

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-02/04-01/15**
Date: **13 September 2019**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

Public

Decision on Defence Request to Meet with Six Prosecution Witnesses

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Others

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX (‘Single Judge’ and ‘Chamber’, respectively) of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 68(1) of the Rome Statute (the ‘Statute’) and Regulations 23 *bis* and 24(5) of the Regulations of the Court, issues the following ‘Decision on Defence Request to Meet with Six Prosecution Witnesses’.

I. Procedural history and submissions

1. In July 2019 the Defence and Office of the Prosecutor (the ‘Prosecution’) had several email exchanges concerning the Defence’s intention to contact former so-called ‘wives’ of Mr Ongwen who testified as Prosecution witnesses in the pre-trial phase of this case under Article 56 of the Statute. The Common Legal Representative of Victims (the ‘CLRv’) was copied into part of this exchange, as it represents some of the witnesses concerned.
2. On 19 July 2019, the Chamber was included into the continuing e-mail exchange. In order to have all facts and arguments it ordered the Defence to file a formal written motion should it wish the Chamber to act.¹
3. On 27 August 2019, the Defence filed a request to meet with six of the witnesses (the ‘Witnesses’) who testified for the Prosecution under Article 56 of the Statute (the ‘Request’).² The Defence submits that it wishes to speak to the Witnesses in order to ‘discuss issues and problems related to the upbringing of their children and grandchildren’.³ It also states that it wishes to meet the Witnesses in order ‘to determine whether they would like to visit Mr Ongwen’.⁴ Further, the Defence clarifies that it does not have the intention to interview the Witnesses, but notes that information concerning the alleged conduct of the accused ‘may materialise’.⁵

¹ E-mail sent from the Chamber to the Defence, Prosecution and Common Legal Representative of Victims, 19 July 2019, at 18:20.

² Defence Request to Meet Selected Individuals, ICC-02/04-01/15-1574-Conf. On 3 September 2019, the Defence filed a corrected version, ICC-02/04-01/15-1574-Conf-Corr. On the same day, the Defence filed a public redacted version, ICC-02/04-01/15-1574-Corr-Red.

³ Request, ICC-02/04-01/15-1574-Corr-Red, para. 2.

⁴ Request, ICC-02/04-01/15-1574-Corr-Red, para. 28.

⁵ Request, ICC-02/04-01/15-1574-Corr-Red, para. 34.

4. Incidentally, the Defence also requests that filing ICC-02/04-01/15-606-Conf-Exp be reclassified as ‘confidential’.⁶
5. On 30 August 2019, the Prosecution filed its response (the ‘Prosecution Response’).⁷ Therein, it stated that it would not object to any of the Witnesses talking to Mr Ongwen or introduce their children to him, should they clearly express such wish.⁸ However, it suggests that the Victims and Witnesses Unit (the ‘VWU’) would be the appropriate body to ask the Witnesses if they wish any contact.⁹ The Prosecution also argues that for the Witnesses who consent to being contacted, the VWU should assess whether the renewed contact between the accused and the concerned witness and their families could cause any potential harm and make recommendations to the Chamber ‘whether and under what conditions such contact should be permitted’.¹⁰ Further, the Prosecution submits that any meetings should be organised by the VWU, that the Prosecution and the legal representative of the witness in question should be present and that the accused and the witness should be informed that no discussion of the witness’s testimony in this case is allowed.¹¹
6. On 2 September 2019, the CLRV filed its response (the ‘CLRV Response’), opposing the Request.¹² It submits that the Witnesses should not be contacted at all.¹³ Should the Chamber order that the Witnesses be contacted, the CLRV proposes that, in case the person is a dual status witness represented by the CLRV, the CLRV or the VWU together with the CLRV contact the person.¹⁴ The CLRV also supports the Prosecution’s proposal that the VWU conducts an assessment with regard to the vulnerability of the Witnesses.¹⁵

⁶ Request, ICC-02/04-01/15-1574-Corr-Red, paras 14 and 37.

⁷ Prosecution’s Response to “Defence Request to Meet Selected Individuals” (ICC-02/04-01/15-1574-Conf), ICC-02/04-01/15-1577-Conf.

⁸ Prosecution Response, ICC-02/04-01/15-1577-Conf, para. 7.

⁹ Prosecution Response, ICC-02/04-01/15-1577-Conf, para. 9.

¹⁰ Prosecution Response, ICC-02/04-01/15-1577-Conf, para. 10.

¹¹ Prosecution Response, ICC-02/04-01/15-1577-Conf, para. 13.

¹² CLRV Response to Defence Request to Meet Selected Individuals, ICC-02/04-01/15-1581-Conf.

¹³ CLRV Response, ICC-02/04-01/15-1581-Conf, paras 10-25.

¹⁴ CLRV Response, ICC-02/04-01/15-1581-Conf, para. 30.

¹⁵ CLRV Response, ICC-02/04-01/15-1581-Conf, para. 32.

7. On 4 September 2019, the Defence filed a request for leave to reply.¹⁶ It submits a reply is warranted to address the modalities proposed in the Prosecution Response in order for the Chamber to be comprehensively informed of all matters to be put to the Witnesses. It also argues that it is currently preparing a separate, but seemingly related, filing with regard to the applicable contact restrictions regime that would include arguments relevant to the Request.¹⁷
8. The CLRV opposes the Defence Request to Reply, arguing that it should be dismissed since it does not raise new issues which could not reasonably have been anticipated. It also submits that the Chamber is already in possession of sufficient information to determine the matter at hand and would not be assisted by receiving further submissions.¹⁸

II. Analysis

9. As concerns the Defence Request to Reply, the Single Judge is of the view that the manner in which the Witnesses should be contacted does not concern new matters that could not reasonably have been anticipated. Similarly, the mere fact that the Defence is currently planning to file another request before the Chamber which, it submits, would include arguments related and of relevance to the Request, and to the way in which the Witnesses might be contacted, does not justify granting leave to reply. The Defence will still be in a position to submit any request on the contact restrictions regime it considers necessary. Moreover, the Single Judge is in possession of sufficient information to decide on the Request, and further submissions in this regard would not be of assistance. The Defence Request to Reply is therefore rejected.
10. With regard to the confidential classification of some of the filings, the Single Judge notes that the Prosecution Response, as well as the Defence Request to Reply and the CLRV's response thereto all indicate that they could be reclassified as 'public'. Accordingly, the Single Judge orders the Registry to reclassify the Prosecution Response, the Defence Request to Reply, and the CLRV's response to the Defence

¹⁶ Defence Request for Leave to Reply to Prosecution filing ICC-02/04-01/15-1577-Conf and CLRV filing ICC-02/04-01/15-1581-Conf, ICC-02/04-01/15-1583-Conf (the 'Defence Request to Reply').

¹⁷ Defence Request to Reply, ICC-02/04-01/15-1583-Conf, paras 3-7.

¹⁸ CLRV's Response to "Defence Request for Leave to Reply to Prosecution filing ICC-02/04-01/15-1577-Conf and CLRV filing ICC-02/04-01/15-1581-Conf", 6 September 2019, ICC-02/04-01/15-1586-Conf, paras 2, 8-11.

Request to Reply as ‘public’. As regards the CLRV Response, the Single Judge orders the CLRV to file a public redacted version as soon as practicable after notification of this decision.

11. The Single Judge further notes the Defence request to reclassify filing ICC-02/04-01/15-606-Conf-Exp as ‘confidential’. Having considered the content of this filing, the Single Judge agrees that filing ICC-02/04-01/15-606-Conf-Exp can be reclassified as ‘confidential’, and orders the Registry to proceed accordingly.
12. Turning to the Request, the Single Judge notes the protocol on contact between a party and witnesses called by the opposing party or a participant (the ‘Protocol’).¹⁹ According to paragraph 28 of the Protocol, the Defence needs the consent of the Witnesses in order to contact them. The Single Judge also notes that the Defence states that it requests the meetings pursuant to the Protocol, indicating that a record of the contact would be made and disclosed.²⁰ The Defence further indicates that it has no objection to the presence of the Prosecution representative during the contact should any of the Witnesses request it.²¹
13. The Single Judge is mindful that the Witnesses testified under Article 56 of the Statute and of the concerns voiced by the Prosecution and CLRV that the Witnesses are vulnerable. The Single Judge notes in particular that the Witnesses’ testimonies concern alleged sexual and gender based crimes committed directly by Mr Ongwen.²² However, this does not mean that the Chamber can decide, on behalf of the Witnesses, whether they should engage with the Defence and have contacts with the accused. This decision must lie with every witness. They have the choice to establish contacts with the Defence and the accused, should they wish to do so. The Single Judge does not agree with the CLRV that the Witnesses are not able to provide a valid consent on this matter.²³ Nor is the Chamber convinced by the Prosecution’s arguments that the Defence’s potential contact with the Witnesses requires the protocol the Prosecution proposes.

¹⁹ Annex to the Order concerning the modalities for the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, 11 November 2019, ICC-02/04-01/15-339-Anx.

²⁰ Request, ICC-02/04-01/15-1574-Corr-Red, para. 34.

²¹ Request, ICC-02/04-01/15-1574-Corr-Red, para. 35.

²² Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute, 10 August 2016, ICC-02/04-01/15-520, para. 13.

²³ See, CLRV Response, ICC-02/04-01/15-1581-Conf, para. 19.

14. However, mindful of the vulnerability of the Witnesses, the Single Judge instructs the VWU together with, where appropriate, the CLRV or, for the witness who is not a victim participating in the proceedings, the Prosecution, to contact the Witnesses in order to seek their informed consent on whether they wish to have any contact with the Defence or the accused. The Witnesses should be informed that the Defence does not wish to question them about their testimonies, but enquire about matters unrelated to the case, including their personal ties and potential contacts with the accused. The Witnesses should, in particular, be informed that it is their own choice whether they wish to establish contacts with the Defence or the accused.
15. Should one of the Witnesses give her informed consent, the Single Judge hereby orders that the VWU assesses whether the witness in question needs any assistance during the contact.²⁴ If applicable, the CLRV may contact the witness to enquire whether she wishes for the CLRV to also be present for the contact. The VWU should also inform the witness that she may choose to have a representative of the Prosecution present during the contact.²⁵ As indicated in the Request,²⁶ a record of the contact is to be made and disclosed.
16. In any contact, the Defence is to be mindful of its own statements in the Request that the purpose of such contact is not to gather any information of the Witnesses.²⁷ Should nevertheless any case-related information ‘materialise’ and the Defence wish to follow up on such information, the Defence is required to promptly inform the Chamber which may give further directions on if and how any formal interview should be organised.

²⁴ See also paragraph 32 of the Protocol.

²⁵ See Request, ICC-02/04-01/15-1574-Corr-Red, para. 35. See also paragraph 33 of the Protocol.

²⁶ See Request, ICC-02/04-01/15-1574-Corr-Red, para. 34.

²⁷ See Request, ICC-02/04-01/15-1574-Corr-Red, paras 2 and 34.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Defence Request to Reply;

ORDERS the VWU and CLRV or Prosecution, where appropriate, to contact the Witnesses to enquire whether they give their informed consent to be contacted by the Defence, in line with paragraphs 14-15 above;

ORDERS the Registry to reclassify filings ICC-02/04-01/15-1577-Conf, ICC-02/04-01/15-1583-Conf and ICC-02/04-01/15-1586-Conf as ‘public’;

ORDERS the Registry to reclassify filing ICC-02/04-01/15-606-Conf-Exp as ‘confidential’;
and

ORDERS the Common Legal Representative of Victims to file a public redacted version of filing ICC-02/04-01/15-1581-Conf as soon as practicable after notification of this decision.

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



Judge Bertram Schmitt, Single Judge

Dated 13 September 2019

At The Hague, The Netherlands