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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 Document

Joint Submissions on the non-disclosure of victims' identities

Source: Office of Public Counsel for Victims

Legal Representatives of Victims

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr Benjamin Gumpert

Counsel for the Defence

Mr Krispus Ayena Odongo
Mr Charles Achaleke Taku

Legal Representatives of the Victims

Mr Joseph Akwenyu Manoba
Mr Francisco Cox
Ms Paolina Massidda
Ms Jane Adong

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Mr Orchlon Narantsetseg
Ms Caroline Walter

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Ms Isabelle Guibal

Other

I. INTRODUCTION

1. In accordance with Trial Chamber IX's oral instruction issued on 23 May 2016¹, Counsel² representing the victims authorised to participate in the present case ("Counsel")³ jointly submit their observations on the non-disclosure of victims' identities to the Defence.

2. Counsel contend that the identity of participating victims shall remain undisclosed for security reasons and because they did not consent to the disclosure of said information to the Defence.

3. Counsel submit that the non-disclosure to the Defence of the identity of the participating victims not enjoying dual status is justified and does not jeopardise the rights of the Accused.

II. BACKGROUND

4. On 4 March 2015, the Single Judge of Pre-Trial Chamber II (the "Single Judge") issued a Decision granting the non-disclosure of victims' identities to the Defence, based either on a need for protection identified by the Registry or on the applicant's informed intention to that effect.⁴

¹ See the transcripts of the Status Conference held on 23 May 2016, No. ICC-02/04-01/15-T-25-ENG ET WT, page 30, lines 1-9.

² For the purposes of this submission, the term "Counsel" refers to both teams of counsel representing the interests of participating victims in the case. When the relevant counsel are addressed separately, the term "Common Legal Representative" is used to refer to counsel appointed by the Pre-Trial Chamber and the term "Legal Representatives" refers to counsel chosen by the victims.

³ 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; and the "Second decision on contested victims' applications for participation and legal representation of victims" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 24 December 2015, pp. 20-22.

⁴ See "Decision Establishing Principles on the Victims' Application Process" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-205, 4 March 2015, page 17, paras. 33-34.

5. On 3 September 2015, in a further Decision on the procedure for admission of victims' applications to participate in the proceedings, the Single Judge reaffirmed this principle, ordering the transmission to the Defence of victims' applications for participation in a form in which all details identifying the persons concerned were redacted, in as much as "*an applicant has expressed security concerns in case his identity and involvement with the Court were to be known to the Defence*".⁵

6. On 27 November, 15 and 24 December 2015 respectively, the Single Judge issued decisions on victims' applications for participation, notably requesting Counsel to consult with their clients about the need for anonymity *vis-à-vis* the Defence, and to report to the Chamber as soon as practicable.⁶

7. On 24 December 2015, the Legal Representatives submitted their Communication to the Chamber, conveying the serious concerns of the victims they consulted about the possibility of disclosing their identities to the Defence.⁷ The reasons advanced were all related to fear for their security, but also for future new revenge or retaliation attacks from members of the Lord's Resistance Army (the "LRA"), also considering that Mr. Kony is still at large. The Legal Representatives suggested that, in light of the concerns expressed by their clients, mainly related to the presence and continued activities of LRA fighters, participating victims in this case should be presumed to want anonymity *vis-à-vis* the Defence unless they have expressly indicated otherwise.⁸

⁵ See "Decision concerning the procedure for admission of victims to participate in the proceedings in the present case" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-299, 3 September 2015, para. 6.

⁶ 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, para. 36; the "Decision on issues concerning victims' participation" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, para. 10; 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, para. 23 and page 23.

⁷ See the "Communication to the Chamber pursuant to the Chamber Decisions of 27th November and 15th December 2015", No. ICC-02/04-01/15-395, 24 December 2015, paras. 8-31.

⁸ *Idem*, paras. 20-21.

8. On 14 January 2016, the Common Legal Representative submitted her Communication to the Chamber, informing the latter of the security concerns of victims in their life environment and of the consequent need for all of her clients to remain anonymous *vis-à-vis* the Defence.⁹

9. Subsequently, on 13 May 2016, the Legal Representatives restated the concerns expressed by their clients in relation to the disclosure of their identities to the Defence, and requested the Chamber to maintain their current anonymity, unless disclosure is warranted in the interests of justice in specific instances.¹⁰

10. On 18 May 2016, the Defence in its written submissions argued that maintaining redactions to the identities of participating victims “*does not protect their identity*”, that such a measure “*is merely a façade*” and that the Accused “*has the right to know the identities of his accusers*”.¹¹

III. SUBMISSIONS

11. As a preliminary remark, Counsel note that, in accordance with the practice of Chambers, the legal basis for the non-disclosure of victims’ identifying information is to be found in article 68(1) of the Rome Statute, which mandates the Court to take appropriate measures to protect, *inter alia*, the safety, privacy, physical and psychological well-being of the victims.¹² Non-disclosure of victims’ identifying information is a protective measure by which the Court can legally secure their

⁹ See the “Communication of the Common Legal Representative in compliance with the Decisions dated 27 November and 24 December 2015”, No. ICC-02/04-01/15-400, 14 January 2016, paras. 4-12.

¹⁰ See the “Submissions on Items Defined for the Status Conference on 23 May 2016”, No. ICC-02/04-01/15-433, 13 May 2016, paras. 30-31.

¹¹ See the “Public Redacted Version of “Defence Submissions in Advance of the 23 May 2016 Status Conference”, No. ICC-02/04-01/15-439-Red2, 18 May 2016, para. 23.

¹² See, *inter alia*, the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings” (Pre-Trial Chamber II, Single Judge), No. ICC-01/09-01/11-249, 5 August 2011, paras. 108-113; and the “Decision on victims’ participation at the confirmation of charges hearing and in the related proceedings” (Pre-Trial Chamber II), No. ICC-01/04-02/06-211, 15 January 2014, paras. 45-46.

participation in the proceedings, and, in this respect, constitutes one of the victims' rights enshrined in article 68 of the Rome Statute.¹³

12. Counsel recall the consistent jurisprudence of Chambers granting anonymity for participating victims' – who are not dual status individuals - *vis-à-vis* the Defence, while ruling that such a measure is not inconsistent with the right of the accused to a fair trial.¹⁴ In this regard, Counsel underline that victims' applications for participation “[u]nlike evidence collected to support or challenge the substantive criminal charges in the case, [...] are administrative in nature and [...] are intended to serve a limited purpose: to provide the Chamber with a basis for determining whether individual victims should be permitted to participate in the proceedings”.¹⁵ As such victims' applications cannot be considered as evidence in respect of the charges in the case and, therefore, participating victims cannot be considered as “accusers”, as argued by the Defence.¹⁶

13. For the purposes of trial preparation, Counsel have undertaken several missions in the field and have consulted extensively with their clients, *inter alia*, on the issue of the disclosure of their identity to the Defence.

14. Counsel inform the Chamber that all victims met expressed the view that the situation on the ground is still volatile and that trial proceedings may trigger

¹³ See the “Decision on victims' participation” (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, paras. 128-129. See also the “Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants” (Trial Chamber III), No. ICC-01/05-01/08-699, 22 February 2010, para. 24.

¹⁴ The Appeals Chamber has upheld the permissibility of anonymous victim participation: See the “Decision on the participation of anonymous victims in the appeal and on the maintenance of deceased victims on the list of participating victims”, No. ICC-01/04-02/12-140, 23 September 2013, para. 17.

¹⁵ See the “Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011” (Trial Chamber III), No. ICC-01/05-01/08-2012-Red, 9 February 2012, para. 100. See also para. 101: “[t]he probative value of the application forms is limited. Unlike evidence collected to support or challenge the substantive criminal charges in the case, the application forms are administrative in nature and are created through a relationship of confidence between a potential victim and the Registry of the Court.”

¹⁶ See the “Public Redacted Version of “Defence Submissions in Advance of the 23 May 2016 Status Conference”, *supra* note 11, para. 23.

reactions from the still active LRA members and/or from supporters of the Accused. More generally, victims indicated that the fact that Mr Kony is still hiding in the bush - and in command of his army -, therefore in a position to perpetrate further crimes, and that the Accused's network is still active, greatly contribute to their fears. Consequently, there is a strongly perceived risk from all of them that their security and well-being could be easily threatened.

15. Moreover, some victims have indicated that they live next to members of the Accused's extended family, creating an environment which is the source of many perceived risks by the victims. As emphasised in previous submissions already,¹⁷ Counsel underline that their clients fear that said proximity, coupled with the facility by which people can be identified in small communities, would put them in danger if their identity is known by the Defence.

16. Furthermore, community leaders who were consulted on this issue also stress that the security situation can evolve very quickly in the areas where the victims live, and that civilians will never be safe while prominent LRA members still have the capacity to perpetrate attacks against them.¹⁸

17. In addition, as noted by the Defence,¹⁹ this case benefits from extensive media coverage which entails that what is discussed in the courtroom is widely broadcasted, potentially exposing the victims further, notably through comments and speculations on social networks. Incidents involving breaches of confidentiality have occurred in other cases before this Court and demonstrate that risks exist. Furthermore, the possibility of *in situ* proceedings, supported by victims, means that victims' identification might become very easy, should the Accused be apprised with their identity.

¹⁷ See the "Communication of the Common Legal Representative in compliance with the Decisions dated 27 November and 24 December 2015", *supra* note 9, para. 9.

¹⁸ See the "Victims' submissions on review of pre-trial detention", No. ICC-02/04-01/15-418, 14 March 2016, para. 9(a).

¹⁹ See the transcripts of the Status Conference held on 23 May 2016, *supra* note 1, page 32, lines 2-12.

18. In this regard, the current stage of the proceedings also carries a reasonable uncertainty as to the outcome of the trial. Should Mr Ongwen not be convicted of the crimes he is accused of, victims fear that the disclosure of their identities to the Defence will compromise their security and may lead to retaliation actions.

19. The behaviour of the Accused also militates for a cautious approach when considering the disclosure of victims' identities. Indeed, decisions on Mr. Ongwen's detention to date were based, in particular, on the recognised risks that the latter could exercise pressure over witnesses, which had further justified the restriction of his communications.²⁰ In addition, the then Single Judge also pointed out that testimony of some witnesses at the pre-trial stage had to be taken under article 56 of the Rome Statute because of the risk that they could become unavailable through direct interference or more subtle pressure from the witnesses' social environment.²¹

20. In light of the Accused's observed behaviour while being detained in The Hague (as notably taken into consideration in the Decisions maintaining the accused in detention),²² Counsel argue that risks exist that the latter could further attempt to exercise pressure over victims and witnesses, either directly or through his active network, should the identity of the participating victims be disclosed to the Defence.

21. Victims also understand – and to a certain extent at this stage, are reassured – that none of the details which could lead to their identification will be disclosed to the Defence without their consent. The memories of what happened to them and their family and of the extreme brutality deployed against them are still very vivid

²⁰ See the "Decision on the "Defence Request for the Interim Release of Dominic Ongwen"" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-349, 27 November 2015 (reclassified as public on 23 March 2016), paras. 21, 23; the "Decision on the review of Dominic Ongwen's detention pursuant to article 60(3) of the Statute" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-421, 23 March 2016.

²¹ *Idem*, the "Decision on the "Defence Request for the Interim Release of Dominic Ongwen"" , para. 22.

²² See the "Observations of the Common Legal Representative on the periodic review of Mr. Ongwen's detention", No. ICC-02/04-01/15-417, 14 March 2016, para. 14; see also the "Victims' submissions on review of pre-trial detention", *supra* note 18, para. 9.

despite the lapse of time and they do not wish to risk that further crimes be perpetrated if their identity is known. This choice is also dictated by their willingness to protect their children and ensure that they will not go through the events they have themselves been exposed to, and are still suffering from.

22. For the reasons explained above, Counsel submit that the non-disclosure to the Defence of the identity of the participating victims not enjoying dual status is justified and does not jeopardise the rights of the Accused.

Respectfully submitted,



Paolina Massidda



Joseph A Manoba



Francisco Cox

Dated this 31th day of May 2016

At The Hague, The Netherlands, at Kampala, Uganda and at Santiago, Chile