

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: **ICC-02/04-01/15**

Date: **7 June 2016**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

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

PUBLIC

Public Redacted Version of 'Defence Response to "Joint Submissions on the non-disclosure of victims' identities"'

Source: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby responds to "Joint Submissions on the non-disclosure of victims' identity."¹
2. Pursuant to Articles 68(1) and (4), the Defence respectfully request Trial Chamber IX ('Chamber') to consult with VWU, and possibly VPRS, on the continued redactions to the victim-participation applications.

II. CONFIDENTIALITY LEVEL

3. Pursuant to Regulation 23*bis*(1) and Articles 68(1) and (5), the Defence files this response as Confidential. [REDACTED]. A public redacted version is filed concurrently.

III. PROCEDURAL HISTORY

4. On 4 March 2015, former Judge Ekaterina Trendafilova issued a decision allowing for the non-disclosure of the names of Victim-Applicants "when a need for protection is detected by the VPRS, or when the applicant expressed an informed intention to have his or her identity not disclosed to the Defence."² Former Judge Trendafilova further elaborated that "this provides victim applicants with an appropriate protective measure *at the application stage*, which is not prejudicial to or inconsistent with the rights of the suspect and a fair and impartial trial."³
5. On 3 September 2015, Judge Cuno Tarfusser, acting as Single Judge for Pre-Trial Chamber II during the Confirmation Phase of the proceedings, reaffirmed that an

¹ ICC-02/04-01/15-451.

² ICC-02/04-01/15-205, para. 33.

³ ICC-02/04-01/15-205, para. 34. [Emphasis added]

applicant's personal opinion about his or her security concerns were sufficient grounds to redact information from the victim applications given to the Defence.⁴

6. On 15 and 24 December 2015, Judge Tarfusser ordered the Common Legal Representative for Victims ('CLRV') and the Pro-Bono Legal Representatives for Victims ('LRV') to consult with their clients on the continued need to redact identifying information from the Defence,⁵ noting specifically on 24 December 2015 that the names of seven (7) Victim-Participants were already disclosed to the Defence.⁶
7. On 8 January 2016, in compliance with the above orders of 15 and 24 December 2015, the LRV filed observations on the personal opinions of some of the Victim-Participants as to why they wished to withhold identifying information from the Defence.⁷
8. On 14 January 2016, the CLRV submitted observations on the personal opinions of some of the Victim-Participants as to why they wished to withhold identifying information from the Defence.⁸
9. On 13 May 2016, the LRV submitted observations in advance of the 23 May 2016 status conference.⁹ The observations contained the personal opinions of some of the Victim-Participants on why they wished to withhold identifying information from the Defence during the Trial Phase of the proceedings.¹⁰
10. During the status conference on 23 May 2016, Presiding Judge for the Chamber, Judge Bertram Schmitt, instructed the CLRV and LRV (collectively 'Legal

⁴ ICC-02/04-01/15-299, para. 6.

⁵ ICC-02/04-01/15-369, para. 10 and ICC-02/04-01/15-384, para. 23.

⁶ ICC-02/04-01/15-384, para. 23. Judge Tarfusser identified the seven (7) as a/3074/10, a/06695/15, a/06812/15, a/06809/15, a/06905, a/06992/15 and a/06996/15.

⁷ See generally ICC-02/04-01/15-395.

⁸ See generally ICC-02/04-01/15-400.

⁹ ICC-02/04-01/15-433.

¹⁰ ICC-02/04-01/15-433, paras 30-31.

Representatives') to provide additional reasoning as to why the identities of the Victim-Participants should not be disclosed to the Defence.¹¹

11. On 31 May 2016, the Legal Representatives filed joint observations on why their clients wished to remain anonymous to the Defence.¹²

IV. SUBMISSIONS

12. The Defence requests that the Chamber follow the guidelines outlined in the Rome Statue when deciding whether to allow the identities of the Victim-Participants. Article 68(1) allows the Chamber to "take *appropriate* measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses."¹³ Different factors are involved in deciding whether or not to release identifying information to the Defence, but such action cannot "be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."¹⁴ In addition, Article 68(4) allows the Chamber to seek the advice of the Victims and Witnesses in these related matters, which has been endorsed by the Appeals Chamber in *Lubanga*.¹⁵

13. When these persons submitted their applications to participate in the proceedings, the Legal Representatives should have informed them that their identities might, at a later date, be disclosed to the Defence so that the Chamber ensures that the fair trial rights of Mr Ongwen are not infringed. This fact should have been communicated to Victim-Applicants and Victim-Participants, but the exact opposite was told to them.¹⁶ Express consent is not needed or required for the names of Victim-Participants to be disclosed to the Defence. It is the

¹¹ ICC-02/04-01/15-T-24-ENG, pg. 30, lines 4-6.

¹² ICC-02/04-01/15-451.

¹³ [Emphasis added.]

¹⁴ Article 68(1) of the Rome Statute.

¹⁵ ICC-01/04-01/06-3045-Red2, para. 20.

¹⁶ ICC-02/04-01/15-451, para. 21.

Chamber's duty, when factoring in specific requirements under the Rome Statute and its supporting documents, to decide whether or not the identities of Victim-Participants are disclosed to the Defence.

14. The Defence notes that we are at a different phase of the proceedings. During the Confirmation Phase of the proceedings, Pre-Trial Chamber II weighed the fair trial rights of Mr Ongwen against the requests of the Victim-Applicants and Victim-Participants to remain anonymous. During the Confirmation Phase, Mr Ongwen was a Suspect. As the proceedings enter the Trial Phase, Mr Ongwen's rights mature now that he is an Accused.
15. The Defence has studied the reasons delineated by the Legal Representatives.¹⁷ The Defence finds no reasonable justification for the continued redaction of identifying information for the Victim-Participants in the case.
16. Firstly, Mr Ongwen's case has entered the Trial Phase. The Legal Representatives have the right to make written submissions on fact and law, and the automatic right of response to submissions from the Parties.¹⁸ The Legal Representatives also have the right to consult all confidential documents lodged in the case, and to inform their clients as to the content therein.¹⁹ Their clients may instruct them on the submissions before the Chamber, *i.e.* taking an active part in the proceedings.²⁰
17. With the Victim-Participants taking such an active role in the case, Mr Ongwen has the right to know the identities of his accusers. They are allowed to make submissions, and the CLRV stated that she might bring Victim-Participants to

¹⁷ See ICC-02/04-01/15-451, paras 14-21.

¹⁸ ICC-02/04-01/15-350, paras 33 and 35.

¹⁹ ICC-02/04-01/15-350, paras 29-31. The Defence notes that the Legal Representatives may inform and show their clients the documents, but as with the Parties, they may not leave copies with them.

²⁰ ICC-02/04-01/15-350, para. 31.

speak during the opening statements.²¹ How far can the envelope be pushed, how far will this Court go, in allowing anonymous people to participate actively in the proceedings?

18. Secondly, the Legal Representatives write of an alleged network of active LRA and/or supporters of Mr Ongwen.²² Who are these people? Where are these people? Absolutely no evidence has been produced to substantiate these claims. They are fears of a bygone era. If the fears are real, where are the police reports? Why are not the UPDF and Police more active in deconstructing this alleged network in Uganda? Respectfully, the simple fact is that this alleged network of LRA members and/or supporters exists only in their minds. The only supporters which Mr Ongwen has are those that do not believe he should be at the ICC.

19. This is not the case of the Democratic Republic of Congo and Central African Republic where active conflicts existed which warranted the redactions of identifying material. This is not a situation like the Ivory Coast, Sudan or Kenya, where the Accused had or have an active role in Government. Any alleged links to a supposed network would have been eliminated when Mr Ongwen escaped on 27 December 2014.

20. Thirdly, the Legal Representatives give unsubstantiated opinions of possible violence against persons that live in the vicinity of Coorom, Uganda. Mr Ongwen knows the name of every witness, including seven (7) Victim-Participants, which were disclosed by the Prosecution.²³ Nothing has befallen them. Moreover, Mr Ongwen has spoken to his family *via* the ICC Detention Centre for over one (1) year. On 6 June 2016, he gained the right to talk to six (6) more of his family members. Again, the Victim-Participants' fears exist only in their minds.

²¹ ICC-02/04-01/15-437, para. 16.

²² ICC-02/04-01/15-451, para. 14.

²³ See footnote 6.

21. [REDACTED].²⁴ [REDACTED].²⁵ [REDACTED].²⁶ [REDACTED].²⁷

22. The communications from the Elders also vexes the Defence. The Acholi elders requested Mr Ongwen to be returned to Uganda to undergo the Acholi traditional reconciliation process of Mato Oput.²⁸ To the Defence's knowledge, this position has not changed.

23. The Defence notes that Mr Ongwen's phone calls are monitored at the ICC Detention Centre. As shown on 11 January and 30 March 2016, his calls are disconnected when the active listener believes that there is a chance that Mr Ongwen is speaking in code, even though the Defence denies such coded language and explained what Mr Ongwen was talking about²⁹ or when the wrong person is on the line. When the wrong person was on the phone with Mr Ongwen, the active listener followed the procedures enacted by Pre-Trial Chamber II and disconnected the calls. For the Legal Representatives to say that Mr Ongwen will disclose the names of Victim-Participants to the people on his non-privileged list means that they do not have faith in the system enacted by Pre-Trial Chamber II. From the Defence's perspective, it appears that the system is working.

24. Finally, the Defence reiterates that the Prosecution has already disclosed the lists of persons at the four (4) alleged IDP Camp attacks.³⁰ The Defence has these person's names, and nothing has befallen them. As such, the Defence maintains that unredacted copies of the Victim-Participants are warranted and there is no actual security risk with the disclosure of the identities of the Victim-Participants.

²⁴ Email from Defence Investigator to Defence Team on 19 January 2016 at 16h36 CET.

²⁵ Email from Defence Investigator to Defence Team on 19 January 2016 at 16h36 CET.

²⁶ Email from Defence Case Manager to Thomas Obhof on 20 January 2016 at 17h46 CET.

²⁷ [REDACTED].

²⁸ UGA-OTP-0231-0873, at 0874. In the alternative, if the trial was to proceed forward, the Elders requested that the trial take place in Gulu, Uganda.

²⁹ ICC-02/04-01/15-444-Conf-Exp-Red, paras 9-13.

³⁰ ICC-02/04-01/15-439-Red2, para. 23.

V. RELIEF

25. The Defence respectfully requests the Chamber to consult with VWU, and possibly VPRS, as to the necessity of the continued redactions of identifying material of persons allowed to participate in the proceedings through the Legal Representatives.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 7th day of June 2016

At The Hague, Netherlands