Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-02/04-01/15**
Date: **12 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
Victims' response to 'Defence Request for Leave to File a No Case to Answer Motion and Application for Judgment of Acquittal'

Source: **Legal Representatives of Victims**

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

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I. INTRODUCTION

1. The Legal Representatives for Victims ("LRVs") oppose the 'Defence Request for Leave to File a No Case to Answer Motion and Application for Judgment of Acquittal' ("Defence Request").[1]

2. The Court's legal texts do not explicitly provide for a 'no-case to answer' procedure, and jurisprudence before this Court has demonstrated that even where this procedure has been applied there must be the existence of *special circumstances*.[2] No such special circumstances exist in the present case.

3. Furthermore, testing the sufficiency of the Prosecution's evidence at this juncture is wholly unnecessary and will negatively impact the expeditiousness of the proceedings, and in turn the rights of participating victims.

II. PROCEDURAL HISTORY

4. On 13 October 2017, the Trial Chamber issued the Preliminary Directions for any LRV or Defence Evidence Presentation.[3]

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.[4]

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.'[5]

[1] ICC-02/04-01/15-1300.
[2] 'Decision on Defence Request to file a 'no case to answer' motion', *The Prosecutor v. Bosco Ntaganda*, 1 June 2017, ICC-01/04-02/06-1931, para. 28.
[3] ICC-02/04-01/15-1021.
[4] ICC-02/04-01/15-1029.
[5] ICC-02/04-01/15-1074.

7. On 13 April 2018, the Prosecution filed its certification of the close of its case[6] and on 24 May 2018, the Legal Representatives for Victims concluded their presentation of evidence.

8. On 5 June 2018, the Trial Chamber set out the schedule and dates for the commencement of the presentation of the Defence case.[7]

9. On 5 July 2018, the Defence filed the Defence Request.[8]

III. SUBMISSIONS

10. The Appeals Chamber of this Court has held that while the Court's legal texts do not explicitly provide for a 'no-case to answer' procedure in the trial proceedings, it is nevertheless permissible and a Trial Chamber may, in principle, decide to conduct or *decline to conduct such a procedure in the exercise of its discretion*.[9]

11. As such, decision on whether or not to conduct a 'no case to answer' procedure is thus discretionary in nature and must be exercised on a case-by-case basis in a manner that ensures that the trial proceedings are fair and expeditious pursuant to article 64 (2) and 64 (3) (a) of the Statute.[10]

12. The Defence submit special circumstances exist that warrant a no-case to answer procedure, namely, that the Trial Chamber has adopted an adversarial trial structure; and the voluminous number of charges and modes of liability against Mr Ongwen[11]. The LRVs submit that in this case such a procedure is unwarranted and on the contrary no such special circumstances exist that would necessitate the application of a no-case to answer procedure.

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[6] ICC-02/04-01/15-1225.
[7] ICC-02/04-01/15-1275.
[8] ICC-02/04-01/15-1300.
[9] Emphasis added, para. 44, 'Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on Defence request for leave to file a 'no case to answer' motion", 5 September 2017, ICC-01/04-02/06-2026.
[10] *Ibid*, para. 45.
[11] ICC-02/04-01/15-1300, para. 20.

13. The LRVs submit that the Defence Request does not adequately establish the need to adopt the 'no case to answer' procedure in this case, on the basis of the issues raised in their submissions.

14. The present case can be strongly contrasted, for example with the *Ruto and Sang*, in which justifications did exist for a 'no-case to answer' procedure. In the latter case unprecedented levels of witness interference led the case to a near collapse, and it became necessary for the Trial Chamber to institute the no-case to answer procedure. The Defence Request seeks to rely on precedents such as this, but entirely fails to demonstrate how a large number of charges and modes of liability, a natural result of trials of this nature, can be compared to the circumstances arising in *Ruto and Sang*, such that a 'no-case to answer' procedure would be appropriate.

15. The Defence Request identifies three "examples" of reasons why a no-case procedure should be permitted. All are flawed.

16. In its first example, the Defence raise concerns about alleged lack of notice concerning the charges. The LRVs submit that this question has no logical connection to a motion for 'no case to answer'. A no case to answer procedure is designed to weigh the prosecution evidence and determine whether a tribunal, in the absence of any other evidence, could render a conviction of the accused person. It involves an assessment of the prosecution evidence against the extant charges. Any question of whether some of those charges should be struck out for lack of specificity is an entirely separate question.

17. The Defence Request raises, as its second and third examples, claims regarding defective charges and modes of liability, respectively[12]. However these issues have not been sufficiently elaborated to justify the need to engage a 'no case to answer' procedure.

[12] ICC-02/04-01/15-1300, paras 27-32.

18. With regard to the issue concerning the purportedly defective charges, the LRVs note that the Defence request fails to set out the precise charges that the Defence contend to be defective. The Defence request merely proposes one example of the defect with regard to the crime of pillage as set out under Article 8(2)(e)(v).[13] In support of this contention the Defence proposes an unsupported and unjustifiable interpretation of the elements of the crime of pillage, claiming that it requires that the property in question "belongs to an 'enemy' or 'hostile' party to the conflict." This is a proposition which cannot be gleaned from a plain reading of the article, or the elements of crimes and for which no legal justification has been provided. The only reference given by the Defence in support of this interpretation is to the *Katanga and Ngudjolo Chui* confirmation of charges decision,[14] and appears to mis-state that decision's *obiter* on the question. Indeed, in that decision Pre-Trial Chamber I wrote that:

> *Unlike the war crime of destruction of property, under article 8(2)(b)(xiii), the war crime of pillage, described in article 8(2)(b)(xvi) does not require, explicitly, that the property pillaged belongs to an "enemy" or "hostile" party to the conflict. However, part of the doctrine endorses the view that, as any war crime, the crime of pillage is committed against the adverse party to the conflict.*[15]

19. The Chamber's comments go on to make clear that in referring to "adverse party" it does not refer to *combatants*, indeed specifically using the term "villagers" to describe the owners of the property in question.[16]

20. The third "example" raised in the Defence request concerning the modes of liability is similarly flawed. The Defence arguments in support of this claim are based on conjecture regarding Prosecution strategy in withdrawing certain witnesses. Far from there being "obvious"[17] bad faith reasons for such a withdrawal, there are numerous possible reasons why the prosecution may modify its strategy regarding witnesses during trial, including where it considers

[13] ICC-02/04-01/15-1300, para. 27
[14] Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, cited in ICC-02/04-01/15-1300, para.27, fn.26.
[15] *Ibid*. fn.340.
[16] *Ibid.*
[17] ICC-02/04-01/15-1300, para.29.

that sufficient evidence on a matter has already been heard. Such an approach in fact promotes the cause of expedition that the Defence Request purports to champion.

21. More significantly, the LRVs consider that greater concerns arise regarding the proposal for a "no case to answer" procedure in the present case. Fundamentally, this process would essentially invite the Parties and the Chamber to consider the admissibility of the submitted evidence, a process which the Chamber has on numerous occasions asserted that it would undertake when deliberating the judgement.[18]

22. In setting out its approach to the 'no case to answer motion' the Chamber in the *Ruto and Sang case* asserted, *inter alia*, that the process did not entail an evaluation of the strength of the evidence presented, especially as regards exhaustive questions of credibility or reliability. The Chamber agreed with the approach of *ad hoc* tribunals to take the prosecution evidence 'at its highest' and to 'assume that the prosecution's evidence was entitled to credence unless incapable of belief' on any reasonable view.[19] However such an approach necessarily requires first being in a position to identify which evidence may be taken into account as admissible in the case. This is something which in the present proceedings has been deferred until the deliberation phase.

23. Consequently, the LRVs posit that Defence Request, not only fails to provide sufficient detail to substantiate the basis for the relief sought, it also reveals a failure to appreciate the scope and purpose of the 'no case to answer' procedure requested. The LRVs note that the Defence Request appears to assume that the

[18] 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, 16 November 2017, ICC-02/04-01/15-1074; Decision on Prosecution's Request to Submit 1006 Items of Evidence, 25 March 2017, ICC02/04-01/15-795; Decision on Prosecution Request to Submit Interception Related Evidence, 1December 2016, ICC-02/04-01/15-615 and Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497.

[19] *The Prosecutor vs William Samoei Ruto and Joshua Arap Sang*, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions), 3 June 2014, ICC-01/09-01/11-1334, para. 24.

use of some adversarial elements in the present case implies the appropriateness of a "no-case to answer" procedure. However the Appeals Chamber in *Ntaganda* held that just because the Trial Chamber in *Ntaganda* had decided to adopt elements of an adversarial trial structure, this did not mean that the Trial Chamber was obligated to provide for a no-case to answer procedure as well.[20] The LRVs contend that this common sense approach must be followed in the present case.

24. With regards to the expeditiousness of the proceedings, the LRVs agree with the Trial Chamber in *Ntaganda* where it held that entertaining a no-case to answer motion may entail a lengthy process requiring submissions from the parties and participants and an evaluation of the evidence by the Chamber.[21] The LRVs therefore note that entertaining a no-case to answer motion would not result in any judicial economy. Instead it would negatively impact on the rights of the participating victims who have waited a long time to see justice for the crimes they have suffered. A no-case to answer motion would most likely result in a delay in these proceedings requiring submissions from the parties and participants as well as an evaluation of the evidence by the Trial Chamber.

IV. RELIEF SOUGHT

FOR THE FOREGOING REASONS the Legal Representative respectfully requests the Chamber to reject the Defence Request.

Respectfully submitted

[20] ICC-01/04-02/06-2026, para. 51.
[21] ICC-01/04-02/06-1931, para. 26..

Joseph A. Manoba

Francisco Cox

Legal Representatives for Victims

Dated this 12th day of July 2018

At Kampala, Uganda and at Santiago, Chile