

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: **ICC-02/04-01/15**
Date: **1 February 2019**

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

**CLRv Response to the “Prosecution’s Request for
Disclosure of Material Provided to D-0133”**

Source: Office of Public Counsel for 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 Common Legal Representative of Victims¹ (the “CLR”) submits that the “Prosecution’s Request for Disclosure of Material Provided to D-0133” (the “Request”)² should be granted.

2. The CLR posits that the Legal Representatives of the victims should also be provided with the material in question since the personal interests of the participating victims are affected by the subject matters of the expert evidence which directly relate to the criminal liability of the Accused and the defences that he raised pursuant to Article 31 of the Rome Statute.

II. PROCEDURAL BACKGROUND

3. On 31 February 2019, the Prosecution filed the Request.³ On the same day, the Trial Chamber (the “Chamber”) shortened the deadline for filing responses to the Request.⁴

III. SUBMISSIONS

4. The CLR notes that the Prosecution requested the Chamber to order the Defence to disclose the material provided to Expert Witness D-0133 for the purpose

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 “Prosecution’s Request for Disclosure of Material Provided to D-0133”, with Confidential Annex A, No. ICC-02/04-01/15-1428, 31 January 2019 (the “Request”).

³ *Idem*.

⁴ See the email sent by the Chamber on 31 January 2019 at 21:25.

of the preparation of his report (the “Material provided to the Expert Witness”). The Prosecution contends that disclosure of said material is necessary to assess the expert’s credibility, the reliability of his opinion and for the determination of the truth.⁵

5. The CLRV supports in full the Request agreeing with the reasons provided by the Prosecution in its submission.⁶ The CLRV further recalls the decision of the Single Judge addressing a similar issue (the “Decision on Defence Disclosure of Material Underlying the Expert Report”) which clearly stated that:

[...] the Single Judge agrees with the international criminal jurisprudence to the effect that ‘sources used in support of any expert witness statement must be clearly indicated and easily accessible to the other party upon request’ as this is necessary for the proper evaluation of the expert evidence and the ability to test or challenge the probative value of such evidence.⁷

6. Moreover, the Single Judge also ruled that material provided to expert witnesses should be disclosed to the parties and participants regardless of whether the expert used or relied upon said material in his or her report(s).⁸ In rendering the Decision on Defence Disclosure of Material Underlying the Expert Report, the Single Judge also referred to the jurisprudence of other international criminal tribunals which consistently uphold this principle.⁹

7. The CLRV contends that these rulings are fully applicable to the Material provided to the Expert Witness. Therefore, as there is no reason to depart from the precedent established in the Decision on Defence Disclosure of Material Underlying the Expert Report, she submits that the Request should be granted.

⁵ See the “Request”, *supra* note 2, para. 1.

⁶ *Idem*, paras. 1-18.

⁷ See the “Decision on the ‘Prosecution Request for Disclosure of Material Underlying the Defence Psychiatric Expert Report’” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-709, 21 February 2017, para. 12 (the “Decision on Defence Disclosure of Material Underlying the Expert Report”) (footnotes omitted).

⁸ *Idem*, para. 13.

⁹ *Ibidem*, footnote 25.

8. Moreover, the CLRV posits that the Material provided to the Expert Witness should also be made available to the Legal Representatives of victims since the subject matters of the expert evidence directly relate to issues which affect the personal interests of the participating victims, namely the criminal liability of the Accused and the defences that he raised pursuant to Article 31 of the Rome Statute. Needless to say, the resolution of these matters may determine the final outcome of the trial and thus profoundly impact the right of the victims to truth and justice, and ultimately, to reparations.

9. Having access to the Material provided to the Expert Witness is critical for the Legal Representatives in comprehensively evaluating and weighing the report prepared by the expert and properly expressing the views and concerns of the victims on the matter. In this regard, the CLRV recalls that, in the Decision on Defence Disclosure of Material Underlying the Expert Report, the joint request submitted by counsel for victims seeking access to similar material was granted.¹⁰

10. **For the foregoing reasons**, the Common Legal Representative of Victims respectfully requests the Chamber to grant the Request and to order that Material provided to the Expert Witness be also made available to the Legal Representatives of victims.



Paolina Massidda
Principal Counsel

Dated this 1st February 2019
At The Hague, The Netherlands

¹⁰ *Ibid.*, p. 7.