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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 Disclosure of Victims' Identities

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'), issues the following 'Decision on Disclosure of Victims' Identities', in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 67(1) and 68 of the Rome Statute ('Statute').

1. On 4 March 2015, the Single Judge of the Pre-Trial Chamber ('Pre-Trial Single Judge') issued the 'Decision Establishing Principles of the Victims' Application Process',¹ which ordered 'the very limited redactions' of the identifying information of victim applicants, 'either 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
2. The Pre-Trial Single Judge subsequently requested that the Legal Representative of Victims and the Common Legal Representative of 592 victims (together 'Legal Representatives') consult with their clients about the need for anonymity *vis-à-vis* the defence for Dominic Ongwen ('Defence') and to report to the Pre-Trial Chamber as soon as practicable.³
3. The Legal Representatives consulted with their clients and submitted communications to the Pre-Trial Chamber,⁴ conveying the victims' security

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 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; Decision on issues concerning victims' participation", 15 December 2015, ICC-02/04-01/15-369, para. 10; and Second decision on contested victims' applications for participation and legal representation of victims, 24 December 2015, ICC-02/04-01/15-384, para. 23 and page 23.

⁴ See Communication to the Chamber pursuant to the Chamber Decisions of 27th November and 15th December 2015", 24 December 2015, ICC-02/04-01/15-395; and Communication of the Common Legal Representative in compliance with the Decisions dated 27 November and 24 December 2015", 14 January 2016, ICC-02/04-01/15-400.

concerns and justifying the need to maintain the anonymity of participating victims *vis-à-vis* the Defence.⁵

4. On 13 May 2016, the Legal Representative of Victims filed its 'Submission on Items Defined for the Status Conference on 23 May 2016',⁶ in which it requests that the Chamber 'maintain the current anonymity of victims' identities *vis-a-vis* the Defence unless disclosure is warranted in the interest of justice in specific instances' ('Request').⁷
5. On 18 May 2016, the Common Legal Representative of 592 victims filed the 'Common Legal Representative's submissions pursuant to the "Order Scheduling First Status Conference and Other Matters"',⁸ stating that victims presenting their views and concerns before the Chamber should 'not automatically be required to lift their anonymity', rather, the issue should be 'considered on a case-by-case basis, depending on the security situation of the victims concerned'.⁹
6. On 18 May 2016, the Defence filed the 'Defence Submission in Advance of the 23 May 2016 Status Conference',¹⁰ in which it submits that maintaining the redactions of victims' identities does not protect the identity of the applicants as alleged by the Legal Representative of Victims and that Mr Ongwen has the right to know the identities of his accusers.¹¹
7. At the 23 May 2016 status conference, the Chamber instructed the Legal Representatives to file submissions regarding the issue of disclosure of victims'

⁵ ICC-02/04-01/15-395, paras 8-31; and ICC-02/04-01/15-400, paras 4-12.

⁶ Submission on items defined for the Status Conference on 23 May 2016, 13 May 2016, ICC-02/04-01/15-433-Corr (the corrected version of the document was filed on 23 May 2016).

⁷ ICC-02/04-01/15-433-Corr, para. 31.

⁸ Common Legal Representative's submissions pursuant to the "Order Scheduling First Status Conference and Other Matters", 18 June 2016, ICC-02/04-01/15-437.

⁹ ICC-02/04-01/15-437, para. 9.

¹⁰ Defence Submission in advance of the 23 May 2016 Status Conference, 18 May 2016, ICC-02/04-01/15-439-Red2 (confidential *ex parte* and confidential versions of the main filing were notified the same day).

¹¹ ICC-02/04-01/15-439-Conf, para. 23. The Single Judge is of the view that any reference to information redacted in the Defence's filings does not warrant confidential treatment as utilized in the present Decision.

identities to the Defence by 31 May 2016; any responses were to be filed by 7 June 2016.¹²

8. On 31 May 2016, the Legal Representatives filed the 'Joint Submissions on the non-disclosure of victims' identities' ('Joint Submissions'),¹³ in which they 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'.¹⁴ The Legal Representatives submit that the victims expressed continued fear that the disclosure of their identities to the Defence would compromise their security.¹⁵ The Legal Representatives also submit that circumstances create risks which warrant the continued anonymity of victims' identities, citing: (i) extensive media coverage of the case; (ii) previous incidents of breaches of confidentiality in other cases; (iii) the possibility of *in situ* proceedings; and (iv) Mr Ongwen's behaviour during detention.¹⁶
9. On 7 May 2016, the Defence filed its response to the Joint Submissions,¹⁷ in which it requests that the Chamber consult with the Victims and Witnesses Unit ('VWU'), and possibly the Victims Participation and Reparations Section ('VPRS'), as to the necessity of the continued redactions of identifying materials of participating victims.¹⁸ The Defence argues that there is no actual security risk associated with the disclosure of the identities of the participating victims.¹⁹
10. The Defence submits that: (i) the expressed consent of victims is not needed or required for the identities of the participating victims to be disclosed to the

¹² Transcript of hearing on 23 May 2016, ICC-02/04-01/15-T-25-ENG-ET, page 29, line 25 to page 30, line 9.

¹³ Joint Submissions on the non-disclosure of victims' identities, 31 May 2016, ICC-02/04-01/15-451.

¹⁴ Joint Submissions, ICC-02/04-01/15-451, paras 3 and 22.

¹⁵ See Joint Submissions, ICC-02/04-01/15-451, paras 14-18 and 21.

¹⁶ Joint Submissions, ICC-02/04-01/15-451, paras 17-20.

¹⁷ Defence Response to 'Joint Submissions on the non-disclosure of victims' identities', 7 June 2016, ICC-02/04-01/15-459-Red (a confidential version of the main filing was notified on the same day).

¹⁸ ICC-02/04-01/15-459-Red, para. 25.

¹⁹ ICC-02/04-01/15-459-Red, para. 24.

Defence;²⁰ (ii) now that Mr Ongwen stands accused, rather than suspected, his fair trial rights mature;²¹ (iii) given the fact that the victims authorised to participate in the Trial take an active part in the proceedings, Mr Ongwen has the right to know the identities of his accusers;²² (iv) the reasons the Legal Representatives assert to underlie the victims' contention about the threat to their security are unfounded;²³ (v) the system in place in the detention centre to monitor Mr Ongwen's calls is working;²⁴ and (vi) despite the Defence's possession of the Prosecution's lists of persons at the four alleged IDP Camp attacks, nothing has happened to those alleged victims.²⁵

11. The Single Judge emphasises at the outset that the victims' role in the proceedings is significantly more limited as compared to the parties, and the Legal Representatives do not have the same disclosure obligations as the Prosecution.²⁶ The Single Judge also observes that Article 68(1) of the Statute requires the Chamber to take appropriate measures to protect, *inter alia*, the safety, privacy, physical and psychological well-being of the victims. The measures taken must, however, not prejudice or be inconsistent with the accused's rights to a fair and impartial trial. The Single Judge, in line with various chambers of this Court,²⁷ rejects the notion that the participation of anonymous victims in the trial proceedings, in and of itself, violates Mr Ongwen's right to a fair and impartial trial.

²⁰ ICC-02/04-01/15-459-Red, para. 13.

²¹ ICC-02/04-01/15-459-Red, para. 14.

²² ICC-02/04-01/15-459-Red, paras 15-17.

²³ ICC-02/04-01/15-459-Conf, paras 18-21.

²⁴ ICC-02/04-01/15-459-Red, para. 23.

²⁵ ICC-02/04-01/15-459-Red, para. 24.

²⁶ Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu 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-01/04-01/07-2288, para. 75.

²⁷ See Appeals Chamber, *The 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, 23 September 2013, ICC-01/04-02/12-140, paras 16-17; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, 22 January 2011, ICC-01/04-04/07-1788-tENG, paras 92-93; and Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, paras 130-131.

12. While the preference is for full disclosure of the victims' identities to the parties, the Single Judge is conscious of the vulnerable position of these victims, as the situation on the ground remains volatile, and thus rejects the Defence's argument that the victims' contentions about the risks to their security are unfounded. Further, the Single Judge considers the Defence's arguments that the measures instituted are not appropriate because the detention centre monitors Mr Ongwen's calls and 'nothing has befallen' the victims at the four alleged IDP Camp attacks, inapposite. The victims do not consent to the revelation of their identities and the Legal Representatives have demonstrated that there remain valid reasons to maintain the victims' anonymity *vis-à-vis* the Defence in the present case. At this time, consultation with the VWU or VPRS is not necessary.
13. However, this does not mean that victims' identities need not be disclosed in all contexts. For instance, 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 *vis-à-vis* the Defence. In such a case, the calling participant must disclose identifying information about the victim in accordance with the disclosure and redaction regime in place.
14. Further, the Single Judge considers that victims presenting their views and concerns also assume a more active role in the proceedings and their continued anonymity before the Chamber could prejudice the accused or be inconsistent with his rights to a fair and impartial trial. Thus, victims presenting their views and concerns before the Chamber shall also relinquish their anonymity *vis-à-vis* the Defence. The Single Judge notes that exceptional circumstances may warrant a victim's continued anonymity.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Legal Representative of Victims' Request.

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



Judge Bertram Schmitt
Single Judge

Dated 17 June 2016

At The Hague, The Netherlands