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**Cour
Pénale
Internationale**

**International
Criminal
Court**



PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN UGANDA

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

Public

**Communication to the Chamber pursuant to the Chamber Decisions of 27th
November and 15th December 2015**

Source: Victims' Legal Representatives

Document to be notified in accordance with regulation 31 of the *Regulations of the Court*
to:

The Office of the Prosecutor

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James Stewart

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Legal Representatives of Victims

Joseph Akwenyu Manoba

Francisco Cox

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
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States' Representatives

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Esteban Peralta Losilla

Victims and Witnesses Unit

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Detention Section**Victims Participation and Reparations
Section**

Fiona McKay

Other

Background:

1. The Legal Representatives recall the decision of the Single Judge dated 27th November 2015 in which the Registry was directed to acknowledge the appointment of Mr. Joseph Akwenyu Manoba and Mr. Francisco Cox pursuant to Rule 90 (1) of the Rules and regulation 123 of the Regulations of the Registry in respect of 249 victims.¹
2. The Legal Representatives pursuant to the above decision on the 1st December 2015, received from VPRS² acknowledgement of a list of 776 victims/applicants who in their applications as of the said date of receipt of acknowledgement have designated both as legal representatives. Annexed in the said acknowledgement is a list of 421 victims whose applications have been transmitted in the proceedings in the case of *The Prosecutor v. Dominic Ongwen*.
3. The Legal Representatives also recall the decision of the Single Judge dated 15th December 2015 in which he revoked the appointment of OPCV to represent 163 victims these being persons who had previously executed powers of Attorney appointing Mr. Joseph Akwenyu Manoba and Mr. Francisco Cox to be their legal representatives.³
4. The Legal Representatives note that pursuant to the said decision, on the 16th December 2015, they received an Acknowledgement of receipt of Powers of Attorney from VPRS⁴ in respect of a list of 631 victims who have additional designated in their application forms for participation or in powers of attorney as their legal representatives.

¹ *Prosecutor v Dominic Ongwen*, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15-350, 27 November 2015.

² Correspondence sent by VPRS to the Legal Representatives, 1 December 2015, Reference no. VPRS-A-2015-052.

³ *Prosecutor v Dominic Ongwen*, Decision on issues concerning victims' participation, ICC-02/04-01/15-369, 15 December 2015, paras 9 to 10.

⁴ Correspondence sent by VPRS to the Legal Representatives, 16 December 2015, Reference no. VPRS-A-2015-057.

5. The Legal Representatives note that in both decisions above, the Single Judge considers it appropriate to order the Legal Representatives to consult with their clients with participating status and report back about whether their identities can be disclosed to the Defence.⁵

Non Qualification for legal Aid:

6. The Legal Representatives inform the Single Judge that they have notified their clients pursuant to his decision that the Legal Representatives do not qualify for Legal Aid.
7. The clients informed the Legal Representatives that they were disappointed with the decision of the Single Judge but remained happy with their decision to continue to be represented by both Legal Representatives.

Consultations with Victims on Disclosure of Identities:

8. The Legal Representatives inform the Chamber that pursuant to the orders on consultations with their clients on disclosure of victims' identities to the Defence, they have managed to consult with 186 of the participating victims.
9. Each and every one of these victims rejects the idea of disclosing their identities to the Defence. The cross cutting reasons advanced by the victims include the following:

Reasons against Disclosure:

10. Defence Counsel, Mr. Crispus Ayena Odong during the 2006 Juba Peace Talks between the Government of Uganda and the LRA, was representing the LRA Delegation as a Legal and Political Advisor and therefore the victims fear that any such disclosure of their identities may compromise their security and expose

⁵*Prosecutor v Dominic Ongwen*, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15-350, 27 November 2015, para.36 and *Prosecutor v Dominic Ongwen*, Decision on issues concerning victims' participation, ICC-02/04-01/15-369, 15 December 2015, para. 18..

them to risk considering that Joseph Kony the indicted LRA Head is still unapprehended.

11. The unique number ascribed to each participating victim is sufficient for the Defence to work with and therefore the full identities of the victims do not need to be disclosed.
12. The victims fear that in the event of an acquittal, if the identities of the victims have been disclosed to the defence, then the accused Dominic Ongwen might link up with Joseph Kony the indicted LRA Head to plan another attack and harm the victims afresh.
13. The victims fear that the Defence might use the disclosed identities to identify persons who witnessed LRA atrocities amongst the victims, which development is not welcome amongst victims.
14. Victims believe that in the event that Dominic Ongwen is not found guilty and is acquitted, upon release he could initiate revenge killings against victims and therefore there can be no compromise "with our enemy" to allow for the disclosure of "our names".
15. "The Defence has all information on all that they (accused) did because the ICC came and took pictures of the graves etc. It's enough evidence for them to defend themselves".

Non Consulted Victims:

16. The Legal Representatives have not been able to consult with all victims for a number of reasons including the fact that although many have designated the Legal Representatives, their status before the Court is still pending.
17. The Legal Representatives wish to inform the Chamber that in order for victims to meet with their Legal Representatives for a consultation process, they have to travel long distances by foot because in their many locations of abode, there is no established transport system on the one hand and they lack the means to pay for

motorcycle services (boda boda) the only and readily transport service on the other. This factor impedes greatly the potential to consult widely.

18. The Legal Representatives additionally note that without access to the Court Legal Aid, many victims cannot easily be reached by travelling to the nearest trading centres and finding secure places to hold consultations.
19. In other cases, the Legal Representatives are mindful of the order of the Single Judge to report back as soon as possible on the consultations and therefore the short time frame does not allow for widespread consultations owing to the fact that many victims are scattered over a wide area and mobilising them to consult with each is not practical in the circumstances.
20. The Legal Representatives, note that the fact Joseph Kony the LRA Head has not been apprehended, a situation that still causes fear and anxiety in the communities is an important fact for those victims consulted and not consulted. This situation is not helped by the fact that the said LRA Head is still actively reported to be perpetrating similar crimes in the Central African Republic.
21. It is telling that 100% of the victims consulted did not agree to have their identities disclosed to the Defence. In the light of this extreme situation, it is submitted that participating victims in this case should be presumed to want anonymity vis-à-vis the defence unless they have expressly indicated otherwise.

Permissibility of non-disclosure

22. The Legal Representatives acknowledge and respect the fundamental principle that ICC proceedings must provide a fair trial to the accused. Article 68(3) of the Rome Statute makes clear that victims' participation is subject to this principle.
23. However decisions of the Court have consistently held that the anonymity of participating victims vis-à-vis the Defence does not interfere with the accused's right to a fair trial. The first clear statement of this principle was made in *Prosecutor v. Thomas Lubanga Dyilo*:

[T]he Trial Chamber rejects the submissions of the parties that anonymous victims should never be permitted to participate in the proceedings. Although the Trial Chamber recognizes that it is preferable that the identities of victims are disclosed in full to the parties, the Chamber is also conscious of the particularly vulnerable position of many of these victims, who live in an area of ongoing conflict where it is difficult to ensure their safety.⁶

24. Trial Chamber I did go on to explain that anonymity should be used cautiously and be regulated by the Chamber, especially where a victim's proposed participation would be of particular extent or significance.⁷ In practice this caution has crystalized into a specific qualification that a victim's identity will be disclosed to the defence if the victim provides evidence as a witness.⁸ This important safeguard of defence rights is not contested by the Legal Representatives. Indeed in the present case, as identified by the Single Judge, the identities of 4 participating victims have been disclosed to the defence because of their status as Prosecution witnesses.⁹

25. However, those participating victims who do not give evidence as witnesses (or in some cases appear in person before a chamber to express views and concerns¹⁰) have until now been permitted by the Court to maintain anonymity should they choose to do so. The permissibility of anonymous participation has

⁶ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, ICC-01/04-01/06-1119, 18 January 2008, para.130.

⁷ *Ibid.* para.131.

⁸ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Directions for the conduct of the proceedings and testimony in accordance with rule 140, ICC-01/04-01/07-Corr, 1 December 2009, para.22; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, ICC-1/04-01/07-1788-tENG, 22 January 2010, paras. 92-93; *Prosecutor v. Mathieu Ngudjolo Chui*, Decision on the participation of anonymous victims in the appeal and on the maintenance of deceased victims on the list of participating victims, ICC-1/04-02/12-140, 23 September 2013, para. 19; *Prosecutor v. Jean-Pierre Bemba Gombo*, Second Order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims, ICC-1/05-01/08-2027, 21 December 2011, para. 19.

⁹ *Prosecutor v. Dominic Ongwen*, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15-350, 27 November 2015, para.36.

¹⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, Second Order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims, ICC-1/05-01/08-2027, 21 December 2011, para. 19.

been confirmed by the Appeals Chamber.¹¹ Likewise the jurisprudence referred to above,¹² which specifies that victim-witnesses may not remain anonymous, implicitly recognises that other victims may do so. In practice, victims have participated anonymously in all cases before the ICC to date. Outside of the exception mentioned above for victims who appear before a Chamber in person, Legal Representatives are not aware of any cases in which participating victims had their anonymity removed without their prior agreement.¹³

26. Finally, the Legal Representatives note that refusing the further disclosure of victim identities would maintain the current situation in which the Prosecution has access to those identities while the Defence do not. As previously held on several occasions by this Chamber, this situation does not entail a violation of the principle of equality of arms, and is therefore permissible.¹⁴

Submissions on the question of disclosure

27. Based on authorities identified above, the Legal Representatives submit that the continued anonymity of the participating victims *vis-à-vis* the Defence, is permissible. Such anonymity is consistent with the rights of the accused to a fair trial.

¹¹ *Prosecutor v. Mathieu Ngudjolo Chui*, Decision on the participation of anonymous victims in the appeal and on the maintenance of deceased victims on the list of participating victims, ICC-1/04-02/12-140, 23 September 2013.

¹² See footnote 8 above.

¹³ It is recognized that anonymity might legitimately be removed for specific victims who do not oppose the disclosure of their identities to the parties: See eg *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, ICC-1/04-01/07-1788-tENG, 22 January 2010, para.92.

¹⁴ *Prosecutor v. Dominic Ongwen*, Decision Establishing Principles on the Victims' Application Process, ICC-02/04-01/15-205, 4 March 2015, para. 35; *Prosecutor v. Francis Kiriimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case, ICC-1/09-02/11-164, 8 July 2011, para.13; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case, ICC-01/09-01/11-169, 8 July 2011, para.14.

28. Moreover, the Legal Representatives submit that such continued anonymity is in fact demanded by the Court's obligations under article 68(1) of the Rome Statute. Not only must the Court safeguard victims' safety and physical well-being, but also their psychological well-being, dignity and privacy.¹⁵ While it is certainly relevant that conditions in Northern Uganda are presently calm, in considering matters of protection it is submitted that the Chamber should take into account the possibilities of future unrest or violence. The Chamber should also consider the psychological well-being of victims many of whom are severely traumatised from past atrocities.
29. The Court's ability to provide other forms of security to victims – including where threats or violence occur – are understandably limited by logistical and resource factors, particularly where victims participate in large numbers, as they do in the present case. For this reason the most important measure available to the court for the protection of large numbers of victims is their anonymity.
30. In the light of all of the above, the Legal Representatives respectfully submit that victims participating in the present case be permitted to maintain their anonymity vis-à-vis the defence except in respect of victims who appear as witnesses.
31. Should the Chamber be minded to consider disclosing the identities of participating victims to the defence, the Legal Representatives respectfully submit that the views of the VWU should first be sought on the potential harm caused by such disclosure, and the feasibility of providing ongoing protection to all participating victims through alternative measures.

¹⁵ Article 68(1) Rome Statute.

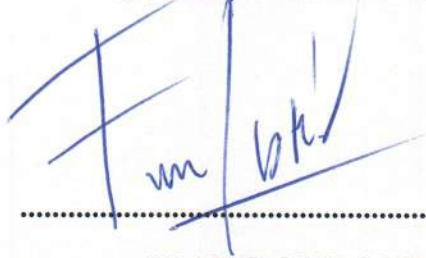
Request on Disclosure:

32. The Legal Representatives respectfully request that none of their clients' identities be disclosed to the Defence whether such clients have been consulted or not on the basis of the reasons advanced above by the said clients.



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JOSEPH A MANOBA



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FRANCISCO COX

Dated at Kampala and Santiago this 24 day of December 2015

