

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 25 April 2018

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN*

Public

Decision on Defence Request to Deny the Use of Items from the CLRV List of Evidence

To be notified, in accordance with regulation 31 of the Regulations of the Court, to:

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Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 64(2) of the Rome Statute and Regulation 23 *bis* of the Regulations of the Court, issues the following 'Decision on Defence Request to Deny the Use of Items from the CLRV List of Evidence'.

A. Background and submissions

1. On 13 October 2017, the Single Judge issued preliminary directions on the presentation of evidence by the victim representatives ('Preliminary Directions').¹ Therein, he, *inter alia*, set the deadline for the Common Legal Representative for Victims ('CLRV') and the Legal Representative for Victims (together 'Victim Representatives') to file their lists of evidence and request to call witnesses by 2 February 2018 and confirm it one week after the notification of the closure of the evidence by the Office of the Prosecutor ('Prosecution').²
2. On 2 February 2018, the Victim Representatives duly filed their requests to present evidence.³ The CLRV did not file any list of evidence.
3. On 6 March 2018, the Chamber issued its decision on the Request by the Victim Representatives to present evidence ('Victim Representatives Evidence Decision').⁴ Therein, the Chamber authorised the CLRV to call three expert witnesses ('Expert Witnesses')⁵ and explained that it understood the fact that no lists of evidence were filed on 2 February 2018 to mean that the Victim

¹ Preliminary Directions for any LRV or Defence Evidence Presentation, ICC-02/04-01/15-1021.

² Preliminary Directions, ICC-02/04-01/15-1021, paras 4-6.

³ Common Legal Representative's submission of Final List of Witnesses and Request for Leave to Present Evidence, ICC-02/04-01/15-1165-Conf, with six confidential annexes 1 to 6. A public redacted version was filed on 5 February 2018, ICC-02/04-01/15-1165-Red. Victims' requests for leave to present evidence and to present victims' views and concerns in person, ICC-02/04-01/15-1166, with one confidential annex, ICC-02/04-01/15-1166-Conf-Anx.

⁴ Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, ICC-02/04-01/15-1199-Conf. A public redacted version was filed on the same day, ICC-02/04-01/15-1199-Red.

⁵ Victim Representatives Evidence Decision, ICC-02/04-01/15-1199-Red, paras 30, 31, 36, 37, 41.

Representatives did not intend to submit any evidence beyond the witnesses' testimonies.⁶

4. On 4 April 2018, the CLRV filed – together with other information relating to its presentation of evidence – a list of evidence ('List of Evidence').⁷ The List of Evidence contains 23 items in relation to the testimony of its upcoming Expert Witnesses. Items 1 to 10 are letters of instructions, the curricula vitae and the reports produced by the Expert Witnesses. Items 11 to 23 are academic articles, reports and similar documents related to the reports of the Expert Witnesses ('13 Items').
5. On 16 April 2018, the defence for Mr Ongwen ('Defence') filed a request ('Request')⁸ to '[d]eny the use of items 11 to 23 of the CLRV's List of Evidence'⁹ and order reclassification of the List of Evidence as 'public'.¹⁰ It argues that the CLRV's provision of the List of Evidence is too late and that allowing the use of the items in question would violate the Defence's right to have adequate time to prepare its defence.¹¹ Further, it submits that the List of Evidence does not contain any confidential information and should therefore be re-classified as 'public'.¹²
6. On 20 April 2018, CLRV filed its response ('Response').¹³ It submits that the part of the Request regarding the usage of the 13 Items should be rejected¹⁴ and does not oppose the re-classification of its List of Evidence.¹⁵

⁶ Victim Representatives Evidence Decision, ICC-02/04-01/15-1199-Red, para. 20.

⁷ Common Legal Representative's Information to the Chamber Pursuant to the Decision to Present Evidence (ICC-02/04-01/15-1199-Red), ICC-02/04-01/15-1215. With the list of evidence contained in confidential annex B, ICC-02/04-01/15-1215-Conf-AnxB.

⁸ Defence Response to the CLRV's List of Evidence, ICC-02/04-01/15-1228.

⁹ Defence Response to the CLRV's List of Evidence, ICC-02/04-01/15-1228, para. 18 a.

¹⁰ Defence Response to the CLRV's List of Evidence, ICC-02/04-01/15-1228, para. 18 b.

¹¹ Request, ICC-02/04-01/15-1228, paras 14-16.

¹² Request, ICC-02/04-01/15-1228, para. 17.

¹³ 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), ICC-02/04-01/15-1235.

B. Analysis

7. In respect of the classification level of the List of Evidence, the Single Judge notes the CLRV's submission that lists of evidence are generally filed confidentially.¹⁶ This in itself is neither a factual nor legal justification,¹⁷ since the reason for the applied classification must arise from the content of the specific document itself. Since the List of Evidence does not contain any information which needs to remain confidential, and also noting that the CLRV does not object to its re-classification,¹⁸ the Single Judge orders that the List of Evidence be reclassified as 'public'.
8. In its Response, the CLRV makes some contradictory statements which oblige the Single Judge to explain the purpose of a list of evidence. The CLRV repeatedly states that it included the 13 Items on its List of Evidence because it intended them only to be used during the questioning of the Expert Witnesses.¹⁹ On the other hand it cites to Chamber decisions ordering the Prosecution to submit a list of items it 'intends to submit as evidence during trial'²⁰ and repeatedly points out that the Chamber may recognise items included on a list of evidence as formally submitted after the relevant testimony.²¹
9. The Single Judge repeats²² that the purpose of a list of evidence is to have a document itemising all the materials which the filer of the document intends to submit as evidence during a trial. Accordingly, if a party or participant does not wish to submit an item as evidence (or have it recognised as formally submitted,

¹⁴ Response, ICC-02/04-01/15-1228, paras 5-13.

¹⁵ Response, ICC-02/04-01/15-1228, para. 14.

¹⁶ Response, ICC-02/04-01/15-1228, para. 14.

¹⁷ Regulation 23 *bis*(1) of the Regulations of the Court.

¹⁸ Response, ICC-02/04-01/15-1228, para. 14.

¹⁹ Response, ICC-02/04-01/15-1228, paras 7, 12 and 13.

²⁰ Response, ICC-02/04-01/15-1228, para. 8.

²¹ Response, ICC-02/04-01/15-1228, paras 10, 12.

²² Decision Setting the Commencement Date of the Trial, 30 May 2016, Decision Setting the Commencement Date of the Trial, para 8. Decision on the "Prosecution's Request to Add Transcripts and Seven Additional Documents to its List of Evidence", 2 December 2016, ICC-02/04-01/15-619.

in accordance with the evidentiary system established by this Chamber) there is no need to include it on a list of evidence.

10. The Single Judge has to correct the CLRV's assertion that there is an established practice before this Chamber that items which are only intended to be used during the questioning of witnesses are always included on the list of evidence.²³ To the contrary, the Prosecution's lists of materials intended to be used during the examination of its witnesses regularly contained items which were not on the Prosecution's list of evidence. For instance, the list of items to be used during the examination of the Prosecution mental health experts included a category described as open source materials cited in an expert's report.²⁴ These items were not included in the Prosecution's list of evidence and are exactly the kind of materials contained in the 13 Items.
11. Despite some ambiguity in the Response, the Single Judge understands the submission of the CLRV to indicate that it does not wish to submit the 13 Items for the Chamber to consider in its judgment. Accordingly, the CLRV did not have to include the 13 Items on its List of Evidence.
12. Even if the CLRV proceeded on a different understanding, the Single Judge further agrees with the Defence that the List of Evidence was filed too late with regard to these items. The CLRV was obliged to provide its List of Evidence by 2 February 2018 and does not present any explanation why the 13 Items could not have been provided earlier.
13. Accordingly, the CLRV is ordered to file an updated List of Evidence, without the 13 Items. However, the CLRV may still use the 13 Items during the questioning of its Expert Witnesses.

²³ Response, ICC-02/04-01/15-1228, para. 9.

²⁴ E-mail sent to the Trial Chamber and the parties and participants on 9 March 2018, at 11:43. See the annexed document to the e-mail, tab 45.

14. The Single Judge does not consider that the usage of the 13 Items unduly prejudices the Defence. As explained above, they have been disclosed and are only to be used during the questioning of the Expert Witnesses and will not be recognised as formally submitted. Further, the role of the 13 Items as intended by CLRV, *via* reference to the material as ‘articles and papers quoted in the Experts’ Reports’,²⁵ indicates that the 13 Items will only have an ancillary role in the questioning of the Expert Witnesses.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

ORDERS the Registry to re-classify the List of Evidence (ICC-02/04-01/15-1215-Conf-AnxB) as ‘public’; and

ORDERS the CLRV to file an updated List of Evidence, without the 13 Items; and

REJECTS the remainder of the Request.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Single Judge

Dated 25 April 2018

At The Hague, The Netherlands

²⁵ Common Legal Representative’s Information to the Chamber Pursuant to the Decision to Present Evidence (ICC-02/04-01/15-1199-Red), para. 9.