

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/04-01/15**
Date: **12 February 2021**

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' Response to "Defence Request for Trial Chamber IX to accept Submissions on Sentencing Pursuant to Rule 103 of the Rules of Procedure and Evidence"

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 Defence requests Trial Chamber IX (“Chamber”) to allow the submission of *amicus curiae* observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence (“Rules”) in preparation for the Chamber’s upcoming decision on sentencing for Mr Ongwen. The Legal Representatives for Victims (“LRVs”) oppose the Request and contend that there are no novel issues at stake that would warrant the submissions from organisations or individuals who have not been privy to all the evidence submitted in this case on matters relating to the sentencing of Mr Ongwen.

II. PROCEDURAL HISTORY

2. On 4 February 2021, Trial Chamber IX rendered its Trial Judgment. The Trial Chamber found Mr Ongwen guilty of 62 counts, which included the attacks on Pajule, Odek, Lukodi and Abok IDP camps, charges related to sexual and gender-based crimes and use of child soldiers.¹
3. On the 9 February 2021 the Defence filed its “Defence Request for Trial Chamber IX to accept Submissions on Sentencing Pursuant to Rule 103 of the Rules of Procedure and Evidence (“Defence Request”) requesting that the Chamber allow *amicus curiae* observations on the appropriate sentence for a former child soldier.²

III. SUBMISSIONS

4. Rule 103(1) of the RPE provides that “[A]t any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organisation or person to submit, in writing or orally, any

¹ Trial Judgment, ICC-02/04-01/15-1762-Conf.

² ICC-02/04-01/15-1765.

observation on any issue the Chamber deems appropriate.”

5. Pre-Trial Chambers, in deciding on a submission, have applied “the proper determination test” to various cases, including by the Appeals Chamber granting a leave for *amicus curiae* submissions in the case against Thomas Lubanga.³ Pre-Trial Chamber II has espoused an “exceptional basis test” where the Chamber will resort, at its discretion, to *amicus curiae* observations only on an exceptional basis, when it is of the view that such observations provide specific expertise on specific topics and when the Chamber considers it desirable for the proper determination of the case.⁴
6. Indeed, “[I]t is recalled that under rule 103(1) of the Rules the Chamber will resort, at its discretion, to *amicus curiae* observations only on an exceptional basis, when it is of the view that such observations providing specific expertise are needed on particular topics, and subject to the Chamber's consideration that this is desirable for the proper determination of the case.”⁵
7. The Defence argues that the novel issue at stake is that the Chamber ‘must determine an appropriate sentence for a victim of child soldiering.’⁶ The LRVs submit that determination of a sentence is regulated under Article 78 of the Statute and rule 145 of the Rules. These provisions set out clearly factors that Chambers

³ Appeals Chamber, “Decision on ‘Motion for Leave to File Proposed *Amicus Curiae* Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence”, ICC-01/04-01/06 OA 11, 22 April 2008, para. 7-8.

⁴ Pre-Trial Chamber II, “Decision on the Application by the Redress Trust to Submit *Amicus Curiae* Observations”, 18 February 2014, ICC-01/04-02/06-259, para. 3; Pre-Trial Chamber II, “Decision on the Request by Ms. Moraa Gesicho to Appear as *Amicus Curiae*”, 12 April 2011, ICC-01/09-01/11-49, para. 14; Pre-Trial Chamber II, “Decision on the Request by Ms. Moraa Gesicho to Appear as *Amicus Curiae*”, 12 April 2011, ICC-01/09-02/11-54, para. 15; Pre-Trial Chamber II, “Decision on the Request for leave to submit *Amicus Curiae* Observations on behalf of the Kenya Section of the International Commission of Jurists Pursuant to Rule 103 of the Rules of Procedure and Evidence”, 11 May 2011, ICC-01/09-01/11-84, para. 8; Pre-Trial Chamber II, “Decision on the Request for leave to submit *Amicus Curiae* Observations on behalf of the Kenya Section of the International Commission of Jurists Pursuant to Rule 103 of the Rules of Procedure and Evidence”, 11 May 2011, ICC-01/09-02/11-87, para. 8.

⁵ Pre-Trial Chamber II, “Decision on the Application by the Redress Trust to Submit *Amicus Curiae* Observations”, 18 February 2014, ICC-01/04-02/06-259, para. 3.

⁶ Para.20, Defence Request.

ought to take into account when deciding upon a sentence, and include, amongst others, individual circumstances of the convicted person, his age, education, social and economic condition. Moreover, consideration of these factors involves assessment of evidence and facts which are case specific and evidence based.

8. The LRVs submit that the Defence Request regarding Mr. Dominic Ongwen's sentence implicates no novel nor specific issue that would warrant *amicus* submissions. Moreover, the Defence has failed to explain in their request how submissions on such a general and broadly defined issue – “appropriate sentence for a victim of child-soldiering” – would assist the Chamber in the sentencing process of Mr. Ongwen specifically..
9. The LRVs acknowledge that, while Mr Ongwen was indeed abducted at a young age, he has been charged and convicted for crimes he committed as an adult of sound mind and practical disposition during the commission of the crimes. The use of the term former child soldier should not be used to imply that Mr. Ongwen remains a “child” for purposes of sentencing. Nothing in the evidence submitted in the case allows for such pedomorphism. Should the defence desire to make that argument on his behalf, they are free to seek to introduce their own expert witnesses on the matter - who would be better placed to make meaningful arguments having had occasion to interact with Mr. Ongwen
10. Furthermore, it is difficult to comprehend how third parties who have limited knowledge of this case and no access to the entire breadth of evidence that has been relied upon by the Chamber, would be well suited to present their views on Mr Ongwen’s sentence.
11. Even if the Chamber were inclined to entertain the issue of novelty purported by the Defence, the Defence do not specify the particular legal or factual issues attending the novel circumstances that necessitate the seemingly open ended call to external expertise. Novelty, by itself does not presuppose a necessity for external

expertise. It could be argued that this is the first time that an accused has been charged and convicted of 62 counts of war crimes and crimes against humanity before an international tribunal. It does not necessarily follow that external expertise is needed to help guide the Chamber on how best to arrive at a sentence in these circumstances.

12. Moreover, if as argued by the Defence that it is the first time a former child soldier has been convicted by an international criminal tribunal, then the question of providing expertise to the supposed issue of novelty doesn't arise.
13. *Amicus curiae* submissions will provide the Chamber only with a general understanding on the experiences of child soldiers, however, the LRVs contend that such information will be of no value given varied experiences of child soldiers. Whether and to what extent the impact of having been a child soldier continues into adulthood and should have a bearing on Mr Ongwen's sentence for the crimes he has been convicted for is case and fact specific and can only be determined by the Chamber.

IV. RELIEF SOUGHT

14. For the reasons outlined above, the LRVs respectfully request that the Defence Request be rejected.

Respectfully submitted,



Joseph A. Manoba



Francisco Cox

Dated this 12th day of February 2021
At Kampala, Uganda and at Santiago, Chile