

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/04-01/15
Date: **22 December 2017**

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 for the Identities of Potential Witnesses on the Legal
Representatives of Victims' Preliminary Lists of Witnesses**

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 64, 67 and 68 of the Rome Statute ('Statute') and Regulation 23 *bis* of the Regulations of the Court, issues the following 'Decision on Defence Request for the Identities of Potential Witnesses on the Legal Representatives of Victims' Preliminary Lists of Witnesses'.

I. Background and submissions

1. On 17 June 2016, the Single Judge issued the 'Decision on Disclosure of Victims' Identities' ('Decision 471'),¹ finding that there remained valid reasons to maintain victims' anonymity *vis-à-vis* the Defence.² However, it was noted that should a victim's participation in the proceedings increase to the extent that he or she is called to appear as a witness, he or she must relinquish his or her anonymity and the calling participant must disclose identifying information about the victim in accordance with the disclosure and redaction regime in place.³
2. On 13 July 2016, the Single Judge issued the Initial Directions on the Conduct of the Proceedings, stating that the LRVs must seek the leave of the Chamber to present evidence in the proceedings.⁴
3. On 13 October 2017, the Single Judge issued the 'Preliminary Directions for any LRV or Defence Evidence Presentation' ('Preliminary Directions').⁵ The Preliminary Directions, *inter alia*, instructed the Common Legal Representative of Victims and the Legal Representatives of Victims ('CLR' and 'LRV', respectively and 'LRVs' collectively) to provide by 14 December 2017, for

¹ ICC-02/04-01/15-471.

² ICC-02/04-01/15-471, para. 12.

³ ICC-02/04-01/15-471, para. 13.

⁴ ICC-02/04-01/15-497, para. 9.

⁵ Preliminary Directions for any LRV or Defence Evidence Presentation, ICC-02/04-01/15-1021.

informational purposes, a preliminary list of witnesses and an estimate of the hours required for witness examination.⁶

4. On 13 December 2017, the CLRV provided its preliminary list of witnesses ('CLRV List').⁷ Therein the CLRV informed the Chamber of her intention to call four experts witnesses as well as three witnesses on the role and service provided in centres where former abductees were taken.⁸ The CLRV did not specify the identities of these potential witnesses, stating that the contracts for the expert witnesses were still being finalised and that she is also currently contacting potential witnesses from various centres in Uganda.⁹
5. On 14 December 2017, the LRV submitted its preliminary list of witnesses ('LRV List').¹⁰ The LRV listed 15 witnesses, including two experts, whom it named, and 13 dual-status victims, whom it listed with pseudonyms.¹¹ The LRV stated its intention to select six witnesses to present evidence in the proceedings from the pool of 13 dual-status victims.¹² The LRV also seeks the Chamber's guidance regarding the likely timeframe for the commencement of the victims' case.¹³
6. On 15 December 2017, the Defence filed its request for disclosure of the unnamed potential witnesses on the LRVs lists ('Request'),¹⁴ in which it requests that the Chamber order (i) the LRVs to disclose the identities of the unnamed potential

⁶ Preliminary Directions, ICC-02/04-01/15-1021, para. 3. The Preliminary Directions noted that the list may be changed up until the applicable deadlines for the final lists of witnesses and that subject to any subsequent order by the Chamber, redacting information from the other participants in these preliminary lists may also be done if strictly necessary. The LRVs were also instructed to provide certain information, including its final lists of evidence and witnesses, three weeks after formal notification of the conclusion of the Office of the Prosecutor's ('Prosecution') presentation of its evidence. Preliminary Directions, ICC-02/04-01/15-1021, para 6.

⁷ Common Legal Representative Preliminary List of Witnesses Provided Pursuant to the 'Preliminary Directions for any LRV and Defence Evidence Presentation', 13 December 2017, ICC-02/04-01/15-1105-Conf (a public redacted version was notified on 19 December 2017).

⁸ CLRV List, ICC-02/04-01/15-1105-Red, para. 8.

⁹ CLRV List, ICC-02/04-01/15-1105-Red, paras 8-9.

¹⁰ Victim's preliminary list of witnesses, 14 December 2017, ICC-02/04-01/15-1106, with confidential Annex.

¹¹ LRV List, ICC-02/04-01/15-1106-Conf-AnxA.

¹² LRV List, ICC-02/04-01/15-1106, para. 4.

¹³ LRV List, ICC-02/04-01/15-1106, para. 14.

¹⁴ Defence Request for Order Regarding ICC-02/04-01/15-1105-Conf, ICC-02/04-01/15-1106 and ICC-02/04-01/15-1106-Conf-Anx", ICC-02/04-01/15-1109-Conf.

witnesses; (ii) the reclassification of the CLRV List (ICC-02/04-01/15-1105-Conf) as public, or in the alternative, the filing of a public redacted version; and (iii) the reclassification of the Request as public.¹⁵ The Defence submits that the LRVs' redaction of the witnesses' names is not strictly necessary and that the LRVs' failure to provide the witnesses' identities violates: (i) the Preliminary Directions;¹⁶ (ii) Mr Ongwen's right to have adequate time and facilities for the preparation of his Defence and to be tried without undue delay;¹⁷ and (iii) Mr Ongwen's rights to disclosure from the Prosecution.¹⁸

7. On 18 December 2017, pursuant to an order shortening the deadline for responses,¹⁹ the LRV submitted its response to the Request ('LRV Response') asking that it be rejected.²⁰ Similarly on 19 December 2017, the CLRV submitted its response to the Request ('CLRV Response'), also asking that it be rejected.²¹
8. On 19 December 2017, the CLRV filed a public redacted version of the CLRV List, thereby making the Defence's request for reclassification or the filing of a public redacted version moot.

II. Analysis

9. As a preliminary matter, the Single Judge notes that Request asks that the Chamber's order be rendered by 20 December 2017. The Single Judge fails to see why such extreme urgency is necessary. Accordingly, this decision is rendered within an appropriate timeframe.

¹⁵ Request, ICC-02/04-01/15-1109-Conf.

¹⁶ Request, ICC-02/04-01/15-1109-Conf, paras 17-23.

¹⁷ Request, ICC-02/04-01/15-1109-Conf, paras 26-30.

¹⁸ Request, ICC-02/04-01/15-1109-Conf, paras 23-25 and 31-33.

¹⁹ Email from the Chamber to the participants of 15 December 2017 at 16.10, ordering the participants to file their responses to the filing by 19 December 2017. The Defence itself had asked for 18 December 2017. Request, ICC-02/04-01/15-1109-Conf, para. 3.

²⁰ Victims' response to 'Defence Request for Order Regarding ICC-02/04-01/15-1105-Conf, ICC-02/04-01/15-1106 and ICC-02/04-01/15-1106-Conf-Anx', ICC-02/04-01/15-1112-Conf.

²¹ Common Legal Representative Response to 'Defence Request for Orders Regarding ICC-02/04-01/15-1105-Conf, ICC-02/04-01/15-1106 and ICC-02/04-01/15-1106-Conf-Anx', ICC-02/04-01/15-1113-Conf.

10. The Single Judge notes that, while useful for the preparation of the parties and participants, the preliminary lists of witnesses are for informational, planning and case management purposes and are subject to change. Participants are presumed to comply with this deadline in good faith, and will not be required to resolve any doubts about who they intend to call at this point. However, if it becomes apparent that a participant has already resolved to call someone as a potential witness, the Chamber may require that the identity of such persons be revealed even before the final witness lists are due.²²
11. At the outset, it is noted that the LRVs have not yet requested the Chamber's leave to call its witnesses. The Single Judge notes that the Preliminary Directions states that any responses to the LRVs' justifications for why leave to present evidence should be granted must be filed within the standard time specified in Regulation 34 of the Regulations.²³ Contrary to the Defence's implications,²⁴ such a timeframe does not on its face violate Mr Ongwen's rights to have adequate time and facilities to prepare his defence. The LRV indicates that it will not request leave to question the majority of the 13 victims in its pool of witnesses. Until the LRV has made a determination on which witnesses it intends to call, the Defence's rights are not implicated. Further, nothing precludes the Defence from making a substantiated request for any additional time should such a need arise.
12. As noted in the Preliminary Directions, if permitted to present evidence, the LRVs will be required to disclose the evidence it intends to use and the identities of its witnesses sufficiently in advance.²⁵ At this point in the proceedings, the Chamber is not in the position to provide guidance regarding the likely

²² *The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* ('Bemba et al. case'), 'Further Directions on the Conduct of the Proceedings in 2016', Trial Chamber VII, 9 December 2015, ICC-01/05-01/13-1518, para.19.

²³ Preliminary Directions, ICC-02/04-01/15-1021, para. 4.

²⁴ Request, ICC-02/04-01/15-1109-Conf, para. 23.

²⁵ Preliminary Directions, ICC-02/04-01/15-1021, para. 2(iv).

timeframe of the victims' case, if any.²⁶ Given the information available at this stage of proceedings, the Defence has no cause to allege that there will not be adequate time and facilities for the preparation of its materials for the witnesses the LRVs intend to call. Thus, the Defence's submissions alleging any violation of Mr Ongwen's right to adequate time to prepare his defence and to be tried without undue delay is not justified at the present time.

13. Turning to the four expert witnesses listed in the CLRV's preliminary lists of witnesses, the Single Judge notes the CLRV's submissions about the on-going procedure of finalising the contracts to engage these experts.²⁷ However, it is clear that the CLRV has identified the experts she wishes to call, going so far as to initiate a process of engaging them. Nothing in the CLRV's submissions justifies the continued anonymity of these experts' identities, even in the preliminary list of witnesses. The identities of these witnesses should be disclosed.
14. Regarding the witnesses the CLRV intends to call to give evidence on the role and services provided to former abductees upon their return from captivity, the CLRV contends that she has not yet identified the potential witnesses and is still assessing a variety of options.²⁸ The Single Judge has no reason to doubt that the CLRV's representations are made in good faith. Thus, the Defence's request in this regard is rejected.
15. In relation to the 13 dual-status victims in the pool from which the LRV intends to select six witnesses, the Single Judge first notes that the Prosecution's

²⁶ The Single Judge notes that any presentation of evidence by the LRVs, should leave to do so be granted, will occur before the presentation of evidence by the Defence. Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497, para. 9.

²⁷ CLRV Response, ICC-02/04-01/15-1113-Conf, para. 14.

²⁸ CLRV Response, ICC-02/04-01/15-1113-Conf, para. 15.

disclosure obligations towards the Defence is subject to the Chamber's restrictions on disclosure.²⁹

16. In support of its request that the identities of the 13 victims be provided, the Defence raises the approach of Trial Chamber VII in the *Bemba et al.* case,³⁰ and argues that the circumstances are analogous.³¹ The Single Judge is of the view that the circumstances are actually distinguishable. Victims in the *Ongwen* proceedings were granted anonymity *vis-à-vis* the Defence.³² This anonymity is of course waived if the victims actually become witnesses in the proceedings.
17. Further, in the *Bemba et al.* case, the Arido defence provided pseudonyms for potential witnesses, but implicitly acknowledged that it had already decided upon the names of certain potential witnesses.³³ Thus, Trial Chamber VII ordered the Arido defence to disclose the relevant names, because a preliminary list of witnesses would serve little purpose if participants could satisfy the requirement by providing no usable information on witnesses it had affirmatively identified. However, in the same decision, the Mangenda and Bemba defence teams indicated that they had not decided which witnesses to call, and thus were not compelled to disclose the identities of their pools of potential witnesses.³⁴
18. The Single Judge considers the present case to be closer to the Mangenda and Bemba rulings referenced above. It is clear from the LRV's submission that it has not yet decided on the six witnesses that it intended to call, even on a

²⁹ See Request, ICC-02/04-01/15-1109, paras 31-34. See also Decision 471, ICC-02/04-01/15-471, paras 12-13 and page 7.

³⁰ ICC-01/05-01/13-1518, para.19 (the Trial Chamber held that the Arido defence was to disclose the identities of the witnesses it identified by pseudonym).

³¹ Request, ICC-02/04-01/15-1109, para. 18.

³² Decision 471, ICC-02/04-01/15-471, paras 12-13 and page 7.

³³ See ICC-01/05-01/13-1518, para.19; Narcisse Arido's Notification of Disclosure and Provisional List of Witnesses pursuant to Trial Chamber VII Directions as Contained in ICC-01/05-01/13-1450, 3 December 2015, ICC-01/0501/13-1510 (notified 4 December 2015).

³⁴ ICC-01/05-01/13-1518, para.19.

preliminary basis.³⁵ Given this uncertainty, as well as the previous decisions restricting the disclosure of victim identities *vis-à-vis* the Defence, the Single Judge is unconvinced that it is necessary to disclose the identities of the 13 victims at this point in time, thereby disclosing the identities of seven protected victims who will not be called to testify. In line with Decision 471, these seven victims' participation in the proceedings have not yet increased to the extent that they are called to appear as witnesses, thus the Single Judge will not require them to relinquish their anonymity at the present time. It is emphasised in this regard that the Defence will know the names of the victims selected by 2 February 2018, when the LRV must provide its final witness list.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

PARTIALLY grants the Request and instructs the CLRV to disclose the names of its four expert witnesses to the Chamber and the parties and participants by **16.00 on 22 December 2017**;

FINDS the Defence request for the reclassification or the filing of a public redacted version of the ICC-02/04-01/15-1105-Conf moot;

REJECTS the remainder of the Request;

ORDERS the Registry to reclassify the Request (ICC-02/04-01/15-1109-Conf) as 'public'; and

ORDERS the LRVs to request reclassification or file public redacted versions of their responses to the Request within 10 days after notification of the present decision.

³⁵ See LRV Response, ICC-02/04-01/15-1112-Conf, para. 12.

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



**Judge Bertram Schmitt,
Single Judge**

Dated 22 December 2017

At The Hague, The Netherlands