

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-02/04-01/15**

Date: **26 March 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***

**Confidential**

**Decision on the Legal Representative Request for Reconsideration of the Decision  
on Witnesses to be Called by the Victims Representatives**

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

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**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

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

**States Representatives**

**Other**

**REGISTRY**

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**Registrar**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**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), 67(1), 68(1) of the Rome Statute ('Statute'), issues the following 'Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives'.

### **I. Procedural history and submissions**

1. On 13 October 2017, the Chamber issued its preliminary directions regarding the presentation of evidence for the defence case and for a potential victims case ('Preliminary Directions').<sup>1</sup> Therein, it ordered, *inter alia*, that the Common Legal Representative for Victims ('CLR') and the Legal Representative for Victims ('LRV', together 'Victim Representatives') file their final lists of proposed witnesses and justification for why leave to present evidence should be granted by 2 February 2018.<sup>2</sup>
2. On 2 February 2018, the CLR and LRV<sup>3</sup> filed their final lists of witnesses and requests for leave to present evidence.
3. On 6 March 2018, the Chamber issued its Decision on the requests by the Victim Representatives, allowing the CLR to call three witnesses and the LRV to call four witnesses. The Chamber rejected the remainder of the requests ('Decision').<sup>4</sup>

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<sup>1</sup> Preliminary Directions for any LRV or Defence Evidence Presentation, ICC-02/04-01/15-1021.

<sup>2</sup> Preliminary Directions, ICC-02/04-01/15-1021, para. 4.

<sup>3</sup> Victims' requests for leave to present evidence and to present victims' views and concerns in person, ICC-02/04-01/15-1166, with one confidential annex, ICC-02/04-01/15-1166-Conf-Anx.

<sup>4</sup> Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, ICC-02/04-01/15-1199-Conf. A public redacted version was filed on the same day, ICC-02/04-01/15-1199-Red.

4. On 12 March 2018, the LRV filed a request for reconsideration ('Request').<sup>5</sup> It seeks that the Chamber reconsider its decision not to call three witnesses proposed by the LRV who were expected to provide testimony about sexual violence against men and boys and the desecration of dead bodies ('Anticipated Testimony').<sup>6</sup>
5. The LRV argues that in rejecting the request to call these three witnesses the Chamber committed an error of reasoning<sup>7</sup> and causes an injustice<sup>8</sup> which justifies the exceptionality of the measure of reconsideration.<sup>9</sup>

## II. Analysis

6. As previously noted by the Chamber, reconsideration is an exceptional measure which should only be done if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice. New facts and arguments arising since the issuance of the decision might be taken into consideration.<sup>10</sup>
7. The LRV argue that the Chamber erred in finding that the issues of the Anticipated Testimony are beyond the scope of the charges. They submit that while it is true that the charges concerning sexual and gender based violence do not cover the topics of the anticipated testimonies, these acts fall under other crimes which were confirmed.<sup>11</sup>

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<sup>5</sup> Request for reconsideration of the "Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests", ICC-02/04-01/15-1203.

<sup>6</sup> Request, ICC-02/04-01/15-1203, para. 42.

<sup>7</sup> Request, ICC-02/04-01/15-1203, paras 10-26.

<sup>8</sup> Request, ICC-02/04-01/15-1203, paras 27-37.

<sup>9</sup> Request, ICC-02/04-01/15-1203, paras 38-41.

<sup>10</sup> Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance, 15 June 2016, ICC-02/04-01/15-468, para. 4; Decision on Legal Representatives' Request Regarding Opening Statements, 29 November 2016, ICC-02/04-01/15-610.

<sup>11</sup> Request, ICC-02/04-01/15-1203, paras 11-26.

8. The Chamber notes that from the arguments brought forward by the LRV there seems to be a misunderstanding. The paragraph of the Decision in question provides as follows (citations removed):

The Chamber notes that both proposed topics (sexual violence against men and boys and the desecration of bodies) are not part of the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber. As noted by the LRV, the charges for SGBC as confirmed concern crimes against women and girls. Since the acts described by the anticipated testimony would fall under the category of sexual crimes and such acts are not mentioned in the facts confirmed by the decision on the confirmation of charges, the Chamber considers them to be beyond the scope of the charges.<sup>12</sup>

9. In this passage, the Chamber considered that presenting such evidence was not sufficiently warranted because it would exceed the facts and circumstances of the sexual and gender based crimes in this case. This was consistent with the LRV's position in its request to call evidence, conceding in its submissions that 'the charges confirmed against Dominic Ongwen in respect of sexual and gender-based crimes (charges 50-68) are specifically concerned with crimes against women and girls'.<sup>13</sup>
10. But the Chamber never indicated that the evidence proposed by the LRV was unrelated to the case *entirely*.<sup>14</sup> Similar to what has been determined in other contexts, evidence that is not squarely part of the facts and circumstances described in the charges could still have been relevant to other parts of the case, such as other confirmed charges or the contextual elements charged.<sup>15</sup>
11. In respect of the injustice argued by the LRV, the main concern seems to be the fear that the victims of the form of sexual and gender based violence for which

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<sup>12</sup> Decision, ICC-02/04-01/15-1199-Red, para. 57.

<sup>13</sup> ICC-02/04-01/15-1166, para. 21.

<sup>14</sup> The Chamber notes that the Prosecution did not file a response to the Request.

<sup>15</sup> *E.g.* Transcript of Hearing, 13 June 2017, ICC-02/04-01/15-T-85-CONF-ENG, page 7 line 15 to page 8 line 9 (referencing proof of the contextual elements and modes of liability as examples for how attacks or criminal conduct outside the charged time period 'can be put forward as evidence to support the facts and circumstances in the charged time period').

the Anticipated Testimony is brought forward will be excluded from potential reparation proceedings. In this respect, the Chamber considers that the question of reparation is premature to be discussed at present, and in any event, the Decision made no pronouncement about any potential reparations phase or reparations eligibility. Accordingly, the LRV's claim of injustice is without any merit.

12. In respect of the argument that the lack of establishing the truth regarding the allegations contained in the Anticipated Testimonies causes an injustice which warrants a reconsideration of the Decision,<sup>16</sup> the Chamber reiterates the requirements set out for granting leave to present evidence by the Victim Representatives.<sup>17</sup> It also recalls, again, that the fact that it does not grant leave to call these witnesses is in no way a determination on the truthfulness of the allegations.<sup>18</sup> As previously stated, the rights of the victims where their interests are affected need to be balanced with the rights of the accused. Accordingly, the Chamber does not find that there is an injustice warranting a reconsideration of the Decision.
13. Accordingly, the Chamber does not consider that there are exceptional circumstances justifying the reconsideration of the Decision and consequently rejects the Request.

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<sup>16</sup> Request, ICC-02/04-01/15-1203, paras 28-35.

<sup>17</sup> Decision, ICC-02/04-01/15-1199-Red, paras 15-17.

<sup>18</sup> *See also*, Decision, ICC-02/04-01/15-1199-Red, para. 58.

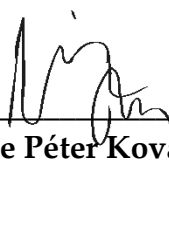
**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**REJECTS** the Request.

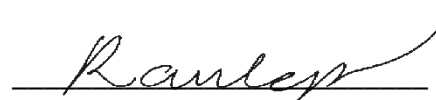
Done in both English and French, the English version being authoritative.



**Judge Bertram Schmitt, Presiding Judge**



**Judge Péter Kovács**



**Judge Raul C. Pangalangan**

Dated 26 March 2018

At The Hague, The Netherlands