

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-02/04-01/15
Date: 18 December 2017

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*

Confidential

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"

Source: 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 and
Mr Francisco Cox

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

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Legal Representatives for Victims ("LRVs"), on behalf of 2598 victims participating in this case, respectfully request that Trial Chamber IX ("Chamber") deny the "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", filed on 15 December 2017 ("Defence Request"),¹ for orders relating to the disclosure by the LRV of thirteen names listed in their confidential annex.²
2. The LRVs wholly oppose the disclosure of the thirteen names of potential witnesses contained within their confidential annex. As explained in the LRVs' submissions dated 14 December 2017 ("Preliminary Witness List"),³ the annexed list of names is preliminary in nature and contains the names of persons who *may* be called to present evidence. The LRVs submit that the disclosure of these names is unwarranted and premature at this stage.

II. CONFIDENTIALITY

3. Pursuant to Regulation 23*bis* (2), the LRVs submit this response as confidential as it is made in response to a confidential filing. However, the LRVs do not oppose the Defence's request that the Defence Request be reclassified as public, which should also entail the reclassification of the present filing.

III. PROCEDURAL HISTORY

4. On 13 October 2017, the Single Judge issued the "Preliminary Directions for any LRV or Defence Evidence Presentation"⁴ ("Preliminary Directions") wherein he, *inter alia*, directed that '[B]y 14 December 2017, the LRVs and the Defence must

¹ ICC-02/04-01/15-1109-Conf.

² ICC-02/04-01/15-1106-Conf-Anx.

³ ICC-02/04-01/15-1106.

⁴ "Preliminary Directions for any LRV or Defence Evidence Presentation" (Trial Chamber IX), 13 October 2017, ICC-02/04-01/15-1021 ("Preliminary Directions").

provide a preliminary list of witnesses and an estimate of how many hours of witness examination it will require.’⁵

5. On 13 December 2017, the Common Legal Representative for Victims (“CLR”) submitted her “Preliminary List of Witnesses Provided Pursuant to the ‘Preliminary Directions for any LRV or Defence Evidence Presentation.’”⁶
6. On 14 December 2017, the LRVs submitted the Preliminary Witness List⁷ and its confidential annex.⁸
7. On 15 December 2017, the Defence filed the “Defence Request” where it requested the Chamber to order the LRV to disclose by 20 December 2017 the names of 13 persons listed in the confidential annex.

IV. SUBMISSIONS

A. The Defence Request is premature and misconstrues the purpose of the preliminary list of witnesses

8. The LRVs submit that the Preliminary Witness List was provided merely for ‘informational purposes’⁹ and may change come 2 February 2018. Moreover, even from among the final list to be submitted on 2 February 2018, it is possible that not all persons named will ultimately give evidence.
9. The possibility for victims to present evidence is dependent upon whether the victims’ personal interests are affected and is determined at the discretion of the Chamber.¹⁰ Therefore, although the LRVs have proposed to call eight witnesses to present evidence, the final determination of how many witnesses will be called to

⁵ *Ibid*, para. 3.

⁶ ICC-02/04-01/15-1105-Conf.

⁷ ICC-02/04-01/15-1106.

⁸ ICC-02/04-01/15-1106-Conf-Anx.

⁹ Preliminary Directions, para.3.

¹⁰ 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, OA 11, para.44.

present evidence rests with the Chamber. A request for the LRVs to disclose the names of 13 persons who may be selected to present evidence is therefore premature at this stage.

10. The above approach accords with that taken by Trial Chamber III, which specifically addressed this question in *Bemba*:

In line with previous practice at this Court and for reasons of fairness, the Chamber will not permit victims to testify as witnesses or to present their views and concerns unless they relinquish their anonymity vis-à-vis the parties. However, the identity of victims need not be disclosed to the parties unless and until the Chamber grants them permission to testify and/or present their views and concerns. This approach reflects the security concerns expressed by victims and the fact that certain victims appear to have consented to their identities being disclosed only if the Chamber grants them permission to appear.¹¹

11. The Defence has sought to argue that disclosing the names of all persons included in the Preliminary Witness List will avoid the wastage of resources. The LRVs respectfully submit that it will be a far greater misuse of resources for the Defence to carry out investigations with respect to thirteen individuals, many of whom may ultimately never present evidence in this case. The rights of the Accused under article 67(1) (b) of the Statute would be far better served by presenting them with a shorter and more focused final list of witnesses on 2 February 2018.

B. Non-disclosure of the Preliminary List of witnesses is ‘strictly necessary’ and does not interfere with the rights of the Defence

12. Out of the thirteen witnesses listed in the Preliminary Witness List, the LRVs aim to select six people to present evidence. Therefore, seven victims whose pseudonyms are contained within the Preliminary Witness List will not be witnesses in these proceedings. The LRVs submit that requiring the disclosure of the names of participating victims who will not be presenting evidence to the

¹¹ *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”, Trial Chamber III, 21 February 2011, ICC-01/05-01/08-2027, para.19.

Defence is unwarranted. At this stage the LRVs are not able to inform the Chamber which of the six people will be proposed in the final list of witnesses to be submitted on 2 February 2018 as this assessment is currently ongoing.

13. The provisions of articles 68(1) and 57(3)(c) of the Statute mandate the Court to take appropriate measures to protect, *inter alia*, the safety, privacy, physical and physiological well-being of victims. Furthermore, in accordance with the principle of proportionality enshrined in article 68(1) of the Statute, measures taken pursuant to this provision may restrict the rights of the suspect only to the extent necessary.¹²

14. The LRVs submit that given the nature and the purpose of the Preliminary Witness List, requiring the disclosure of the names of victims who will not present evidence will be contrary to the principle of proportionality enshrined in article 68(1) of the Statute and may result in the unnecessary exposure of participating victims. The redactions of identifying information in the victims' applications are the only available measures to protect the victims concerned and the disclosure of any further information would unnecessarily compromise their safety and security. For these reasons, the non-disclosure of the names of proposed witnesses in the Preliminary List of witnesses is 'strictly necessary.'

¹² See *The Prosecutor v. Joseph Kony et al.*, 'Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06', Pre-Trial Chamber II, 1 February 2007, ICC-02/04-01/05-134, paras. 16-25; *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, "Decision inviting the parties' observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08", dated 6 May 2008 and registered on 7 May 2008, ICC-01/04-01/06-1308, para. 25; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Pre-Trial Chamber II, 'Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case', 8 July 2011, ICC-01/09-02/11-164, para.18; *The Prosecutor v. Laurent Gbagbo*, 'Corrigendum to the Second Decision on victims' participation at the confirmation of charges hearing and in the related proceedings', Pre-Trial Chamber I, 6 February 2013, ICC-02/11-01/11-384-Corr, para. 34; *The Prosecutor v. Charles Blé Goudé*, 'Decision on Victims' Participation in the Pre-Trial Proceedings and Related Issues', Pre-Trial Chamber I, 11 June 2014, ICC-02/11-02/11-83, para.43.

15. Furthermore, non-disclosure of the names of victims who will not present evidence will not unnecessarily restrict the rights of the Defence. The names of the individuals who are actually granted leave to give evidence should be disclosed to the Defence with adequate time for them to (a) request the Chamber to reconsider the grant of leave to give evidence if that is considered necessary; and (b) prepare for the evidence. The time allowed for such steps is entirely within the power of the Chamber and ensuring that sufficient time is given is the best means by which to protect the rights of both the Defence and the participating victims.
16. The Defence Request also seeks to selectively apply the approach of Trial Chamber VII when dealing with preliminary defence witness lists in the *Bemba et al.* case.¹³ However, the approach followed by Trial Chamber VII in that case for the *Arido* defence team is not applicable in this case for two reasons.
17. Firstly, the *Arido* team gave no indication that it remained undecided about the witnesses it would call. There was, therefore, no reason to delay the disclosure of witness names. In contrast, the *Mangenda* and *Bemba* defence teams indicated that witness names 'could not be provided because they had not decided on witnesses to be called,' and this was permitted by Trial Chamber VII.¹⁴ The LRVs aver that similarly, they too, have not decided on the witnesses to be called. The purpose of the Preliminary Witness List was merely to provide the Chamber with an indication of those potential victims that the LRVs *may* call to present evidence. In this respect, if the example of *Bemba et al.* is applicable at all, it demonstrates that the course adopted by the LRVs is permissible.
18. Secondly, a material distinction exists between the matter present in issue and that which arose in *Bemba et al.* concerning preliminary defence witness lists. That difference is that the thirteen individuals in question in the Preliminary Witness

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

¹⁴ *Ibid*, para.19.

List are already the subject of a decision by the Court granting them protective measures under Article 68(1), such that their identity is not to be disclosed to the defence.¹⁵ Certainly in the *Bemba et al.* case it was open to the *Arido* team to seek protective measures if that had been required, however, this was not done. In contrast, the question of disclosing participating victims' identities to the defence has been long-settled.¹⁶

C. The Defence Request conflates the role of the LRVs and the Prosecutor

19. The Defence Request asserts that '[T]he failure of the CLRV and LRV to disclose the Identities of its (*sic*) potential witnesses violates Mr Ongwen's rights pursuant to Articles 61(3)(b) and 67(2) of the Rome Statute and Rule 77 of the Rules of Procedure and Evidence.' The LRVs submit that the Defence Request conflates the role of the LRVs with that of the Prosecution.

20. Pursuant to article 61(3) of the Statute and rules 121(3) and (5) of the Rules of Procedure and Evidence, the Prosecutor must disclose all of the evidence intended for use at the confirmation hearing prior to that hearing. After the confirmation hearing, pursuant to article 64(3)(c) of the Statute, the Trial Chamber shall "provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial."

21. In terms of the presentation of evidence by victims:

this is contingent on (i) the victims fulfilling the requirements of article 68(3) of the Statute, and (ii) the Trial Chamber deciding to exercise its authority under article 69(3) of the Statute. The submission of such evidence therefore falls within the regime provided for

¹⁵'Decision on Disclosure of Victims' Identities', Trial Chamber IX, 17 June 2016, ICC-02/04-01/15-471, paras. 11 and 12.

¹⁶See 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.

*the Trial Chamber to exercise its authority to request the submission of "evidence that it considers necessary for the determination of the truth."*¹⁷

22. Therefore, any disclosure of evidence in respect of witnesses that the LRVs expect to call will be made by the LRVs, with the permission of the Chamber, and not the Prosecutor. As such the non-disclosure of names in the Preliminary Witness List has no bearing on the Prosecutor's disclosure obligations and the Defence is misguided in this respect. Indeed, the filing of the Preliminary Witness List has made no change to the pre-existing situation that the Prosecution is aware of victim identities while the Defence is not. To date, the Chamber has not considered that the Prosecution is obliged to disclose such identities to the Defence. There is no reason why this would be changed by virtue of the filing of a provisional list of potential witnesses.

D. Defence concerns regarding coordination between the CLR and LRVs are inapposite

23. The Defence Request 'notes with circumspect... similarities in which both participants submitted its respective list of witnesses' [*sic*]. The Defence goes on to assert that this 'gives the appearance of bad faith.'¹⁸

24. The LRVs are surprised by the suggestion of bad faith or even of its appearance. Consultation and cooperation between the LRVs and the CLR has been mandated by the Chamber as a means of promoting 'the fair and expeditious conduct of the proceedings and the rights of the accused.'¹⁹ Therefore, any concerns that the Defence may have regarding such consultations are entirely misplaced.

¹⁷ See *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, OA 11, para.44.

¹⁸ Defence Request, para.39.

¹⁹ See 'Decision on Requests Concerning Organisation of Victim Representation', Trial Chamber IX, 17 June 2016, ICC-02/04-01/15-476, para.11.

V. RELIEF SOUGHT

25. The LRVs respectfully request the Chamber to dismiss the request for an order requiring disclosure to the Defence of the thirteen names listed in the confidential annex.

26. The LRVs do not oppose the request that the Defence Request be reclassified as public.

Respectfully submitted,



Joseph A. Manoba



Francisco Cox

Dated this 18th day of December 2017

At Kampala, Uganda and at Santiago, Chile