

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/04-01/15
Date: 13 October 2017

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN*

Public

Preliminary Directions for any LRV or Defence Evidence Presentation

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart
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Counsel for the Defence

Krispus Ayena Odongo

Legal Representatives of Victims

Joseph Akwenyu Manoba
Francisco Cox
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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 31, 66, 67(l)(e) and (g), 68(3) and 69 of the Rome Statute ('Statute'); Rules 78-80 and 140 of the Rules of Procedure and Evidence ('Rules') and Regulation 54 of the Regulations of the Court ('Regulations'), issues the following 'Preliminary Directions for any LRV or Defence Evidence Presentation'.

1. At this point in the trial, the Office of the Prosecutor ('Prosecution') has completed the testimony of over half its *viva voce* witnesses and, barring exceptional circumstances, should complete its presentation of evidence in the spring of 2018. The Single Judge therefore considers it appropriate to give certain preliminary directions as regards the presentation of evidence by the legal representatives for victims ('LRVs') and the Defence for Mr Ongwen ('Defence'). These preliminary directions are given far in advance in order to facilitate the effective preparation of the LRVs and Defence.
2. Before setting out these directions, the Single Judge recalls the initial directions on the conduct of the proceedings ('Rule 140 Decision')¹ and indicates the following:
 - i. To give effect to the spirit and intention of Article 68(3) of the Statute in the context of the trial proceedings, 'it must be interpreted so as to make participation by victims meaningful'.² As stated in the Rule 140 Decision, the LRVs may present evidence after the Prosecution with leave from the

¹ Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497.

² Appeals Chamber, *The Prosecution v. Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, OA9 and OA10, para. 97. Article 68(3) provides, in relevant part: '[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial [...]'.

Chamber.³ This said, the Chamber notes that it has already heard many victims in the course of the Prosecution's case. The LRVs have also been permitted throughout the trial to question Prosecution witnesses on matters where victims' interests are engaged, including on matters related to any future reparations proceedings which may occur.⁴ Additional evidence above and beyond what has already been elicited in the course of the Prosecution's evidence presentation will be permitted only when it is clearly justified. Further, and noting it is for the Chamber to determine the appropriate stages of the proceedings for presenting views and concerns,⁵ the Chamber is not provisionally inclined to hear victims present unsworn, non-evidentiary 'views and concerns'⁶ before its Judgment.

- ii. The onus is on the Prosecution to prove the guilt of the accused, pursuant to Article 66(2) of the Statute. Conversely, the accused has the right to remain silent and need not present any evidence, as foreseen in Article 67(1)(g) of the Statute. The Defence has already been required to give advance notice of affirmative defences, and gave notice on 9 August 2016 of the possibility of raising an alibi for one of the charged incidents, a mental disease or defect defence, and/or a duress defence.⁷

³ Article 69(3) of the Statute; Rule 140 Decision, ICC-02/04-01/15-497, para. 9.

⁴ Rule 140 Decision, ICC-02/04-01/15-497, para. 10. *See also* Regulation 56 of the Regulations.

⁵ Article 68(3) of the Statute.

⁶ *E.g.* Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of 'Decision on the request by the Legal Representative of the Victims of the Attacks for leave to present evidence and victims' views and concerns' (10 February 2017, ICC-01/04-02/06-1780-Conf), 15 February 2017, ICC-01/04-02/06-1780-Red, paras 42-49 (with annex containing the partly dissenting opinion of J. Ozaki).

⁷ Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules of Procedure and Evidence, ICC-02/04-01/15-517 (with annex); Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules of Procedure and Evidence, ICC-02/04-01/15-518; Defence Notification Pursuant to Rule 79(2) of the Rules of Procedure and Evidence, ICC-02/04-01/15-519-Conf. *Filed pursuant to* Decision on 'Prosecution's request to order the Defence to comply with rule 79', 7 June 2016, ICC-02/04-01/15-460.

- iii. If the LRVs and/or Defence present evidence, the Chamber may set deadlines and request information on their presentation.⁸
 - iv. The disclosure obligations of the Defence and Prosecution differ significantly, because of the particular role the two parties have at trial.⁹ This said, the Defence must permit the Prosecution to inspect any books, documents, photographs and other tangible objects in their possession or control, which are intended for use by the Defence as evidence for purposes at trial.¹⁰ In this regard, the Single Judge has taken note of the Defence disclosure already effectuated up until now. If permitted to present evidence, the LRVs also will be required to disclose the evidence it intends to use and the identities of its witnesses sufficiently in advance.¹¹
 - v. The LRVs have already given their opening statements, but the Defence may present an opening statement at the beginning of the Defence presentation of evidence if it so wishes.¹²
 - vi. The timelines and procedures set out in the course of paragraphs 16-38 of the Rule 140 Decision, apply to all participants when presenting their evidence.
3. By 14 December 2017, the LRVs and Defence must provide a preliminary list of witnesses and an estimate of how many hours of witness examination it will require. These lists are for informational purposes and may be changed up until the applicable deadlines for the final lists of witnesses. Subject to any subsequent

⁸ Regulation 54(b)-(e) and (l) of the Regulations. *See also* Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Directions on Defence Presentation of Evidence, 3 November 2015, ICC-01/05-01/13-1450, para. 2(i) (further citations therein).

⁹ ICC-01/05-01/13-1450, para. 2(ii) (further citations therein).

¹⁰ Rule 78 of the Rules.

¹¹ Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled “Decision on the Modalities of Victim Participation at Trial”, 16 July 2010, ICC-01/04-01/07-2288, OA 11, para. 55.

¹² Rule 140 Decision, ICC-02/04-01/15-497, paras 7-8; Transcript of Hearing, 7 December 2016, ICC-02/04-01/15-T-27. For purposes of indicating any material used in the course of a Defence opening statement, this is to be provided by email eight days prior to the opening statement.

order by the Chamber, redacting information from the other participants in these preliminary lists may also be done if strictly necessary.

4. The LRVs must present its final lists of proposed witnesses and evidence by 2 February 2018. The LRVs must also provide its justifications for why leave should be granted to present evidence. Any responses to the justifications provided must be filed within the standard time specified in Regulation 34 of the Regulations.
5. In what is currently expected to occur in the spring of 2018, the Prosecution's evidence presentation will be understood as having concluded by way of a formal notice filed by the Prosecution in the case record.¹³ This notice must be filed promptly after the conclusion of the Prosecution's last *viva voce* witness.
6. Within one week from notification of this notice, and to the extent leave to present evidence is granted, the LRVs must: (i) confirm its final lists of evidence and witnesses; (ii) certify that all necessary witness information forms have been completed and given to the VWU; (iii) provide anticipated testimony summaries for all witnesses; (iv) complete disclosure of all items it intends to use during its evidence presentation (to the extent not already disclosed); and (v) request any protective measures or relief under Rule 68 of the Rules.
7. Within three weeks from notification of the Prosecution's notice, the Defence must provide the information specified in items (i)-(v) of the previous paragraph.

¹³ This notice may be conditional on the resolution of any outstanding requests for the submission of evidence, either in writing or through the email submission procedure specified at paragraph 28 of the Rule 140 decision. A deadline for the Prosecution to submit any final items in writing will be set in due course.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

ADOPTS the aforementioned directions concerning the conduct of proceedings.

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

A handwritten signature in black ink, appearing to read 'BS', is written over a horizontal line.

Judge Bertram Schmitt, Single Judge

Dated 13 October 2017

At The Hague, The Netherlands