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**International
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Date: **30 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

Public Redacted Version of ‘Defence Response to “Prosecution’s request to introduce prior recorded testimony of seven Defence witnesses under rule 68(2)(b)”’, filed on 30 July 2018

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 “Prosecution’s request to introduce into evidence prior recorded testimony of seven Defence witnesses under rule 68(2)(b)”¹ should be rejected.² The Defence for Dominic Ongwen (‘Defence’) avers that the Prosecution’s venture to change the manner in which the Defence intends to present its own evidence misconstrues the elementary organisation of criminal trials and the characteristic roles of parties in such trials. It assumes the role of the Defence by making decisions on how to best present the Defence evidence. It also appropriates the powers and functions of the Trial Chamber IX (‘Trial Chamber’), by commenting on what it deems to be central issues in dispute, and thus placing itself in a position of an arbiter of fact in the *Ongwen* case.
2. Such a paternalistic approach and tactic, as turning Mr Ongwen’s right to be tried unduly to his detriment and circumventing his right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him,³ are deceiving and borderline unprofessional.⁴
3. Finally, the Defence notes the Prosecution’s decision not to request an opportunity to test the evidence of witnesses D-0007, D-0018, D-0088, D-0125, D-0130, D-0131, and D-0132 through oral examination.⁵

II. CONFIDENTIALITY

4. Pursuant to Regulation 23bis(2) of the Regulations of the Court (‘RoC’), the Defence files this response confidentially because it responds to a confidential request and discusses evidence of Defence witnesses, some of whom have been granted protective measures. Annex A is also designated confidential as it refers to *inter partes* communications between the Defence and the Prosecution.

¹ ICC-02/04-01/15-1310-Conf.

² Confidential Annex A: E-mail Communication, from Ongwen Defence to Benjamin Gumpert, RE: Defence Witnesses, 6 July 2018, 15:29 CET.

³ Article 67(1)(e) of the Rome Statute.

⁴ Code of Conduct for the Office of the Prosecutor, Chapter 1, Section 4, para. 8(b), and Chapter 4, Section 4, para. 69(a).

⁵ ICC-02/04-01/15-1310-Conf, para. 11, (“Considering the content and significance of their evidence, the Prosecution does not request an opportunity to test their evidence through oral examination.”).

III. PROCEDURAL HISTORY

5. On 13 July 2016, the Single Judge issued “Initial Directions on the Conduct of the Proceedings”⁶ and held that “[s]ubject to Articles 64(6)(b) and 69(3) of the Statute, the trial will be organised into: (i) presentation of evidence by the Prosecution; (ii) any presentation of evidence by the LRVs, should leave to do so be granted, and (iii) any presentation of evidence by the Defence.”⁷
6. On 13 April 2018, the Prosecution notified the Trial Chamber that it has completed its presentation of evidence in the *Ongwen* case.⁸
7. On 4 June 2018, the Defence filed its anticipated testimony summaries and final lists of witnesses and evidence.⁹ The final list of witnesses, *inter alia*, included witnesses D-0007, D-0018, D-0088, D-0125, D-130, D-0131, and D-0132. The ‘mode of testimony’ for these seven witnesses is designated as ‘live’.¹⁰
8. On the same day, the Defence also requested the admission into evidence of the prior recorded statements and associated documents of nine witnesses, under Rule 68(2)(b) of the RPE.¹¹
9. On 13 June 2018, the Prosecution responded to the Defence final list of witnesses and evidence, requesting the Trial Chamber to: (i) strike five witnesses from the Defence LoW because ‘the Defence has not provided concrete information about the anticipated testimony of these witnesses’; (ii) order the Defence to file summaries of anticipated testimony for four further witnesses; (iii) reject, *in limine*, the Defence request for leave to add witnesses and materials to its List of Witnesses and List of Evidence; and (iv) instruct the Defence to submit, no later than 27 June 2018, an overall witness order.¹² However, the Prosecution did not request the Trial Chamber to change the manner in which the above seven witnesses will provide their evidence.

⁶ ICC-02/04-01/15-497.

⁷ ICC-02/04-01/15-497, para. 9.

⁸ ICC-02/04-01/15-1225.

⁹ ICC-02/04-01/15-1272-Conf-Red-Corr.

¹⁰ ICC-02/04-01/15-1272-Conf-AnxA-Corr. *See also* E-mail Communication, from Ongwen Defence to Trial Chamber IX, Prosecution Participants and VWU, OTP vs Ongwen – DEF List of Witnesses, 2 July 2018, 15:56 CET.

¹¹ ICC-02/04-01/15-1271-Conf.

¹² ICC-02/04-01/15-1284-Red.

10. On 21 June 2018, the Single Judge issued “Decision on Requests Following Final Defence Witness and Evidence Lists”¹³ and held that “the Single Judge considers that the Defence generally complied with its obligation to provide anticipated testimony summaries.”¹⁴

IV. APPLICABLE LAW

11. Article 67 of the Rome Statute (‘Statute’) enumerates several rights that are guaranteed to the accused in “full equality”. Article 67(1)(b) of the Statute bestows the right of having “adequate time and facilities for the preparation of the defence.”¹⁵ Moreover, Article 67(1)(e) of the Statute grants the accused the right “to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.”¹⁶
12. Article 69(2) of the Statute stipulates that “[t]he testimony of a witness shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence,” thus indicating a preference for *viva voce* testimony.

13. Trial Chamber II in the *Katanga and Ngudjolo Chui* found:

The Chamber is of the view that compliance with the requirements of rule 68(b) of the Rules does not automatically create a sufficient ground to deviate from the orality principle. The simple assertion that a written statement of a witness who has appeared for testimony provides the broader context in which a specific statement was made, or allegedly corroborates the oral testimony given at trial, does not qualify as a sufficient reason for admitting it into evidence.¹⁷

14. Additionally, Trial Chamber III in the *Bemba* case found:

Pursuant to Article 69(2) of the Statute, “[t]he testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence”. Under Rule 68 of the Rules, the Chamber “may, in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony”. The Chamber may thus depart from the general principle of giving evidence in person and explore the possibility of having evidence submitted in

¹³ ICC-02/04-01/15-1289.

¹⁴ ICC-02/04-01/15-1289, para. 10.

¹⁵ Human Rights Committee, General Comment No. 32: Article 14, Right to equality before courts and tribunals and to a fair trial, 23 August 2007, CCPR/C/GC/32, para. 32, citing: Communication No. 1128/2002, *Morais v. Angola*, para. 5.6; Similarly, Communications No. 349/1989, *Wright v. Jamaica*, para. 8.4; No. 272/1988, *Thomas v. Jamaica*, para. 11.4; No. 230/87, *Henry v. Jamaica*, para. 8.2; Nos. 226/1987 and 256/1987, *Sawyers, Mclean and Mclean v. Jamaica*, para. 13.6

¹⁶ Article 14(3)(e) of the International Covenant on Civil and Political Rights.

¹⁷ ICC-01/04-01/07-2954, para. 7.

writing, as long as it is not prejudicial to, or inconsistent with, the rights of the accused. However, the introduction of such prior-recorded testimony remains an option which should be adopted only in specific and exceptional circumstances.¹⁸

15. The Appeals Chamber in the *Bemba* case held:

[Referring to article 69(2) of the Statute] [t]he direct import of the first sentence of this provision is that witnesses must appear before the Trial Chamber in person and give their evidence orally. **This sentence makes in-court personal testimony the rule, giving effect to the principle of orality.** The importance of in-court personal testimony is that the witness giving evidence under oath does so under the observation and general oversight of the Chamber. The Chamber hears the evidence directly from the witness and is able to observe his or her demeanour and composure, and is also able to seek clarification on aspects of the witness' testimony that may be unclear so that it may be accurately recorded.¹⁹

16. Judge Henderson's partial dissent in the *Gbagbo and Blé Goudé* case found:

I would also like to express my disagreement with my colleagues' view that making use of rule 68 of the Rules "cannot come into conflict with the Statute because the latter instrument explicitly states in Article 69(2) that witnesses shall give testimony in person, except, *inter alia*, to the extent provided for in the Rules." **With respect, I do not think it is correct to state that, because there are possible exceptions to a principle, the principle ceases to exist.** The Majority's approach amounts to saying that there is no legal difference between in person testimony and the admission of prior recorded testimony, I do not subscribe to such a view, as I think there is great value in hearing incriminating evidence from the witness him or herself under oath and in front of the accused, the judges and the public. A feature of these proceedings has been the emergence of inconsistencies between the oral evidence of the witness when examined and what they may have said in their statement to the investigators. Exploring such inconsistencies is a legitimate approach in assessing the credibility of such witnesses.²⁰

V. SUBMISSIONS

17. In essence, the Prosecution is requesting the Trial Chamber to introduce into evidence prior recorded testimony of seven Defence witnesses under Rule 68(2)(b) of the RPE. The Prosecution is requesting this 19 months after the opening of its case-in-chief²¹ and three months after the closure of its presentation of evidence.²²

¹⁸ ICC-01/05-01/08-886, para. 7.

¹⁹ ICC-01/05-01/08-1386, para. 76. (Bolded added).

²⁰ Partially Dissenting Opinion of Judge Henderson, ICC-02/11-01/15-722-Anx, para. 6. (Bolded added).

²¹ ICC-02/04-01/15-T-26-ENG-ET, 6 December 2016.

²² ICC-02/04-01/15-1225.

18. As a preliminary matter, it appears necessary to remind the Prosecution that the trial proceedings at this Court and in this case are organised into three parts.²³ During the first part, it is for the Prosecution to present its evidence, which it did until 13 April 2018. The Prosecution was allowed to call 69 live Prosecution witnesses²⁴ and requested the submission into evidence of the prior recorded testimonies of 40 witnesses under Rule 68(2) of the RPE.²⁵ During the second part, the LRVs presented its evidence, after being granted leave to do so.
19. Finally, it is the Defence's turn to present its evidence. The Defence presentation of evidence is set to start on 18 September 2018.²⁶ It is the decision of Mr Ongwen and his Defence to call these seven witnesses live. The Defence (and participants) gave the Prosecution room to present its evidence as it deemed necessary and requests the Prosecution to extend the same right and professional courtesy. The Defence trusts the Prosecution that this is not an attempt to undermine Mr Ongwen's fundamental right to obtain the attendance and examination of witnesses on his behalf under the same conditions as the witnesses called on behalf of the Prosecution.²⁷ As discussed above, based on its professional judgment, the Prosecution is free to make an executive decision and not to cross-examine these seven Defence witnesses.²⁸
20. The Prosecution also argued that the "[p]arties do not have unfettered discretion in how they choose to present their evidence."²⁹ However, it provides no legal authority to substantiate its claim.³⁰ Instead, it ventures to take on the role of a trial management body by intervening in the adversarial party's presentation of evidence and attempting to manage the trial as such.

²³ ICC-02/04-01/15-497, para. 9.

²⁴ The live testimonies of 69 Prosecution witnesses amounted to a rough estimated total of 400 hours in direct examination alone.

²⁵ Of the Rule 68(2) witnesses for the Prosecution, 39 were pursuant to Rule 68(2)(b) and one pursuant to Rule 68(2)(c).

²⁶ Email Communication from Trial Chamber IX to the Registry and Counsel, Modification of Order 1275, 9 July 2018, at 10:1,1 (The Trial Chamber informed the parties and participants that the first block for the Defence presentation will run from 1 to 10 October 2018. The Defence opening statements will be given on 18 September 2018).

²⁷ Article 67(1)(e) of the Statute.

²⁸ ICC-02/04-01/15-1310-Conf, para. 11.

²⁹ ICC-02/04-01/15-1310-Conf, page 13 and see also para. 28.

³⁰ See ICC-02/04-01/15-1310-Conf, page 13, para. 28.

Prosecution's misapplication of Rule 68(2)(b) of the RPE

21. The Prosecution submits that the "Trial Chamber can apply Rule 68(2)(b) of the RPE, *proprio motu* or at the request of either Party."³¹
22. That said, the Prosecution misinterprets the application of Rule 68 of the RPE and misleads the Trial Chamber by concluding that "[n]othing in the rule suggests that its application is conditioned upon a request or approval from the calling party (or participant)."³² In particular, the Prosecution cites two decisions to support its claim. The first one being when the Single Judge decided *proprio motu* to introduce the evidence of the Prosecution's mental health experts via Rule 68(3) of the RPE, yet still giving the Prosecution the possibility of examining their experts live.³³ In the second decision cited, the Trial Chamber decided to introduce an additional interview transcript of D-0050; this transcript was pointed out by the Prosecution in a response to a request by the Defence to submit, *inter alia*, D-0050 pursuant to Rule 68(2)(b) of the RPE.³⁴ In other words, the initial choice of calling D-0050 as a Rule 68(2)(b) of the RPE was made by the Defence³⁵ and not by the Prosecution.³⁶
23. Thus, nothing in Rule 68 or in the case law cited by the Prosecution demonstrates that an adversarial party to this case (the Prosecution) can request on behalf of the other party (the Defence) the introduction of prior recorded testimonies. In other words, it is not the role of the Prosecution to decide on behalf of the Defence the manner in which the evidence of the Defence case should be presented.
24. Furthermore, the Prosecution highlighted that the reason behind the amendment in November 2013 to Rule 68 of the RPE was done "to reduce the length of ICC proceedings and to streamline evidence presentation."³⁷ However, the same document referred to by the Prosecution also noted that although this amendment could lead to the reduction of the length

³¹ ICC-02/04-01/15-1310-Conf, para. 2.

³² ICC-02/04-01/15-1310-Conf, para. 9.

³³ ICC-02/04-01/15-1310-Conf, para. 9 citing ICC-02/04-01/15-1024, ICC-02/04-01/15-1073, and ICC-02/04-01/15-497.

³⁴ ICC-02/04-01/15-1294, para. 25.

³⁵ ICC-02/04-01/15-1271-Conf, para. 19.

³⁶ ICC-02/04-01/15-1282-Conf, paras 14 and 15, specifically at para. 15, the OTP merely pointed out that there was an additional interview which was not included in the Defence request, and even went on to oppose the introduction of D-50 into Rule 68(2)(b) of the RPE, and did not go on to request the additional interview to be submitted via Rule 68(2)(b) of the RPE. Thus arguably, the Chamber introduced the additional interview *proprio motu*.

³⁷ Working Group on Lessons Learnt: Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence, ICC-ASP/12/37/Add.1, p. 21.

of proceedings, it cannot be inconsistent or prejudicial to the rights of the accused.³⁸ Nonetheless, the Prosecution's request is prejudicial and inconsistent with Mr Ongwen's rights as safeguarded by Rule 68(1) of the RPE.

Mr Ongwen's right to be tried without undue delay

25. The Defence notes that the Prosecution prominently bases its request on expeditiousness and undue delay of the trial against Mr Ongwen.³⁹ Specifically, the Prosecution submits that "[t]he particular circumstances related to the seven witnesses suggest that introduction of their prior recorded testimony will further the interests of the Accused, as well as those of the Court, by ensuring that the trial proceedings are expeditious and that Mr Ongwen is tried without undue delay."⁴⁰
26. Article 67 of the Statute enumerates the rights of an accused, not of the Prosecution. The right to be tried without undue delay is Mr Ongwen's right, and it is also his prerogative to determine if there has been a violation of this right.⁴¹ While Article 67(1)(c) of the Statute does guarantee Mr Ongwen the right to be tried without undue delay, Article 67 of the Statute guarantees other fair trial rights in full equality. These being, the right to adequate time to prepare for his defence⁴² and the right to obtain the attendance and examination of witnesses on his behalf.⁴³ The Defence trusts the Prosecution that its request is not an attempt to outweigh Mr Ongwen's fundamental fair trial rights because of the Prosecution's inappropriate and misplaced concerns regarding Mr Ongwen's right to be tried without undue delay.
27. The Defence avers that Mr Ongwen's rights to adequate time and to obtain the attendance and examination of witnesses on his behalf are non-derogable rights of a fair trial. There can be no denial of these rights on the grounds that, as the Prosecution argues, substituting Rule 68(2)(b) statements for live testimonies advances other fair trial rights.⁴⁴ For this reason, any contention that allowing the seven impugned witnesses to testify live would constitute undue delay, or

³⁸ Working Group on Lessons Learnt: Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence, ICC-ASP/12/37/Add.1, p. 31, para. 43.

³⁹ ICC-02/04-01/15-1310-Conf, paras 2, 7, 8, 12, 28.

⁴⁰ ICC-02/04-01/15-1310-Conf, para. 28.

⁴¹ Article 67 "Rights of the Accused", in particular Article 67(1)(c) of the Statute.

⁴² Article 67(1)(b) of the Statute.

⁴³ Article 67(1)(e) of the Statute.

⁴⁴ ICC-02/04-01/15-1310-Conf, para. 2: ("The advantages in this case of introducing the statements of the seven witnesses in lieu of their live testimony clearly outweigh any countervailing considerations.")

somehow infringe upon the interests of parties or participants, contradicts the notion of ‘Rights of the accused’ and is false.

28. Therefore, the Prosecution’s proposal to “safeguard” Mr Ongwen’s right to be tried without undue delay and its suggestion of the submission of the aforementioned witnesses *via* Rule 68(2)(b) of the RPE nullifies Mr Ongwen’s right to obtain the attendance and examination of his witnesses and his right to adequate time. This is prejudicial and infringes on the rights safeguarded by Rule 68(1) of the RPE and Article 67 of the Statute.
29. It is the Prosecution which has jeopardised Mr Ongwen’s right to an expeditious trial by filing of a smörgåsbord of 70 charged crimes and 7 modes of liability.⁴⁵ This is not Mr Ongwen’s doing, and does not and cannot create a reason to deny his other fair trial rights.
30. Furthermore, the Prosecution submits that “[t]he seven witnesses are currently designated to travel to The Hague and to testify live for an estimated total of 35-41 hours in direct examination alone, amounting to 8-10 court days.”⁴⁶
31. According to the Prosecution, if its request would be granted, it could potentially save time by reducing the total number of trial days by 8-10 court days. However, the amount of time and resources spent on this litigation, initiated by the Prosecution’s request, should be taken into consideration as well. First, through an *inter partes* email, the Prosecution proposed to introduce the prior recorded testimony of the seven Defence witnesses into evidence under Rule 68(2)(b) of the RPE. Second, the Defence had to draft an e-mail response, rejecting the Prosecution’s misplaced proposal. Third, the Prosecution drafted a 14 page long request, which had to be processed and notified by the Court Management Section. Fourth, the Defence is in the process of drafting this response, which likewise needs to be processed and notified by the Court Management Section. Finally, the Trial Chamber will have to review both the request and the response, deliberate and issue a decision. This decision needs to be processed by the Court Management Section and notified to the parties and participants. In addition, given that the pleadings concern Defence witnesses, they need to be carefully reviewed before public redacted versions can be filed and processed by the Court Management Section. This whole process, intending to hinder the live testimony of the Defence witnesses, amounts to several days of work and use of considerable amount of human and financial resources.

⁴⁵ ICC-02/04-01/15-533.

⁴⁶ ICC-02/04-01/15-1310-Conf, para. 12.

The principle of orality

32. Article 69(2) of the Statute stipulates that the testimony of a witness shall be given live, with enumerated exceptions; this preserves the preference for *viva voce* testimony through the principle of orality.⁴⁷ As held by Trial Chamber II in *Katanga and Ngudjolo Chui* case, the fact that all of the requirements of Rule 68(b) of the RPE are met does not “create a sufficient ground to deviate from the orality principle.”⁴⁸ Therefore, the Prosecution’s argument that the statements referred to fulfil all the requirements of Rule 68(2)(b) of the RPE⁴⁹ is not a sufficient reason to circumvent the Defence’s wish to presents its witnesses *viva voce*.
33. As found by Judge Henderson, live testimony is of great importance notably when it concerns incriminating evidence or given that inconsistencies may arise during oral testimony.⁵⁰ Thus it is logical to conclude that *viva voce* testimony is equally as important when it concerns potentially exculpatory or mitigating evidence. Additionally, the Appeals Chamber in the *Bemba* case highlighted the importance of live testimony, as it gives the opportunity for the Chamber to hear the evidence of the witness directly, and possibility for it to request clarifications from the witness of any areas that may seem unclear.⁵¹ Furthermore, not only would the Chamber have the possibility to ask for clarifications on unclear areas, but also areas that it deems of interest or importance.

Defence viva voce witnesses

34. The Defence witnesses D-0007, D-0018, D-0088, D-0125, D-0130, D-0131, and D-0132 voluntarily agreed to travel to The Hague and provide their testimony on behalf of Mr Ongwen. These witnesses are willing to tell their story and the story of their communities about the conflict in Northern Uganda. Following the careful assessment of the Prosecution’s evidence, it is the view and preference of Mr Ongwen and his defence that oral examination of these witnesses will help to establish the truth in this case while ensuring Mr Ongwen’s Article 67 rights.

⁴⁷ ICC-01/04-01/07-2954, para. 4.

⁴⁸ ICC-01/04-01/07-2954, para. 7.

⁴⁹ ICC-02/04-01/15-1310-Conf, para. 7.

⁵⁰ ICC-02/11-01/15-722-Anx, para. 6.

⁵¹ ICC-01/05-01/08-1386, para. 76.

35. As for the individual witnesses, the Prosecution downplays the importance of each witness. Even though the Defence needs not to justify its selection of witnesses, below are a few points as to the necessity of each witness.

- a. D-0007 – [REDACTED]. He knows the experiences suffered by Mr Ongwen and shall lay background evidence as to Mr Ongwen’s Article 31(1)(a) defence.
- b. D-0018 – This witness discusses highly relevant and material background information to the war, the NRA and the different rebel groups (including the LRA). He was an official in the LRA Embassy in Sudan during the 1990s, and can speak to the lack of organisational structure of the LRA both pre and post November 1999 and material related to Mr Ongwen’s duress defence.⁵²
- c. D-0088 – The witness was at the ground floor in the development of the reception centres in Uganda ([REDACTED]). He has invaluable insight into the problems and issues facing persons: 1) born in the bush, 2) raised for all or most of their lives in the bush and 3) those returning from the bush (amongst other issues). His testimony shall aid in both Article 31(1) defences.
- d. D-0125 – The Prosecution lead contested evidence about Mr Ongwen being in Teso during the summer of 2003.⁵³ This witness, and others, contests this falsity. His evidence goes directly to the reliability, credibility and veracity of this type of evidence.
- e. D-0130 – The witness’s testimony shall touch upon issues highly relevant to Mr Ongwen’s duress defence and Mr Ongwen’s position in the LRA around the time of the charged period.
- f. D-0131 – The witness shall discuss issues relevant to the area of duress, noting specifically the treatment by the UPDF of persons who returned from the bush. [REDACTED].

⁵² See ICC-02/04-01/15-717-AnxA-Red.

⁵³ For example, see testimony of P-0200.

g. D-0132 – The witness worked in one of the rehabilitation centres in Uganda ([REDACTED]) during the charged period. His testimony shall discuss, amongst other issues, practices of the rehabilitation centre with LRA escapees.

36. The Defence notes that issues described above, and other issues to be discussed by these witnesses, relate to areas which the Prosecution failed to bring witnesses to testify about or rebut evidence given by Prosecution *viva voce* or Rule 68(2) witnesses.
37. In sum, it is expected that the Prosecution leaves the Defence to make its professional judgment on how to effectively represent its client and to decide the manner in which it intends to call its witnesses and present its evidence. It is also expected that the Prosecution leaves the assessment of content and significance of the Defence evidence to the Trial Chamber.

VI. CONCLUSION

38. For the reasons stated above, the Defence requests the Trial Chamber to reject the Prosecution's request.

Respectfully submitted,



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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 30th day of July, 2018