

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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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 Request for Leave to Appeal the Trial Chamber's Oral
Decision on the Exclusion of Certain Parts of the CLRV Expert Report**

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

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Trial Chamber IX ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 82(1)(d) of the Rome Statute ('Statute'), issues the following 'Decision on Defence Request for Leave to Appeal the Trial Chamber's Oral Decision on the Exclusion of Certain Parts of the CLRV Expert Report'.

I. Procedural history and submissions

1. On 14 May 2018, prior to the start of Prof. Reicherter's ('PCV-1') testimony, the Defence made a request, *inter alia*, to exclude certain pages from his expert report referring to witness testimonies ('Initial Request').¹ It was alleged that the witness testimonies and PCV-1's comments in relation to them were 'prejudicial to the fair trial rights' of the accused and a generic reference to an 'Article 56' witness meant that the Defence remained unaware of the witness's identity.² According to the Defence, the pages in question go beyond the scope of evidence that the Common Legal Representative for Victims ('CLRV') and the Legal Representative for Victims ('LRV', together 'Legal Representatives') are allowed to elicit.³ The Defence reiterated the Chamber's previous decisions in this regard.⁴
2. The CLRV subsequently made an oral submission seeking a dismissal of the Initial Request ('CLRV Response to Initial Request').⁵ It was highlighted that the reason PCV-1 incorporated parts of trial witnesses' testimony in his report was

¹ Transcript of hearing on 14 May 2018, ICC-02/04-01/15-T-175-CONF-ENG, page 2, line 20 to page 8, line 15.

² Initial Request, ICC-02/04-01/15-T-175-CONF-ENG, page 2, line 24 to page 3, line 6.

³ Initial Request, ICC-02/04-01/15-T-175-CONF-ENG, page 3, line 7 to page 6, line 24.

⁴ Initial Request, ICC-02/04-01/15-T-175-CONF-ENG, page 3, 3 lines 13-18 *referring to* 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 ('T-65 Oral Decision'); Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, 6 March 2018, ICC-02/04-01/15-1199-Red, para. 18 ('Decision on the Legal Representatives Request to Present Evidence'); Decision on Defence Request to Delay the Opening of the Legal Representatives' Evidence Presentation, 26 April 2018, ICC-02/04-01/15-1248, paras 12-13 ('Decision on Defence Request to Delay the Opening of the Legal Representatives' Evidence Presentation').

⁵ Transcript of hearing on 14 May 2018, ICC-02/04-01/15-T-175-CONF-ENG, page 8 line 19 to page 10, line 21.

to highlight that the ‘report connects the vast empirical literature [...] with actual victim trial testimony’, providing ‘strong evidence of the mental impacts of sexual violence and rape on survivors’.⁶ Therefore, PCV-1’s report was within the scope of evidence that the CLRV were allowed to elicit; i.e. to elaborate upon the mental health impacts on victims and not Mr Ongwen’s responsibility.⁷ Furthermore, the CLRV stated that the Defence was aware of all evidence pertaining to Article 56 witnesses.⁸

3. On the same day, the Chamber issued an oral decision rejecting the Initial Request (‘Impugned Decision’).⁹ The Chamber was of the view that all extracts of witness testimony referred to in PCV-1’s report were already in evidence, made by witnesses known to the Defence and that the expert report complied with the scope of evidence the Legal Representatives were allowed to elicit. In this regard, the Chamber specifically referred to its previous decisions.¹⁰
4. On 17 May 2018, the Defence filed a request for leave to appeal the Impugned Decision (‘Request for Leave to Appeal’).¹¹ The Defence seeks leave to appeal on one issue:¹²

Whether the [Impugned Decision] is inconsistent with [the Chamber’s] previous rulings establishing the scope of the LRV and CLRV presentation of evidence, restrictions on the evidence that the LRV and CLRV are allowed to elicit, and the purpose and content of the materials disclosed by the LRV and CLRV.

⁶ CLRV Response to Initial Request, ICC-02/04-01/15-T-175-CONF-ENG, page 9, lines 7-14.

⁷ CLRV Response to Initial Request, ICC-02/04-01/15-T-175-CONF-ENG, page 10, lines 15-21.

⁸ CLRV Response to Initial Request, ICC-02/04-01/15-T-175-CONF-ENG, page 10, lines 15-21.

⁹ Transcript of hearing on 14 May 2018, ICC-02/04-01/15-T-175-CONF-ENG, page 11, line 14 to page 13, line 2.

¹⁰ Impugned Decision, ICC-02/04-01/15-T-175-CONF-ENG, page 12, lines 4-11 *referring to* the T-65 Oral Decision, ICC-02/04-01/15-T-65-RED-ENG and the Decision on the Legal Representatives Request to Present Evidence, ICC-02/04-01/15-1199-Red.

¹¹ Defence Request for Leave to Appeal the Trial Chamber’s Oral Decision on the Exclusion of Certain Parts of the CLRV Expert Report, ICC-02/04-01/15-1261.

¹² Request for Leave to Appeal, ICC-02/04-01/15-1261, para. 14.

The Defence submits that the Impugned Decision erred in stating that the identity of all witnesses was known to the Defence, as some remain anonymous. However, it is subsequently acknowledged that whether or not the witnesses are known is ‘irrelevant’ and not part of the legal standard the Defence are arguing to implement.¹³ It is further alleged that PCV-1 was allowed to comment on portions of testimony that are of an incriminatory nature and discuss elements of the crimes charged against Mr Ongwen.¹⁴ This according to the Defence, as well as allowing the CLRV to submit the report into evidence, violates the Chamber’s previous rulings on this matter.¹⁵

5. According to the Defence the issue significantly affects the fair and expeditious conduct of the proceedings, as the Impugned Decision is prejudicial to the accused and violates his rights under Articles 67(1)(e) and 64(2) of the Rome Statute.¹⁶ It is further stipulated that resolution of the issue would significantly affect the outcome of the trial and an immediate and urgent resolution by the Appeals Chamber will materially advance the proceedings.¹⁷
6. On 21 May 2018, the CLRV submitted its response to the Defence Request for Leave to Appeal, seeking a rejection of the request (‘CLRV Response’).¹⁸ The CLRV submits that the Defence ‘fails to identify clearly an appealable issue by indicating a specific factual and/or legal error’.¹⁹ It is alleged that the Defence is simply in an ‘uncompromising disagreement’ with the Impugned Decision.²⁰ PCV-1 was examined in Court solely in relation to the personal interests of the victims and comments by him on specific extracts of witness testimonies in his

¹³ Request for Leave to Appeal, ICC-02/04-01/15-1261, para. 21.

¹⁴ Request for Leave to Appeal, ICC-02/04-01/15-1261, para. 22.

¹⁵ Request for Leave to Appeal, ICC-02/04-01/15-1261, para. 22.

¹⁶ Request for Leave to Appeal, ICC-02/04-01/15-1261, para. 25.

¹⁷ Request for Leave to Appeal, ICC-02/04-01/15-1261, paras 26-29.

¹⁸ CLRV Response to the “Defence Request for Leave to Appeal the Trial Chamber’s Oral Decision on the Exclusion of Certain Parts of the CLRV Expert Report”, ICC-02/04-01/15-1262.

¹⁹ CLRV Response, ICC-02/04-01/15-1262, paras 2 and 12-14.

²⁰ CLRV Response, ICC-02/04-01/15-1262, paras 2 and 15-16.

report, on the extent of the harm suffered, does not make his evidence ‘incriminatory nor part of the evidentiary elements of the crimes charged’.²¹ The CLRV further submits that the Defence’s argument relating to the identity of the witnesses is ‘confusing, self-contradictory and self-defeating’.²² Finally, the CLRV claims that the issue does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Given the stage of the proceedings, an intervention by the Appeals Chamber also could not possibly materially advance the proceedings but might have the opposite effect.²³

7. On 21 May 2018, the Office of the Prosecutor (‘Prosecution’) communicated, *via* email, that it did not intend to make a submission in relation to the Defence Request for Leave to Appeal.²⁴

II. Applicable law and analysis

8. The Chamber is required under Article 82(1)(d) to assess: (i) whether the matter is an appealable issue; (ii) whether the issue would significantly affect either the fair and expeditious conduct of the proceedings or the outcome of the trial; and (iii) whether, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. Due to the cumulative nature of the leave to appeal criteria set out in Article 82(1)(d), the failure to satisfy any one of the criteria stipulated must result in the rejection of a request for leave to appeal. The Chamber recalls the

²¹ CLRV Response, ICC-02/04-01/15-1262, para. 18.

²² CLRV Response, ICC-02/04-01/15-1262, para. 17.

²³ CLRV Response, ICC-02/04-01/15-1262, para. 19.

²⁴ Email from the Prosecution to the Trial Chamber IX Communications Inbox and to parties and participants, 21 May 2018 at 15:53.

interpretation of Article 82(1)(d) of the Statute as set out in detail in previous decisions.²⁵

9. Even if the issue raised by the Defence was considered an appealable issue, the Chamber is of the view that it does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The prejudice alleged by the Defence is unfounded. This is especially so given that the primary purpose of PCV-1's report referring to witness testimonies is to highlight the physical and psychological trauma experienced by victims of sexual and gender based crimes. Therefore, when being considered by the Chamber, the pages of the expert report in question will be assessed in accordance with their overall purpose. The Chamber does not see how in light of this conclusion the fairness of the proceedings could be significantly affected. The Defence also fails to elaborate on how the issue significantly affects the expeditiousness of the trial given that the Legal Representatives' evidence presentation was close to being concluded at the time of filing of the present request.
10. Finally, the Chamber fails to see how this issue significantly affects the outcome of the trial. The extracts of witness testimonies will be assessed by the Chamber when conducting its deliberations on the evidence provided by each witness. Even if PCV-1's repetition of them in his report had been declared inadmissible, the underlying extracts themselves would still have been eligible for consideration in the Chamber's judgment as part of the relevant witnesses' trial testimonies. It was never alleged that PCV-1's expertise extended to being able to provide substantive comments on the accused's responsibility or the elements of the crimes charged. Therefore,

²⁵ Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, paras 4-8. *See also* Decision on the Defence Request for Leave to Appeal the Decision on the Confirmation of Charges, 29 April 2016, ICC-02/04-01/15-428, paras 5-9.

even if certain comments inadvertently appear to do so — those comments cannot be relied upon to establish the accused's responsibility for the crimes.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request for Leave to Appeal.

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



Judge Bertram Schmitt, Presiding Judge

Judge Péter Kovács

Judge Raul C. Pangalangan

Dated 1 June 2018

At The Hague, The Netherlands