

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-02/04-01/15
Date: **19 December 2017**

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

**Common Legal Representative Response to
"Defence Request for Orders Regarding ICC-02/04-01/15-1105-Conf, ICC-02/04-
01/15-1106 and ICC-02/04-01/15-1106-Conf-Anx"**

Source: Office of Public Counsel for Victims

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. The Common Legal Representative¹ submits that the Defence's "Request for Orders Regarding ICC-02/04-01/15-1105-Conf, ICC-02/04-01/15-1106 and ICC-02/04-01/15-1106-Conf-Anx" ("Request")² should be rejected.

2. The Common Legal Representative contends that the Preliminary Directions simply required the Legal Representatives to provide their preliminary list of witnesses and an estimated length of their examination only for the purpose of obtaining information needed for facilitating future trial proceedings. As stated in her previous submission, the Common Legal Representative will be able to provide the names of the witnesses she intends to call within the relevant deadline of 2 February 2018.

3. Because of the short time between the issuance of the Preliminary Directions and the deadline to file the Preliminary List, as well as of the daily involvement in the trial proceedings during said period and the need to avoid repetition with the Prosecution's case which is still unfolding, the Common Legal Representative was understandably unable to make her determination about the witnesses she will request to be called. Indeed, the process of looking for competent experts and potential witnesses, engaging with them, explaining the purpose of their eventual testimony, secure their consent to appear as witnesses, and making practical arrangements take substantial amount of time and efforts.

¹ See the "Decision on contested victims' applications for participation, legal representation of victims and their procedural rights" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, p.19; the "Decision on issues concerning victims' participation" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; the "Second decision on contested victims' applications for participation and legal representation of victims" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-384, 24 December 2015, pp. 20-22; and the "Decision on the 'Request for a determination concerning legal aid' submitted by the legal representatives of victims" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-445, 26 May 2016, para. 13.

² See the "Defence Request for Orders Regarding ICC-02/04-01/15-1105-Conf, ICC-02/04-01/15-1106 and ICC-02/04-01/15-1106-Conf-Anx", No. ICC-02/04-01/15-1109-Conf, 15 December 2017.

4. The Defence's arguments about its inability to investigate the potential witnesses and the denial of the Accused's rights are erroneous insofar as at this stage it is not even known whether the Legal Representatives will be authorised to present evidence; and the Single Judge has already indicated, in the Preliminary Directions, that the Chamber will issue a separate decision on the disclosure of evidence by the Legal Representatives, if authorised. Moreover, the Defence's assertions on the alleged failure to implement the Chamber's instructions, lack of due diligence and existence of bad faith on part of the Legal Representatives are without merit.

II. PROCEDURAL BACKGROUND

5. On 13 July 2016, the Single Judge of Trial Chamber IX (respectively, the "Single Judge" and the "Chamber") issued the "Initial Directions on the Conduct of the Proceedings".³ On 13 October 2017, the Single Judge issued the "Preliminary Directions for any LRV or Defence Evidence Presentation" (the "Preliminary Directions") requesting the Legal Representatives and the Defence to provide a preliminary list of their witnesses and an estimate of how many hours of witness examination they will require by 14 December 2017.⁴

6. On 13 December 2017, the Common Legal Representative filed her "Preliminary List of Witnesses Provided Pursuant to the "Preliminary Directions for any LRV or Defence Evidence Presentation" (the "Preliminary List").⁵ On 14 December 2017, the Legal Representatives of Victims filed their "Victims'

³ See the "Initial Directions on the Conduct of the Proceedings" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-497, 13 July 2016.

⁴ See the "Preliminary Directions for any LRV or Defence Evidence Presentation" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1021, 13 October 2017, para. 3 (the "Preliminary Directions").

⁵ See the "Common Legal Representative Preliminary List of Witnesses Provided Pursuant to the 'Preliminary Directions for any LRV or Defence Evidence Presentation'", No. ICC-02/04-01/15-1105-Conf, 13 December 2017.

preliminary list of witnesses.”⁶ On the same day, the Defence filed the “Defence Submission of its Provisional List of Witnesses and Estimated Examination Times”.⁷

7. On 15 December 2017, the Defence filed its Request inviting the Chamber to order the Legal Representatives to disclose by 20 December 2017 the names of the persons they intend to call as witnesses (the “Defence’s Request”).⁸

8. The same day, by e-mail, the Chamber shortened the deadline to file responses to the Defence’s Request by 19 December 2017.⁹

9. Pursuant to regulation 23bis(1) of the Regulations of the Court, this document is filed confidential since it refers to previous submissions bearing the same classification.

III. SUBMISSIONS

10. The Common Legal Representative notes that the Preliminary Directions required the Legal Representatives to provide their preliminary list of witnesses and an estimated length of their examination only for the purpose of obtaining information needed for facilitating future trial proceedings. Indeed, the Single Judge clearly stated that “[t]hese lists are for informational purposes and may be changed up until the applicable deadlines for the final lists of witnesses.”¹⁰ Moreover, the Single Judge stressed that “these preliminary directions are given far in advance in order to facilitate the

⁶ See the “Victims’ preliminary list of witnesses”, No. ICC-02/04-01/15-1106 with a confidential annex, 14 December 2017.

⁷ See the “Defence Submission of its Provisional List of Witnesses and Estimated Examination Times”, No. ICC-02/04-01/15-1107 with Confidential *ex parte* Annex A available to Trial Chamber IX, Defence, Prosecution, CLRV, LRV and VWU only, 14 December 2017.

⁸ See the “Defence Request for Orders Regarding ICC-02/04-01/15-1105-Conf, ICC-02/04-01/15-1106 and ICC-02/04-01/15-1106-Conf-Anx”, No. ICC-02/04-01/15-1109-Conf, 15 December 2017, para. 41 (the “Defence’s Request”).

⁹ See the email sent on behalf of Trial Chamber IX, on 15 December 2017 at 16:10.

¹⁰ See the Preliminary Directions, *supra* note 4, para. 3 (Emphasis added).

effective preparation of the LRVs and Defence."¹¹ Accordingly, it is clear that the information was required in order to prepare for the upcoming stage of the trial after the Prosecution will have concluded its presentation of evidence which is ongoing at the moment. As intended by the Single Judge, being thus informed *far in advance* about the approximate number of witnesses the Legal Representatives wish to call and the rough estimate of the hours they may need for their examination, is essential for the Chamber to foresee and organize future trial hearings.

11. Therefore, the matter of exhaustive disclosure of finalized names of potential witnesses, as forcefully advocated by the Defence, does not arise from the Preliminary Directions. The Single Judge expressly stated therein that "[i]f the LRVs and/or Defence present evidence, the Chamber may set deadlines and request information on their presentation"¹² and "[i]f 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".¹³ The Common Legal Representative posits that it is clear from these terms that the Chamber will issue a separate decision in the future governing the disclosure of evidence, including the identities of witnesses, to be presented by the Legal Representatives. Most importantly, this shall occur only after the Chamber has made its determination on whether to allow the victims to present evidence and on which topic(s).

12. Consequently, all the Defence's developments on the need to investigate about the proposed witnesses and the denial of the Accused's rights¹⁴ are simply misplaced. Indeed, should the Legal Representatives not be authorised to present evidence, the Defence would not need to undertake any investigation; and, more importantly, individuals who will not come to testify will have needlessly been exposed.

¹¹ *Idem*, para. 1 (Emphasis added.)

¹² *Ibidem*, para. 2 (iii).

¹³ *Ibid.*, para. 2 (4).

¹⁴ See the Defence's Request, *supra* note 8, paras. 26 to 34.

13. In keeping with the letter and spirit of the Preliminary Directions, the Common Legal Representative thus filed her Preliminary List, indicating the number of experts and witnesses she intends to call based on the real progress made up to date in locating and engaging those potential witnesses. In its Decision Rejecting the Defence's Application for Revised Timeline, the Chamber clarified that "[r]egarding the preliminary list of witnesses and estimate of witness examination time, the Preliminary Directions merely directs that the Defence inform the Chamber and the participants of the relevant information known to it as of 14 December 2017 for informational purposes."¹⁵ Similarly, the Legal Representatives were equally expected to inform the Chamber and the parties of the relevant information in the state *known to them as of 14 December 2017* concerning the potential witnesses they intend to call.

14. The Common Legal Representative stated in her Preliminary List that the names of the experts and witnesses will be provided in her final list due on 2 February 2018, which is approximately only one month away. Moreover, she explained that she was not in a position to provide the names of potential experts since the contracts for engaging with them are in the process of being finalised. The finalisation of said contracts is necessary prior to the disclosure of the names of the experts because without signing contracts, they can provide no guarantees for conducting their expertise, and eventually testifying before the Chamber, which will definitely take substantial amount of their time, professional commitment and significant logistical and practical arrangements. In addition, due to the unique placement of the Common Legal Representative in the administrative structure of the Court, because the remuneration fees of the experts will be taken from the OPCV regular budget, in order to abide with the Court's Financial Rules and Regulations she had to engage in discussions with the Registry, and namely the Human Resources Section, for the finalisation of said contracts which also requires a proper

¹⁵ See the "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" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1074, 16 November 2017, para. 24 ("the Decision Rejecting the Defence's Application for Revised Timeline").

vetting procedure. Additionally, this is the first time that a common legal representative from the OPCV asks for the appointment of experts and therefore procedures had to be looked into to accommodate the request. In the circumstances, it has not been possible to finalise said contracts before the deadline of 14 December 2017.

15. As for the other potential witnesses, the Common Legal Representative indicated that she is currently contacting them in order to verify their willingness to appear as witnesses before the Court. Indeed, the process of looking for potential witnesses, engaging with them, explaining the purpose of their eventual testimony, secure their consent to appear as witnesses, and making practical arrangements take substantial amount of time and effort. In this regard, the Common Legal Representative has not yet identified – as clearly implied in the wording of her previous submission – the potential witnesses – and therefore secure their consent to appear as witnesses - because she is assessing a variety of options which calls for careful consideration in order to comply with the Chamber's orders. Moreover, some of the potential witnesses do not reside anymore in Uganda and therefore missions to the countries where they reside will need to be planned to meet with them. It is indeed essential that the Common Legal Representative meets with the potential witnesses before providing their names in order to explain to them the imperative of the proceedings, including matters related to the disclosure of their identities and material eventually provided to the parties. However, the Common Legal Representative, diligently, indicated the topics on which potential witnesses will testify in order for the Chamber and the parties to already appreciate the extent of her intended presentation of evidence to facilitate as much as possible future trial planning.

16. Unlike the Defence, the Common Legal Representative was not in a position to undertake these actions prior to the issuance of the Preliminary Directions. In contrast, in its Decision Rejecting the Defence's Application for Revised Timeline, the

Chamber recalled that the Defence had already informed the Chamber, the Prosecution and the Legal Representatives of Victims of the names of some of its potential witnesses due to its detailed understanding of the case acquired since the confirmation of the charges.¹⁶

17. Given the fact that the Legal Representatives were completely unaware of the impending issuance of the Preliminary Directions in the middle of the Prosecution case, compounded with the fact that they were afforded only two months to file their preliminary list of witnesses, the Common Legal Representative had to act urgently and did proceed to the best of her abilities to meet the deadline. The Common Legal Representative recalls that the Preliminary Directions were issued on 13 October 2017, at a time in which both Legal Representatives' teams were undertaking a joint mission in the field to meet with the affected communities and, separately, with their clients. After said mission the trial resumed and three dual status individuals represented by the Common Legal Representative testified in the last evidentiary block before the winter recess. It is worth noting that the Common Legal Representative has only one member of her team based in Uganda and therefore the assertion by the Defence about the resources in the field¹⁷ appears completely erroneous.

18. Consequently, the Defence's contention to the effect that the names of the experts and witnesses have been withheld or redacted without providing reasons and showing their strict necessity is simply misplaced.¹⁸ In fact, there was no need to redact their names in the first place since the Common Legal Representative was neither in a position nor required at this stage to present a definite list of the witnesses she intends to call.

¹⁶ *Idem*, paras. 24-25.

¹⁷ See the Defence's Request, *supra* note 8, para. 21.

¹⁸ *Idem*, paras. 19 et al.

19. Moreover, the Defence's arguments, including the alleged failure to implement the Preliminary Directions, lack of due diligence and existence of bad faith on part of the Legal Representatives are simply false, overly exaggerated and without any factual basis. Unfortunately, the tone and language of Defence's contentions based on either mere misunderstanding of the Common Legal Representative's well stated intentions or unfounded suspicion appear to be at odds with the spirit of courteous conduct expected from all counsel appearing before the Court.

20. Finally, as far as the request for reclassification of filing ICC-02/04-01/15-1105-Conf is concerned, the Common Legal Representative has filed today a public redacted version of said submission in the record of the case. In this regard, she contends that the part related to the institutions shall remain redacted because – as explained above – she is currently contacting individuals from said institutions to identify the persons best placed to testify and secure their consent to appear as witnesses.

For the foregoing reasons

The Common Legal Representative respectfully requests the Chamber to reject the Defence's Request.

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line drawn underneath the name.

Paolina Massidda

Dated this 19th day of December, 2017

At The Hague (The Netherlands)