

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **16 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

Defence Response to the CLRV's List of Evidence

Source: Defence for Dominic Ongwen

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

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**Unrepresented Applicants
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**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby responds to the Common Legal Representative for Victims' ('CLR') submission "Common Legal Representative's Information to the Chamber Pursuant to the Decision to Present Evidence (ICC-02/04-01/15-1199-Red)".¹ The Defence requests Trial Chamber IX ('Chamber') to deny the CLR's List of Evidence, noting specifically items 11-23.² The issue at the core of this request is the fair trial rights of the Accused, including the right to notice. With this order, the Defence requests that no Party or Participant be allowed to use these items during either the CLR or Legal Representatives for Victims ('LRV') presentation of evidence.
2. Furthermore, the Defence requests ICC-02/04-01/15-1215-Conf-AnxB be reclassified as public. The Defence sees no reason for the list of be classified confidential.

II. PROCEDURAL HISTORY

3. On 13 October 2017, the Chamber issued the "Preliminary Directions for any LRV or Defence Evidence Presentation."³ In it, the Chamber ordered that the CLR and LRV "must present its final lists of proposed witnesses and evidence by 2 February 2018."⁴ The Chamber further ordered the CLR and LRV to confirm the lists one week after the Prosecution closed its case-in-chief.⁵
4. On 2 February 2018, the CLR requested to present evidence before the Chamber on behalf of the victims it represents.⁶ The CLR did not submit a list of evidence as required by the "Preliminary Directions for any LRV or Defence Evidence Presentation".⁷
5. On 15 February 2018, the Defence responded to the CLR's request.⁸ The Defence also noted that the CLR did not file a list of evidence.⁹

¹ ICC-02/04-01/15-1215, including annexes A-C.

² ICC-02/04-01/15-1215-Conf-AnxB, pp 2-3.

³ ICC-02/04-01/15-1021.

⁴ *Ibid.*, para. 4.

⁵ *Ibid.*, para. 6.

⁶ ICC-02/04-01/15-1165-Conf (including confidential annexes 1-6).

⁷ ICC-02/04-01/15-1021.

⁸ ICC-02/04-01/15-1182-Red.

⁹ *Ibid.*, at para. 8.

6. On 6 March 2018, the Chamber issued the “Decision on the Legal Representatives for Victims Request to Present Evidence and Views and Concerns and related requests” (‘Decision’). In response to the Defence’s observation that the CLRV did not submit a list of evidence, the Chamber stated that it “understands that fact that the Legal Representatives did not submit list of evidence on 2 February 2018 to simply mean that they do not wish to use further items beyond the witnesses’ testimonies. The Chamber repeats that it will be vigilant in respect of the observance of the rights of the accused.”¹⁰
7. On 4 April 2018, the CLRV submitted, for the first time, a List of Evidence with 23 items contained in the list.¹¹

III. SUBMISSIONS

A. The use of items 11-23 on the CLRV’s List of Evidence violates Mr Ongwen’s fair trial rights and violates the Chamber’s order from 13 October 2017

8. Article 64(2) of the Rome Statute requires the Chamber to ensure that the trial is fair and conducted with full respect of the rights of Mr Ongwen.
9. Article 67(1)(b) of the Rome Statute grants Mr Ongwen the right to have adequate time to prepare his defence.
10. On 13 October 2017, the Chamber ordered the CLRV and LRV to submit lists of witnesses and evidence by 2 February 2018. The Chamber ordered these preliminary directions “far in advance in order to facilitate the *effective preparation of the LRVs and Defence*.”¹²
11. When the Defence argued about the CLRV not submitting a list of evidence,¹³ the Chamber responded that it “understands that fact that the Legal Representatives did not submit list of evidence on 2 February 2018 to simply mean that they do not wish to use further items beyond the witnesses’ testimonies. The Chamber repeats that it will be vigilant in respect of the observance of the rights of the accused.”¹⁴

¹⁰ *Ibid.*, para. 20.

¹¹ ICC-02/04-01/15-1215-Conf-AnxB.

¹² ICC-02/04-01/15-1021, para. 1 (emphasis added).

¹³ ICC-02/04-01/15-1182-Red, para. 8.

¹⁴ *Ibid.*, para. 20.

12. On 4 April 2018, a day before the Chamber required the CLRV to **confirm** its list of evidence, the CLRV surprised the Defence with its first list of evidence.¹⁵ 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 1021.¹⁶
13. It appears that the CLRV misinterpreted the Chamber's instructions. In its 4 April 2018 filing, the CLRV referenced paragraph 79 of the Decision. Paragraph 79 specifically required the CLRV to **confirm** its final lists of witnesses and evidence, not submit its first list of evidence.
14. Fundamentally, the CLRV's late provision of items does not provide fair notice. Mr Ongwen has the right for adequate time to prepare his defence. The earlier deadline of 2 February 2018 for the CLRV's list of evidence was set to ensure these rights were respected. The CLRV failed to adhere to this deadline. As the Defence complained of this fact, the CLRV should have been aware of this issue and requested permission for the documents not directly related to the commission of the expert reports (*i.e.* items 11-23). It did not. In fact, the CLRV wrote that it might request to add even more documents to its list. The Chamber should not permit this. Mr Ongwen's fair trial rights would be violated if items 11-23 are allowed in the CLRV's list of evidence.
15. Furthermore, the Defence requests that these items not be allowed to be used by the Parties or Participants during the CLRV and LRV presentation of evidence. To allow the use of these items, items 11-23, during the upcoming presentation of evidence would be tantamount to allowing these items on the CLRV's list of evidence.
16. The Defence respectfully requests the Chamber to deny items 11-23 from being on the CLRV's list of evidence and deny the use of these items by the Parties or Participants during the presentation of evidence by the CLRV and LRV.

B. Reclassification of ICC-02/04-01/15-1215-Conf-AnxB.

17. All witnesses for the CLRV are testifying publicly.¹⁷ There is nothing contained within ICC-02/04-01/15-1215-Conf-AnxB that warrants a confidential classification. The Defence requests the Chamber to order the reclassification of this filing.

¹⁵ ICC-02/04-01/15-1215-Conf-AnxB.

¹⁶ ICC-02/04-01/15-1021, para. 4.

¹⁷ ICC-02/04-01/15-1215, para. 7.

IV. RELIEF

18. The Defence respectfully requests that the Chamber to
- a. Deny the use of items 11-23 in the CLRV's List of Evidence to all Parties and Participants during the CLRV's and LRV's examination of witnesses; and
 - b. Order the reclassification of ICC-02/04-01/15-1215-Conf-AnxB from confidential to public.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 16th day of April, 2018
At Kampala, Uganda