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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

Public

**Decision on Prosecution's Request to Disclose Lesser Redacted Versions of 43
Victims' Applications**

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 ('Court') in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 67(1) and 68 of the Rome Statute ('Statute'), Rules 77 and 81-82 of the Rules of Procedure and Evidence ('Rules') and Regulation 23 *bis* of the Regulations of the Court, issues the following 'Decision on Prosecution's Request to Disclose Lesser Redacted Versions of 43 Victims' Applications'.

I. Background and Submissions

1. On 4 March 2015, the Single Judge of the Pre-Trial Chamber issued the 'Decision Establishing Principles of the Victims' Application Process',¹ which ordered 'very limited redactions [...] of the identifying information of [victim] applicants'.²
2. On 17 June 2016, the Single Judge issued the 'Decision on Disclosure of Victim's Identities' ('Disclosure Decision'),³ maintaining the redactions of identifying information of victims *vis-à-vis* the Defence, with the exception of identifying information of dual-status witnesses and victims expressing their views and concerns.⁴
3. On 31 May 2017, the Prosecution asserted that a number of the applications which the Defence had received with identifying information redacted relate to individuals who are close relatives of witnesses giving evidence about events at the four charged locations.⁵ The Prosecution submitted that these individuals were often at the same location at the time of events about which evidence is given and make assertions about events at this time in their applications'.⁶ The Prosecution requested that the Chamber authorise it to disclose to the Defence

¹ Decision Establishing Principles of the Victims' Application Process, 4 March 2015, ICC-02/04-01/15-205.

² ICC-02/04-01/15-205, paras 33-34.

³ ICC-02/04-01/15-471.

⁴ Disclosure Decision, ICC-02/04-01/15-471, paras 12-14.

⁵ Email from the Prosecution to the Chamber and participants on 31 May 2017 at 21:28.

⁶ Email from the Prosecution to the Chamber and participants on 31 May 2017 at 21:28.

lesser redacted versions of three application forms of victims believed to be family members of two dual status individuals, witness P-24 and P-330.⁷

4. On 1 June 2017, the Defence responded that it did not oppose the Prosecution's request.⁸ The Legal Representatives of Victims ('LRVs') and the Common Legal Representative of Victims ('CLR') (collectively 'Legal Representatives') responded that they would be able to submit their observations at the hearing scheduled that day.⁹
5. On 1 June 2017, approximately two hours before P-24's testimony commenced, the Chamber issued a decision authorising the Prosecution to disclose the two victim application forms related to P-24 and indicated that it did not require further submissions from the participants.¹⁰
6. On 6 and 8 June 2017, Prosecution requested¹¹ and was granted authorisation to disclose to the Defence the lesser redacted versions of two further victim applications.¹² The Prosecution indicated that it intended to file a request for authorisation to disclose the victim applications related to the other witnesses not indicated in the earlier disclosures.¹³
7. On 9 June 2017, the Prosecution filed its request for authorisation to disclose 43 lesser redacted victim applications related to the family members of the

⁷ Email from the Prosecution to the Chamber and participants on 31 May 2017 at 21:28. One of the applications related to P-330, who had already testified.

⁸ Email from the Defence to the Chamber and other participants on 31 May 2017 at 4:17.

⁹ Email from the CLR to the Chamber and other participants on 1 June 2017 at 7:00 and Email from the LRV and the other participants on 1 June 2017 at 8:48.

¹⁰ Email from the Chamber to the participants on 1 June 2017 at 9:22.

¹¹ Email from the Prosecution to the Chamber and the other participants on 6 June 2017 at 9:13 and Email from the Prosecution to the Chamber and Legal Representatives of Victims on 8 June 2017 at 12:08.

¹² Email from the Chamber to the participants on 6 June 2017 at 10:02 and Email from the Chamber to the participants on 8 June 2017 at 14:31.

¹³ Email from the Prosecution to the Chamber and Legal Representatives of Victims on 8 June 2017 at 12:08.

witnesses called by the Prosecution ('Request').¹⁴ The Prosecution stated that the disclosure of these applications falls within its Rule 77 disclosure obligations.¹⁵

8. In its Request, the Prosecution proposes to lift the redaction of identifying information of the victim participants and redact only the following information: (i) the village/parish and identifying numbers appearing on the identity document; (ii) when a document attesting the kinship or identity is provided, the village/parish where the document was compiled as well as names and functions of the persons making the statement; their signatures and stamps; and (iii) the place where the application form was filled in if it refers to a specific place like a hotel or guest house.¹⁶
9. On 12 June 2017, the LRVs filed a response ('LRV Response')¹⁷ arguing that the Request be denied.¹⁸ The LRVs argue that the Request did not demonstrate a legal basis for the disclosure of victim applications on the basis of family relationship with a dual status witness and thus the Request should be denied.¹⁹ In the alternative, the LRVs argue that, should the Chamber conclude that the relevant lesser redacted applications of family members of witnesses are disclosable to the Defence, the concept of 'family members' must be strictly defined so as to make the scope of any obligation clear.²⁰ Specifically, the LRV proposes that the following criteria should be applied: (i) there must be a verified first degree family relationship at the time of the relevant event;²¹ (ii) the family

¹⁴ Prosecution's Request to Disclose Lesser Redacted Versions of 43 Victim's Applications, ICC-02/04-01/15-862, with confidential *ex parte* Annex A, paras 1-2.

¹⁵ Request, ICC-02/04-01/15-862, para. 2.

¹⁶ Request, ICC-02/04-01/15-862, para. 6.

¹⁷ Legal Representatives of Victims' Response to the Prosecution's request to disclose lesser redacted versions of 43 victims' applications, ICC-02/04-01/15-865, with confidential Annex A.

¹⁸ LRV Response, ICC-02/04-01/15-865, paras 2 and 59.

¹⁹ LRV Response, ICC-02/04-01/15-865, paras 23-32 and 59. Indeed the LRVs argue that the Court's jurisprudence does not extend specific disclosure obligations beyond dual status individuals. LRV Response, ICC-02/04-01/15-865, para. 28.

²⁰ LRV Response, ICC-02/04-01/15-865, paras 33-37.

²¹ LRV Response, ICC-02/04-01/15-865, paras 37-40. A first degree family relationship as proposed by the LRV encompasses first degree blood relationships, *i.e.* mother, father, sister, brother, daughter, son, as well as spouse.

member must be mentioned in the statement of the dual status victim;²² and (iii) the family member witnessed and described relevant events.²³

10. The LRVs also submit that procedures should be in place for the disclosure of lesser redacted versions of the application forms: (i) the Legal Representatives verify that a given victim falls within the criteria set by the Chamber as defining the category of disclosable applications;²⁴ (ii) the Legal Representatives confirm whether the family member is aware of the witness's role as a prosecution witness;²⁵ (iii) the Legal Representatives inform the family member of proposed disclosure to the Defence;²⁶ and (iv) the Legal Representatives have an opportunity to consider the proposed redactions before the disclosure occurs.²⁷
11. The LRVs also make submissions in relation to specific victims.²⁸ Particularly, the LRVs propose that the Legal Representatives meet all relevant persons and provide detailed submissions as soon as practicable on whether disclosure is appropriate for these individuals²⁹
12. On 12 June 2017, the Defence responded that it does not object to the Request.³⁰
13. On 12 June 2017, the Chamber, noting five of the victim applications relate to P-252 and P-269, who were next scheduled to testify before the Chamber, granted

The LRV refers to a first degree family relationship at the time of the events, *i.e.* in the event that two individuals did not know each other before 2005 but have since met and married, the spouse's application would not be disclosable. LRV Response, ICC-02/04-01/15-865, paras 37-38. The LRVs also note that given the fact that many individuals bear similar names, the family relationship should not be established based on name alone and procedures, including verification by legal representative would be required. ICC-02/04-01/15-865, para. 39.

²² LRV Response, ICC-02/04-01/15-865, para. 40.

²³ LRV Response, ICC-02/04-01/15-865, para. 41.

²⁴ LRV Response, ICC-02/04-01/15-865, paras 44-47.

²⁵ LRV Response, ICC-02/04-01/15-865, para. 48.

²⁶ LRV Response, ICC-02/04-01/15-865, para. 49.

²⁷ LRV Response, ICC-02/04-01/15-865, paras 50-51.

²⁸ LRV Response, ICC-02/04-01/15-865, paras 52-58. The Annex to the LRV Response contains detailed submissions in relation to the family members of two witnesses, P-252 and P-269.

²⁹ LRV Response, ICC-02/04-01/15-865, para. 58.

³⁰ Email from the Defence to the Chamber and participants on 12 June 2017 at 12:15.

the Request in relation to those five applications.³¹ The Chamber noted that it would provide its reasoning in this Decision.³²

14. On 22 June 2017, the CRLV filed its response ('CLR V Response'),³³ opposing the Request.³⁴ The CLR V argues that this category of information does not necessarily fall under Rule 77 of the Rules and that the Prosecution has not adequately justified the reasons for such disclosure.³⁵ The CRLV contends that the victim applications provide information for the purposes of substantiating the status of victims in the case and are not evidence on either points of law or facts.³⁶ The CLR V also contends that the previous consent of the persons concerned should be sought before the disclosure.³⁷
15. The CLR V further submits that in the alternative, should the Chamber consider that the information has to be disclosed to the Defence, the relevant criteria for such a disclosure should be clearly identified.³⁸ In this regard the CLR V proposes that the following criteria be applied: (i) the relationship justifying disclosure must be a first-degree family relationship; (ii) the family member is mentioned in the witness's statement and therefore the Defence is already aware of this information; and (iii) the family member witnessed the event and was an adult at the time of the events.³⁹ The CLR V also submits that the Prosecution should primarily consult with the relevant legal representative on the proposed lifting of redactions and engage in a bilateral discussion.⁴⁰

³¹ Email from the Chamber to the participants on 12 June 2017 at 14:17.

³² Email from the Chamber to the participants on 12 June 2017 at 14:17.

³³ Common Legal Representative's Response to the Prosecution's request to disclose lesser redacted versions of 43 victims' applications, ICC-02/04-01/15-900.

³⁴ CLR V Response, ICC-02/04-01/15-900, para. 1. The CLR V notes that she shares the views represented in the LRV Response. ICC-02/04-01/15-900, para. 20.

³⁵ CLR V Response, ICC-02/04-01/15-900, paras 2 and 22-42.

³⁶ CLR V Response, ICC-02/04-01/15-900, paras 25-39.

³⁷ CLR V Response, ICC-02/04-01/15-900, paras 3, 43-48.

³⁸ CLR V Response, ICC-02/04-01/15-900, paras 4 and 49.

³⁹ CLR V Response, ICC-02/04-01/15-900, para. 51.

⁴⁰ CLR V Response, ICC-02/04-01/15-900, para. 52.

II. Analysis

16. At the outset, the Single Judge acknowledges that absent exceptional and exigent circumstances the Legal Representatives are entitled to submit their views and concerns on matters of this nature.
17. Turning to the matter at hand, the Single Judge notes that the Request is narrowly tailored to 43 applications which the Prosecution seeks to disclose, citing its obligations under Rule 77 of the Rules. These 43 applications are the remaining applications related to Prosecution witnesses scheduled to testify in the proceedings, and there is no indication that further review would reveal a larger pool of relevant applications.
18. In this case, distinct from a situation where the Defence seeks to compel a disclosure in the face of the Prosecution's objection, the Prosecution seeks permission to make a disclosure. As a general rule, it is for the Prosecution to determine whether a document is disclosable under Rule 77 of the Rules. Permission is required in the present instance because the Prosecution received these victim applications through Registry filings in the case record and wishes to disclose certain *ex parte* information not contained in the confidential redacted versions of these applications transmitted by the Registry to the Defence.⁴¹
19. The Legal Representatives argue that the statutory framework excludes the Prosecution's disclosure of victim applications.⁴² However, the Court's jurisprudence recognises that victim applications can contain disclosable information, and does not exclude the Prosecution's disclosure of victim

⁴¹ In this regard, it is noted that the Defence received the victim applications of dual status witnesses by way of a judicially ordered reclassification. *See* Second decision on contested victims' applications for participation and legal representation of victims, 24 December 2015, ICC-02/04-01/15-384, paras 23-24; Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, 27 November 2015, ICC-02/04-01/15-350, para. 36 and page 21.

⁴² LRV Response, ICC-02/04-01/15-865, paras 23-32 and CLRV Response, ICC-02/04-01/15-900, paras. 22-42.

applications pursuant to its Rule 77 obligations.⁴³ Indeed, the Prosecution's obligations under Rule 77 of the Rules are broad,⁴⁴ and the assessment of whether certain victim applications fall within its Rule 77 disclosure obligations are dependent on the circumstances, i.e. case specific. The Single Judge further recalls the applicable two-prong Prosecution disclosure framework set out previously.⁴⁵

20. As to the first prong, the Single Judge is of the view that the Prosecution's contention that the material falls under its Rule 77 disclosure obligation is correct. A victim application of a family member of a witness making assertions concerning events about which the witness will give evidence is *prima facie* relevant for use by the Defence for several purposes, not limited to potentially impeaching the witness's testimony or testing the witness's credibility. Indeed, the Defence has utilised recently disclosed victim applications of family members in its questioning of several witnesses.⁴⁶
21. Rather than caution for a rigid criteria allowing the disclosure of applications of only immediate blood relatives or a spouse,⁴⁷ the expansive nature of the witnesses and victims' definition of family means that an extended family member could have such a proximate relationship with a witness that his or her victim application could contain information material to the preparation of the

⁴³ See Appeals Chamber, *The Prosecutor v. Germain Katanga and Matthieu Ngudjolo Chui*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled 'Decision on the Modalities of Victim Participation at Trial', 16 July 2010, ICC-01/04-01/17-2288, para. 81.

⁴⁴ Appeals Chamber, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled 'Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor' ('Banda Appeals Decision'), 28 August 2013, ICC-02/05-03/09-501, para. 38 and Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433, paras. 77-78.

⁴⁵ Decision on Disclosure Issues Arising Out of First Status Conference, 7 June 2016, ICC-02/04-01/15-457, para. 4.

⁴⁶ See Transcript of hearing of 2 June 2017, ICC-02/04-01/15-T-78, page 6, line 13 – page 13 line 17 and Transcript of hearing of 9 June 2017, ICC-02/04-01/15-T-83, page 13, line 25 – page 15 line 4.

⁴⁷ See *contra*, LRV Response, ICC-02/04-01/15-865, paras 37-41.

Defence. Accordingly, the Single Judge sees no reason to conclude that the Prosecution overstates its disclosure obligations, noting that the Prosecution is better placed than the Chamber to assess if a person is a family member of a witness.

22. As to the second prong, whether Rules 81 or 82 of the Rules restrict disclosure to the Defence, the Legal Representatives present no specific information suggesting that any part of Rule 81 of the Rules would restrict disclosure in this instance. The Single Judge further recalls that the Disclosure Decision emphasised that ‘the preference is for full disclosure of the victims’ identities to the parties’.⁴⁸ However, being conscious of the vulnerable position of these victims, the Single Judge held that there remained valid reasons to maintain the victims’ anonymity *vis-à-vis* the Defence.⁴⁹ However, ‘this does not mean that victims’ identities need not be disclosed in all contexts’⁵⁰ and the Single Judge considers that one of these contexts is when these identities fall under the Prosecution’s disclosure obligations.
23. For these reasons, the Single Judge therefore considers that the applications covered by the Request must be disclosed. The Single Judge will now turn to some final considerations as to how disclosure is to be effected.
24. First, the Single Judge is of the view that, contrary to the CLRV’s contention,⁵¹ Regulation 42(4)⁵² of the Regulations of the Court – and the ensuing duty to seek the prior consent of the person subject of the protective measure – does not apply in the present case. Rule 87 of the Rules, which set out the regime of protective measures subject to Regulation 42 of the Regulations of the Court, governs

⁴⁸ Disclosure Decision, ICC-02/04-01/15-471, para. 12.

⁴⁹ Disclosure Decision, ICC-02/04-01/15-471, para. 12.

⁵⁰ Disclosure Decision, ICC-02/04-01/15-471, para. 13.

⁵¹ CLRV Response, ICC-02/04-01/15-900, para. 43-46.

⁵² The CLRV cites to Regulation 42(3) of the Regulations of the Court, but the Single Judge notes that sub-regulation (4) is implicated.

measures 'to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness'.⁵³ The Prosecution seeks to provide further information only to the Defence, and not the broader public. As such, neither Rule 87 nor Regulation 42 are implicated.

25. Second, the Legal Representatives submit that they should verify that a given victim's application falls within the relevant criteria before his or her application form is disclosed to the Defence and should have the opportunity to consider the proposed redaction before the disclosure occurs.⁵⁴ The Single Judge is of the view that verification of information and proposal of the appropriate redaction is primarily the Prosecution's purview. However, paying heed to the protection of the victims' interest, the Prosecution should give the relevant legal representative an opportunity to review the lesser redacted applications covered by the Request before they are disclosed.⁵⁵ Any consultations in this regard must be concluded within 15 days of the issuance of the present Decision, except for applications related to P-218.⁵⁶ For applications related to P-218, any consultations must conclude by 7 July 2017.

26. Third, the LRVs submits that the relevant Legal Representative should speak with the dual status person and ascertain whether the family member whose victim application is to be disclosed knows of the dual status witness's role in the proceedings and also inform the family member of his or her lesser redacted victim application's proposed disclosure to the Defence.⁵⁷ The Single Judge is of the view that while the relevant legal representative may speak with the family

⁵³ Rule 87(3) of the Rules.

⁵⁴ LRV Response, ICC-02/04-01/15-865, paras 44-47 and 50 and CLRV Response, ICC-02/04-01/15-900, para. 52.

⁵⁵ The Single Judge notes that the Prosecution will produce the lesser redacted applications in line with its submissions on the appropriate redactions.

⁵⁶ P-218 is expected to commence testifying on 10 July 2017.

⁵⁷ LRV Response, ICC-02/04-01/15-865, paras 48 -49.

member or the dual status witness, the legal representative is not permitted to reveal the identity of a protected witness to a family member unaware of the fact that the witness will testify before the Court. Nor is it necessary that such contact occur before the disclosure to the Defence.

27. Further, and as noted by the CLRV,⁵⁸ certain witnesses, particularly victims of gender based crimes, may not have informed their partners of what happened to them and consequently that they are witnesses or participating victims. The Single Judge reminds the parties and the participants that care must be taken when using the information contained in victim applications. In particular, any use of the applications must not reveal protected information about witnesses to other victim applicants.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Prosecution's Request, subject to paragraph 25 above, and

ORDERS the Registry to file the lesser redacted versions of the applications identified in the Request in the case record following the Prosecution's disclosure to the Defence.

⁵⁸ CLRV Response, ICC-02/04-01/15-900, para. 50.

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

A handwritten signature in black ink, appearing to read 'BS', is positioned above a horizontal line.

Judge Bertram Schmitt
Single Judge

Dated 06 July 2017

At The Hague, The Netherlands