

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-02/04-01/15
Date: 6 September 2019

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul Cano Pangalangan

SITUATION IN UGANDA

**IN THE CASE OF
*THE PROSECUTOR v. DOMINIC ONGWEN***

Confidential

**CLRV's Response to "Defence Request for Leave to Reply
to Prosecution filing ICC-02/04-01/15-1577-Conf and
CLRV filing ICC-02/04-01/15-1581-Conf"**

Source: Office of Public Counsel for Victims

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Benjamin Gumpert

Counsel for the Defence

Mr Krispus Ayena Odongo

Mr Charles Achaleke Taku

Ms Beth Lyons

Legal Representatives of the Victims

Mr Joseph Akwenyu Manoba

Mr Francisco Cox

Common Legal Representatives for Victims

Ms Paolina Massidda

Ms Jane Adong

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Ms Paolina Massidda

Mr Orchlon Narantsetseg

Ms Caroline Walter

The Office of Public Counsel for the Defence

Mr Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Common Legal Representative of Victims¹ (the “CLR/V”) opposes the “Defence Request for Leave to Reply to Prosecution filing ICC-02/04-01/15-1577-Conf and CLR/V filing ICC-02/04-01/15-1581-Conf” (the “Request to Reply”).²

2. The CLR/V submits that the Request to Reply should be dismissed since the Defence fails to raise any new issue that it could not have reasonably anticipated in the submissions made by the Prosecution and the CLR/V. Additionally, the Chamber is already in possession of sufficient information to determine the matters at hand and it would not be assisted by receiving further submissions from the Defence.

II. PROCEDURAL BACKGROUND

3. In September and November 2015, under article 56 of the Rome Statute (the “Statute”), the Single Judge of Pre-Trial Chamber II heard the testimonies of seven witnesses (“Article 56 Witnesses”).³

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 Leave to Reply to Prosecution filing ICC-02/04-01/15-1577-Conf and CLR/V filing ICC-02/04-01/15-1581-Conf”, No. ICC-02/04-01/15-1583-Conf, 04 September 2019 (the “Request to Reply”).

³ P-0226 and P-0227 testified between 15 and 19 September 2015. Between 9 and 17 November 2015, P-0099, P-0101, P-0214, P-0235 and P-0236 testified. See respectively the transcripts of the hearings, No. ICC-02/04-01/15-T-8-Conf to No. ICC-02/04-01/15-T-11-Conf; and No. ICC-02/04-01/15-T-13-Conf to No. ICC-02/04-01/15-T-17-Conf. For the audio-visual recordings of the hearings, see No. ICC-02/04-01/15-351-Conf-Anx1 and Conf-Anx2; No. ICC-02/04-01/15-354-Conf-Anx1 and Conf-Anx2; No. ICC-02/04-01/15-355-Conf-Anx1; No. ICC-02/04-01/15-358-Conf-Anx1 and Conf-Anx2; No. ICC-02/04-01/15-356-Conf-Anx1; No. ICC-02/04-01/15-357-Conf-Anx1; and No. ICC-02/04-01/15-352-Conf-Anx1. The Trial Chamber recognised the ensuing evidence as formally submitted. See the “Decision on Request

4. On 27 August 2019, the Defence filed a request (the “Initial Request”)⁴ asking the Chamber to order the VWU to contact certain Article 56 Witnesses and facilitate requests for meetings. On 30 August 2019 the Prosecution filed its Response (“Prosecution’s Response”)⁵, opposing the Initial Request. On 2 September 2019, the CLRV also filed her response opposing the Initial Request (the “CLRV’s Response”).⁶ On 4 September 2019, the Defence filed its Request to Reply.⁷

III. CONFIDENTIALITY

5. The present submission is filed confidential in accordance with regulation 23bis (2) of the Regulations of the Court, following the level of classification chosen by the Defence. However, the CLRV indicates that the present submission does not contain confidential information and can be reclassified as public.

IV. SUBMISSIONS

6. Regulation 24(5) of the Regulations of the Court (the “Regulations”) states that “[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.” The Appeals Chamber ruled in this regard that this provision “precludes the possibility of an automatic response by the parties to the victims’

to Admit Evidence Preserved Under Article 56 of the Statute” (Trial Chamber IX), No. ICC-02/04-01/15-520, 10 August 2016.

⁴ See the “Defence Request to Meet Selected Individuals”, No. ICC-02/04-01/15-1574-Conf, 27 August 2019 (the “Initial Request”). A public redacted version of the document was filed on 3 September 2019. See ICC-02/04-01/15-1574-Corr-Red.

⁵ See the “Prosecution’s Response to “Defence Request to Meet Selected Individuals” (ICC-02/04-01/15-1574-Conf)”, No. ICC-02/04-01/15-1577-Conf, 30 August 2019 (the “Prosecution’s Response”).

⁶ See the “CLRV’s Response to Defence Request to Meet Selected Individuals”, No. ICC-02/04-01/15-1581-Conf, 02 September 2019 (the “CLRV’s Response”).

⁷ See the Request to Reply, *supra* note 2.

*response, except with the leave of the [Chamber]”.*⁸ The Chamber also held that “[...] it is at the Chamber’s discretion as to whether such leave to reply will be granted. It is equally within the Chamber’s discretion to conclude that a reply would not be of assistance in reaching a decision and instead issue its decision forthwith particularly when time is of the essence [...]”.⁹ Moreover, requests to reply should be rejected if the Chamber is in possession of sufficient information to determine the matter at hand.¹⁰

7. In the Request to Reply, the Defence seeks leave to reply to a Prosecution’s submission in which it had simply argued that, if the Chamber considers it appropriate for the Article 56 Witnesses to be asked whether they wish to meet or speak to the Accused, and whether they wish to introduce him to the children he has fathered, then these questions would best be asked by the VWU (the “OTP Proposal”).¹¹

8. Thus, the crux of the OTP Proposal, as acknowledged by the CLRV,¹² is a simple reference to article 43(6) of the Statute according to which the VWU, as a neutral body with expertise in trauma, including trauma related to crimes of sexual violence, shall provide, in consultation with the Office of the Prosecutor, counselling and other appropriate assistance to witnesses and victims appearing before the Court.¹³ Neither the Prosecution nor the CLRV raise any novel legal arguments going beyond these clear parameters of the VWU’s mandate or make completely new

⁸ See the “Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled ‘Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute’” (Appeals Chamber), No. ICC-02/11-01/15-208 OA6, 08 September 2015, para. 22.

⁹ See the “Decision on Defence Request for Leave to Appeal Decision 1248” (Trial Chamber IX), No. ICC-02/04-01/15-1263, 22 May 2018, para. 20. See also the “Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision” (Trial Chamber IX), No. ICC-02/04-01/15-1147, 24 January 2018, para. 15.

¹⁰ See the “Decision on the ‘Prosecution’s submissions on the conduct of proceedings pursuant to decision ICC-02/04-01/15-277’” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-293-Red, 23 March 2016, para. 8.

¹¹ See the Request to Reply, *supra* note 2, para. 1. See also the Prosecution’s Response, *supra* note 5, para. 9.

¹² See the CLRV’s Response, *supra* note 6, para. 30(iii).

¹³ See the Prosecution’s Response, *supra* note 5, paras. 9-12.

factual allegations in this regard. The Defence should have known the obvious fact that the Prosecution and the CLRV will support their arguments in reference to the most relevant statutory provisions. It is in fact the Defence that initially advocated for involving the VWU in the process.¹⁴ Hence, the Defence's argument that it could not have anticipated the OTP Proposal is simply wrong.

9. Moreover, the Defence argues that the OTP Proposal is similar to another Defence request concerning communications restrictions that it is currently drafting whose content would ultimately support said Proposal.¹⁵ Yet, the fact that the Defence wishes to include its arguments, supposedly related to a different matter, in its prospective reply goes directly against the *rationale* for granting leave to reply. As mentioned above, a reply must be limited to only *new issues* raised in the response. Since said draft filing deals with a different matter, the Defence's prospective reply cannot possibly be in response of the alleged *new issues* raised in the Prosecution's and the CLRV's Responses. Therefore, the suggestion that the Chamber should consider combining a reply with another draft document (to which none of the parties and participants is privy) appears to be beyond any stretch of logic.

10. In addition, the CLRV submits that the Chamber is already in possession of sufficient information to determine the matter at hand. The Initial Request forms a part of a long simmering litigation concerning the Article 56 Witnesses in which the Chamber was involved at various junctures.¹⁶ In fact, it is the Chamber that instructed the Defence, after having reviewed the exchange of email communications

¹⁴ See the Initial Request, *supra* note 4, paras. 1 and 36.

¹⁵ See the Request to Reply, *supra* note 2, para. 3.

¹⁶ See the "Decision concerning the restriction of communications of Dominic Ongwen" (Single Judge, Pre-Trial Chamber II), No. ICC-02/04-01/15-283-Conf, 3 August 2015, para. 2. (Pursuant to Pre-Trial Chamber II's instruction, this decision has been reclassified as "Public" on 29 September 2015), the "Decision on issues related to the restriction of communications of Dominic Ongwen" (Single Judge Pre-Trial Chamber II), No. ICC-02/04-01/15-450-Conf, 31 May 2016, the "Decision on Prosecution 'Request for an order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen'" (Single Judge, Trial Chamber IX), No. ICC-02/04-01/15-521, 10 August 2016 and the "Decision on Request for Disclosure and Related Orders Concerning Mr Ongwen's Family" (Single Judge, Trial Chamber IX), No. ICC-02/04-01/15-1444, 12 February 2019.

between the parties and participants, to make a formal written submission, detailing all the relevant facts and arguments.¹⁷ Accordingly, the parties and participants have fully explored the contested issues and made their respective submissions, thus enabling the Chamber to dispose of the matter expeditiously.

11. Lastly, the CLRV posits that the Chamber would not be assisted by receiving further submissions from the Defence. As mentioned above, the OTP Proposal simply referred to the established mandate of the VWU under article 43(6) of the Statute. It is also clear from the language of the Request to Reply that the Defence will not add anything new related to the OTP Proposal. Obviously, the Defence's arguments allegedly planned for its draft document concerning a different matter will not be of assistance to the Chamber. As a result, the Defence fails to fulfil the legal requirements for seeking leave to reply, under regulation 24(5) of the Regulations and the relevant jurisprudence of the Chamber.

V. CONCLUSION

12. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Chamber to reject the Request to Reply.



Paolina Massidda
Principal Counsel

Dated this 6th day of September 2019

At Bangui, Central African Republic

¹⁷ See the email sent by the Chamber on 19 July 2019 at 18:20.