

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 20 May 2016

**TRIAL CHAMBER IX**

**Before: Judge Bertram Schmitt, Single Judge**

**SITUATION IN UGANDA**

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

**Public**

**Defence Response to the Pro-Bono Legal Representatives for Victims Request for  
Legal Aid**

**Source: Defence for Dominic Ongwen**

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

**The Office of the Prosecutor**

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James Stewart, Deputy Prosecutor  
Benjamin Gumpert, QC

**Counsel for the Defence**

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**Legal Representatives of the Victims**

Paolina Massidda  
Jane Adong  
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**Unrepresented Victims**

**Legal Representatives of the Applicants**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for the Victims**

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**Amicus Curiae**

**REGISTRY**

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**Registrar**

Herman Von Hebel

**Counsel Support Section**

Esteban Peralta Losilla

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section** **Other**

## I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') responds to the Pro-Bono Legal Representatives for Victims (PLRV) "Request for a determination concerning legal aid" ('Complaint').<sup>1</sup> The Defence opposes the Complaint of the PLRV because it does not comply with Rule 155 of the Rules of Procedure and Evidence ('Rules') and that the entire argument put forth by the PLRV is predicated on an outdated selection procedure for the common legal representative.
2. The Defence requests Trial Chamber IX ('Chamber') to deny the Complaint.

## II. PROCEDURAL HISTORY

3. On 6 January 2015, Mr Dominic Ongwen surrendered to US Special Forces in the Central African Republic. On 16 January 2015, Mr Ongwen was transferred to the care of the Registrar of the International Criminal Court ('ICC'). On 21 January 2015, Mr Ongwen arrived in the Netherlands. On 26 January 2015, Mr Ongwen had his initial appearance.
4. On 27 November 2015, Judge Cuno Tarfusser of Pre-Trial Chamber II, pursuant to his power as the Single Judge of Pre-Trial Chamber II, issued the "Decision on contested victims' applications for participation, legal representation of victims and their procedural rights" ('Decision').<sup>2</sup> At the time of the Decision, it was in no way apparent that 75% of the victims would sign a power of attorney for the PLRV.
5. On 13 May 2015, the PLRV filed its Complaint with the Single Judge.

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<sup>1</sup> ICC-02/04-01/15-434.

<sup>2</sup> ICC-02/04-01/15-350.

### III. SUBMISSIONS

#### Law

6. Article 82(1)(d) reads that:

*“Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”*

7. Rule 155 reads:

*(1) When a party wishes to appeal a decision under article 82, paragraph 1 (d), or article 82, paragraph 2, **that party shall, within five days of being notified of that decision**, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal.*

*(2) The Chamber shall render a decision and shall notify all parties who participated in the proceedings that gave rise to the decision referred to in sub-rule 1.<sup>3</sup>*

8. Paragraph 33 of the Decision reads in part:

*“Third, the legal representatives shall have the right to make written submissions to the Chamber, and the right of response as provided for in regulation 24(2) of the Regulations of the Court.”<sup>4</sup>*

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<sup>3</sup> Emphasis added.

<sup>4</sup> ICC-02/04-01/15-350, para. 33.

9. Rule 21(1) of the Rules, which falls under “Subsection 3. Counsel for the Defence”, reads:

*Subject to article 55, paragraph 2 (c), and article 67, paragraph 1 (d), criteria and procedures for assignment of legal assistance shall be established in the Regulations, based on a proposal by the Registrar, following consultations with any independent representative body of counsel or legal associations, as referred to in rule 20, sub-rule 3.*

10. Rule 90(1) of the Rules grants victims the right to choose legal representation. Rule 90(3) of the Rules grants the acting chamber the power to have the Registrar choose a common legal representative, especially in time sensitive situations. Rule 90(4) mandates that the acting chamber and Registrar act in the best interest of all victim-participants, and that conflicts of interests are avoided.
11. Regulation 80(1) of the Regulations of the Court (RoC) grants the acting chamber the authority to appoint a common legal representative from the Office of Public Counsel for Victims.
12. Regulation 83(2) of the RoC instructs the acting chamber to consult the Registrar and determine if legal assistance should be paid to victims for representation.

*Analysis – The PLRV have filed the Complaint Five Months Late*

13. On 27 November 2015 when Pre-Trial Chamber II appointed the Registrar’s choice for a common legal representative, it also informed the PLRV that they and their team would not be funded by the Court.<sup>5</sup> In the same decision, Pre-Trial Chamber II granted the common legal representative and PLRV the right of submissions before the Pre-Trial Chamber.<sup>6</sup>

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<sup>5</sup> *Ibid*, para. 18.

<sup>6</sup> *Ibid*, para. 33.

14. Rule 155 clearly mandates that interlocutory appeals must be filed within five days of receiving the decision. An appeal on a decision issued on 27 November 2015 needed to be filed on 7 December 2015, not 13 May 2016.
15. The Rules do not allow one to hold out for five months for a new chamber before appealing an issue. This is not even a case where the failure came from a prior counsel neglecting to enforce his or her client's rights. The Defence can even understand if the PLRV requested sought leave to appeal, was denied and wanted to reapply to the Chamber. None of these happened. The PLRVs made a conscious decision not to appeal the Decision. They cannot hold-out until it *appears* a more favourable situation has arisen to file an interlocutory appeal.
16. The Defence requests that the Single Judge deny the PLRV's Complaint for filing the appeal out of time.

*Analysis – The PLRV's Complaint is not Consistent with Current ICC Practice*

17. Persons accepted as victim-participants have the right to an attorney of their choice during the proceedings.<sup>7</sup> Such right does not extend the right of audience to every representative chosen by a victim-participant. It would be ridiculous if even a small fraction of persons appointed to represent a victim-participant would be given rights of audience. As such, the Rules grant the acting chamber the power to order the Registrar to appoint a common legal representative. As such, the acting chamber is required to attempt to avoid conflicts of interests between the victim-participants and the common legal representative.
18. Nothing in the Rome Statute, Rules, RoC or Regulations of the Registry mandates that the Registrar pay the PLRV. Nothing from the Decision violates the principals described in Article 68(3), the Rules or regulations as the PLRV would

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<sup>7</sup> Rule 90(1) of the Rules.

have one think. It must also be noted that Rule 21(1) of the Rules pertains solely to the rights of the Accused and persons suspected of committing crimes within the jurisdiction of the Court,<sup>8</sup> not the rights of victim-participants.

19. At the time of the Decision, around one-half of the victim-participants were represented by the PLRV, not the three-fourths that are today. Seeking the best interest of the victims-participants, Judge Tarfusser approved the Registrar's appointment of a neutral advocate from the OPCV, which was done in consultation with the Registrar.
20. Furthermore, considering Mr Manoba's current and past positions as an advisor and/or advocate for several different victim groups in Uganda, the Registrar would need to conduct an extensive background check for conflicts of interests or have every applicant for participation in the proceedings sign a waiver of conflicts of interests. In the past, common legal representatives at the ICC would have gone through a selection process akin to that of a P4 counsel.<sup>9</sup> One cannot look to the past practices, but fail to notice the finer details of the process. Rule 90(4) mandates the Registrar and acting Chamber to ensure that conflicts of interests are avoided.
21. Additionally, the PLRV writes of previous practices before the Court,<sup>10</sup> but neglects the recent practices of the Trial Chambers I, V(a), V(b) and VI.<sup>11</sup> The PLRV accepted their positions knowing full well of the recent practices of the Court.
22. During the Kenyan cases, to better serve the victim-participants, the Court started its switch from an outside common legal representative to one appointed from

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<sup>8</sup> See Article 55(2) of the Rome Statute.

<sup>9</sup> See also ICC-02/04-01/15-350, para. 20.

<sup>10</sup> ICC-02/04-01/15-434, paras 26-28.

<sup>11</sup> For example see ICC-01/04-02/06-650, paras 29-32. Trial Chamber VI, by majority, retained OPCV employees as the CLRVs for the case.

the OPCV. In those cases, the respective Chambers kept the main duty of the outside legal representative,<sup>12</sup> but ordered the OPCV to handle the day-to-day interactions at the seat of the Court.<sup>13</sup> This system quickly caused the legal representative for the victims in the Kenya 2 Case to resign from what appears to be possible conflicts between his representation and the use of OPCV for day-to-day operations.<sup>14</sup> The system has now developed to where a senior attorney within the OPCV, one which meets the criteria for Rule 22 of the Rules, is selected by the Court.<sup>15</sup> The Decision follows this same route.

23. The system in place works. The OPCV searched for, and found, a highly competent trial attorney in Ms Jane Adong to assist Ms Massidda. Ms Adong has ample international criminal experience and is originally from the Situation country. As inferred from the Complaint, the OPCV has staff working in-country to advise its clients accordingly. The Court should not have to carry the burden of having two legal representatives for the same charges. This is not what was meant by the framers of the legal texts.

24. Accordingly, the Defence requests the Chamber to dismiss the Complaint of the PLRV for the failure to explain why the Chamber should depart from the Court's practices these past four years.

#### **IV. RELIEF**

25. The Defence respectfully requests the Chamber to deny the Complaint of the PLRV.

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<sup>12</sup> ICC-01/09-01/11-460, para. 42 and ICC-01/09-02/11-498, para. 41.

<sup>13</sup> ICC-01/09-01/11-460, para. 43 and ICC-01/09-02/11-498, para. 42.

<sup>14</sup> ICC-01/09-02/11-503, para. 4.

<sup>15</sup> ICC-01/04-02/06-650, paras 29-32.

Respectfully submitted,



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Hon. Krispus Ayena Odongo  
On behalf of Dominic Ongwen

Dated this 20<sup>th</sup> day of May, 2016

At Lira, Uganda