

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 18 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

Decision on Defence Request for Leave to File a No Case to Answer Motion

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IX ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64(2), 3(a) and 6(f), 66 and 67(1)(a), (e) and (g) of the Rome Statute ('Statute') and Rule 134(3) of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Defence Request for Leave to File a No Case to Answer Motion'.

I. Procedural history and relief sought

1. On 5 July 2018, the defence for Mr Ongwen ('Defence') requested leave to file a 'no-case-to-answer' ('NCTA') and judgment of acquittal motion ('Request').¹
2. On 12 July 2018,² the Office of the Prosecutor ('Prosecution') and Legal Representatives of Victims filed responses opposing the relief sought in full.³

II. Applicable law

3. The Chamber emphasises from the outset that the Request is not a so-called NCTA motion. Rather, it is a request for leave to file such a motion.
4. The Court's legal texts do not explicitly provide for a NCTA procedure, nor does international human rights law necessarily require such a procedure in order to protect the rights of the accused.⁴

¹ Defence Request for Leave to File a No Case to Answer Motion and Application for Judgment of Acquittal, ICC-02/04-01/15-1300. This was filed after a prior request for directions on the possibility of a no-case-to-answer motion was rejected. *See* 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, paras 28-34.

² The response deadline was shortened to this date. Email from the Chamber, 5 July 2018, at 16:18.

³ Prosecution's Response to the Defence Request for Leave to File a No Case to Answer Motion and Application for Judgment of Acquittal, ICC-02/04-01/15-1305 ('Prosecution Response'); CLRV Response to "Defence Request for Leave to File a No Case to Answer Motion and Application for Judgment of Acquittal", ICC-02/04-01/15-1304; Victims' response to 'Defence Request for Leave to File a No Case to Answer Motion and Application for Judgment of Acquittal', ICC-02/04-01/15-1306.

⁴ *See* Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, 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, OA 6 ('Ntaganda OA6 Judgment'), paras 43, 47-49.

5. Nevertheless, 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.⁵ A decision on whether or not to conduct a NCTA 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 (3)(a) of the Statute.⁶
6. Two past ICC cases have called for a NCTA procedure or something functionally similar to it.⁷ Most have not.

III. Analysis

A. Issues identified for a potential NCTA motion

7. The Defence indicates that it has identified several issues where, in its view, the Prosecution failed to meet the legal standard of presenting sufficient evidence on which the Chamber could reasonably convict Mr Ongwen. The Defence presents a few non-exhaustive examples that would be raised should the Request be granted:
 - (i) The lack of notice of the charges, particularly that the confirmation decision does not identify the supporting evidence of each charge and does not explicitly define some of the charges and modes of liability;⁸
 - (ii) Defective charges not supported by evidence, with an example that the Prosecution has not proven that any property subject to the crime of

⁵ *Ntaganda* OA6 Judgment, ICC-01/04-02/06-2026, para. 44.

⁶ *Ntaganda* OA6 Judgment, ICC-01/04-02/06-2026, para. 44.

⁷ Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Public redacted version of Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, ICC-01/09-01/11-2027-Red-Corr (with two annexes; corrigendum notified 16 June 2016); Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Second Order on the further conduct of the proceedings, 4 June 2018, ICC-02/11-01/15-1174 (ordering the Defence to file submissions ‘addressing the issues for which, in their view, the evidence presented by the Prosecutor is not sufficient to sustain a conviction’).

⁸ Request, ICC-02/04-01/15-1300, paras 23-26.

pillaging actually belonged to an ‘enemy’ or ‘hostile’ party to the conflict;⁹ and

- (iii) The lack of evidence that Mr Ongwen conceived the common plan to attack Pajule or was one of the senior commanders who agreed to it.¹⁰
8. Even accounting for the fact that the Defence presents these examples non-exhaustively, the Chamber is not persuaded that a NCTA procedure on such matters would be meaningful.
9. The Defence has argued before that the accused lacks notice of the charges. As noted by the Prosecution, the Chamber has previously rejected such arguments both for being untimely and on their merits.¹¹ In particular, both this Chamber and the Pre-Trial Chamber have emphasised the significant distinction between being informed of the *charges* and the confirmation decision’s *reasoning*.¹² The Defence arguments for evidentiary references and legal definitions fail to appreciate this distinction, and the Chamber fails to see why its prior determinations on notice would change in a NCTA context.
10. For a pure question of legal interpretation, like the pillaging example raised by the Defence, the answer to this question does not necessarily require presentation of additional Defence evidence to resolve it. The Chamber fails to see why a NCTA procedure on such a matter would lead to a fairer and more expeditious trial. The Defence will have the opportunity to present its legal arguments in relation to this issue. The Request in this respect is tantamount to asking for the Chamber’s understanding of the applicable law prior to its

⁹ Request, ICC-02/04-01/15-1300, paras 27-28.

¹⁰ Request, ICC-02/04-01/15-1300, paras 28-32.

¹¹ *E.g.* Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision, 24 January 2018, ICC-02/04-01/15-1147 (further citations therein), *cited in* Prosecution Response, ICC-02/04-01/15-1305, para. 14.

¹² ICC-02/04-01/15-1147, para. 19; Pre-Trial Chamber II, Decision on the Defence request for leave to appeal the decision on the confirmation of charges, 29 April 2016, ICC-02/04-01/15-428, paras 24-27.

judgment. The Chamber sees no justification for making such an advance determination in the present proceedings.

11. As for the arguments about Mr Ongwen's involvement in the alleged planning of the Pajule attack, even if the Defence could persuade the Chamber that evidence was lacking on these points, this would not meaningfully affect the scope of the trial. Mr Ongwen is charged with attacking Pajule under several alternative modes of liability,¹³ not all of which necessarily require him to be involved in a common plan or be in a position of authority. In other words, the Defence's proposed arguments in relation to Pajule would not lead to removing any of the charges related to this alleged incident.

B. Other specific circumstances alleged

12. Further, the Defence alleges that other specific circumstances of this case justify initiating a NCTA procedure. The Chamber is again unpersuaded.
13. First, the Defence makes reference to the format of this trial arguably being adversarial in nature.¹⁴ However, as clarified by the Appeals Chamber, the choice on the part of a trial chamber to adopt elements of an adversarial trial structure does not oblige a trial chamber to provide for a NCTA procedure.¹⁵

¹³ Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, ICC-02/04-01/15-422-Red, (with annex) ('Confirmation Decision'), pages 73-77 (all Pajule charges confirmed with Article 25(3)(a) (indirect co-perpetration), (c), d(i)-(ii) and 28(a) of the Statute in the alternative). *See also* Prosecution Response, ICC-02/04-01/15-1305, para. 26.

¹⁴ Request, ICC-02/04-01/15-1300, para. 20.

¹⁵ *Ntaganda* OA6 Judgment, ICC-01/04-02/06-2026, paras 50-51 (citations removed: '[t]he Appeals Chamber accepts that Common Law systems and international and internationalised criminal jurisdictions following an adversarial trial structure typically provide for a 'no case to answer' procedure. [...] In the view of the Appeals Chamber, by comparing the trial proceedings in his case to adversarial systems on the domestic and international level, Mr Ntaganda fails to appreciate that, for the purposes of this appeal, the primary question is whether the decision of the Trial Chamber not to conduct a 'no case to answer' procedure contravenes Mr Ntaganda's fair trial rights within the legal framework of the Court').

14. Second, the Defence makes repeated reference to the burdens caused by the ‘voluminous’ number of charges and modes of liability in this case.¹⁶ However, the Chamber does not consider this to be of much significance. It is more the factual scope of a case – rather than the number of legal characterisations within it – that drives the time and resources needed during trial. Properly formulated charges can be sub-divided in different ways, meaning that the number of charges is not necessarily a good indicator of a case’s complexity or the burdens on the defence in meeting it.¹⁷ Similarly, when the same acts and conduct of an accused are charged under alternative modes of liability, the additional burden on the defence would typically stem from longer legal submissions at the end of trial rather than from having a larger ‘case to answer’. Noting that the confirmed charges in this case rely extensively on alternative modes of liability and characterising discrete incidents under a variety of crimes, the Chamber does not consider that the number of charges and modes of liability lend any greater impetus to pursue a NCTA procedure.
15. Third, and with reference to the *Ntaganda* jurisdictional appeal as a distinguishing point, the Defence argues that there is an absence of resolution of important legal issues on appeal in this case which justifies a NCTA procedure.¹⁸ The Chamber, in the present circumstances, is not convinced that this issue is of particular relevance to the determination of whether a NCTA procedure would be worthwhile. In any case, the Chamber is also not persuaded that this is a meaningful point of distinction from the *Ntaganda* case

¹⁶ Request, ICC-02/04-01/15-1300, paras 20-21, 34.

¹⁷ For example, both this case and the (pre-joinder) *Gbagbo* case have four charged incidents where murders are alleged. In *Gbagbo*, the murder charges were consolidated into a single count. In this case, the murder charge is separated across four counts. Compare Confirmation Decision, ICC-02/04-01/15-422-Red, (with annex), pages 76, 80, 84, 88 with Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, ICC-02/11-01/11-656-Red (with annex), paras 271, 278.

¹⁸ Request, ICC-02/04-01/15-1300, para. 21, *referencing* Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeal of Mr Ntaganda against the “Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”, 15 June 2017, ICC-01/04-02/06-1962, OA 5.

(where Trial Chamber VI rejected leave to file a NCTA motion).¹⁹ Only a limited fraction of the important legal issues in that case were resolved by the appellate judgment referenced by the Defence, and this Chamber again emphasises that it sees no need to make advance determinations on the applicable law in the present proceedings.²⁰

C. Conclusion

16. Taking into account all the Defence arguments and the circumstances of the case, the Chamber does not consider that a NCTA procedure would further the fair and expeditious conduct of the proceedings. Accordingly, the Request is rejected. In view of its ruling, the Chamber sees no reason to engage with Defence arguments on the correct standard for reviewing a NCTA motion.²¹

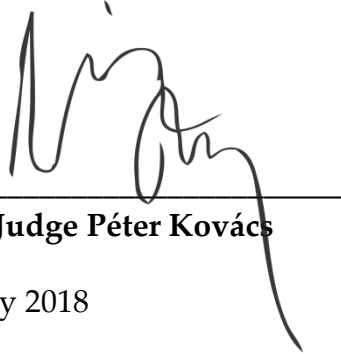
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge



Judge Péter Kovács



Judge Raul C. Pangalangan

Dated 18 July 2018

At The Hague, The Netherlands

¹⁹ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Defence request for leave to file a ‘no case to answer’ motion, 1 June 2017, ICC-01/04-02/06-1931.

²⁰ Paragraph 10 above.

²¹ See Request, ICC-02/04-01/15-1300, paras 15-17.