



Original: **English**

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

Date: **10 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 the Common Legal Representatives Request to Recognise One Item as
Formally Submitted**

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 the Victims

Joseph Akwenyu Manoba and Francisco
Cox
Paolina Massidda

Legal Representatives of the 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

Other

REGISTRY

Registrar

Herman von Hebel

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 Rule 68 of the Rules of Procedure and Evidence ('Rules') and Regulation 23 *bis* of the Regulations of the Court ('Regulations'), issues the following 'Decision on the Common Legal Representatives Request to Recognise One Item as Formally Submitted'.

I. Procedural history and submissions

1. On 13 July 2016, the Presiding Judge issued the Initial Directions for the Conduct of the Proceedings ('Initial Directions').¹ Therein, the approach to the admissibility of evidence is explained: when participants submit evidence during the trial the Chamber will recognise the evidence as formally submitted and defer the assessment of its relevance and probative value until the deliberation of the judgment pursuant to Article 74 of the Rome Statute.² The Chamber retained the discretion to rule upfront on certain aspects, should, for instance, procedural bars prevent the admissibility of specific items.³
2. On 6 March 2018, the Chamber issued its decision on the requests by the Common Legal Representatives for Victims ('CLR') and Legal Representatives for Victims to present evidence ('Decision on Evidence presented by the Victims Representatives').⁴ Therein, it allowed the CLR to call one of the two experts it requested on issues related to children and youth. The Chamber left the decision as to which one of the experts initially identified provides testimony up to the CLR and stated that it would not be opposed to the expert report being produced jointly by the two experts.⁵

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

² Initial Directions, ICC-02/04-01/15-497, para. 24.

³ Initial Directions, ICC-02/04-01/15-497, para. 26.

⁴ 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.

⁵ Decision on Evidence presented by the Victims Representatives, ICC-02/04-01/15-1199-Red, paras 30-31.

3. On 29 March 2018, the CLRV filed a motion relating to the report of the expert on children and youth it does not intend to call ('Request').⁶ The CLRV requests that the report produced by Professor Betancourt ('Report') be submitted in the record of the case and be recognised as formally submitted.⁷
4. The CLRV submits that the Report affects the personal interests of victims and issues in the case, is necessary for the determination of the truth, is appropriate and consistent with the rights of the accused and is relevant and has probative value.⁸
5. On 6 April 2018, the Defence filed its response ('Response'),⁹ requesting that the Request be rejected.¹⁰ The Defence submits that the Report lacks authenticity,¹¹ needs to be submitted via Rule 68 of the Rules¹² and that recognising its formal submission would violate Article 67(1)(e) of the Statute.¹³

II. Analysis

6. The Chamber notes that the Response is classified as 'confidential' and the Defence cites to Regulation 23 *bis*(2) of the Regulations as a justification. However, the Request is classified as 'public' and the information redacted by the Defence in its public-redacted version of the Response is already revealed in the Request. Additionally, the Chamber does not find any information contained in the Response which needs to remain confidential. Accordingly, the Chamber reclassifies the Response as 'public'.

⁶ Common Legal Representative's Request to Introduce One Item of Evidence through Bar Table Motion, ICC-02/04-01/15-1214 with three confidential annexes A to C.

⁷ Request, ICC-02/04-01/15-1214, paras 1 and 24.

⁸ Request, ICC-02/04-01/15-1214, paras 4 and 14.

⁹ Defence Response to the CLRV's Request to Admit Testimony through the Bar Table Motion, ICC-02/04-01/15-1222-Conf. A public redacted version was filed on 9 April 2018, ICC-02/04-01/15-1222-Red.

¹⁰ Response, ICC-02/04-01/15-1222-Red, para. 18.

¹¹ Response, ICC-02/04-01/15-1222-Red, paras 8-10.

¹² Response, ICC-02/04-01/15-1222-Red, para. 16.

¹³ Response, ICC-02/04-01/15-1222-Red, para. 17.

7. In respect of the first limb of the Request, the submission of the Report in the record of the case, the Chamber notes that this was done by the CLRV when it annexed the Report to the Request.¹⁴ Accordingly, this part of the Request is moot.
8. With regard to the second limb of the Request, which seeks the recognition of the Report as formally submitted, the Chamber recalls that the Initial Directions state that expert reports must fulfil the procedural requirements of Rule 68 of the Rules, unless no objection to the submission is raised.¹⁵ The Defence opposes the submission of the report on this basis. In line with its previous ruling the Chamber sees no reason why the Rule 68 requirements should not apply to expert reports submitted by victim representatives during trial.¹⁶
9. Under these circumstances, the Report cannot be recognised as formally submitted. Rule 68 of the Rules is an exception to the principle of orality of witness testimony.¹⁷ In other words, in cases where the witness is not present before the Chamber (and Rule 68(2) of the Rules applies), the person giving the prior recorded testimony is still considered a witness in the case. In the Decision on Evidence presented by the Victims Representatives the Chamber specifically allowed the testimony of only one of the two experts proposed by the CLRV on issues related to children and youth. A submission of Professor Betancourt's report would amount to a de facto circumvention of this decision. Accordingly, the Chamber denies this part of the Request.

¹⁴ Annex A to the Request, ICC-02/04-01/15-1214-Conf-AnxA.

¹⁵ Initial Directions, ICC-02/04-01/15-497, para. 33.

¹⁶ *See for instance*, Decision on Evidence presented by the Victims Representatives, ICC-02/04-01/15-1199-Red, paras 32, 37, 41 and 69 which allow the introduction of reports by several experts proposed by the Legal Representatives for Victims, subject to the requirements of Rule 68(3) of the Rules.

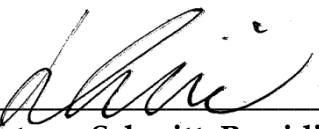
¹⁷ Appeals Chamber, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony", 12 February 2016, ICC-01/09-01/11-2024, paras 84 and 94.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

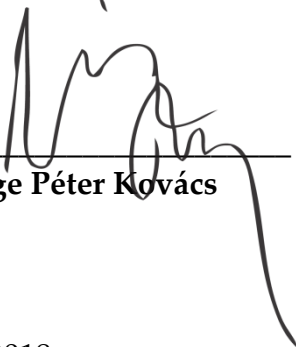
ORDERS that the Response is reclassified as 'public' and;

REJECTS the Request.

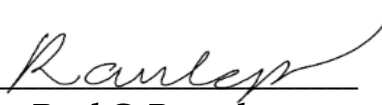
Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge



Judge Péter Kovács



Judge Raul C. Pangalangan

Dated 10 April 2018

At The Hague, The Netherlands