

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **9 May 2018**

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

**CLRv Response to the "Defence Request for Leave to Appeal the 'Decision on
Defence Urgent Request for Delay in Opening of LRV and CLRv Evidence
Presentation'"**

Source: 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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I. INTRODUCTION

1. The Common Legal Representative of the victims¹ (the “CLRv”) submits that the “Defence Request for Leave to Appeal the ‘Decision on Defence Urgent Request for Delay in Opening of LRV and CLRv Evidence Presentation’” (the “Request”)² should be rejected.

2. In particular, the CLRv contends that the Request is moot given Trial Chamber IX (the “Chamber”) dismissed the original request by the Defence to postpone the presentation of evidence by the Legal Representatives and because said presentation of evidence has already begun. In any case, the Request fails to meet the criteria for granting interlocutory appeal under article 82(1)(d) of the Rome Statute.

II. PROCEDURAL BACKGROUND

3. On 13 December 2017, following the Single Judge’s decision³, the CLRv filed her preliminary list of witnesses.⁴ On 14 December 2017, the Legal Representatives of Victims (the “LRV”) filed their preliminary list of witnesses.⁵ On 15 December 2017, the Defence filed a request seeking, *inter alia*, the full disclosure of the names of the

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 Appeal the “Decision on Defence Urgent Request for Delay in Opening of LRV and CLRv Evidence Presentation”, No. ICC-02/04-01/15-1253, 4 May 2018 (the “Request”).

³ See the “Preliminary Directions for any LRV or Defence Evidence Presentation” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1021, 13 October 2017, paras. 3-4.

⁴ See the “Common Legal Representative Preliminary List of Witnesses Provided Pursuant to the ‘Preliminary Directions for any LRV or Defence Evidence Presentation’”, No. ICC-02/04-01/15-1105-Conf. A public redacted version of the document was notified on 19 December 2017; see No. ICC-02/04-01/15-1105-Red.

⁵ See the “Victims’ preliminary list of witnesses”, No. ICC-02/04-01/15-1106, 14 December 2017.

witnesses that the legal representatives wish to call.⁶ On 18 December 2017, LRV⁷ and the CLRV⁸ filed their responses. On 22 December 2017, the Chamber partially granted the request and notably instructed the CLRV to disclose the names of its four expert witnesses.⁹ Accordingly, the CLRV proceeded with the disclosure of the names of four experts on 22 and 29 December 2017.¹⁰

4. On 2 February 2018, the CLRV submitted her Final List of Witnesses and her Request for Leave to Present Evidence.¹¹ On the same day, the LRV filed their request for leave to present evidence and to present victims' views and concerns in person.¹² On 15 February 2018, the Defence filed its response to both Legal Representatives' requests to present evidence.¹³ On 6 March 2018, the Chamber rendered its Decision Authorising the Presentation of Evidence, partially granting the requests to present evidence by both teams of Legal Representatives and ordered the latter, *inter alia*, to provide their lists of witnesses and summaries of their testimony etc. within one week after the Prosecution's formal notice that it concluded its evidence

⁶ See the "Defence Request for Orders Regarding ICC-02/04-01/15-1105-Conf, ICC-02/04-01/15-1106 and ICC-02/04-01/15-1106-Conf-Anx", No. ICC-02/04-01/15-1109-Conf, 15 December 2017. Pursuant to Trial Chamber IX's Decision, dated 22 December 2017, this document was reclassified as "Public".

⁷ See the "Victims' response to 'Defence Request for Order Regarding ICC-02/04-01/15-1105-Conf, ICC-02/04-01/15-1106 and ICC-02/04-01/15-1106-Conf-Anx'", No. ICC-02/04-01/15-1112-Conf, 18 December 2017.

⁸ See the "Common Legal Representative Response to 'Defence Request for Orders Regarding ICC-02/04-01/15-1105-Conf, ICC-02/04-01/15-1106 and ICC-02/04-01/15-1106-Conf-Anx'", No. ICC-02/04-01/15-1113-Conf, 19 December 2017. Pursuant to Trial Chamber IX's Decision, dated 22 December 2017, this document was reclassified as "Public".

⁹ See "Decision on Defence Request for the Identities of Potential Witnesses on the Legal Representatives of Victims' Preliminary Lists of Witnesses" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1117, 22 December 2017.

¹⁰ See email to the Chamber, parties and participants sent by the Common Legal Representative on 22 December 2017 at 11:41; and the "List of Experts Provided Pursuant to the 'Decision on Defence Request for the Identities of Potential Witnesses on the Legal Representatives of Victims' Preliminary Lists of Witnesses'", with Confidential Annex A, No. ICC-02/04-01/15-1125, 29 December 2017.

¹¹ See the "Common Legal Representative's submission of Final List of Witnesses and Request for Leave to Present Evidence", No. ICC-02/04-01/15-1165-Conf + Conf-Anxs, 2 February 2018. A public redacted version of the Request was filed on 5 February 2018; see No. ICC-02/04-01/15-1165-Red.

¹² See the "Victims' requests for leave to present evidence and to present victims' views and concerns in person", No. ICC-02/04-01/15-1166 + Conf-Anx, 2 February 2018.

¹³ See the "Defence Response to the LRV and CLRV Requests to Present Evidence and the Views and Concerns of Registered Victims", No. ICC-02/04-01/15-1182-Conf, 15 February 2018. A public redacted version of the document was notified on 23 February 2018; see No. ICC-02/04-01/15-1182-Red.

presentation.¹⁴ On 14 March 2018, by e-mail, the Chamber modified its previous ruling and instructed the Legal Representatives to provide said information by 5 April 2018.¹⁵

5. On 23 March 2018, the CLRV informed the Chamber, the parties and participants of the availability of the expert witnesses to appear at the Court between 14-16 and 23-24 May 2018.¹⁶ On 27 March 2018, the LRV also informed via email of the availability of their witnesses to testify in Court between 1 and 9 May 2018.¹⁷ On 27 March 2018, the Chamber communicated via email its decision setting the hearing schedule of the victims' presentation of evidence on 1-9, 14-16 and 23-24 May 2018.¹⁸

6. On 4 April 2018, the CLRV submitted the information required by the Chamber and related annexes.¹⁹ On the same day, the CLRV provided her notice of evidence disclosure.²⁰ On 6 April 2018, the LRV provided their notice of evidence disclosure.²¹ On the same day, the CLRV provided an additional notice of evidence disclosure.²²

¹⁴ See the "Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests (Trial Chamber IX), No. ICC-02/04-01/15-1199-Conf, 06 March 2018, para. 79 (the "Decision Authorising the Presentation of Evidence"). A public redacted version of the decision was filed on the same day; see No. ICC-02/04-01/15-1199-Red.

¹⁵ See the email from Trial Chamber IX sent on 14 March 2018 at 9:40. See also email sent by the Prosecution on 13 March 2018 at 12:10.

¹⁶ See the email from the Common Legal Representative of Victims sent on 23 March 2018 at 09:19.

¹⁷ See the email from the Legal Representatives of Victims sent on 27 March 2018 at 13:26.

¹⁸ See the email from Trial Chamber IX sent on 27 March 2018 at 15:28.

¹⁹ See the "Common Legal Representative's Information to the Chamber Pursuant to the Decision to Present Evidence (ICC-02/04-01/15-1199-Red)", with Public Annexes A and C and Confidential Annex B, No. ICC-02/04-01/15-1215, 4 April 2018.

²⁰ See the "Common Legal Representative's Communication of the Disclosure of Evidence", with Confidential Annex A, No. ICC-02/04-01/15-1216, 04 April 2018.

²¹ See the "Legal Representatives of Victims' Communication of the Disclosure of Evidence", with Confidential Annex A, No. ICC-02/04-01/15-1220, 06 April 2018.

²² See the "Common Legal Representative's Communication of the Disclosure of Evidence", with Public Annex A, No. ICC-02/04-01/15-1221, 06 April 2018.

7. On 13 April 2018, the Prosecution filed its notice of the completion of evidence presentation.²³ On 23 April 2018, the Defence filed its “Defence Urgent Request for Delay in Opening of LRV and CLRV Cases, Pursuant to Articles 67(1)(b) and 67(1)(e) of the Rome Statute” (the “Initial Request”).²⁴ On 26 April 2018, the Prosecution²⁵ the CLRV²⁶ and the LRV²⁷ responded to the Initial Request. On the same day, the Chamber issued the decision, rejecting the Initial Request.²⁸

8. From 1 to 4 May 2018, the Chamber conducted the trial hearings as scheduled and heard the testimonies of all the witnesses (three crime-base witnesses and an expert) called by the LRV.²⁹

9. On 4 May 2018, the Defence filed the Request.³⁰

III. SUBMISSIONS

A. The Request is moot

10. At the outset, the CLRV contends that the Request is moot. As the Chamber rejected the Initial Request, the presentation of evidence by the Legal Representatives has already begun and is halfway finished. Needless to say, the presentation of

²³ See the “Notice of the Prosecution’s completion of evidence presentation”, No. ICC-02/04-01/15-1225, 13 April 2018.

²⁴ See the “Defence Urgent Request for Delay in Opening of LRV and CLRV Cases, Pursuant to Articles 67(1)(b) and 67(1)(e) of the Rome Statute”, No. ICC-02/04-01/15-1239, 23 April 2018 (the “Initial Request”).

²⁵ See the “Prosecution’s Response to the Defence Urgent Request for Delay in Opening of LRV and CLRV Cases, No. ICC-02/04-01/15-1245, 26 April 2018.

²⁶ See the “CLR Response to the ‘Defence Urgent Request for Delay in Opening of LRV and CLRV Cases, Pursuant to Articles 67(1)(b) and 67(1)(e) of the Rome Statute’”, No. ICC-02/04-01/15-1246, 26 April 2018.

²⁷ See the “Victims’ response to “Defence Urgent Request for Delay in Opening of LRV and CLRV Cases, Pursuant to Articles 67(1)(b) and 67(1)(e) of the Rome Statute”, No. ICC-02/04-01/15-1247, 26 April 2018.

²⁸ See the “Decision on Defence Urgent Request for Delay in Opening of LRV and CLRV Evidence Presentation” (Trial Chamber IX), No. ICC-02/04-01/15-1248, 26 April 2018 (the “Impugned Decision”).

²⁹ See Transcripts ICC-02/04-01/15-T-171 to ICC-02/04-01/15-T-174.

³⁰ See the Request, *supra* note 2.

evidence by the CLRV is yet to commence but imminent. However, the Defence, in its Initial Request, presented the beginning of the presentation of evidence on behalf of the participating victims as a whole and undivided appealable issue since it had “[objected] to the start of the Legal Representatives of Victims (‘LRV’) and Common Legal Representative for Victims (‘CLRV’) cases on 1 May 2018 and 14 May 2018, respectively.”³¹ Hence, the Chamber, in issuing the Impugned Decision, dismissed the Initial Request with regard to all the witnesses and experts called by both teams of Legal Representatives.³² The Chamber did *not* leave the part of the presentation of evidence by the CLRV up to reconsideration or re-litigation.³³

11. Moreover, while the Defence still had an opportunity to lodge its appeal prior to the start of the evidentiary block dedicated to the presentation of evidence by the Legal Representatives, it failed to do so. Besides, the Defence fully participated in the recent trial hearings and questioned all the witnesses called by the LRV on equal footing with the latter in terms of both scope and time.³⁴ As found in the Impugned Decision, this shows that the Defence was in fact given adequate time to prepare for the presentation of evidence by the Legal Representatives.³⁵ Consequently, on the ground of mootness alone, the Request should be rejected in its entirety.

B. The requirements for Leave to Appeal are not met

12. Article 82(l)(d) of the Rome Statute sets out the criteria for granting a request for leave to appeal as follows: (a) the decision shall involve an issue that would significantly affect: (i) the fair and expeditious conduct of proceedings; or (ii) the outcome of the trial; and (b) for which, in the opinion of the relevant Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

³¹ See the Initial Request, *supra* note 24, para. 1.

³² See the Impugned Decision, *supra* note 28, paras. 11-17.

³³ *Idem*.

³⁴ See Transcripts ICC-02/04-01/15-T-171 to ICC-02/04-01/15-T-174.

³⁵ See the Impugned Decision, *supra* note 28, para. 16.

13. For the purposes of the first prong of the above mentioned test, the Appeals Chamber defined an “issue” as *“an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”*.³⁶ Moreover, the Appeals Chamber ruled that *“the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue”*.³⁷

14. Consequently, it must first be determined whether the purported “issue” in the Request is an “appealable issue” within the meaning of article 82(l)(d) of the Rome Statute as interpreted by the jurisprudence of the Court. Indeed, *“while an application for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, it must still identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error. Only in this case can the Chamber assess whether the issue, provided it was wrongly decided, may have implications on the fairness and expeditiousness of the proceedings or outcome of the trial”*.³⁸

15. In the Request, the Defence seeks leave to appeal the following issues: “Issue 1: a) Whether Decision 1248 violates Mr Ongwen’s fair trial rights under Articles 67(1)(b), 67(1)(e) and 64(2) of the Statute; and b) whether Decision 1248 complies with the Trial Chamber’s previous decision ICC-02/04-01/15-1199” and “Issue 2: Whether the Trial Chamber acted ultra vires for disregarding the Defence procedural right to prepare and file a request for leave to reply to a response from the Prosecution within three days of notification pursuant to Regulations 24(5), 31 and 34(c) of the Regulations of the Court (‘RoC’) and the Defence’s procedural right to reply to submissions from the CLRV and LRV pursuant to Rule 91(2) of the RPE.”³⁹

³⁶ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, para. 9.

³⁷ *Idem*, para. 20.

³⁸ See the “Decision on the Gbagbo Defence request for leave to appeal the ‘Decision on Defence requests relating to the Prosecution’s Pre-Trial Brief’” (Trial Chamber I), No. ICC-02/11-01/11-307, 21 October 2015, para. 70.

³⁹ See the Request, *supra* note 2, paras. 14–24 and 25–29.

16. As for Issue 1), the Defence principally argues that the Impugned Decision violated the fair trial rights of the Accused and did not comply with the Decision Authorising the Presentation of Evidence. In contrast with the established jurisprudence on granting interlocutory appeal, the Defence fails to identify clearly the appealable issue by indicating a specific factual and/or legal error.⁴⁰ Rather, the Defence challenges *the whole* of the Impugned Decision. In this regard, article 82(1)(d) of the Rome Statute “*requires the parties to articulate discrete issues for Appeals Chamber resolution and [...] it is generally insufficient to argue that the entirety of the Chamber’s reasoning is erroneous when requesting leave to appeal”.*⁴¹

17. Yet still, among various arguments purportedly supporting the existence of Issue 1), the Defence alleges in particular that: (a) while in the Decision Authorising the Presentation of Evidence, the Chamber had ordered the Legal Representatives to produce Acholi translations of the summaries of anticipated testimonies, the CLRV failed to comply with it by submitting three-page long documents which were broad and incomplete; and (b) the Chamber omitted to take this failure into consideration in issuing the Impugned Decision.⁴²

18. The CLRV strongly objects to this line of arguments alleging a failure to comply with the rulings of the Chamber. In fact, in the Decision Authorising the Presentation of Evidence, the Chamber instructed the Legal Representatives to submit only summaries of the anticipated testimonies of their witnesses and corresponding Acholi translations in *liaison* with the Registry.⁴³ Accordingly, the

⁴⁰ See the “Decision on the Gbagbo Defence request for leave to appeal the ‘Decision on Defence requests relating to the Prosecution’s Pre-Trial Brief’”, *supra* note 38.

⁴¹ See the “Decision on the joint defence request for leave to appeal the decision on witness preparation” (Trial Chamber V), No. ICC-01/09-01/11-596, 11 February 2013, para. 11 (Emphasis added); and the “Decision on Defence Request for Reconsideration of or Leave to Appeal/Decision on ‘Defence Request for Disclosure and Judicial Assistance’” (Trial Chamber VII), No. ICC-01/05-01/13-1282, 22 September 2015, para. 10.

⁴² See the Request, *supra* note 2, paras. 17-24.

⁴³ See the Decision Authorising the Presentation of Evidence, *supra* note 14, para. 79.

CLRV duly and timely disclosed the summaries and their translations on 5 April 2018.⁴⁴

19. The Chamber never found that the length and content of the summaries and their translations were incomplete or overly broad. Indeed, in the Impugned Decision, the Chamber dismissed the Initial Request “*considering: (i) the purpose of this part of the proceedings; (ii) the restrictions on the evidence the Legal Representatives are allowed to elicit; and (iii) the quantity (as well as purpose and content) of the materials disclosed.*”⁴⁵ The Chamber further determined that “[t]aking into account the purpose, content and quantity of the disclosed materials, the Defence has been given adequate time to prepare itself for the Legal Representatives’ evidence presentation.”⁴⁶ Lastly, the Chamber added that “*the Defence has been in possession of the disclosed material since 5 April 2018. Therefore, the Defence has been aware of the volume of the materials at issue for well over two weeks, and submitting this Request three working days before the start of the Legal Representatives’ case is unacceptable.*”⁴⁷

20. Thus, in re-iterating the arguments already specifically addressed and ruled upon⁴⁸ by the Chamber in the Impugned Decision, Issue 1) of the Request shows a mere disagreement with the ruling of the Chamber. As recalled above,⁴⁹ such disagreements do not qualify for an appealable issue. Thus, there is no issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial. In fact, the Impugned Decision fully explored the practical implications of the commencement of the presentation of evidence by the Legal

⁴⁴ See the “Common Legal Representative’s Communication of the Disclosure of Evidence”, *supra* note 22.

⁴⁵ See the Impugned Decision, *supra* note 28, para. 12 (Emphasis added).

⁴⁶ *Idem*, para. 16 (Emphasis added).

⁴⁷ *Ibidem*, para. 17.

⁴⁸ See the “Decision on the ‘Request for Leave to Appeal against the ‘Decision on the Request for an order for the commencement of the pre-confirmation phase by the Defence of Saif Al-Islam Gaddafi’” (Pre-Trial Chamber I), No. ICC-01/11-01/11-490, 1 December 2013, para. 31 and the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’” (Trial Chamber I), No. ICC-02/11-01/15-117, 2 July 2015, para. 22.

⁴⁹ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 36.

Representatives *vis-à-vis* the fair trial rights of Mr Ongwen. As mentioned above, the evidentiary block for hearing testimony of the witnesses called by the Legal Representatives has already started and is midway to the end. As a result, even if granted leave to appeal, an intervention of the Appeals Chamber could not possibly materially advance the proceedings at such a late stage.

21. As for Issue 2), the Defence mainly argues that, prior to issuing the Impugned Decision, the Chamber committed an error by not allowing the Defence to exercise its “*procedural right to*” reply to the responses filed by the Prosecution and the Legal Representatives to its Initial Request.⁵⁰ In this regard, regulation 24(5) of the Regulations of the Court clearly states that participants may only reply to a response *with the leave of the Chamber*. Thus, a decision on whether to allow the parties and participants to file a reply is fully discretionary. In fact, before seeking this relief, any party or participant is expected to reasonably anticipate and address all possible counter arguments in its initial document.

22. Consequently, it follows that the Defence does not have an unfettered and automatic *procedural right* to reply to all documents including responses filed by the Legal Representatives. Thus, there arises no appealable issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial in this regard. Even if leave to appeal is granted, a resolution of this purported issue by the Appeals Chamber will not advance the proceedings since the presentation of the evidence by the Legal Representatives is already underway.

23. Therefore, the CLRV submits that none of the issues identified by the Defence constitute appealable issues, nor do they meet the stringent requirements for granting interlocutory appeal under article 82(1)(d) of the Rome Statute.

⁵⁰ See the Request, *supra* note 2, paras. 25-29.

IV. CONCLUSION

24. For the foregoing reasons, the Common Legal Representative respectfully requests the Chamber to dismiss the Request.

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 9th day of May 2018

At The Hague (The Netherlands)