

**Cour
Pénale
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**International
Criminal
Court**

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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

**CLRV Response to “Defence Request for Leave to File a No Case
to Answer Motion and Application for Judgment of Acquittal”**

Source: Office of Public Counsel for 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 Common Legal Representative of Victims¹ (the “CLR”) opposes the “Defence Request for Leave to File a No Case to Answer Motion and Application for Judgment of Acquittal” (the “Request”).²

2. The CLR submits that none of the matters raised in the Request meets the requirements for triggering No-Case-to-Answer proceedings. In particular, the Defence’s allegations about “*Lack of Notice*” appear to be a preliminary issue which was already ruled upon by the Chamber. Furthermore, the allegations related to “*Defective Charges*” and “*Modes of Liability*” are grossly unsubstantiated and far too insignificant to warrant an extensive review of the extensive body of evidence presented by the Prosecution at trial. Consequently, granting the Request and entertaining No-Case-to-Answer Motion will not further the fair and expeditious conduct of the proceedings.

II. PROCEDURAL BACKGROUND

3. On 13 October 2017, the Single Judge of Trial Chamber IX (the “Single Judge” and the “Chamber”) issued the “Preliminary Directions for any LRV or Defence Evidence Presentation” (the “Preliminary Directions”).³

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; and the “Decision on the ‘Request for a determination concerning legal aid’ submitted by the legal representatives of victims” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-445, 26 May 2016, para. 13.

² See the “Defence Request for Leave to File a No Case to Answer Motion and Application for Judgment of Acquittal”, No. ICC-02/04-01/15-1300, 05 July 2018 (the “Request”).

³ See the “Preliminary Directions for any LRV or Defence Evidence Presentation” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1021, 13 October 2017, paras. 3-4.

4. On 27 October 2017, the Defence filed its Observations on the Preliminary Directions and requested the Chamber to provide guidance on the procedure for No-Case-to-Answer Motion (the “Initial Request”).⁴ On 1 and 3 November 2017, the Prosecution⁵ and both teams of Legal Representatives⁶ respectively, responded to the Initial Request. On 16 November 2017, the Chamber dismissed the Initial Request and decided to take no position on whether a No-Case-to-Answer Motion will be entertained due to the unsubstantiated nature of said Request (the “Decision on the Initial Request”).⁷

5. On 5 July 2018, the Defence filed its Request.⁸ On the same day, the Chamber shortened by e-mail the deadline for the responses to 12 July 2018 at 16:00.⁹

III. SUBMISSIONS

A. Legal Basis for No-Case-to-Answer Motions

6. The Appeals Chamber held that “[while] *the Court’s legal texts do not expressly provide for a ‘no case to answer’ procedure* [, it] *is not inherently incompatible with the legal framework of the Court. 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. A decision on whether or not to conduct a ‘no case to answer’ procedure*

⁴ See 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”, with Confidential Annexes A-C, No. ICC-02/04-01/15-1029-Conf, 27 October 2017 (the “Initial Request”).

⁵ See the “Prosecution’s Response to Defence Observations on the Chamber’s Preliminary Directions and Request for Guidance (ICC-02/04-01/15-1029-Conf)”, No. ICC-02/04-01/15-1048-Conf, 1 November 2017. (A public redacted version was filed on 3 January 2018, No. ICC-02/04-01/15-1048-Red)

⁶ See the “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’”, No. ICC-02/04-01/15-1056-Conf, 3 November 2017. (Pursuant to Trial Chamber IX’s instruction, dated 17 November 2017, this document is reclassified as “Public”)

⁷ See the “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” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1074, 16 November 2017, paras. 28-34 (the “Decision on the Initial Request”).

⁸ See the Request, *supra* note 2.

⁹ See the email sent by the Chamber on 05 July 2018 at 16:18.

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. [Thus, a] Chamber may, in principle, decide to conduct or decline to conduct such a procedure in the exercise of its discretion. [...] A Trial Chamber is expected to exercise its discretion bearing in mind the specific circumstances of the case before it.”¹⁰

7. In reaching this conclusion, the Appeals Chamber referred¹¹ to the decision of Trial Chamber V(A) in the *Ruto and Sang* case which set the criteria for entertaining No-Case-to-Answer Motions.¹² In particular, Trial Chamber V(A) held that:

“[...] The primary rationale underpinning the hearing of a ‘no case to answer’ motion - or, in effect, a motion for a judgment of (partial) acquittal - is the principle that an accused should not be called upon to answer a charge when the evidence presented by the Prosecution is substantively insufficient to engage the need for the defence to mount a defence case. [...] It is also noted that the Statute places the onus on the Prosecution to prove the guilt of an accused. This is consistent with the underlying premise of a ‘no case to answer’ motion, which is appropriately brought in cases where the Prosecution has failed to fulfil that burden by not having presented evidence for the elements that would be required to be proven in order to support a conviction. [...] [A] ‘no case to answer’ motion pleads that there has been insufficient evidence, or ‘no case’, presented which could reasonably support a conviction. [...] [In sum] the test to be applied in determining a ‘no case to answer’ motion, if any, in this case is whether there is evidence on which a reasonable Trial Chamber could convict. In conducting this analysis, each count in the Document Containing the Charges will be considered separately and, for each count, it is only necessary to satisfy the test in respect of one mode of liability, as pleaded or for which a Regulation 55 of the Regulations notice has been issued by the Chamber. 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.”¹³

8. Accordingly, the Chamber also held in its Decision on the Initial Request that “entertaining such a motion may result in a lengthy process requiring an evaluation of

¹⁰ See the “Judgment on the appeal of Mr Bosco Ntaganda against the ‘Decision on Defence request for leave to file a ‘no case to answer’ motion’” (Appeals Chamber), No. ICC-01/04-02/06-2026 OA6, 05 September 2017, paras. 43-54.

¹¹ *Idem*, footnote 108.

¹² See the “Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on ‘No Case to Answer’ Motions)” (Trial Chamber V(A)), No. ICC-01/09-01/11-1334, 03 June 2014 (the “Ruto and Sang Decision”).

¹³ *Idem*, paras. 12-13 and 22-32.

evidence by the Chamber, in contravention of the Chamber's specified approach to the consideration of the relevance and admissibility of evidence as set out in previous decisions. Further, a no-case-to-answer motion should only be entertained if the specific circumstances of the case warrant such action."¹⁴

B. Matters raised in the Request

9. In the Request, the Defence asserts that *"the Prosecution has failed to meet the legal standard of presenting sufficient evidence on which this Chamber could reasonably convict Mr Ongwen. [...] [It] 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."*¹⁵ Then the Defence provides three examples of issues that it will prospectively raise in its No-Case-to-Answer Motion, should the Chamber grant the Request.¹⁶

10. Firstly, the Defence makes very vague and generic arguments in relation to the *"Lack of Notice"* of the charges brought against Mr Ongwen. Reading the relevant part of the Request in combination with the Initial Request¹⁷ on this subject, the CLRV understands that the Defence is essentially complaining about the alleged inadequacy or insufficiency of the Document Containing the Charges which was then *"transpose[d] to"*¹⁸ the Confirmation Decision.

¹⁴ See the Decision on the Initial Request, *supra* note 7, para. 33.

¹⁵ See the Request, *supra* note 2, para. 18.

¹⁶ *Idem*, paras. 23-32.

¹⁷ See the Initial Request, *supra* note 4, paras. 29-34. *"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. [...] 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."*

¹⁸ See the Request, *supra* note 2, para. 23.

11. However, on 6 December 2016 at the opening of the trial, the Chamber has already found that Mr Ongwen understands the nature of the charges brought against him.¹⁹ This ruling is still valid today. In case, the Defence intends to raise a dissimilar challenge, it should have done so at earlier stages of the trial pursuant to rule 134(2) of the Rules of Procedure and Evidence which is designed to expeditiously address preliminary motions in order to avoid endless procedural challenges delaying trial proceedings.²⁰ The Chamber also ruled on a preceding Defence's request regarding the lack of notice purportedly occasioned by the unavailability of the Acholi translation of the Confirmation Decision and held that:

*"[...] Rule 134(2) of the Rules requires the Chamber to give the parties an opportunity at the commencement of trial to raise any objections or observations concerning the conduct of the proceedings which have arisen since the confirmation hearings. This rule mandates that '[s]uch objections or observations may not be raised or made again on a subsequent occasion in the trial proceedings without leave of the Trial Chamber in this proceeding'. [...] The Chamber notes that the accused has had a translated document containing the charges (whose text is repeated in the disposition of the Confirmation Decision) well before the trial's commencement, and before even the confirmation hearing. The lack of an Acholi translation of the entire Confirmation Decision was immediately apparent to the Defence well before the commencement of trial on 6 December 2016. [...] However, when given the opportunity mandated by Rule 134(2) of the Rules to object to commencing the trial, the Defence did not mention the need for any translations. The Defence [also] gave no indication that the trial could not proceed. [...] Prior to trial, when a post-confirmation issue of such significance arises that the moving party considers that failure to resolve it would warrant a stay of proceedings, Rule 134(2) of the Rules requires that this issue be raised no later than the commencement of trial. For the Defence to frame the lack of an Acholi translation as a trial-halting proposition 13 months after its commencement is plainly untimely. [...] Even if the Request was timely, there is no reason to believe that the Chamber's decision on 6 December 2016 that Mr Ongwen sufficiently understands the charges requires revisiting. [...] Before the confirmation hearing, Mr Ongwen received an Acholi translation of the text which mirrors the operative part of the Confirmation Decision. He also had the confirmed charges read to him on the first day of trial, has heard the entire trial through Acholi interpretation and has instructed his defence team throughout the trial without any discernible impediments [...]"*²¹

¹⁹ See Oral Decision of the Chamber, Transcript No. ICC-02/04-01/15-T-26, p. 17 line 19 - p. 20 line 1.

²⁰ See PETER LEWIS, Trial Procedure in LEE (R.S.) (Ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, N.Y., Transnational Publishers, 2001, p. 543.

²¹ See the "Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision" (Trial Chamber IX), No. ICC-02/04-01/15-1147, 24 January

12. This ruling of the Chamber has already addressed the Defence's allegations about the lack of notice, at least, in relation to the Acholi translation of the relevant documents. *Arguendo*, even if the Defence deems that Mr Ongwen still suffers from a lack of notice for a different reason, No-Case-to-Answer proceedings are not the appropriate venue for conducting such litigation since the latter is exclusively intended to assess whether the evidence presented at trial could reasonably support a conviction,²² not whether the Document Containing the Charges and/or the Confirmation Decision provide an adequate and fair notice.

13. Secondly, the Defence makes overly broad arguments about the purported "Defective charges" and avers that [it] *has identified a number of charges that are not supported by sufficient evidence or no evidence at all [...]* [For example] [t]he 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."²³

14. Yet, according to the test developed in the *Ruto and Sang* case, this is not enough to trigger No-Case-to-Answer proceedings. In particular, the Chamber held that "[i]n respect of the elements required to be proved in order to sustain a conviction before the Court (i) both the legal and factual components of the alleged crime and (ii) the individual criminal responsibility of the accused must be established. Therefore, evidence which could support both of those aspects must be present. [...] In respect of the components of the alleged crime(s), it is recalled that Rule 142(2) of the Rules provides that where there is more than one charge the Trial Chamber shall, in its deliberations, reach a verdict separately on each charge. In that light, the Chamber considers that the appropriate analysis in the context of a

2018, paras. 13-22. See also the "Decision on Defence Request for Leave to Appeal Decision 1147" (Trial Chamber IX), No. ICC-02/04-01/15-1176, 12 February 2018, para. 9.

²² See *supra* paras. 6-8.

²³ See the Request, *supra* note 2, para. 27 (emphasis in the original).

'no case to answer' motion would be for each count to be considered separately."²⁴ In other words, the Defence is obliged to demonstrate that the Prosecution failed to present any or sufficient evidence that supports *all the legal and factual components of the alleged crimes/counts* and the individual criminal responsibility of the accused pertaining those counts. Most importantly, according to Trial Chamber V(A), the determination on whether or not legal and factual components of the alleged crimes are present is made by assessing the evidence against all the specific elements of crimes, including the contextual elements.²⁵

15. Yet, the example, supposedly the best amongst others and purposefully chosen by the Defence, is merely one and rather minor requirement²⁶ of a single crime. Therefore, it remains grossly unsubstantiated and far too insignificant to trigger an extensive review of the massive body of evidence presented in relation to all 70 counts by the Prosecution since January 2017.

16. Thirdly, the Defence contends that the evidence regarding the "*Modes of Liability*" charged against Mr Ongwen is either inexistent or insufficient. In particular, the Defence merely alleges 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*" and "[t]here 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."²⁷

²⁴ See the Ruto and Sang Decision, *supra* note 12, paras. 26 and 27.

²⁵ See the "Decision on Defence Applications for Judgments of Acquittal, Reasons of Judge Fremr", (Trial Chamber V(A)), No. ICC-01/09-01/11-2027-Red-Corr, 16 June 2016, paras. 69, 112, 114 and 118.

²⁶ The requirement that the pillaged property must belong to an "enemy" or "hostile" party is not contained in the Element of Crimes Article 8(2)(e)(v). War crime of pillaging. Elements 1. The perpetrator appropriated certain property. 2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use. 3. The appropriation was without the consent of the owner. 4. The conduct took place in the context of and was associated with an armed conflict not of an international character. 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict. See The Elements of Crimes, the Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002, p. 36.

²⁷ See the Request, *supra* note 2, paras. 28-32.

17. Yet again, according to the test developed in the *Ruto and Sang* case, “[f]or a conviction at the end of trial, once it is determined that the evidence for the relevant crime and its underlying context are satisfied to the required standard, it is sufficient to establish individual criminal responsibility for those crimes through only one mode of liability. Consequently, in the context of a ‘no case to answer’ determination, once it is established that there is evidence which could support any one pleaded mode of liability, in respect of each count, that aspect of the required elements would be satisfied and there is no need to consider other modes of liability. [...] However, it is recalled that pursuant to Regulation 55 of the Regulations a Chamber may change the legal characterisation of facts to accord with the crimes or forms of participation specified in the Statute, provided such re-characterisation does not exceed the facts and circumstances described in the charges. The Trial Chamber could therefore refuse to grant a ‘no case to answer’ motion on the basis that, although no evidence was presented which could support the legal characterisation of the facts as set out in the document containing the charges, it appears to the Chamber at the time of rendering its decision on the ‘no case to answer’ motion that the legal characterisation of the facts may be subject to change, in accordance with Regulation 55 of the Regulations.”²⁸

18. It must be recalled here that Mr Ongwen is charged with multiple modes of criminal liability under Articles 25(3)(a) and/or (b), (c), or (d)(i) and (ii), or 28(a) of the Rome Statute.²⁹ In the Request, the Defence alleges the purported absence of “*common plan*” but fails to address all the other forms of criminal responsibility charged against Mr Ongwen, let alone any other possible modes of liability that might arise from the Chamber’s potential re-characterisation of facts. Consequently, the Defence’s allegations in relation to the modes of liability are again grossly unsubstantiated and too insignificant to trigger an extensive review of the large amount of evidence presented in relation to all the different modes of liability.

²⁸ See the *Ruto and Sang* Decision, *supra* note 12, paras. 28-29.

²⁹ See the “Document Containing The Charges”, No. ICC-02/04-01/15-375-Conf-AnxA, 21 December 2015, pp. 12-14 and the “Prosecution’s Pre-Trial Brief”, No. ICC-02/04-01/15-533, 06 September 2016, paras. 246-287.

19. Lastly, the Defence argues in its Request that entertaining No-Case-to-Answer Motion will foster fair and expeditious conduct of proceedings by streamlining the Defence case.³⁰ Yet, the Defence discounts the fact that, as held by Trial Chamber VI, “[...] *entertaining such a motion may also entail a lengthy process requiring parties and participants’ submissions and evaluation of the evidence by the Chamber, and may thus not necessarily positively affect the expeditiousness of the trial, even if successful in part. Mindful of its obligations under Article 64 of the Statute, the Chamber therefore considers that a motion arguing that there is no case to answer, in whole or in part, ought to be entertained only if it appears sufficiently likely to the Chamber that doing so would further the fair and expeditious conduct of the proceedings.*”³¹ Moreover, Trial Chamber V(A) also held that “[No-Case-to-Answer Motions] *should not be pursued on a merely speculative basis or as a means of raising credibility challenges that are to be considered at the time of final deliberations. Nor should they be filed merely to shape the Chamber’s view as to the strength of the Prosecution case thus far presented.*”³²

20. Consequently, the CLRV submits that none of the matters raised by the Defence meets the requirements for triggering No-Case-to-Answer proceedings. Rather, the Defence’s allegations or, at least, the examples it provided, appear particularly unclear, grossly unsubstantiated and far too insignificant to warrant an extensive review of the extensive body of evidence presented at trial by the Prosecution during one year and half. Accordingly, granting the Request shall not only be antithetical to the fair and expeditious conduct of the proceedings but also extremely prejudicial to the legitimate interest of the participating victims in this case who wish that the trial proceeds expeditiously.

³⁰ See the Request, *supra* note 2, paras. 33-34.

³¹ See the “Decision on Defence request for leave to file a ‘no case to answer’ motion” (Trial Chamber IV), No. ICC-01/04-02/06-1931, 01 June 2017, para. 6.

³² See the Ruto and Sang Decision, *supra* note 12, para. 39.

IV. CONCLUSION

21. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Chamber to reject the Request.

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 12th day of July 2018

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