

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 26 April 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 Urgent Request for Delay in Opening of LRV and CLRV
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
Benjamin Gumpert

Counsel for the Defence

Krispus Ayena Odongo

Legal Representatives of Victims

Joseph Akwenyu Manoba
Francisco Cox
Paolina Massidda

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

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

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), 66(2), 67 and 69 of the Rome Statute ('Statute'), issues the following 'Decision on Defence Urgent Request for Delay in Opening of LRV and CLRV Evidence Presentation'.

I. Procedural history and submissions

1. On 13 October 2017, the Presiding Judge issued preliminary directions for the presentation of evidence by the Common Legal Representative for Victims ('CLR') and the Legal Representative for Victims ('LRV', together 'Legal Representatives') ('Preliminary Directions').¹ The Preliminary Directions stipulated that disclosure of all items intended to be used during the evidence presentation by the Legal Representatives should be completed within one week after the Office of the Prosecutor ('Prosecution') has filed a formal notice closing its evidence presentation.²
2. On 6 March 2018, the Chamber informed the parties and participants that it envisaged hearing the testimony of witnesses to be called by the Legal Representatives from 30 April 2018 to 16 May 2018, with the exact dates to be confirmed ('Decision on the Legal Representatives Request to Present Evidence').³ The decision also reinforced the disclosure deadline as set out in the Preliminary Directions.⁴
3. On 14 March 2018, following receipt of information that the Prosecution's evidence presentation would extend into mid-April, the Legal Representatives

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

² Preliminary Directions, ICC-02/04-01/15-1021, para. 6.

³ Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, ICC-02/04-01/15-1199-Red, para. 82.

⁴ Decision on the Legal Representatives Request to Present Evidence, ICC-02/04-01/15-1199-Red, para. 79.

were ordered, *inter alia*, to complete disclosure by a new deadline of 5 April 2018.⁵

4. On 27 March 2018, the Chamber confirmed the hearing schedule, with the Legal Representatives' evidence presentation starting from 1 May 2018.⁶
5. On 3 and 5 April 2018, the Legal Representatives disclosed to the defence for Mr Ongwen ('Defence') materials intended to be used during the upcoming evidence presentation.⁷
6. On 13 April 2018, the Prosecution submitted a formal notification of the completion of its evidence presentation.⁸
7. On 24 April 2018, the Defence submitted an urgent request seeking the delay of at least one month to the opening of the Legal Representatives' evidence presentation ('Request').⁹ It argues that the extension, in order to allow the Defence adequate time to prepare, is necessary to ensure compliance with the accused's rights under Articles 67(1)(b), 67(1)(e) and 64(2) of the Statute.¹⁰
8. On 26 April 2018, the Prosecution filed its response, seeking that the Request be rejected ('Prosecution Response').¹¹ The Prosecution submits that the Request fails to establish that it is in the interests of justice to delay the proceedings by at

⁵ Email communication from Trial Chamber IX Communications to parties and participants, 14 March 2018 at 9:40.

⁶ Email from Trial Chamber IX to the parties and participants, 27 March 2018 at 15:28. The exact dates confirmed were 1-9, 14-16 and 23-24 May 2018.

⁷ Common Legal Representative's Communication of the Disclosure of Evidence, 4 April 2018, ICC-02/04-01/15-1216 (with confidential Annex A listing 23 items) and on 6 April 2018, ICC-02/04-01/15-1221 (with Annex A listing 3 items); Legal Representatives of Victims' Communication of the Disclosure of Evidence, 5 April 2018, ICC-02/04-01/15-1220 (with confidential Annex A listing 16 items).

⁸ Notice of the Prosecution's completion of evidence presentation, ICC-02/04-01/15-1225.

⁹ Defence Urgent Request for Delay in Opening of LRV and CLRV Cases Pursuant to Articles 67(1)(b) and 67(1)(e) of the Rome Statute, ICC-02/04-01/15-1239, para. 26; Email communication from Trial Chamber IX Communications to parties and participants, 24 April 2018 at 17:34 shortened the response deadline to 26 April 2018.

¹⁰ Request, ICC-02/04-01/15-1239, paras 12-25.

¹¹ Prosecution's Response to the Defence Urgent Request for Delay in Opening of LRV and CLRV Cases, ICC-02/04-01/15-1245.

least one month, as well as failing to provide reasons justifying a delay or the reasons for making such a late request.¹² The Prosecution Response highlights that failure to continue the proceedings as scheduled would impinge Mr Ongwen’s right to a fair and expeditious trial, as well as the right of victims and witnesses in this case.¹³ The Prosecution is also of the view that the Defence’s assertion of being unable to process the materials in the time available is unreasonable, and certain aspects of the Request are speculative and without merit.¹⁴

9. On the same day, the CLRV submitted its response, strongly opposing the Request (‘CLRV Response’).¹⁵ The CLRV argues that the Request amounts to an attempt to re-litigate a matter that has already been addressed and settled *via* previous decisions, and the time limits for lodging appeals have long passed.¹⁶ Therefore, the CLRV submits that the Request is frivolous and should be dismissed *in limine*.¹⁷
10. Also on 26 April 2018, the LRV submitted its response seeking that the Request be rejected (‘LRV Response’).¹⁸ The LRV argue that given the small amount of material relating to its witnesses, the Defence had sufficient time and resources to prepare for the commencement of the Legal Representatives’ evidence presentation.¹⁹ It is further submitted that no justification has been provided as to why the Request was not made earlier and any extension risks having a

¹² Prosecution Response, ICC-02/04-01/15-1245, paras 2-3, 7-9.

¹³ Prosecution Response, ICC-02/04-01/15-1245, paras 4 and 10.

¹⁴ Prosecution Response, ICC-02/04-01/15-1245, paras 11-16.

¹⁵ CLR Response to the “Defence Urgent Request for Delay in Opening of LRV and CLRV Cases, Pursuant to Articles 67(1)(b) and 67(1)(e) of the Rome Statute”, 26 April 2018, ICC-02/04-01/15-1246.

¹⁶ CLRV Response, ICC-02/04-01/15-1246, paras 2, 9-16.

¹⁷ CLRV Response, ICC-02/04-01/15-1246, paras 2 and 17.

¹⁸ Victims’ response to “Defence Urgent Request for Delay in Opening of LRV and CLRV Cases, Pursuant to Articles 67(1)(b) and 67(1)(e) of the Rome Statute”, ICC-02/04-01/15-1247.

¹⁹ LRV Response, ICC-02/04-01/15-1247, paras 2, 11-17.

negative impact on the psychological well-being of the witnesses due to appear.²⁰

II. Analysis

11. The Chamber is not persuaded that a delay of one month to the opening of the Legal Representatives' evidence presentation is necessary in order to ensure protection of the accused's rights under Articles 64(2), 67(1)(b) or 67(1)(e) of the Statute.
12. The Chamber is conscious of the Defence's duty to review comprehensively all items disclosed and subsequently confer with the accused.²¹ However, the Chamber finds that there is not an overly cumbersome burden of preparation, in the time available, upon the Defence when considering: (i) the purpose of this part of the proceedings; (ii) the restrictions on the evidence the Legal Representatives are allowed to elicit; and (iii) the quantity (as well as purpose and content) of the materials disclosed.
13. In general, the role of the Legal Representatives and any evidence elicited by them serves a different purpose to that of evidence presented by the Prosecution. The Chamber reiterates that the burden of proof regarding the guilt of the accused lies with the Prosecution and therefore it is the role of the Prosecution, and not the Legal Representatives, to present, in principle, incriminating evidence.²² The Chamber further recalls the oral decision of 4 April 2017 on the scope of questioning permitted by the LRV, which applies equally to the Legal Representatives and the presentation of evidence by them ('Oral Decision').²³

²⁰ LRV Response, ICC-02/04-01/15-1247, paras 3, 19 and 21.

²¹ Request, ICC-02/04-01/15-1239, paras 18, 22-24.

²² Article 66(2) of the Statute; Decision on the Legal Representatives Request to Present Evidence, ICC-02/04-01/15-1199-Red, para. 16.

²³ Transcript of hearing on 4 April 2017, ICC-02/04-01/15-T-65-Red-ENG, page 55, line 14 to page 56, line 16; *See also*, Decision on the Legal Representatives Request to Present Evidence, ICC-02/04-01/15-1199-Red, para. 18.

While the Chamber will decide the issue on a case-by-case basis, the Legal Representatives should not attempt to ‘elicit evidence which aims to prove the elements of the crimes charged or Mr Ongwen’s role in their commission’.²⁴

14. The main purpose of this particular phase of the proceedings is to allow the Legal Representatives to pose questions to witnesses regarding matters ‘relevant to the personal interests of the victims’ (such as the nature of the harms suffered),²⁵ or in the case of experts to elicit evidence which more broadly assists the Chamber with the determination of the truth.²⁶ In this particular instance the experts will all speak to general matters unrelated to Mr Ongwen’s individual criminal responsibility (such as victimisation of affected communities, Acholi culture, issues related to children and youth, and effects on victims of sexual/gender based crimes).²⁷
15. Furthermore, many of the items disclosed by the Legal Representatives only have an ancillary role in the questioning of the witnesses. This was highlighted in a recent decision ordering the CLRV to remove 13 of their 23 disclosed items from their list of evidence (totalling 759 pages, or almost 60% of all pages disclosed), confirming that these items cannot be submitted for the Chamber to consider in its judgment.²⁸
16. The Chamber has in the past, keeping in mind the rights of the accused, deliberately set new disclosure deadlines to allow the Defence sufficient time to prepare.²⁹ Taking into account the purpose, content and quantity of the disclosed

²⁴ Oral Decision, ICC-02/04-01/15-T-65-Red-ENG, page 56, lines 7-8.

²⁵ Oral Decision, ICC-02/04-01/15-T-65-Red-ENG, page 56 lines 10-12.

²⁶ Article 69(3) of the Statute.

²⁷ See Decision on the Legal Representatives Request to Present Evidence, ICC-02/04-01/15-1199-Red, para. 23.

²⁸ Decision on Defence Request to Deny the Use of Items from the CLRV List of Evidence, 25 April 2018, ICC-02/04-01/15-1241, paras 13-14; Request, ICC-02/04-01/15-1239-Conf-AnxA. The total page count is stated as 1275 pages. See Common Legal Representative’s Communication of the Disclosure of Evidence, 3 April 2018, ICC-02/04-01/15-1216-Conf-AnxA (items 11 to 23).

²⁹ See para. 3 above.

materials, the Defence has been given adequate time to prepare itself for the Legal Representatives' evidence presentation. The accused has not suffered any undue prejudice in the present case and an extension of one month is not necessary.

17. It should also be noted that that the Defence has been in possession of the disclosed material since 5 April 2018. Therefore, the Defence has been aware of the volume of the materials at issue for well over two weeks, and submitting this Request three working days before the start of the Legal Representatives' case is unacceptable. The Defence should endeavour to make more timely requests in the future.

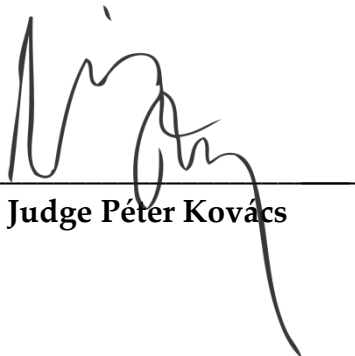
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

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 April 2018

At The Hague, The Netherlands