

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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**

**Pubic Redacted Version of “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”, filed on 27 October 2017**

**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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**Victims Participation and Reparations  
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## **I. INTRODUCTION**

1. The Defence for Dominic Ongwen ('Defence') hereby makes several requests in response to the "Preliminary Directions for any LRV or Defence Evidence Presentation" ('Preliminary Directions'), issued by the Single Judge on 13 October 2017.<sup>1</sup>
2. Whilst the Defence is mindful of the rate at which the Prosecution case is proceeding and welcomes the Preliminary Directions, several issues arise in relation thereto, thus the need to bring them to the attention of Trial Chamber IX ('Trial Chamber'). As developed below, the Defence requests:
  - a. Modification of the January to April 2018 trial 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;
  - b. The issuance of 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 LRVs; and
  - c. Revision of the timelines contained in the Preliminary Directions.

## **II. CONFIDENTIALITY**

3. 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 Trial Chamber make such a request.

## **III. BACKGROUND**

4. On 13 July 2016, the Trial Chamber issued the Initial Directions on the Conduct of Proceedings<sup>2</sup> which were supplemented by the additional guidance in the email from the Trial

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<sup>1</sup> ICC-02/04-01/15-1021.

Chamber on 23 August 2017<sup>3</sup>. 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.”<sup>4</sup>

5. On 6 October 2017, the Trial Chamber, by way of email notified the parties and participants of the court schedule from January to April 2018.<sup>5</sup>
6. On 13 October 2017, the Trial Chamber issued the Preliminary Directions for any LRV or Defence Evidence Presentation.<sup>6</sup>

#### IV. SUBMISSIONS

##### A. Applicable Standard

7. Rule 134 of the Rules of Evidence and Procedure (‘RPE’) provides for motions relating to trial proceedings. In particular, Rule 134(3) 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.

8. Trial Chamber VI has considered that:

in the event the Defence faces ‘concrete difficulties’, it may take – as part of its inherent trial management powers particular measures to assist the Defence, including amendments to [...] the sitting schedule.<sup>7</sup>

9. Other decisions of Trial Chamber VI further confirm the inherent power to amend the trial schedule,<sup>8</sup> including in relation to the Defence case.<sup>9</sup>
10. In line with the above provision, the Defence respectfully requests the Trial Chamber to modify the current hearing schedule for January to April 2018, to issue additional directions to the Preliminary Directions to include a procedure for a no-case-to-answer and acquittal motion, and revise the time frames within which the Defence should prepare its case.

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<sup>2</sup> ICC-02/04-01/15-497.

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

<sup>4</sup> ICC-02/04-01/15-497, para. 4.

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

<sup>6</sup> Preliminary Directions.

<sup>7</sup> ICC-01/04-02/06-1102-Red, para. 19.

<sup>8</sup> ICC-01/04-02/06-1143-Red.

<sup>9</sup> ICC-01/04-02/06-1914.

**B. The current January to April 2018 hearing schedule violates Mr Ongwen's right to have adequate time for the preparation of his defence**

11. The Defence respectfully submits that the current hearing schedule projected for January to April 2018 will violate Mr Ongwen's internationally recognised rights and should be revised. Article 67(1)(b) identifies a few interdependent fair trial rights which individually, and in the aggregate, affirm the fundamental and central right to present a defence as per Article 67(1)(e). These include the right to have adequate time and facilities for the preparation of his defence.<sup>10</sup> The following issues regarding the hearing schedule for January to April 2018 must be brought to the Chamber's attention.

*1. The Personal Circumstances of Mr Ongwen Warrant a Change in the Upcoming Schedule*

12. The personal circumstances [REDACTED] of Mr Ongwen, which are known to the Trial Chamber, continue to prevail and impede the ability to consult consistently with him. Within the reasoning of Trial Chamber VI,<sup>11</sup> this would constitute a concrete difficulty. Requiring Mr Ongwen to undergo the rigorous schedule as currently defined will violate his right to have adequate time and facilities for the preparation of his defence.
13. [REDACTED].<sup>12</sup> [REDACTED]. The witnesses in the 2018 sessions include those with transcripts which are more time-consuming to read than statements. Witness P-0145, for example, who may be the starting witness has 4 transcripts that total 118 substantive pages to read. Other witnesses in January to April 2018 have many transcripts, as in P-0224,<sup>13</sup> P-0258,<sup>14</sup> P-0028,<sup>15</sup> P-0200,<sup>16</sup> and P-0209.<sup>17</sup> These five witnesses alone have 2,138 pages of transcripts. This limiting issue is compounded by issues delineated below.

<sup>10</sup> See also Principle 18(2) of the Body of Principle for the Protection of All Persons under Any Form of Detention or Imprisonment, 9 December 1988, United Nations General Assembly, A/RES/43/173, available at: <http://www.un.org/documents/ga/res/43/a43r173.htm> and Article 14(3)(b) of the International Covenant on Civil and Political Rights, United Nations General Assembly, available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>.

<sup>11</sup> See para. 8 above.

<sup>12</sup> ICC-02/04-01/15-702-Conf-AnxII, fn. 4. [REDACTED].

<sup>13</sup> Witness P-0224 has 822 pages of Acholi transcripts from the Prosecution.

<sup>14</sup> Witness P-0258 has 348 pages of Acholi transcripts from the Prosecution and 212 pages of English transcripts with Acholi audio from the Defence.

<sup>15</sup> Witness P-0028 has 293 pages of Acholi transcripts from the Prosecution and two separate [REDACTED].

<sup>16</sup> Witness P-0200 has 272 pages of Acholi transcripts from the Prosecution.

<sup>17</sup> Witness P-0209 has 132 pages of Acholi transcripts from the Prosecution and 59 pages of English transcripts with Acholi audio from the Defence.

14. [REDACTED]. The Defence avers that the upcoming trial schedule violates the Registrar's duty pursuant to [REDACTED]."<sup>18</sup>
15. [REDACTED]<sup>19</sup> [REDACTED]:
  - a. [REDACTED].<sup>20</sup>
  - b. [REDACTED].<sup>21</sup>
16. [REDACTED]. This time would significantly decrease if Mr Ongwen is required to attend trial on the schedule emailed to the Parties and Participants on 6 October 2017.
17. For the abovementioned reasons, the Defence requests that more time be allotted between the evidence blocks in the 2018 trial schedule because of the personal circumstances of Mr Ongwen. The Defence respectfully suggests allowing 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.
2. *The Resources Available to the Defence are Inadequate and Violate the Principle of Equality of Arms if the 2018 Trial Schedule is Maintained*
18. All the rights provided for under Article 67(1) are preceded by a statement that a fair hearing shall be conducted impartially and in *full equality*.<sup>22</sup> While the Defence acknowledges that the Prosecution has the burden of proof and has the obligation to fulfil the high standard of proof required for conviction, the Defence nonetheless highlights the importance of equality of arms in resources and facilities. The Defence continues to struggle with the adequacy of time and resources available for the preparation of the case. The Prosecution had 12 years to prepare its case, starting during the summer of 2004. While the Defence continues to request more funds from the Registry, for instance to instruct consultants and experts, hire more qualified staff members, and undertake missions, this does not always happen at a fast pace to facilitate the expeditious preparation of the case required by the 2018 schedule and timelines given by the

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<sup>18</sup> Emphasis added.

<sup>19</sup> ICC-02/04-01/15-702-Conf-AnxII, p. 5.

<sup>20</sup> [REDACTED].

<sup>21</sup> [REDACTED].

<sup>22</sup> Emphasis added.

Trial Chamber.<sup>23</sup> In addition, the Prosecution has had a qualitative head-start in investigations with the cooperation of the Government of Uganda – including benefitting from its investigative resources prior to the case – whereas even the few requests so far from the Defence have taken months before receiving a response.<sup>24</sup>

19. In respect to investigations in Uganda, the Defence notes several issues which have, are, and will serious hamper its progress in the field. Firstly, whilst the three to four-month dry season should be starting in early December 2017, the Defence has experienced several problems relating to contacting witnesses in the diaspora due to weather conditions. Attached as Confidential Annexes A and B are a video of a recent excursion which took thirteen hours, yet should have taken less than six hours, and photographs of the road conditions in the surrounding areas of the excursion.
20. The Defence is also plagued by an inconsistent supply of electricity to run its equipment. As the ICC has failed to open a field office in Gulu<sup>25</sup>, the Defence rents office space in Gulu, but it is subject to the same power-outages to the rest of the area.<sup>26</sup> The Defence requested a battery-powered printer from CSS, but did not receive one for its investigation.<sup>27</sup> The Defence is currently awaiting a response from CSS requesting pre-authorisation to purchase a new petrol-powered generator for its office to circumvent this issue.<sup>28</sup> This issue may yet be raised as a request before the Trial Chamber.

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<sup>23</sup> *For example*, the request to the Registry for a [REDACTED], emailed on 24 July 2017, has not been responded to, notwithstanding the fact that the Prosecution, the Presidency and the Registry have held numerous outreach missions in the recent past. The Defence sent a follow-up notification about this request on 15 October 2017.

<sup>24</sup> *For example*, the Defence sent an RFA to the Registry on 12 December 2016 for [REDACTED].

<sup>25</sup> See Confidential Annex C. The Defence notes that it was told verbally in late 2016 that the creation of a field office in Gulu, Uganda was not going to happen. As of today, there are only rumours as to a field office in Gulu, and the Defence unfortunately does not have high hopes that one will open.

<sup>26</sup> As an example, there was no power in Gulu during the afternoon of 14 October, the morning of 20 October until 09h30 and 21 October 2017 until 10h35. Power is regularly shut off at night and returns around 10h00, but a week does not go by when power is missing for a significant time during the working hours.

<sup>27</sup> See also UGA-D26-0021-0165, which is an investigation report outlining the reason why a witness had to sign his statement electronically because of lack of power. The Defence sent a reminder email to CSS on 15 May 2015 at 09h11 requesting a mobile printer, but noted that it was not necessary until 17 June 2015. The Defence requested on 23 June 2015 at 13h53 to purchase a mobile printer and use the investigation funds, but no such authorisation was given. Mr Obhof bought one, but it is currently inoperable because a specific cartridge needed for the printer to operate can only be purchased in North America.

<sup>28</sup> The office which the Defence works at used to have a generator, but it is no longer operational and has been fixed on many occasions. The cost of repair would almost exceed the cost of buying a new and more efficient generator.

21. Furthermore, the Defence has been hampered by ongoing attempts to be provided multiple copies of CaseMap and DocManager to aid in case-analysis and preparation. This issue may yet be raised as a request before the Trial Chamber. In contrast to the Prosecution, the Defence has one copy of the software on one computer. The inability to work concurrently on the evidence has rendered the software practically useless as the value of the software exists (a) where multiple users can add new information to the database as they work and (b) where consulting this information does not involve displacing a staff member each time to get at their computer. The inequality of arms in this regard could not be starker. Metaphorically speaking, the Prosecution has a computer and the Defence has a typewriter. Thus, the review and analysis of transcripts and evidence takes longer than the Prosecution. This longer delay will impact upon the degree to which the Defence can prepare for the deadlines in the directions for the Defence case.
22. The Defence respectfully requests a revision of the current schedule to avoid burnout and health-related scares that have previously occurred on this team<sup>29</sup> and other teams in other chambers of this court.<sup>30</sup> Simply put, Defence staff enjoy from human rights, and where the health and well-being of Mr Ongwen's Defence is negatively impacted, the quality of defence may suffer to his detriment and in violation of the Statute.
23. The Trial Chamber may have well noticed that while the Prosecution has approximately 12 trial lawyers who have been conducting direct examination, the Defence only has four, plus the exceptional possibility of having case managers question particular witnesses at the discretion of the Trial Chamber.<sup>31</sup> This is to say nothing of the unseen Prosecution resources which exist throughout that organ<sup>32</sup> and can be called upon for consultation<sup>33</sup> at short notice. Thus, during trial, nearly all the Defence resources are directed towards court preparation. Defence staff consistently work 180 to 240 hour months. Long hours lead to heightened levels

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<sup>29</sup> ICC-02/04-01/15-T-92, p. 1, lns 14-20, and noting that Mr Obhof had to take two sick days on 19 and 20 September 2017 during the evidence block because of fatigue and other physical problems.

<sup>30</sup> ICC-01/04-02/06-T-64-Red-ENG WT, p. 2 lns 21-25 and p. 3 lns 1-3 and ICC-01/04-02/06-T-65-Red-ENG WT pp 2-5 which reflects the true working conditions of defence counsel in this institution.

<sup>31</sup> The Defence requested such permission with the examinations of P-0256 and P-0242 because of one of its case managers having practical experience in the field which these witnesses have or to which these witnesses will testify.

<sup>32</sup> See for example the staff available to assist with witnesses at para. 85 of Prosecution 'Policy Paper on Sexual and Gender-Based Crimes', available at: <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>.

<sup>33</sup> See, just for example, ICC-02/04-01/15-T-119-Conf-Eng, p. 5, ln. 24 to p. 6 ln. 2 where in response to a Defence objection, within minutes, a member of the Prosecution from another case was present in the court room to address the subject matter in question.



of stress which are associated with a wide range of short-term and long-term physical and mental health issues such as heart disease, high blood pressure, diabetes, gastro-intestinal illnesses and depression and anxiety.<sup>34</sup> The maintenance of family ties and relationships as well as any other forms of personal growth and development are significantly impaired where this must occur during limited marginal hours of the day. Thus, unless the 2018 trial schedule is changed, the practical effect of the current schedule is an understanding that the current team members are expected to put in more than twelve hour days at the expense of their internationally protected right to health, family, and private life<sup>35</sup> as well as general wellbeing.

24. Additionally, Defence Team members are not employees of the Court, although admittedly the Court assists with immigration related matters. According to the Legal Aid Policy however, Case Managers and Assistants to Counsel are presumed to be based primarily in The Hague.<sup>36</sup> Whereas in fact, these Defence Team members are *only* based in The Hague as it is impossible to perform their tasks without an internal ICC computer<sup>37</sup> and Mr Ongwen is incarcerated at the ICC-DC. Whilst telephone communication is convenient for asking Mr Ongwen small questions, it is not so for discussing the merits of a witness statement and transcripts of interviews. As such, the Defence must maintain legally privileged persons in The Hague. The Prosecution on the other hand, does not have such challenges.
25. This significantly impedes Defence team members from seeing their families, most of whom live on different continents,<sup>38</sup> and makes it difficult for many staff members to take a holiday longer than two to three business days. Cognisant of the importance of rest and family time,

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<sup>34</sup> <https://www.nimh.nih.gov/health/publications/stress/index.shtml#pub3>.

<sup>35</sup> See Article 12(1) of The International Covenant on Economic, Social and Cultural Rights, found at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>, Article 23(1) of the International Covenant on Civil and Political Rights, and Article 16(3) of the Universal Declaration of Human Rights United Nations General Assembly, found at: <http://www.un.org/en/universal-declaration-human-rights/>. See also generally Universal Declaration of Human Rights. See also, Article 16(1) and Article 18 of the African Charter on Human and Peoples' Rights, available at: [http://www.achpr.org/files/instruments/achpr/banjul\\_charter.pdf](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf); Article 8(1) of the European Convention of Human Rights, available at: [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf); and Article 17 of the American Convention on Human Rights, available at: <http://www.refworld.org/docid/3ae6b36510.html>.

<sup>36</sup> ICC Legal Aid Policy, ICC-ASP/12/3, paras 139-145, and specifically para. 144.

<sup>37</sup> Materials cannot be imported or exported from Ringtail/eCourt without an internal computer. Ringtail requires the IEM 2007 software to import or export evidence, which is only accessible on specific internal computers. Additionally, the manner in which the Prosecution discloses evidence *via* Trim is only accessible from internal computers.

<sup>38</sup> Defence members immediate families live in [REDACTED].

the Defence's has agreed without complaint to several Prosecution's requests to modify the witness schedule.<sup>39</sup>

26. Inequality of arms and the risk of burnout are also exacerbated by uncertainty over working conditions caused by an unresolved legal issue related to Dutch domestic taxation.<sup>40</sup> This issue is now being pursued by both the ICC Bar Association and Registrar, yet the potential resolution of the issue has been in flux for some years. The Legal Aid Policy which was adopted by the Assembly of State Parties, including seemingly the Host State,<sup>41</sup> enshrined the principle of equivalency of payment between Defence and Prosecution as a core value and indicative of equality arms,<sup>42</sup> and the previously adopted Headquarters Agreement provides a provision related to domestic tax exemption.<sup>43</sup> The assessment of taxation has been inconsistent and some Hague based staff across the external teams at the ICC have been asked for nearly half of their salary. Notwithstanding the possibility of some re-imbursement<sup>44</sup> from the court – itself being perhaps taxable, this clearly undermines the principle of equivalence in the legal aid policy and thus equality of arms. Thus at present, every further hour of over-time required by the present rigorous trial schedule and Defence case schedule translates into a lower effective hourly wage which, pending resolution of the taxation legal issues, may mean even lower wages and further harm to the principle of equality of arms.
27. Early last year, a consultant commission by the Registrar evaluated the Legal Aid System under which Mr Ongwen's Defence is financed.<sup>45</sup> It found that both in relation to the principles set in the Legal Aid Policy and in relation to other tribunals Defence team members were not being paid on a basis equivalent to their counter-parts in the Prosecution<sup>46</sup> which undermines equality of arms. This assessment was arrived in part after considering the entitlements and benefits given to ICC staff, such as pension contributions and consistently

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<sup>39</sup> [REDACTED].

<sup>40</sup> See a partial discussion in p. 12, paras 100-101, 137, 145, and 163 of the Roger's Report.

<sup>41</sup> The LAP was acknowledged by the ASP in resolution ICC-ASP/12/Res.8 "by consensus", which thus presumably includes the Netherlands, see ICC-ASP/12/Res.8, p. 55, available at: <https://www.legal-tools.org/doc/7a9071/pdf/>. The Legal Aid Policy is acknowledged, in a formal and solemn act, as the implementation of the Rome Statute provisions regarding a fair-trial, see p. 59, para. 35 and see paras 10-20 of the Legal Aid Policy, available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-3-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-3-ENG.pdf).

<sup>42</sup> See principle 1, p. 4, para. 9 and that the various salaries "are set so as to correspond to the net salaries received by Court staff performing equivalent duties" (para. 109) which means that "the salary entitlements of [team] members [...] is comparable to that of teams in the Office of the Prosecutor" (para. 109).

<sup>43</sup> See Article 25 of the Headquarters Agreement between the International Criminal Court and the Host State.

<sup>44</sup> See Roger's Report, para. 137.

<sup>45</sup> Assessment of the ICC's Legal Aid System, Richard J. Rogers, 5 January 2017, available at: [https://docs.wixstatic.com/ugd/ff5a5e\\_94ac61343ad64fff89966f8edf279fde.pdf](https://docs.wixstatic.com/ugd/ff5a5e_94ac61343ad64fff89966f8edf279fde.pdf) ('Roger's Report').

<sup>46</sup> See Roger's Report, paras 133, 135, 137, and 145.

applied tax exemptions,<sup>47</sup> to say nothing of staff holiday, yearly court paid flights home, and over-time entitlements. Though Defence staffs are salaried, it must also be noted that this conclusion of inequality was reached upon a comparison with reference to a 150-hour work month<sup>48</sup> which appears to correspond to the 7.5 hours per day schedule set for court staff.<sup>49</sup>

28. The Defence respectfully requests an alteration of the 2018 trial schedule to allow for longer breaks during the evidence block as the current schedule violates (1) Mr Ongwen's right to adequate time and facilities to help prepare his defence, (2) Mr Ongwen's right to health and wellbeing, (3) the Registrar's duty to ensure the health and safety of detainees, and (4) the Defence Team members' right to health, family and private life. As stated above, the Defence respectfully requests 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.

### **C. The procedure and timing for no-case-to-answer**

29. The Defence notifies the Chamber of its intention to file a no-case-to-answer motion and request for acquittal of some or all of the counts against Mr Ongwen. With the Prosecution now half way through its *viva voce* witnesses, the Defence may potentially file a motion for acquittal after the close of the Prosecution and LRV cases, if any. This will depend on the outcome of the upcoming witness blocks and an evaluation of the Prosecution evidence as a whole.
30. Under Article 64(2) of the Rome Statute, the Trial Chamber is obligated to ensure a fair and expeditious trial with full respect of the rights of the accused person and due regard for the protection of victims and witnesses.
31. The Defence is cognizant of the recent Appeals Chamber decision in *Prosecution v. Ntaganda* which confirmed that this procedure is discretionary to each Trial Chamber.<sup>50</sup> Whilst the Initial Directions on the Conduct of Proceedings and the Preliminary Directions are silent on

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<sup>47</sup> See Roger's Report, para. 139.

<sup>48</sup> See Roger's Report, para. 148. Compare with the working hours referred to in para. 23 above.

<sup>49</sup> The 150 hours appears to corresponds to the 7.5 hours per day weekly schedule set out in the court circular 'Official Working Hours of the Court and Official Holidays', ICC/INF/2012/020, 1 June 2007, available at: <https://www.icc-cpi.int/resource-library/Vademecum/Official%20working%20hours%20of%20the%20Court%20and%20official%20holidays.PDF>.

<sup>50</sup> ICC-01/04-02/06-2026.

the procedure, the Defence does not interpret this to be a rejection of the procedure and invites the Trial Chamber to issue further directions on the possibility of a no-case-to-answer motion from the Defence.

32. The Defence recalls the jurisprudence in *Prosecutor v. Ruto and Sang* where Trial Chamber V(A) 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.<sup>51</sup>
33. At this point, the Defence is only in position to argue the theoretical appropriateness of the procedure for a no-case-to-answer and acquittal motion, but when the Prosecution case, and the LRV case, if any, comes to an end, the Defence shall be better placed to argue for the procedure.
34. The Defence has so far identified a few legal and factual issues that have arisen and likely to arise in the Prosecution theory of the case. For instance, Mr Ongwen has asserted that he has not been given appropriate and reasonable notice of the crimes with which he has been charged. Indeed, while Mr Ongwen has been explained the charges and been provided with many sections of the confirmation of charges in Acholi, a final draft has yet to be provided. This affects the ability for Mr Ongwen to refer back to the charging document and assist Counsel effectively during the preparation of cross examination and investigations in the field.
35. The Prosecution has adduced evidence of crimes and conduct that fall out the temporal, territorial and crime base jurisdiction, for instance the September 2006 peace talks and other non-charged attacks. Ostensibly, the Prosecution has argued that this is to prove the widespread and systematic nature of the charges, demonstrate a consistent pattern of conduct, and challenge any affirmative defence. The resolution of these issues may impact upon

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<sup>51</sup> ICC-01/09-01/11-2027-Red-Corr. Para. 144.

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, expeditiousness, and notice and should be resolved in advance of the Defence case.

36. 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) which extends the presumption of innocence in Article 66. This is true concerning the possibility of Mr Ongwen testifying personally, as well as the wider principle that emanates from the presumption of innocence as there is no requirement under the statute for the Defence to advance a positive case. Article 67(1)(g) will be violated should Mr Ongwen answer a charge for which there is no prospect of conviction.
37. The Defence underscores the appropriateness of adopting a procedure for no-case-to-answer motion in the present case considering the volume of the 70 charges and seven modes of liability against Mr Ongwen.
38. First, the Prosecution is expected to know its case before proceeding to trial and cannot mould the case against the Accused in the course of the trial depending on how the evidence unfolds.<sup>52</sup> It is not for the Defence to "guess" against which conduct it must defend. A no-case-to-answer procedure would potentially clarify some of these issues.
39. Second, 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 support Mr Ongwen's fair trial rights guaranteeing his right to remain silent under Article 67(1)(g) of the Statute. In addition, this would be at par with the provisions of Article 64(2) which would prevent the unnecessary calling of defence witnesses.

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<sup>52</sup>

40. The Defence respectfully requests the Trial Chamber to issue further directions on the timing and procedure for a Defence no-case-to-answer motion.

**D. The timelines given for the preparation of the Defence case are prejudicial to Mr Ongwen's fair trial right to an effective defence**

41. The Defence has endeavoured to furnish the Trial Chamber with all the information regarding the preparedness and progress on the Defence side in so far as possible at each stage. The Defence does not envisage to be prepared to provide the Trial Chamber with a preliminary list of witnesses and the estimate of the hours of witness examination by the 14 December 2017 deadline in para. 3 of the Preliminary Directions.
42. Given the nature of the Prosecution case and how it has been presented – particularly both the limited notice and the leading of information outside of the temporal and geographic jurisdiction – the Defence informs the Chamber that at the end of the Prosecution case, and the LRV case, if any, it shall require time to examine and evaluate the evidence and how best to proceed. The Defence needs reasonable time to consolidate its investigation and adequately prepare its case.
43. Moreover, at the point of the initial deadline for the preliminary list, some of the key insider Prosecution witnesses will not have testified, for instance P-0028, P-0048, and P-0258, P-0105, and P-0224. These witnesses have been mentioned systematically by many of the witnesses. Witness P-0224, for instance, [REDACTED]. Witnesses P-0028 and P-0258 were [REDACTED] during the charged period. It would not be a surprise that some of these witnesses were on the list of the 15 suspects that were originally considered by the Government of Uganda for prosecution as mentioned in the cross examination of P-0038.<sup>53</sup>
44. The latter deadlines following the end of the Prosecution case are also arduous. As noted above,<sup>54</sup> cross-examination preparation consumes most of the available resources of the Defence. Absent a prior indication, the Prosecution could close its case in a couple of days following the last witness. This would leave the Defence with three weeks to review and revise its potential case, including further investigations, potentially being impacted by 25 witnesses with perhaps multiple days of testimony.

<sup>53</sup> ICC-02/04-01/15-T-117-CONF-ENG ET, p. 7, lns 1-4.

<sup>54</sup> See para. 23.

45. As a final argument in support of revision of the schedule in the Preliminary Directions: despite an initial investment of time, a disposition of a no-case-to-answer-motion may reduce the scope of evidence and witnesses need to be called thus shortening any eventual Defence case.
46. The Defence respectfully request the Trial Chamber to reconsider the timelines for the Defence's case-in-chief.

**V. RELIEF**

47. The Defence requests the Chamber to modify the hearing schedule currently in place for January to April 2018 in accordance with paragraph 2(a) above; to issue further directions on the Preliminary Directions to provide a no-case-to-answer motion procedure, and revise the timelines for the preparation of the Defence case provided for in the Preliminary Directions.

Respectfully submitted,



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Hon. Krispus Ayena Odongo  
On behalf of Dominic Ongwen

Dated this 8<sup>th</sup> day of November, 2017  
At The Hague, Netherlands