

**Cour
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**International
Criminal
Court**



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No.: ICC-02/04-01/15
Date: 26 February 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 Redacted Version of Filing ICC-02/04-01/05-1184-Conf

**Common Legal Representative's Request for leave to reply to the Defence
Response No. ICC-02/04-01-15-1182-Conf**

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 respectfully requests leave to reply to the “Defence Response to the LRV and CLRV Requests to Present Evidence and the Views and Concerns of Registered Victims” (the “Defence’s Response”).²

2. In accordance with Regulation 24(5) of the Regulations of the Court, “[p]articipants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated”.

3. The Common Legal Representative seeks leave to reply to two discrete issues raised by the Defence in its Response, respectively: 1) the ostensible confusion made between fact witness and expert witness evidence;³ and 2) the allegations about [REDACTED].⁴

4. For the reasons developed *infra*, the Common Legal Representative argues that none of these two issues could have been reasonably anticipated in her Request and that the Chamber will be assisted in receiving relevant information which appears to be of utmost importance for the victims’ interests in this case.

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 Response to the LRV and CLRV Requests to Present Evidence and the Views and Concerns of Registered Victims”, No. ICC-02/04-01/15-1182-Conf, 15 February 2018 (the “Defence Response”).

³ *Idem*, paras. 31 to 34.

⁴ *Ibidem*, paras. 40 to 45.

II. PROCEDURAL BACKGROUND

5. On 13 December 2017, the Common Legal Representative filed her preliminary list of witnesses⁵ in accordance with the “Preliminary Directions for any LRV or Defence Evidence Presentation” (the “Preliminary Directions”) issued by the Single Judge on 13 October 2017.⁶ On 14 December 2017, the Legal Representatives filed their preliminary list of witnesses.⁷ On 15 December 2017, the Defence filed a request seeking, *inter alia*, the full disclosure of the names of the witnesses that the Legal Representatives wish to call.⁸ On 18 December 2017, the Legal Representatives⁹ and the Common Legal Representative¹⁰ responded to the Defence’s request. On 22 December 2017, the Chamber partially granted the Defence’s request and instructed the Common Legal Representative to disclose the names of its four expert witnesses.¹¹ Accordingly, the Common Legal Representative proceeded with the disclosure of the names of four experts on 22 and 29 December 2017.¹²

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. A public redacted version of the document was notified on 19 December 2017. See No. ICC-02/04-01/15-1105-Red.

⁶ 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, paras. 3-4.

⁷ See the “Victims’ preliminary list of witnesses”, No. ICC-02/04-01/15-1106, 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 (Pursuant to Trial Chamber IX’s Decision, dated 22 December 2017, this document is reclassified as “Public”).

⁹ See the “Victims’ response to “Defence Request for Order 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-02/04-01/15-1112-Conf, 18 December 2017.

¹⁰ See the “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’”, No. ICC-02/04-01/15-1113-Conf, 19 December 2017 (Pursuant to Trial Chamber IX’s Decision, dated 22 December 2017, this document is reclassified as “Public”).

¹¹ See the “Decision on Defence Request for the Identities of Potential Witnesses on the Legal Representatives of Victims’ Preliminary Lists of Witnesses” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1117, 22 December 2017.

¹² See the email sent to the Chamber, parties and participants by the Common Legal Representative on 22 December 2017 at 11:41; and the “List of Experts Provided Pursuant to the ‘Decision on Defence Request for the Identities of Potential Witnesses on the Legal Representatives of Victims’ Preliminary Lists of Witnesses’”, with Confidential Annex A, No. ICC-02/04-01/15-1125, 29 December 2017.

6. On 2 February 2018, the Common Legal Representative submitted its Final List of Witnesses and Request for Leave to Present Evidence (the “Request”).¹³ The same day, the Legal Representatives filed their request for leave to present evidence and to present victims’ views and concerns in person.¹⁴

7. On 15 February 2018, the Defence filed its Response to both Legal Representatives of victims’ requests to present evidence.¹⁵

8. Pursuant to regulation 23bis(1) of the Regulations of the Court, this document is filed confidential since it refers to information not to be known by the public at the present stage considering its preliminary nature and so far treated confidential in related submissions.

III. SUBMISSIONS

9. At the outset, the Common Legal Representative underlines that the Defence seems to continue misunderstanding¹⁶ the Chamber’s directions with regard to the submission by the legal representatives of victims of their respective list of witnesses and the rules on disclosure which will be decided by the Chamber at a later stage should leave to present evidence be granted. In this regard, the Single Judge has already clarified that “[a]s noted in the preliminary Directions, if permitted to present evidence, the LRVs will be required to disclose the evidence it intends to use [...] sufficiently in advance”.¹⁷

¹³ See the “Common Legal Representative’s submission of Final List of Witnesses and Request for Leave to Present Evidence”, No. ICC-02/04-01/15-1165-Conf + Conf-Anxs, 2 February 2018 (the “Request”). A public redacted version of the Request was filed on 5 February 2018.

¹⁴ See the “Victims’ requests for leave to present evidence and to present victims’ views and concerns in person”, No. ICC-02/04-01/15-1166 + Conf-Anx, 2 February 2018.

¹⁵ See the “Defence Response”, *supra* note 2.

¹⁶ *Idem*, paras. 8 to 4.

¹⁷ See the “Decision on Defence Request for the Identities of Potential Witnesses on the Legal Representatives of Victims’ Preliminary Lists of Witnesses”, No. ICC-02/04-01/15-1117, 22 Decembers 2017, para. 12 (referring in footnote to the Preliminary Directions at para. 2(iv).)

10. With regard to the two issues for which leave to reply is requested, the Common Legal Representative argues that none of these issues could have been reasonably anticipated by her at the time of the submission of her Request and that the Chamber will be assisted in receiving the corresponding information¹⁸ which appears to be of utmost importance for the victims' interests in this case.¹⁹

11. On this basis, the Common Legal Representative respectfully requests leave to reply to the following two discrete issues arising from the Defence's Response: 1) the ostensible confusion made between fact witness and expert witness evidence; and 2) the allegations about [REDACTED].

12. Regarding the first issue for which the Common Legal Representative requests leave to reply, if granted, the latter will argue that the Defence submission is based on a misapprehension of expert testimonies and its purported value as distinct evidence for this case. While it is true that many fact witnesses have referred in their testimonies to issues related to the four topics covered by the proposed experts, said testimonies do not provide an expertise on the topics. It is indeed precisely the reason why the Common Legal Representative submits that expert evidence is necessary for the Chamber to be in the best possible position to assess their evidence.

13. In this regard, these two types of evidence are clearly distinct and the argument put forward by the Defence could not have been foreseen by the Common Legal Representative at the time of the submission of her Request.

¹⁸ See the "Decision on the defence request for leave to reply" (Trial Chamber IV), No. ICC-02/05-03/09-147, 11 May 2011, para. 5; and the "Decision on the prosecution request for leave to reply" (Trial Chamber V), No. ICC-01/09-02/11-530, 14 November 2012, para. 5.

¹⁹ See the "Decision on the Prosecution's request for leave to reply to the "Defence Response to Prosecution's Request for the Review of Potentially Privileged Material" (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/10-61, 24 February 2011, pp. 3-4; and the "Decision on request of the Legal Representative of Victims for leave to reply" (Trial Chamber V(B)), No. ICC-01/09-02/11-979, 26 November 2014.

14. With regard to [REDACTED], the Common Legal Representative indicates that she was unaware of the circumstances referred to by the Defence and that she did inquire [REDACTED]. In this regard, the Common Legal Representative is in the process of verifying information and may provide in her reply further relevant information. Again, this matter could not have been anticipated because she was unaware of the circumstances referred to by the Defence in its Response.

15. If leave to reply is granted, the Common Legal Representative undertakes to address these discrete issues concisely and without repeating the arguments presented in the Request.

IV. CONCLUSION

16. For the foregoing reasons, the Common Legal Representative respectfully requests the Chamber to grant her leave to reply to the Defence's Response on the two discrete issues identified in this submission.

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 26th day of February 2018

At The Hague (The Netherlands)