

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

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 Victims' Request to Present Views and Concerns in Person
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Source: Legal Representatives of 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 Legal Representatives of Victims (“the LRVs”) respectfully request Trial Chamber IX (“the Chamber”) to grant leave for two participating victims to present their views and concerns in person during the oral hearing for closing statements in this case. The presentation of views and concerns would take an estimated total of 15-30 minutes. This time could be taken from the total time allocated to the LRVs for their oral closing statements.
2. Victims represented by the LRVs have expressed a desire to have their views on the proceedings heard directly by the Chamber. The LRVs submit that the presentation by victims of their views and concerns is consistent with and would further the intended objectives of Article 68(3) of the Statute.
3. The LRVs submit that the presentation of views and concerns is clearly distinct from the submission of evidence. Hearing the unsworn views and concerns of two victims will enable the Chamber to obtain a first-hand account of the importance of these proceedings to the victim communities represented by the LRVs.
4. If permitted to do so, the LRVs propose to present the views and concerns of the leaders of two communities: one Acholi, one Lango, to ensure that the different perspectives and views of these communities are heard. One man, and one woman, would present these views; both being leaders of their communities. The LRVs would aim to ensure that the views presented will not be repetitive of issues already heard by the Chamber.

II. PROCEDURAL HISTORY

5. On 13 October 2017 the Single Judge issued the 'Preliminary Directions for any LRV or Defence Evidence Presentation', in which he directed the LRVs to provide a proposed witness list by 2 February 2018.¹
6. In his 'Preliminary Directions for any LRV or Defence Evidence Presentation' the Single Judge indicated that the Chamber was 'not provisionally inclined to hear victims present unsworn non-evidentiary 'views and concerns' before its Judgment.'²
7. On 2 February 2018 the LRVs submitted the 'Victims' requests for leave to present evidence and to present victims' views and concerns in person' ("Victims' Requests").³
8. On 6 March 2018 the Chamber issued its 'Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests' ("Decision on Evidence and Views and Concerns").⁴
9. The Chamber granted leave for the LRVs to call three victim witnesses and one expert witness. It rejected leave for two victims represented by the LRVs to present their views and concerns in person, and ruled that it did 'not deem it appropriate to hear additional submissions, which are not related to the presentation of the evidence or subject to scrutiny through Defence questioning, at this stage of the proceedings.'⁵
10. In the 'Decision on Evidence and Views and Concerns', the Chamber noted that 'there will be a possibility for [the LRVs] to make closing statements after the

¹Preliminary Directions for any LRV or Defence Evidence Presentation, ICC-02/04-01/15-1021, 13 October 2017.

²Preliminary Directions for any LRV or Defence Evidence Presentation, ICC-02/04-01/15-1021, 13 October 2017, para. 2.i.

³'Victims' requests for leave to present evidence and to present victims' views and concerns in person, ICC-02/04-01/15-1166, 2 February 2018.

⁴Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, ICC-02/04-01/15-1199-Red, 6 March 2018 ('Decision on Evidence and Views and Concerns').

⁵*Ibid.*, para. 77.

conclusion of the defence case and the closure of the evidence.’⁶ Finally, the Chamber stated that ‘[t]his ruling is irrespective of any decision on a request to present views and concerns at a later stage of the proceedings.’⁷

11. On 13 April 2018 the Single Judge issued the ‘Directions on Closing Briefs and Closing Statements.’⁸

III. SUBMISSIONS

12. At the outset, the LRVs would like to highlight that the present request does not aim to re-litigate matters that were decided upon by the Chamber in its Decision on Views and Concerns. The LRVs take note of the position articulated by the Chamber in the latter decision, and do not seek to replicate the request previously made. Rather, a fresh request relating to a different stage of the proceedings is made now in light of further instructions from the participating victims, as well as the Chamber’s directions regarding closing submissions and statements.

The legal framework and practice to date

13. As elaborated in the Victims’ Requests,⁹ clear jurisprudence exists from a number of Trial Chambers recognising the possibility for victims to appear in person to present their views and concerns during trial.¹⁰ It is apparent that article 68(3) of the Statute is the legal basis for this possibility.¹¹

⁶*Ibid.*

⁷*Ibid.*, para.78.

⁸Directions on Closing Briefs and Closing Statements, ICC-02/04-01/15-1226, 13 April 2018.

⁹Victims’ requests for leave to present evidence and to present victims’ views and concerns in person, ICC-02/04-01/15-1166, 2 February 2018, paras 39-40.

¹⁰For example: *Prosecutor v Thomas Lubanga Dyilo*, Annex to Order issuing public redacted version of the “Decision on the request by victims a/0225/06, a/0229/06, a/0270/07 to express their views and concerns in person and to present evidence during the trial”, ICC-01/04-01/06-2032-Anx, 26 June 2009; *Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, ICC-01/05-01/08-2138, 22 February 2012, para. 17.

¹¹*Prosecutor v Thomas Lubanga Dyilo*, Annex to Order issuing public redacted version of the “Decision on the request by victims a/0225/06, a/0229/06, a/0270/07 to express their views and concerns in person and to present evidence during the trial”, ICC-01/04-01/06-2032-Anx, 26 June 2009, para.17; *Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, ICC-01/05-01/08-2138, 22 February 2012, paras 15-17; *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on victims’ representation and participation, ICC-01/09-01/11-460, 3 October 2012, para. 26; *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on victims’ representation and participation, ICC-01/09-02/11-498, 3 October 2012, para. 25.

14. In the Court's practice to date, divergent approaches are apparent regarding the most appropriate timing during trial for victims' views and concerns to be presented. Some chambers have permitted such views and concerns to be heard at the same stage as the victims' presentation of evidence.¹² Conversely, other Chambers have indicated or suggested that the appropriate moment for victims' views and concerns to be heard would be during opening and/or closing statements.¹³ The latter approach is arguably consistent with the interpretation of victims' views and concerns as being *submissions* distinct from evidence.

15. Rule 89(1) of the Rules of Procedure and Evidence ("RPE") expressly anticipates that victims may be permitted to present their views and concerns during opening and closing statements. It states:

*In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber... Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.*¹⁴

16. Although rule 91 of the RPE enables the participation of victims through a legal representative, nothing in the Statute or the RPE indicates that interventions from victims must *exclusively* be made by legal representatives. To the contrary, the jurisprudence cited above supports the view that in some instances it is appropriate for participating victims to be heard directly.

¹²*Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, ICC-01/05-01/08-2138, 22 February 2012, para. 17; *Prosecutor v Bosco Ntaganda*, Decision on the request by the Legal Representative of the Victims of the Attacks for leave to present evidence and victims' views and concerns, ICC-01/06-02/04-1780-Red, 15 February 2017.

¹³*Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on victims' representation and participation, ICC-01/09-01/11-460, 3 October 2012, para. 73; *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on victims' representation and participation, ICC-01/09-02/11-498, 3 October 2012, para. 72; See also comments of Trial Chamber I seeking clarification as to "the rationale underlying the suggestion that [the victims'] intervention should be at the end of the evidence called by the Prosecution rather than as a part of the general submissions at the close of the case": *Prosecutor v Thomas Lubanga Dyilo*, Transcript, ICC-01/04-01/06-T-171-ENG, 8 May 2009, p. 37.

¹⁴Emphasis added.

17. The LRVs contend that the presentation of closing arguments (or opening statements) is not limited to legal representatives. The fact that closing statements are provided for in rule 89 can be seen as an exception to the principle provided for in rule 91 that victims are generally to be represented in the courtroom by their legal representatives. Therefore, it cannot be argued that only legal representatives may present closing (or opening) statements.
18. This view is also supported by reference to commentators who have analysed the drafting history of the Court's texts. Bitti and Friman state that the RPE mentions 'the making of opening and closing statements, which suggests as appropriate measures that the Court should also consider the participation at hearings and oral interventions' and go on to explain that this was done at the request of some delegations which 'stressed the importance of allowing victims to appear in person before the Court.'¹⁵

Victim statements at closing are practicable and appropriate

19. The LRVs take note of the fact that oral closing statements will be made two weeks after the filing of closing briefs.¹⁶ The LRVs respectfully request that two participating victims be permitted to present views and concerns in person at that hearing.
20. Permitting the presentation of these oral victim statements would also not have any negative impact on the timeliness of the proceedings, as the victims would speak during the time allocated to LRVs. As indicated above, the matters to be addressed would not be repetitive of matters already adequately addressed before the Chamber during trial.
21. The LRVs note and agree with the established jurisprudence of the Court which warns that victims' personal presentation of views and concerns should not be

¹⁵G. Bitti and H. Friman, Participation of victims in the proceedings, in *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Roy S. Lee (ed.), Transnational Publishers (2001), at 461.

¹⁶ Directions on Closing Briefs and Closing Statements, ICC-02/04-01/15-1226, 13 April 2018, para. 9.

unnecessarily repetitive of matters already dealt with at trial.¹⁷ Following consultations with their clients they present the following areas as topics to be addressed by the two victims proposed to present their views and concerns:

- The significance of the trial process to the participating victims and their communities;
- The meaning and significance given by victims to their participation in the trial process;
- The extent to which the proceedings are capable of impacting on stability, reconciliation and other social change.
- Any other issue that the Court would deem it appropriate for the victims to address.

22. The victims the LRVs propose would be able to present oral observations before the Court on behalf of victim communities on these matters. Their presence in person would enable the Chamber to hear about these matters in their own words, and to put any relevant questions to them. Moreover, presentation of their views and concerns by these community leaders is appropriate in order for the victims to feel that the Court is alive to their interests, and would further build onto the legal representatives' efforts to ensure that participation is meaningful but realistic for them, as elaborated below.

23. The statements made by the proposed victims would not be evidence. It would present no prejudice to the defence as they are simply personal observations and have no evidentiary value.

Victim participation must be meaningful

24. ICC jurisprudence has emphasized that the participation of victims must be 'meaningful' as opposed to 'purely symbolic'.¹⁸ Victim participation before the

¹⁷*Prosecutor v Thomas Lubanga Dyilo*, Annex to Order issuing public redacted version of the "Decision on the request by victims a/0225/06, a/0229/06, a/0270/07 to express their views and concerns in person and to present evidence during the trial", ICC-01/04-01/06-2032-Anx, 26 June 2009, para. 26.

Court has been criticised by numerous commentators for not being meaningful for victims.¹⁹ The LRVs aim to mitigate these difficulties by allowing the victims to tell the Court, through their leaders, in their own words, of the impact of these proceedings on their lives as well as on their communities.

25. As stated by the Assembly of States Parties: '[T]he Court was created with both a punitive and restorative function, with the Rome Statute giving victims a right to *directly participate* in proceedings.²⁰ The former President and Registrar of the ICC,²¹ ICC Judges²², and the Revised Strategy in relation to Victims²³ have all highlighted the ICC's role in providing not only retributive, but restorative justice.

26. One of the key pillars of restorative justice is the direct participation of victims within the criminal justice process as opposed to 'authoritative' legal professionals.²⁴ The LRVs submit that when victims feel involved in the justice

¹⁸ *Prosecutor v Thomas Lubanga Dyilo*, Decision on Victims' Participation, Appeals Chamber, ICC-01/04-01/06-1119, 22 January 2008, para. 85; *Prosecutor v Thomas Lubanga Dyilo*, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Appeals Chamber, ICC-01/04-01/06-1432, 11 July 2008, para. 97; Order on the Organisation of Common Legal Representation of Victims, *Katanga and Ngudjolo*, Trial Chamber II, ICC-01/04-01/07-1328, 22 July 2009, para. 10(a); Decision on the Modalities of Victim Participation at Trial, *Katanga and Ngudjolo*, Trial Chamber II, ICC-01/04-01/07-1788-tENG, 22 January 2010, para. 57; Decision on Common Legal Representation of Victims for the Purpose of Trial, *Bemba*, Trial Chamber III, ICC-01/05-01/08-1005, 10 November 2010, para. 9(a).

¹⁹ See for example, S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood', 76 *Law and Contemporary Problems* (2014), 235-262, at 258; K.M. Clarke, 'Global Justice, Local Controversies: The International Criminal Court and the Sovereignty of Victims', in T. Keller and M.-B. Dembour (eds), *Paths to International Justice: Social and Legal Perspectives* (Cambridge University Press, 2007), at 134; and K.M. Clarke, *Fictions of Justice: The ICC and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press, 2009), at 20-23; R. Killean and L. Moffett, 'Victim Legal Representation before the ICC and ECCC', 15 *JICJ* (2017), 713-740 and at R. Nickson, 'Participation as Restoration: The Current Limits of Restorative Justice for Victim Participants in International Criminal Trials', in Clamp (ed), 175-177.

²⁰ Assembly of States Parties, International Criminal Court, Report of the Court on the Implementation in 2013 of the Revised Strategy in Relation to Victims. ICC-ASP/12/41, 11 October 2013, para. 28. Emphasis added.

²¹ President Judge Silvia Fernandez de Gurmendi, 'International Criminal Court Today: Challenges and Opportunities'. Keynote speech given at the seminar 'International Criminal Court – the Past, the Present and the Future', Helsinki, Finland, 9 June 2016. <https://www.icc-cpi.int/itemsDocuments/1600609-Helsinki-keynote-speech-ICC-President-Fernandez.pdf>; Herman von Hebel, Registrar, 'Remarks to the 15th session of the Assembly of State Parties', The Hague, 21 November 2016, p. 11. https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ASP15-OpeningStatement-Registrar-ENG.pdf.

²² See the dissenting opinion of Judge Eboe-Osuji: *The Prosecutor v. Uhuru Muigai Kenyatta*. ICC-01/09-02/11. Dissenting Opinion of Judge Eboe-Osuji, 26 November 2013, para. 61uji, 26 November 2013, para. 61

²³ Assembly of States Parties, ICC-ASP/12/41, paras 2, 28.

²⁴ See generally Van Camp, T. & Wemmers, J. (2013). *Victim satisfaction with restorative justice: more than simply procedural justice*. *International Review of Victimology*, 19(2), 117-143; and Van Ness, D. & Heetderks Strong, K. (1997). *Restoring justice*. Cincinnati: Anderson Publishing.

process and their participation is meaningful, they are able to develop a sense of ownership *vis-à-vis* the Court. Arguably, this contributes to a greater impact of the ICC proceedings at the local level.

27. The closing submissions will be viewed by hundreds, if not thousands of victims in Northern Uganda. The LRVs hold that for these victim communities, to see two of their own representatives speaking directly to the Court will be an empowering experience. Furthermore, such an experience could potentially provide victims with a sense of healing, agency, and closure.
28. The LRVs therefore respectfully request the Chamber to grant leave for two participating victims to be heard in person during closing statements. Enabling this form of participation at the final stage of these proceedings would provide substantial value and recognition to the victim communities who have participated throughout this trial. At the same time, it would have no negative impact on the fairness of the proceedings or the rights of the accused.

IV. RELIEF SOUGHT

29. Accordingly, the LRVs respectfully request leave for two victims to appear in person during the closing statements to present views and concerns in person.

Respectfully submitted,



Joseph Manoba



Francisco Cox

Dated this 15th day of October 2019

At Kampala, Uganda and Santiago, Chile