the LRA's Control Altar during the charged period and had been in the LRA even longer than Mr Ongwen.[38] The only reasonable inference to be drawn from this, is that the Prosecution, in its assessment, determined that their proposed witnesses were not going to support the flawed theory of their case. This is particularly with regards to Mr Ongwen's alleged position and stature within the LRA during the charged period, as well as his participation, if any, in the crimes charged.

32. The Prosecution, however, has not sought the Trial Chamber's permission to withdraw any of the charges against Mr Ongwen pursuant to Article 61(9) of the Statute. Since the Prosecution has not sought to withdraw those charges, the Defence avers and contends that a no case to answer decision and judgment of acquittal on those charges would be appropriate at this stage. This would strike out 10 counts and streamline the case further down the line.

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[33] UGA-OTP-0236-0557, 0561-0563, paras 30-42.
[34] ICC-01/04-01/15-532-Conf-AnxC, page 132.
[35] ICC-01/04-01/15-533, para 713, fn 1874.
[36] See for instance P-0309's testimony at T-60 page 45, lines 4-8.
[37] See generally ICC-01/04-01/15-533, paras 258-262
[38] P-0028 and P-0258.

Fair and expeditious conduct of proceedings

33. The resolution of these issues may impact upon whether there is a case to answer and certainly impact upon the selection of witnesses and evidence for the Defence case. If given the opportunity, the Defence shall make submissions on these as well as other factual and legal issues identified. The Defence believes that these matters are fundamental to fairness, notice, and expeditiousness, and should be resolved in advance of the Defence case.

34. The Defence underscores the appropriateness of adopting a procedure for no case to answer motion in the present case considering the volume of the charges against Mr Ongwen. Even a partial acquittal of some charges would greatly streamline the Defence case by limiting the scope of its case to only those charges for which the Prosecution would have shown a *prima facie* case. The time alone saved through such a procedure would compensate the amount of time taken to defend against all the 70 counts against Mr Ongwen. This would further enhance Mr Ongwen's fair trial rights guaranteeing his right to remain silent under Article 67(1)(g) of the Statue. In addition, this would be at par with the provisions of Article 64(2) of the Statute which would prevent the unnecessary calling of defence witnesses.

V. RELIEF SOUGHT

35. For the reasons stated above, the Defence respectfully requests that leave is granted by the Trial Chamber to file a no case to answer and judgment of acquittal motion.

Respectfully submitted,

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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 5th day of July, 2018
At Kampala, Uganda