

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: ICC-02/04-01/15  
Date: 25 November 2016

**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 Document**

**Victims' Joint Submission following the Decision regarding Opening Statements  
(ICC-02/04-01/15-602)**

**Source:** Legal Representatives of Victims  
Office of Public Counsel for Victims

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

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
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## I. INTRODUCTION

1. Counsel representing the victims authorised to participate in the present case (“Counsel”)<sup>1</sup> jointly submit their position in relation to the presentation of opening statements in the proceedings.

2. Following the Single Judge’s ruling issued on 22 November 2016<sup>2</sup>, Counsel consulted with each other in the matter and decided to further address the Chamber in light of their professional obligations to comply with their clients’ instructions. Indeed, said instructions, as explained *infra*, prevent them from finding a common position at this point in time.

3. Regrettably, Counsel had understood the Initial Directions<sup>3</sup> as permitting the Common Legal Representative, the Legal Representatives and the Defence to opt individually for the timing of their opening statements. This interpretation appeared to be supported by the fact that the Initial Directions did not distinguish between the “LRVs” and the Defence. The difficulty in which Counsel now find themselves is that they have respectively acted on the basis of this common understanding in order to advise their clients regarding this choice and take instructions.

4. In light of the new information provided *infra*, Counsel respectfully request the Chamber to consider allowing them to present the opening statements at two separate moments in time. Counsel submit that this course of events will allow them to fully comply with the instructions and wishes of their respective clients. Moreover,

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<sup>1</sup> For the purposes of this submission, the term “Counsel” refers to both teams of counsel representing the interests of participating victims in the case. For the purposes of this submission, when counsel are addressed separately, the term “Common Legal Representative” is used to refer to counsel appointed by the Pre-Trial Chamber and the term “Legal Representatives” refers to counsel chosen by the victims.

<sup>2</sup> See “Decision on Legal Representatives’ Notification Regarding Opening Statements”, No. ICC-02/04-01/15-602, 22 November 2016 (the “Decision”).

<sup>3</sup> See the “Initial Directions on the Conduct of the Proceedings” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-497, para. 7 (the “Initial Directions”).

they posit that it will not be inefficient since they will consult in advance on the issues to be addressed and they will make sure that no repetition of arguments occurs.

5. Counsel further submit that, while victims have common interests, the way in which they perceive their intervention in the proceedings – including the appropriate time at which to do so – may vary, as might the strategy of each counsel’s team to present the views and concerns of the victims they represent.

## II. PROCEDURAL HISTORY

6. On 13 July 2016, the Single Judge of Trial Chamber IX (the “Chamber”) issued the Initial Directions on the Conduct of the Proceedings (the “Initial Directions”), indicating, *inter alia*, that Counsel may make their opening statements either at the commencement of the trial or just prior to the presentation of their evidence, *if any*. The Single Judge also instructed Counsel and the Defence to inform the Chamber within 15 days of the commencement of the trial of their intention as to the time of their opening statements.<sup>4</sup>

7. On 21 November 2016, the Common Legal Representative informed the Chamber by email that she intends to present her opening statements at the commencement of the trial.<sup>5</sup> On the same day, the Legal Representatives filed a notification indicating that they intend to present their opening statements prior to the presentation of their case, rather than at the commencement of trial;<sup>6</sup> and the Defence informed the Chamber by email that it will make its opening statements at the beginning of its presentation of evidence.<sup>7</sup>

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<sup>4</sup> *Idem*, para. 7 (Emphasis added).

<sup>5</sup> See email sent to the Chamber by the Common Legal Representative on 21 November 2016 at 12:04.

<sup>6</sup> See the “Legal Representatives of Victims’ notification regarding opening statements”, No. ICC-02/04-01/15-597, 21 November 2016 (the “Notification”).

<sup>7</sup> See email sent to the Chamber by the Defence on 21 November 2016 at 15:34, and transmitted to Counsel on 22 November 2016 at 09:29.

8. On 22 November 2016, the Single Judge rendered the “Decision on Legal Representatives’ Notification Regarding Opening Statements”, clarifying that Counsel must hold their opening statements in a consolidated manner and directing them to inform the Chamber and the parties of their decision by 25 November 2016.<sup>8</sup>

### III. SUBMISSIONS

#### A. Common Legal Representative’s position

9. The Common Legal Representative notes that already on 18 May 2016, in her submissions in preparation for the first status conference, she explicitly indicated:

*“[t]he opening statements represent a unique opportunity for the victims to convey to the Chamber their views and concerns, and particularly to make use of their right to explain the reasons for their participation. [...] She also wishes to inform the Chamber that she is considering the possibility for individual victims to directly present their views and concerns during the opening statements.”<sup>9</sup>*

10. This paragraph was included in the filing because the victims represented by the Common Legal Representative and consulted for the purpose of said submissions, clearly stated their wish to have their views and concerns presented at the commencement of the trial. The reasons adduced by the victims were mainly the fact that they have been waiting for years to be heard in a court of law and that they consider that the start of the trial is the best moment and the more appropriate to state their quest for justice, particularly because they may have different perspectives from the one which will be presented by the Prosecution at the same time. Some of them even indicated that they wish to personally explain to the Judges which are their expectations for the trial and this has, of course, to be done at the

<sup>8</sup> See the “Decision”, *supra* note 2, p. 5.

<sup>9</sup> See the “Common Legal Representative’s submissions pursuant to the ‘Order Scheduling First Status Conference and Other Matters’”, No. ICC-02/04-01/15-437, 18 May 2016, paras. 15-16.

commencement of the proceedings. Delaying such a possibility to the end of the presentation of the Prosecution case will also empty it of all meaning for the victims represented by the Common Legal Representative.

11. Victims consulted over the months – including after the issuance of the Initial Directions and very recently in October and November 2016 – have always maintained said position.

12. In this regard, the Common Legal Representative notes that she is bound to abide to the instructions given by her clients in conformity with the professional obligations under the Code of Professional Conduct for Counsel. This is particularly true in relation to the obligation to take into account her clients' personal circumstances and specific needs.<sup>10</sup> All victims represented by the Common Legal Representative have suffered from physical, psychological and/or sexual violence and include many children, elderly and disabled individuals. Thus, the fact that their lawyer is making opening statements at the start of the trial has a tremendous positive impact on the expectations they have towards the Court.

13. The Common Legal Representative also wishes to note that in the Initial Directions the Single Judge expressly stated that Counsel *"may make their opening statements either at the commencement of the trial or just prior to the presentation of their evidence, if any"*.<sup>11</sup>

14. At present, the Chamber has not ruled on the modalities for victims to present evidence after the Prosecution has concluded its case. In the practice of the Court, Chambers have acknowledged that victims may present evidence that (i) is relevant

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<sup>10</sup> See Articles 9(2) and 14(2)(a), (b) of the Code of Professional Conduct for counsel, Resolution ICC-ASP/4/Res.1 adopted at the 3rd plenary meeting on 2 December 2005. See also Article 15 of the Basic Principles on the Role of Lawyers Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

<sup>11</sup> See the "Initial Directions on the Conduct of the Proceedings", *supra* note 4, para. 7 (We underline).

to the personal interests of victims; (ii) may contribute to the determination of the truth while keeping with the rights of the accused and a fair and impartial trial.<sup>12</sup> Moreover, Trial Chambers have ruled that evidence to be presented by the victims must make a real contribution to the search for the truth<sup>13</sup> and should bring to light substantial new information that is relevant to issues which the Chamber must consider in its assessment of the charges while not being repetitive of those presented by the parties.<sup>14</sup>

15. Consequently, the Chamber will only be able to render a decision on whether or not to authorise the legal representatives to proceed with their presentation of evidence towards the end or at the closing of the Prosecution case, should the legal representatives decide to proceed accordingly. Therefore, while being unlikely, there still exists a real possibility that the victims decide not to present their evidence and thus be deprived of the possibility to make opening statements at a later stage of the trial, if not allowed to do so at the start of the trial.

16. Finally, the Common Legal Representative wishes to indicate that she finds merit in the reasons adduced by the Legal Representatives to justify their request to delay their opening statements. Indeed, the mandate of legal representatives is to convey the views and concerns of the victims and being their voice in the proceedings. Therefore, proper consultation with the clients is absolutely necessary to be able to fulfil their mandate.

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<sup>12</sup> See the “Decision on victims’ representation and participation” (Trial Chamber V), No. ICC-01/09-01/11-460, 03 October 2012, para. 77.

<sup>13</sup> See the “Decision on the Modalities of Victim Participation at Trial” (Trial Chamber II), 22 January 2010, No. ICC-01/04-01/07-1788-tENG, paras. 86-91.

<sup>14</sup> See the “Directions for the conduct of the proceedings and testimony in accordance with rule 140” (Trial Chamber II), No. ICC-01/04-01/07-1665-Corr, 1 December 2009, paras. 20-32. See also the “Decision on Directions for the Conduct of the Proceedings” (Trial Chamber III), No. ICC-01/05-01/08-1023, 19 November 2010, para. 5.

17. As far as the schedule of the hearing for opening statements at the commencement of the trial is concerned, the Common Legal Representatives indicates that she will need 30 minutes.

**B. Legal Representatives' position**

18. The Legal Representatives refer to the Notification and rely on the submissions already made therein. The Notification represents the views and the preference of the Legal Representatives' clients. Through the meetings held with their clients Legal Representatives have received clear instructions as to the victims' views and concerns and their interests in several regards. The victims wish to obtain reparations and to have the truth come out before the Court and the victims' voices heard in this process.

19. The victims represented by the Legal Representatives are clear and unequivocal in discussing the many forms of serious harm they have suffered as a result of the crimes committed by the Accused. They not only want this harm recognised but they want the Court to provide reparations.

20. Many victims are interested in sharing their knowledge with the Court, whether directly (as witnesses) or through other means (including the use of audio-visual). They want to ensure that this material makes a clear and meaningful impression on the judges and others who are watching the proceedings.

21. Finally, the victims also want that their participation in these proceedings to be meaningful. They want their lawyers to represent their interests, but most importantly to convey their views and concerns based on their actual instructions.



22. It is these factors which the Legal Representatives have had to weigh up when discussing the choice presented in the Initial Directions with their clients, and advising on which approach will best advance their interests. While increased media attention and initial impact may be served by an early statement, ultimately victims have agreed in discussions that their ultimate objectives in the proceedings are best advanced by presenting opening statements later. This will allow Prosecution evidence to be observed and responded to; and a strong and coherent victims' presentation to be made which will best advance the victims' desire for reparations and the clear communication of their stories to the Chamber and the international community.

23. Having undergone these discussions with their clients the Legal Representatives now feel committed to the course indicated in the Notification which reflects both their clients' instructions and best interests.

24. The Legal Representatives acknowledge and respect the different approach taken by the victims led by the Common Legal Representatives. Theirs is an approach which may bring some relief in the shorter-term to all victims in the case, by enabling a victims' presence to be observed from the very outset of the trial. The Legal Representatives also acknowledge the Common Legal Representative's professional obligations to her clients, which is a comment that the Legal Representatives also feel keenly towards the 2603 participating victims who have personally appointed them in the present case.

25. These victims have waited many years for an opportunity to tell their stories. The arrest of the Accused has presented them with what might be their only opportunity to tell their stories to the international community, through the Court, and to obtain some reparations for the harm which they are still suffering. They have indicated that they are prepared to wait a little longer, after so many years, in order to make the best presentation possible before this Court.

26. Finally, the Legal Representatives note that they are so far only in a position to convey the views of some of their clients to the Chamber. They are currently conducting ongoing consultations with their clients, on these among other issues. However it remains the case that it has not yet been possible to meet meaningfully with the over 1000 clients who have only recently been admitted to participate during the course of the previous month. In order to ensure that every participating victim is given a chance to be heard and to exercise his or her participatory rights under the Statute (including the possibility to present opening statements as set out in rule 89(1) of the Rules of Procedure and Evidence and recognised in the Initial Directions), the Legal Representatives are anxious to fully consult with those remaining new clients before opening statements are presented. Concerning the time required for a statement at the outset of the victims' evidence, the Legal Representatives indicate that they would require no more than 1 hour.

#### IV. CONCLUSION

27. The foregoing arguments demonstrate that the inability of Counsel to reach a common position has not been the result of any uncooperative attitude or a failure to cooperate. It also appears to Counsel that a different outcome might have prevailed had they correctly understood the Initial Directions before undertaking discussions with their clients.

28. Therefore, Counsel seek the Chamber's indulgence to consider an alternative solution. They note that, in light of the above, while the Common Legal Representative intends to present the reasons for the participation of the victims at trial and their expectations, the Legal Representatives intend to use the opening statements to *"introduce and contextualise the evidence to be led or views and concerns to be*

*represented*".<sup>15</sup> Therefore, it is agreed that the respective opening statements will serve different purposes, and will be complementary. Furthermore, allowing the two teams to present said statements at a different point in time would take into account the wishes of the victims, while maintaining the efficiency of the proceedings.

29. In the present case two teams of lawyers represent individual victims: not groups of victims but actual individuals who have been admitted as such in the proceedings. As a consequence, this may sometimes lead to differentiated legal and practical outcomes. One such outcome is that there may be disagreements as to some strategic decisions. To the extent that no interference with the rights of the Accused arises, Counsel submit that due regard should be paid, on the basis of the *pro homine* principle, to decisions taken by the different teams and their respective clients as to the best way to meaningfully represent the interests of the victims. In the present instance, no interference would occur with the expediency of the trial or the rights of the Accused if the two victims' groups were authorised to present opening statements at different junctures. Conversely, to impose an agreement in a case in which different instructions were received by clients would annihilate the individual role of the victims in the proceedings and confine opening statements to only a procedural rite, lacking relevance and substantive meaning for victims.

30. For the foregoing reasons, Counsel respectfully request the Chamber to allow the Common Legal Representative to present opening statements at the commencement of the trial and the Legal Representatives to present opening statements prior to the presentation of their evidence. If so authorised, Counsel will make sure that their respective statements will be complementary, non-repetitive and focused for the efficiency of the proceedings.

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<sup>15</sup> See the "Notification", *supra* note 6, paras. 4, 7 and 8.

31. Should the Chamber not approve this approach, Counsel will of course comply with any instruction provided by the Chamber as to when the opening statements should be presented.



Paolina Massidda



Francisco Cox



Joseph Manoba

Dated this 25<sup>th</sup> day of November 2016

At The Hague (The Netherlands), Kampala (Uganda) and Santiago (Chile)