

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **6 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

Confidential

Defence Response to the CLRV's Request to Admit Testimony through the Bar Table Motion

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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I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby responds to the Common Legal Representative for Victims's ('CLRv') request to introduce testimonial evidence through a bar table motion.¹ The Defence requests Trial Chamber IX ('Chamber') to deny the request as the proposed document is testimonial in nature, as it is an expert report (*i.e.* expert witness statement).

II. CONFIDENTIALITY

2. Pursuant to Regulation 23 *bis*(2) of the Regulations of the Court, the Defence submits this request as confidential. A public redacted version will be issued as soon as practicable after filing.

III. PROCEDURAL HISTORY

3. On 2 February 2018, the CLRv requested to present evidence before the Chamber on behalf of the victims it represents.² The CLRv did not submit a list of evidence as required by the "Preliminary Directions for any LRV or Defence Evidence Presentation".³
4. On 15 February 2018, the Defence responded to the CLRv's request, asking that this specific witness be denied the ability to testify before the Chamber.⁴ The Defence also noted that the CLRv did not file a list of evidence.⁵
5. 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'), requiring the CLRv to choose one of two experts "on issues related to children and youth – in particular former child soldiers" to testify before the Chamber.⁶ In the Decision, the Chamber noted that it would be acceptable if the two proposed witnesses wrote a **joint report**, and said report would be *prima facie* eligible for submission pursuant to Rule 68(3) of the Rules of

¹ ICC-02/04-01/15-1214 (including annexes A-C).

² ICC-02/04-01/15-1165-Conf (including confidential annexes 1-6).

³ ICC-02/04-01/15-1021.

⁴ ICC-02/04-01/15-1182-Red.

⁵ *Ibid.*, at para. 8.

⁶ ICC-02/04-01/15-1199-Conf, paras 30-31.

Procedure and Evidence ('Rules') when either proposed witness testifies.⁷ Additionally, 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."⁸

6. On 29 March 2018, the CLRV filed the "Common Legal Representative's Request to Introduce One Item of Evidence through Bar Table Motion."⁹ The CLRV requests to admit into evidence via the bar table the expert witness statement of Theresa Betancourt ('Expert Statement').¹⁰
7. On 29 March 2018, the Chamber shortened the deadline for responses to 6 April 2018.¹¹

IV. SUBMISSIONS

A. Authenticity of the Expert Statement and the Procedural Error

8. The Defence notes an inconsistency in the Expert Statement. At ICC-02/04-01/15-1214-Conf-AnxA, the date "March 9, 2018" appears in a different font than the rest of the Expert Statement. It appears as if the date of the Expert Statement was inserted after it was turned into a Portable Document Format ("PDF"). As the Chamber shall notice, the date on the PDF appears to be raised, and no such statement or documentation has been disclosed which explains this apparent post-conversion alteration.
9. Additionally, the Defence notes that the Expert Statement has not been disclosed through Ringtail and eCourt. The document filed at ICC-02/04-01/15-1214-Conf-AnxA does not contain an ERN as required by ICC-02/04-01/15-203.
10. As such, the Defence respectfully requests the Chamber to deny the CLRV's request to admit the Expert Statement as it has an obvious authenticity issue and it has not adhered to the disclosure protocol.

⁷ See *ibid.*, paras 30-32.

⁸ *Ibid.*, para. 20.

⁹ ICC-02/04-01/15-1214.

¹⁰ *Ibid.*

¹¹ Email communication from Trial Chamber IX to the Parties and Participants, "shortening of response deadline for ICC-02 04-01 15-1214", sent at 10h05 CET.

B. The Submission of the Expert Statement via the Bar Table Violates Article 67(1)(e) of the Rome Statute and Rule 68(2) of the Rules

11. Article 67(1)(e) of the Rome Statute grants Mr Ongwen the right “[t]o examine, or have examined, the witnesses against him...”.
12. Rule 68(2)(b) of the Rules creates an exception for the admission of previously recorded testimony.¹²
13. In the Decision, the Chamber indicated that it did not oppose the CLRV submitting a report pursuant to Rule 68(3) of the Rules from the chosen expert about issues related to children and youths.¹³ The Chamber noted that it did not oppose if the expert report was a joint report authored by Professor Betancourt and Professor Michael Wessells.¹⁴ From a plain reading of paragraphs 30-32 of the Decision, the Chamber **did not authorise** the submission of a singular statement by the expert not chosen to testify, *i.e.* the Expert Statement.
14. Quite simply, the Expert Statement has not been authorised by the Chamber to be presented as evidence. The Defence understands the request submitted by the CLRV is an attempt to bypass the Chamber’s Decision, and respectfully, the Chamber should deny this roundabout attempt at reconsideration of the Decision.
15. Furthermore, the Expert Statement, regardless of the correctness of the content, outlines issues which directly touch and concern Counts 69-70 of the charges against Mr Ongwen. The Expert Statement relates to issues which are materially in dispute, and which the Chamber might rely upon during its deliberations for the Article 74 Judgment.
16. Mr Ongwen has the right pursuant to Article 67(1)(e) of the Rome Statute to examine witnesses brought against him. Pursuant to Rule 68(2)(b) of the Rules, this right has limited exceptions. In the situation at hand, Rule 68(2)(b) of the Rules is not operational and the Defence does not waive Mr Ongwen’s right pursuant to Article 67(1)(e) to examine Professor Betancourt.
17. Respectfully, the Defence requests the Chamber to deny the CLRV’s request to submit the Expert Statement into evidence as it violates Mr Ongwen’s rights under Article 67(1)(e) and is an attempt to circumvent the Decision of the Chamber.

¹² The Defence notes that Rule 68(2)(c) and (d) have similar provisions, but are not applicable for the purpose of this response.

¹³ Decision, para. 32.

¹⁴ Decision, paras. 31-32.

V. RELIEF

18. For the reasons set out above, the Defence respectfully requests that the Chamber to deny the CLRV's request to introduce the Expert Statement *via* the bar table.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 6th day of April, 2018
At The Hague, Netherlands