

**Cour
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**International
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Court**

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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***

Confidential

Joint Response to the “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”

Source: Office of Public Counsel for Victims
Legal Representative of Victims

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. Counsel¹ submit that the Defence' request for the Chamber to provide directions on a possible no-case-to-answer motion shall be rejected because it is speculative and premature at this stage of the proceedings.

2. On the Defence's contention in relation to the time line for the presentation of its case, Counsel submit that it should be rejected as groundless. Indeed, in accordance with the Preliminary Directions, the Defence is only required to provide a tentative list of witnesses and the length of witnesses' examination which could always be amended until the provision of the final list. Moreover, the Defence has already provided notice of its intention to call experts and certain witnesses. Therefore, the Defence's contentions in relation to the time limit imposed in the Preliminary Directions for the presentation of its case appear to be without any justification.

3. Finally, on the request to reconsider the Initial Hearing Schedule for 2018, Counsel underline that ensuring the expeditiousness of the proceedings has a vital importance to the victims participating at trial.

4. However, Counsel have some concerns since the Initial Hearing Schedule has an impact on the effective participation of the victims in the trial because it will entail an increasing workload and practical difficulties both in The Hague and in the field in adequately preparing for the questioning of the upcoming witnesses and for the

¹ See the "Decision on contested victims' applications for participation, legal representation of victims and their procedural rights" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, p. 19; the "Decision on issues concerning victims' participation" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; the "Second decision on contested victims' applications for participation and legal representation of victims" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-384, 24 December 2015, pp. 20-22, "Decision concerning 300 Victim Applications and the Deadline for Submitting Further Applications", (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-543, 26 September 2016, para. 8 and p. 5, and the "Decision Concerning 610 Victim Applications (Registry Report ICC-02/04-01/15-544) and 1183 Victim Applications (Registry Report ICC-02/04-01/15-556)" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-586, 04 November 2016, p. 8, paras. 9, 15 and 16.

presentation of their evidence. Consequently, Counsel submit that said Schedule may need some minor adjustments in order to be conducive to the continued effective participation of the victims at trial and to the proper preparation of the impending crucial phase of their presentation of evidence.

II. PROCEDURAL BACKGROUND

5. On 06 October 2017, Trial Chamber IX (the "Chamber") notified the parties and participants via email of the Initial Hearing Schedule for 2018.²

6. On 13 October 2017, the Single Judge of Trial Chamber IX issued the "Preliminary Directions for any LRV or Defence Evidence Presentation" (the "Preliminary Directions") providing instructions to the Defence and the Legal Representatives in relation to their upcoming presentation of evidence.³

7. On 27 October 2017, the Defence filed its Request asking the Chamber to: (i) issue directions for the conduct of the proceedings to permit the possibility of a no-case-to-answer motion following the presentation of evidence by the Prosecution and the victims; (ii) revise the timelines imposed to the Defence by the terms of the Preliminary Directions; and (iii) modify the Initial Hearing Schedule to allow for two full business weeks of break after evidence blocks lasting between ten to fifteen business days and three full business weeks of break after evidence blocks lasting between sixteen to twenty business days (the "Request").⁴

² See the email sent by Trial Chamber IX on 06 October 2017 at 12:32.

³ See the "Preliminary Directions for any LRV or Defence Evidence Presentation", No. ICC-02/04-01/15-1021, 13 October 2017 (the "Preliminary Directions").

⁴ See the "Observations on the Preliminary Directions for any LRV or Defence Evidence Presentation and Request for Guidance on Procedure for No-case-to-answer Motion", Confidential with Confidential Annexes A-C, No. ICC-02/04-01/15-1029-Conf (the "Request").

8. On 30 October 2017, the Chamber shortened the time limit for filing responses to the Request pursuant to Regulation 34 of the Regulations of the Court and instructed the parties and participants to file their responses by 3 November 2017.⁵

9. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this response is filed confidential following the classification chosen by the Defence. However, Counsel indicate that this document does not contain any confidential information and can be reclassified as "public".

III. SUBMISSIONS

A. Possibility to Entertain No Case to Answer Motion

10. Counsel submit that the Defence's request for the issuance of directions for a no-case-to-answer motion is speculative and premature at the present stage of the proceedings. The Defence itself acknowledges in its Request that it may *potentially* file a no-case-to-answer motion and that a decision to file such a motion *will depend* on the evaluation of the evidence led by the Prosecution and the victims.⁶ Consequently, the Defence asks the Chamber to define "*the theoretical appropriateness*"⁷ of said procedure. However, the Defence fails to make reference to any specific legal provision (elements of crime etc.) or precise facts (extracted from either live or documentary evidence) in support of the alleged existence of circumstances requiring to set a procedure for a no-case-to-answer motion.

11. Consequently, in the absence of specific legal and factual basis, Counsel are not in a position to offer concrete submissions on this part of the Request. Indeed, the Chamber will not be assisted by hypothetical pleadings from the parties and participants. Therefore, Counsel cannot but conclude that the issue is not properly

⁵ See email from Trial Chamber IX, sent on 30 October 2017 at 13:04.

⁶ See the Request, *supra* note 4, para. 29.

⁷ *Idem*, para. 33.

placed before the Chamber, and that entertaining said Request will oblige the Chamber to give a theoretical⁸ or an advisory opinion which is not foreseen under the Rome Statute.

12. However, Counsel reserve their right to make substantive submissions on the matter should the Defence properly file a no-case-to-answer motion in the future.

B. The Provisional Schedule for the Defence Case

13. The Defence argues that it will not be prepared to provide the Chamber with a preliminary list of its witnesses and the estimate of the hours of witnesses' examination by 14 December 2017 since it needs reasonable time to consolidate its investigation and adequately prepare its case.⁹

14. Counsel observe that, as explicitly recalled in the Preliminary Directions,¹⁰ the Defence has already gave advance notices more than a year ago of the possibility of raising an alibi for one of the charged incidents, a mental disease or defect defence, and/or a duress defence.¹¹ In particular, in its Annex to the "Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules of Procedure and Evidence", the Defence had already filed a tentative list of witnesses which it intends to call with

⁸ The International Court of Justice held that while it is the parties that seize the Court, the Court is not compelled in every case to exercise its jurisdiction since "[t]here are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity." See ICJ, Judgment, Preliminary Objections, Case Concerning The Northern Cameroons (Cameroon v. United Kingdom), 2 December 1963, p. 29. See also. ICJ, Judgment, Admissibility, Nuclear Tests Case (New Zealand v France), 20 December 1974, par. 23.

⁹ See the Defence Request, *supra* note 4, paras. 41 – 46.

¹⁰ See the Preliminary Directions, *supra* note 3, para. 2 (ii).

¹¹ See the "Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules of Procedure and Evidence (with annex); No. ICC-02/04-01/15-517, 9 August 2016; the "Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules of Procedure and Evidence", No. ICC-02/04-01/15-518, 9 August 2016; and the "Defence Notification Pursuant to Rule 79(2) of the Rules of Procedure and Evidence", No. ICC-02/04-01/15-519-Conf, 9 August 2016.

respect to the affirmative defence of duress.¹² Moreover, in its “Notification Pursuant to Rule 79(2) of the Rules of Procedure and Evidence”, the Defence also stated explicitly that it had already contracted experts to examine Mr Ongwen to determine if he suffered from a mental disease or defect and expected a full report and *a list of experts* intending to testify as to his mental disease or defect.¹³ In addition, with respect to the defence of alibi, the Defence had also mentioned *the names of its witnesses* in its “Notification Pursuant to Rule 79(2) of the Rules of Procedure and Evidence”¹⁴. Therefore, given the substantial passage of time elapsed since August 2016, the Defence must be able to comply with the relevant time limit set in the Preliminary Directions.

15. Moreover, in accordance with the terms of the Preliminary Directions, the Defence is only requested to provide a *preliminary* list of witnesses and the approximate length of its witnesses’ examination. As further clarified in the Preliminary Directions, this list is just “*for informational purposes*” only, and “*may be changed*” up until the applicable deadline for the final list of witnesses.¹⁵ Consequently, the Defence’s contentions in relation to the time limit imposed in the Preliminary Directions for the presentation of its case appear to be without any justification.

C. The Initial Hearing Schedule in 2018

16. Counsel underline, first, the vital importance of ensuring expeditious trial since the victims have waited for these proceedings more than a decade and are anxious to see the end of the trial. In the same vein, Counsel appreciate the Chamber’s past and current efforts to streamline the proceedings and conduct

¹² See Confidential Annex A to the “Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules of Procedure and Evidence, *supra* note 11, p. 2.

¹³ See the “Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules of Procedure and Evidence”, *supra* note 11, paras. 3 and 4.

¹⁴ See the “Defence Notification Pursuant to Rule 79(2) of the Rules of Procedure and Evidence”, *supra* note 11, para. 5.

¹⁵ See the Preliminary Directions, *supra* note 3, para. 3.

hearings in an expeditious manner, while respecting the fair trial rights of the Accused.

17. However, Counsel have concerns since the Initial Hearing Schedule will have an impact on the effective participation of the victims in the trial. Indeed, they will face an increasing workload and practical difficulties both in The Hague and in the field in adequately preparing for the questioning of the upcoming witnesses and for the presentation of their evidence.

18. Besides of attending trial proceedings in The Hague, Counsel and their team members have to fulfil various professional duties during judicial breaks in accordance with the Code of Professional Conduct for Counsel. These include, for example, organising missions to several remote locations in Northern Uganda in order to meet their clients, explaining rights and duties of the victims, constantly informing them of the progress of the proceedings, and, most importantly, hearing their views and concerns and obtaining their instructions. Provided that Counsel jointly represent more than 4000 victims participating in this case, the execution of these tasks are extremely resource-intensive.

19. In addition, with the recent issuance of the Preliminary Directions, Counsel are now required to provide a preliminary list of witnesses along with the approximate length of their witnesses' examination and also appropriately prepare for the presentation of their evidence which is projected to occur in 2018. This is a critical juncture of the proceedings during which the victims will have a rare opportunity to greatly contribute to the establishment of the truth. Therefore, while both victims' teams have limited resources,¹⁶ Counsel are determined to marshal their utmost efforts to meet the deadlines imposed in the Preliminary Directions.

¹⁶ As for the Common Legal Representative, she, along with her team members, is also appointed in three other cases at various stages at the Court. As for the Legal Representatives, their team members reside in various parts of the world while operating as a team.

20. However, identifying potential witnesses, interviewing witnesses and preparing for their live testimony will necessitate considerable time and resources. In this regard, adequate judicial breaks between the hearings scheduled in early 2018 will be particularly essential. Therefore, Counsel submit that the Initial Hearing Schedule may need some minor adjustments in order to be conducive to the continued effective participation of the victims at trial and to the proper preparation of the impending crucial phase of their presentation of evidence.

Respectfully submitted.



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Francisco Cox



Joseph Manoba Akwenyu

Dated this 03rd day of November, 2017

At The Hague (The Netherlands) and Kampala (Uganda)