

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **20 April 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

**Response to the Defence Request to deny the use of certain items contained in the
List of Evidence of the Common Legal Representative (ICC-02/04-01/15-1228)**

Source: Office of Public Counsel for Victims

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

Ms Fatou Bensouda
Mr Benjamin Gumpert

Counsel for the Defence

Mr Krispus Ayena Odongo
Mr Chief Charles Achaleke Taku

Legal Representatives of the Victims

Ms Paolina Massidda
Ms Jane Adong
Mr Joseph Akwenyu Manoba
Mr Francisco Cox

Legal Representatives of Applicants**Unrepresented Victims****Unrepresented Applicants
(Participation/Reparation)****The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Mr Orchlon Narantsetseg
Ms Caroline Walter

**The Office of Public Counsel for the
Defence****States' Representatives****Amicus Curiae****REGISTRY****Registrar**

Mr Peter Lewis

Counsel Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations
Section****Other**

I. INTRODUCTION

1. The Common Legal Representative of victims¹ preliminarily notes that the “Defence Response to the CLRV’s List of Evidence” (the “Defence’s Request”)² should be considered as a new motion challenging the propriety, content and timeliness of the List of Evidence submitted by the Common Legal Representative. In this regard, she notes the Trial Chamber’s (the “Chamber”) communication indicating that *responses* to the Defence’s Request should be submitted by Friday 20 April 2018³ which seems to implicitly acknowledge this understanding.

2. The Common Legal Representative submits that the Request should be rejected since the Defence’s arguments are based on a misunderstanding of the nature of certain items contained in the List of Evidence she submitted and thus are without merits. In particular, the Common Legal Representative argues that the Defence seems to misunderstand the nature of the items in question, which have been included in the List of Evidence only for the purpose of their possible use during the questioning of the witnesses, in line with the practice established by the Chamber.

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 Response to the CLRV’s List of Evidence”, No. ICC-02/04-01/15-1228, 16 April 2018 (the “Defence’s Request”).

³ See the email sent by Trial Chamber IX on 16 April 2018 at 16:01.

II. PROCEDURAL BACKGROUND

3. On 2 February 2018, the Common Legal Representative submitted its Final List of Witnesses and Request for Leave to Present Evidence.⁴ The same day, the Legal Representatives filed their request for leave to present evidence and to present victims' views and concerns in person.⁵ On 15 February 2018, the Defence filed its Response to both Legal Representatives of victims' requests to present evidence.⁶ On 6 March 2018, the Chamber issued its Decision authorising the presentation of evidence by both teams of Legal Representatives of Victims, ordering the latter, *inter alia*, to provide certain information within one week after the Prosecution's formal notice that it concluded its evidence presentation.⁷ On 14 March 2018, by e-mail, the Chamber modified the original deadline indicating that the Legal Representatives should provide said information by 5 April 2018.⁸

4. On 4 April 2018, the Common Legal Representative submitted the CLRV's Information and related Annexes including the List of Evidence.⁹ On 16 April 2018, the Defence filed its Request.¹⁰ On the same day, the Chamber shortened the deadline for filing responses to the Defence's Request to 20 April 2018, pursuant to regulation 34 of the Regulations of the Court.¹¹

⁴ 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.

⁵ 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.

⁶ 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.

⁷ 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. A public redacted version of the decision was filed on the same day. See No. ICC-02/04-01/15-1199-Red.

⁸ See the email from Trial Chamber IX sent on 14 March 2018 at 9:40.

⁹ 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 (the "CLRV's Information").

¹⁰ See the Defence's Request, *supra* note 2.

¹¹ See the email sent by Trial Chamber IX, *supra* note 3.

III. SUBMISSIONS

5. The Common Legal Representative preliminarily submits that the Defence's Request appears not to be a response to the CLRV's Information, but rather constitutes a new motion challenging the propriety, content and timeliness of her List of Evidence. In this regard, the Common Legal Representative understands that the Chamber is of the same view since, in its decision communicated via email, it indicated that *responses*, pursuant to regulation 34(b) of the Regulations of the Court - not an optional *reply* – had to be filed by 20 April 2018.¹²

6. In its Request, the Defence asks the Chamber to deny the use of certain documents included in the List of Evidence submitted by the Common Legal Representative, namely items under No. 11 to 23 (the "Items").¹³

7. The Common Legal Representative submits that the Defence appears to misunderstand the nature of the public documents No. 11 to 23 contained in her List of Evidence that were either quoted in the Experts' Reports or are relevant to the matters on which the Experts will testify. Indeed, it is clear from the wording of the CLRV's Information that these Items are only listed for their future or potential use as *materials intended to be used during the questioning of witnesses*.¹⁴

8. This is in accordance with the usual practice established by the Chamber which has no prejudice to the Accused or principles of fair trial.¹⁵ Indeed, similarly, in relation to the Prosecution's case, the Chamber issued a decision ordering, *inter alia*, the Prosecution to provide:

¹² See the email sent by Trial Chamber IX, *supra* note 3.

¹³ See the Defence's Request, *supra* note 2, para. 1.

¹⁴ See the CLRV's Information, *supra* note 9, para. 9.

¹⁵ See the "Initial Directions on the Conduct of the Proceedings" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-497, 13 July 2016, paras. 19 - 23.

*(i) its final list of witnesses (with summaries of anticipated witness testimony and estimated length of testimony); (ii) a list of evidence, containing the materials which the Prosecution intends to submit as evidence during trial and (iii) its pre-trial brief.*¹⁶

9. Moreover, the Chamber treated in the same manner the Prosecution's requests seeking to add items which the latter intended to use during its questioning of the witnesses by integrating them to the Prosecution's List of Evidence.¹⁷ Therefore, it is an established practice before this Chamber that the material intended to be used during the questioning of witnesses are presented as a part of the calling party's or participants' List of Evidence.

10. Nonetheless, pursuant to the Initial Directions on the Conduct of the Proceedings, such items do not automatically become evidence since they *may* only be used during the questioning of witnesses and then *may* be submitted to the Chamber after the completion of the testimony of the concerned witness if the calling party or participant chooses to do so.¹⁸ Yet, the Defence seems to erroneously consider these Items as "independent" documentary evidence submitted for the truth of their contents. In the List of Evidence submitted by the Common Legal Representative, the Items are not at all presented as incriminating or otherwise prejudicial evidence against Mr. Ongwen. Nevertheless, if chosen to be used by the Common Legal Representative during her questioning of the witnesses, these public documents may in fact *become* evidence should the Chamber decide that they are formally submitted, pursuant to the Initial Directions on the Conduct of the

¹⁶ See the "Decision Setting the Commencement Date of the Trial (Trial Chamber IX)", No. ICC-02/04-01/15-449, 30 May 2016, para. 8 (Emphasis added).

¹⁷ See the "Decision on Prosecution's Request to Add 14 Items to its List of Evidence" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-957, 24 August 2017, paras. 4 - 14; the "Corrigendum of Decision on Prosecution's Request to Add Updated Forensic Report to its List of Evidence" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-956-Corr, 25 August 2017, paras. 9 - 16; the "Decision on Prosecution Unopposed Request to Add One item to Prosecution LOE" conveyed in an email sent by the Chamber on 21 December 2017 at 18:52; and the "Decision on Prosecution Request to Add Items Related to the Testimony of its Mental Health Experts to its List of Evidence (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1202, 12 March 2018, paras. 12 - 17.

¹⁸ See the "Initial Directions on the Conduct of the Proceedings", *supra* note 15, paras. 19 - 23.

Proceedings.¹⁹ This is the reason why these Items are provided in the List of Evidence, along with actual evidence such as the Experts' Reports and related documents under No. 1 to 10.

11. Furthermore, the Common Legal Representative included the Items in her List of Evidence in order to provide fair notice to the Defence, the other party and participants. If the Common Legal Representative failed to include these Items in her List of Evidence, the parties and participants, especially the Defence, will have indeed been surprised to learn about the existence or the potential use of the material at the fast approaching dates of the appearance of the witnesses. For this reason, the Common Legal Representative understands that the Chamber, in the Decision authorising the presentation of evidence, had instructed the legal representatives to confirm by the end of the Prosecution's case, their final Lists of Evidence and Witnesses, as well as the disclosure of all items which are intended to be used during the evidence presentation "*in order to protect the rights of the accused.*"²⁰ Hence, the Defence's arguments relating to the Common Legal Representative's alleged failure to provide fair notice must be dismissed. The Common Legal Representative simply complied with the deadline set by the Chamber. In case the Defence deemed this time frame insufficient to their preparation, then it should have lodged an appeal against the Decision authorising the presentation of evidence within the time limit provided for in the legal texts of the Court.

12. In the same vein, the Defence's assertion suggesting that the Common Legal Representative allegedly "*misinterpreted the Chamber's instructions [which] required the CLRV to **confirm** its final lists of witnesses and evidence, not submit its first list of evidence*"²¹ should be rejected. As shown *supra*, the Items challenged by the Defence are not "independent" documentary evidence submitted for the truth of their

¹⁹ *Idem.*, paras. 27 - 28.

²⁰ See the "Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests", *supra* note 7, para. 79.

²¹ See the Defence's Request, *supra* note 2, para. 13 (Emphasis in original).

contents. The Common Legal Representative is obligated to reiterate the fact that these Items are only intended to be used *during* the presentation of evidence. In accordance with the Initial Directions on the Conduct of the Proceedings, their inclusion in the List of Evidence does not necessarily mean that they are definitely submitted for consideration as evidence and, if admitted after the relevant testimony, their relevance and probative value will not be considered until the Chamber's deliberations at the end of the trial.²²

13. The Defence further argues that “[...] *the CLRV surprised the Defence with its first list of evidence. The CLRV neither proffered a reason as to the tardiness of its list of evidence nor sought leave from the Chamber to submit its list of evidence more than two months past the date required by Order 1021.*”²³ This assertion is groundless and should equally be dismissed. As shown *supra*, the Items contained in the List of Evidence submitted by the Common Legal Representative are not the “*proposed evidence*” referred in paragraph 4 of the Preliminary Directions whose submission was due on 2 February 2018.²⁴ Rather, these are the Items which are intended to be used during the presentation of evidence foreseen in paragraph 79 of the Decision authorising the presentation of evidence.²⁵

14. Lastly, the Common Legal Representative notes that the Defence requested the reclassification as public of the List of Evidence she submitted as Annex B. The Common Legal Representative underlines that she filed the document in question as

²² See the “Decision on Defence Request for Leave to Appeal Decision Adding an Updated Forensic Report to the List of Evidence (Single Judge, Trial Chamber IX), No. ICC-02/04-01/15-971, 06 September 2017, para. 8.

²³ See the Defence's Request, *supra* note 2, para. 12.

²⁴ 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.

²⁵ See *supra* note 7.

confidential since the Lists of Evidence are generally filed confidential.²⁶ Nonetheless, the Common Legal Representative has no objection for its reclassification as public.

IV. CONCLUSION

15. For the foregoing reasons, the Common Legal Representative respectfully requests the Chamber to dismiss the Defence's Request.

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

Paolina Massidda
Principal Counsel

Dated this 20th day of April 2018

At The Hague (The Netherlands)

²⁶ See for example the "Prosecution's submission of the document containing the charges, the pre-confirmation brief, and the list of evidence", with confidential annexes A, B, C, and D, No. ICC-02/04-01/15-375, 21 December 2015.