

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **15 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

**URGENT
CONFIDENTIAL**

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

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. Pursuant to the “Preliminary Directions for any LRV or Defence Evidence Presentation”¹ (‘Decision 1021’) the Defence for Dominic Ongwen (‘Defence’) requests Trial Chamber IX (‘Chamber’) order:
 - a. The Common Legal Representative for Victims (‘CLRV’) to disclose by 20 December 2017 the names of persons she and her team currently intends to call as witnesses during her case-in-chief;
 - b. Filing ICC-02/04-01/15-1105-Conf be reclassified as public, or in the alternative, a public redacted version in compliance with recommendations below be filed immediately;
 - c. The Legal Representatives for Victims (‘LRV’) to disclose by 20 December 2017 the names of the 13 persons within their witness pool listed in ICC-02/04-01/15-1106-Conf-Anx; and
 - d. This filing be reclassified as public.
2. The Defence asserts that submissions ICC-02/04-01/15-1105-Conf and ICC-02/04-01/15-1106 and confidential annex directly violates Decision 1021. Furthermore, as the Defence is not privy to almost all of the names associated with victim applications, the confidential annex to ICC-02/04-01/15-1106 and ICC-02/04-01/15-1105-Conf violate Mr Ongwen’s rights pursuant to Article 67(1)(b) and (c), and the Prosecution’s disclosure obligations to the Defence pursuant to Articles 61(3)(b) and 67(2) of the Rome Statute and Rule 77 of the Rules of Procedure and Evidence.

II. URGENCY and CONFIDENTIALITY

3. Pursuant to Regulation 35(1) of the Regulations of the Court, the Defence requests a shortening of the deadline for responses to this request. The Defence asks that any response to this request be filed by 16h00 CET on 18 December 2017. The Defence states this is necessary as the deadline for the relief sought was 14 December 2017, and

¹ ICC-02/04-01/15-1021.

the CLRV and LRV have not informed the Chamber, Parties and Participants why withholding the names of the potential witnesses is “strictly necessary”.²

4. Pursuant to Regulation 23 *bis*(2) of the Regulations of the Court, the Defence submits this request as confidential because it discusses issues related to confidential submissions. The Defence avers that there is no reason for this request and ICC-02/04-01/15-1105-Conf to remain confidential, and asks that both documents be reclassified as public.

III. BACKGROUND

5. On 13 October 2017, Trial Chamber IX (‘Chamber’) issued Decision 1021. The Chamber ordered the Defence, CLRV and LRV to submit provisional list of witnesses by 14 December 2017.³ The Chamber also order the Defence, CLRV and LRV to provide an estimated time for the examination of each witness.
6. On 27 October 2017, the Defence requested the Chamber to provide further directions for the schedule provided for in Decision 1021.⁴
7. The Chamber rejected the request on 16 November 2017.⁵
8. On 13 December 2017, the CLRV filed a confidential submission, which was not notified to the Defence by the Registry pursuant to Regulation 31 of the Regulations of the Court,⁶ outlining reasons for her failure to submit names of persons whom the CLRV intends to call as witnesses, and states that she will be able to provide the names of the proposed experts by 2 February 2018.⁷ The CLRV did not give a reason why the withholding of the names of the potential seven witnesses was strictly necessary pursuant to Decision 1021.
9. On 14 December 2017, the Defence filed its provisional list of witnesses with 44 names of witnesses and the Defence’s estimate times of its examination of the witnesses.⁸ The

² Decision 1021, para. 3.

³ Decision 1021, para. 3.

⁴ ICC-02/04-01/15-1029-Red.

⁵ ICC-02/04-01/15-1074.

⁶ Emailed response from CMS to the Defence on 15 December 2017 at 09h24 CET. CMS forwarded the notification to the Defence at this time, noting that CMS stated it inadvertently omitted the Defence from the notification.

⁷ ICC-02/04-01/15-1105-Conf, paras 8-10.

⁸ ICC-02/04-01/15-1107-Conf-Exp-AnxA.

Defence further noted the mode of the intended testimony for each witness.⁹ Finally, the Defence also noted that it is seeking final consent from approximately 20 additional potential witnesses before adding their names onto its list.¹⁰

10. On 14 December 2017, the LRV filed its provisional list of witnesses with 15 witnesses, two of whom are named and are being proposed as expert witnesses by the LRV.¹¹ Thirteen of the potential witnesses were identified by victim-application codes and not by their names.¹² The LRV noted that of the 13 unnamed potential witnesses, it expects to call six of them to testify.¹³

IV. SUBMISSIONS

a) *The Law and Order from the Chamber.*

11. Article 64(8)(b) of the Rome Statute grants the Presiding Judge the authority to “give directions for the conduct of the proceedings, including to ensure that they are conducted in a fair and impartial manner.”
12. Article 64(3)(c) of the Rome Statute grants the Chamber the power to order the “disclosure of document or *information* not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.”¹⁴
13. Article 67(1)(b) of the Rome Statute grants Mr Ongwen the right “to have adequate time and facilities for the preparation of the defence...”.
14. Article 67(1)(c) of the Rome Statute grants Mr Ongwen the right “to be tried without undue delay.”
15. Articles 61(3)(b) and 67(2) of the Rome Statute and Rule 77 of the Rules of Procedure and Evidence create disclosure obligations for the Prosecution, regardless of whether the materials relate to a Prosecution witness or its case.

⁹ ICC-02/04-01/15-1107-Conf-Exp-AnxA.

¹⁰ ICC-02/04-01/15-1107, para. 9. The Defence notes that some of the 20 people have not been interviewed by the Defence, only contacted for the purpose of setting up an interview. Furthermore, more names might be added if Defence investigations lead to new persons.

¹¹ ICC-02/04-01/15-1106-Conf-Anx.

¹² ICC-02/04-01/15-1106-Conf-Anx.

¹³ ICC-02/04-01/15-1106, para. 4.

¹⁴ Emphasis added.

16. Pursuant to Regulation 23 *bis*(3), a “Chamber may also re-classify a document upon request by any other participant or on its own motion.”
17. On 13 October 2017, the Chamber ordered the submission of preliminary lists of witnesses from the Defence, CLRV and LRV to be filed by 14 December 2017.¹⁵ The Chamber noted that, “redacting information from the other participants in these preliminary lists may also be done *if strictly necessary*.”¹⁶
18. In relation to placing identification codes instead of witness identities, the Defence notes that Trial Chamber VII dealt with a similar issue relating to identification codes instead of names in a provisional list of witnesses.¹⁷ In that case, Trial Chamber VII order the *Arido* Defence Team to provide the identities of the witnesses forthwith.¹⁸
- b) *The failure of the CLRV and LRV to provide witness identities of its potential witness in the preliminary lists of witnesses violates Decision 1021.*
19. The Defence asserts that the failure of the CLRV and LRV to include the identities of its potential witnesses in the preliminary lists of witnesses violates Decision 1021. The CLRV and LRV have not provided reasons as to why the withholding of the identities of the witnesses is strictly necessary.
20. The CLRV states that for the expert witnesses, their contracts are being finalised and that she shall be able to disclose their identities by 2 February 2018.¹⁹ From the face of the CLRV’s filing, she knows who she intends to ask for permission to call as expert witnesses, and she should be required to disclose their names immediately, regardless of whether contract negotiations have concluded. The Defence retorts that this reasoning fails the standard outlined in Decision 1021.
21. Furthermore, the CLRV has failed to disclose the identities of its three remaining witnesses, who are supposedly being searched for now. The Defence asserts that this failure to know which witnesses the CLRV will call as the remaining three can only

¹⁵ Decision 1021, para. 3.

¹⁶ Decision 1021, para. 3. [Emphasis added.]

¹⁷ ICC-01/05-01/13-1518, para. 19.

¹⁸ ICC-01/05-01/13-1518, para. 19.

¹⁹ ICC-02/04-01/15-1105-Conf, para. 9.

have come about from a lack of due diligence as the CLRV has full time support staff in Uganda.

22. Likewise, the LRV has failed to disclose the names of the pool of witnesses which it might call. Instead, it offered victim application numbers instead of identities. Whilst this more aligns to the spirit of Decision 1021, the Defence avers that it does not meet the standard outlined in Decision 1021 for withholding information from the Defence.
23. The Defence distinguishes this act by the LRV from a similar act by some of the defence teams in the *Bemba et al case*. In the *Bemba et al case*, it was the Defence which requested the use of pseudonyms instead of identities in its preliminary lists as it had not decided which witnesses to call.²⁰ The Defence is a party to the proceeding and not a participant. The Defence has the right to present witnesses, which the CLRV and LRV do not. In the case at bar, the disclosure of the names of witnesses limits the amount of time the Defence may investigate the witnesses, and restricts the Defence's ability to respond to the upcoming submissions on 2 February 2018 by the CLRV and LRV. Instead of having nearly two months to investigate the potential witnesses, the Defence shall have 10 days to investigate, research and respond to the 2 February 2018 submissions of the CLRV and LRV. This violates Mr Ognwen's right pursuant to Article 67(1)(b) of the Rome Statute.
24. Finally, the Defence notes that the Prosecution is able to determine the entire witness pool given by the LRV as the Prosecution has the unredacted copies of the victim applications.
25. For the abovementioned reasons, the Defence respectfully requests the Chamber to order the CLRV and LRV to disclose to the Defence and Prosecution the names of the persons listed in ICC-02/04-01/15-1106-Conf-Anx and the persons described in ICC-02/04-01/15-1105-Conf on or before 16h00 on 20 December 2017 because the submissions as filed violate Decision 1021.

²⁰ ICC-01/05-01/13-1518, para. 19.

c) *The failure of the CLRV and LRV to disclose the identities of its potential witnesses violates Mr Ongwen's rights pursuant to Articles 67(1)(b) and 67(1)(c) of the Rome Statute.*

26. The failure of the CLRV and LRV to disclose the identities of its witnesses to the Defence violates Mr Ongwen's rights "to have adequate time and facilities for the preparation of the defence..." and "to be tried without undue delay."
27. As the LRV noted, the scheduling for the cases-in-chief for the CLRV and LRV are not known,²¹ and the Defence cannot be assured at this time that there will be adequate time and facilities for the preparation of its material for the witnesses the CLRV and LRV intend to call. The Defence emphasises that the early disclosure of the identities of the witnesses in the preliminary list of witnesses ensures that, in this respect, Article 67(1)(b) is respected. As the submissions currently sit, the Defence knows two names of a potential 15 witnesses between the CLRV and LRV. Nine of those unknown witnesses apparently reside in Uganda.
28. The Defence is currently undertaking a mission in Northern Uganda. Its resources are focused on the preparation of the case as a whole. The Defence expected to receive names of persons from the CLRV and LRV, and to use the last few days before the holiday season to investigate some of these proposed witnesses. Similarly, the Defence is requesting another field mission just after the new year, but before the next block of Prosecution witnesses. The Defence is now and will be denied the chance to investigate these potential witnesses.
29. It is both a denial of Mr Ongwen's rights, and indirectly, wasteful mismanagement of the Court's time. Further resources from the Registrar will need to be allocated to the Defence to obviate this problem, and additional time will be needed by the Defence to investigate witness stories that were to be investigated in the current and upcoming meeting. Contrary to what the CLRV and LRV have written, these actions are **against** the expeditious conduct of the trial.
30. For the abovementioned reasons, the Defence respectfully requests the Chamber to order the CLRV and LRV to disclose to the Defence and Prosecution the names of the persons listed in ICC-02/04-01/15-1106-Conf-Anx and the persons described in ICC-

²¹ ICC-02/04-01/15-1106, para. 14.

02/04-01/15-1105-Conf on or before 16h00 on 20 December 2017 because the submissions as filed violate Mr Ongwen's rights under Articles 67(1)(b) and (c) of the Rome Statute.

d) The failure of the CLRV and LRV to disclose the Identities of its 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.

31. Mr Ongwen has the right to receive disclosure from the Prosecution. By failing to supply the Defence with the names of the persons the CLRV proposes to call as witnesses, and by the LRV neglecting to give the names of its potential witnesses to the Defence, the Prosecution is unable to fulfil its duty under the Rome Statute and Rules of Procedure and Evidence.
32. Metadata in the evidence links documents to witnesses. Since the names of witnesses, save for two proposed experts of the LRV, are not known to the Defence, the Prosecution cannot properly re-disclose metadata linking it to witnesses called by the CLRV and LRV, or search its database for undisclosed documents which might not have fallen under its disclosure obligations before, but would now. It is also possible that the Prosecution has met some of these potential witnesses, and might have reports or other documents which must need to be disclosed because these persons are testifying.
33. Furthermore, as the names of the potential witnesses for the LRV are known to the Prosecution, but not the Defence, the Prosecution is forbidden to link documents to the potential witnesses and disclose the new metadata to the Defence.
34. For the abovementioned reasons, the Defence respectfully requests the Chamber to order the CLRV and LRV to disclose the names to the Defence and Prosecution of the persons listed in ICC-02/04-01/15-1106-Conf-Anx and the persons described in ICC-02/04-01/15-1105-Conf on or before 16h00 on 20 December 2017 because the submissions as filed violate Mr Ongwen's rights under Articles 61(3)(b) and 67(2) of the Rome Statute and Rule 77 of the Rules of Procedure and Evidence.

e) *The Defence requests the reclassification of ICC-02/04-01/15-1105-Conf and this request.*

35. The Defence requests the reclassification of ICC-02/05-01/15-1105-Conf and this request to public. The Defence sees no reason, save maybe for one, why the CLRV classified her submission confidential.
36. The Defence's only hesitation for the reclassification of the CLRV's submission is the description given for the third fact witness. The specification of the first two facts witnesses is broad enough, and enough persons have gone through those places, that merely mentioning the places is not enough to identify the first two potential witnesses. The third description might, but the Defence argues that this witness's position would require public testimony because of the position the person holds. Without the person testifying in public, the whole of the witness's testimony would have to be in private session.
37. Should the Chamber choose the latter, the Defence requests the Chamber to order the CLRV to file a public redacted version immediately, redacting only the identifying information of the third fact witness. The Defence would still request this document to be reclassified as public.

f) *Final Observations*

38. The Defence has concern with paragraph 12 of the LRV's filing and paragraph 4 of the CLRV's filing.
39. Whilst it is proper and an efficient use of the their and the Court's time to consult about the presentation of their cases-in-chief, the Defence notes with circumspect that only two proposed experts from the LRV were named, and that both the CLRV and LRV stated that their respective teams would provide final lists by 2 February 2018. Whilst the Defence is not accusing either participant of acting in bad faith, the similarities in which both participants submitted its respective list of witnesses gives the appearance of bad faith in disclosing the names of their potential witnesses in advance of the final date.

40. The Defence of course does not ask for reprimands, but merely draws this oddity to the attention of the Chamber, and notes that this is merely one piece of the proverbial pie when deciding this request.

V. RELIEF

41. The Defence request the Chamber to order:
- a. The CLRV to disclose by 20 December 2017 the names of persons she currently intends to call as witnesses during her case-in-chief;
 - b. Filing ICC-02/04-01/15-1105-Conf be reclassified as public, or in the alternative, a public redacted version as written in paragraph 37 above be filed immediately;
 - c. The LRV to disclose by 20 December 2017 the names of the 13 persons within their witness pool listed in ICC-02/04-01/15-1106-Conf-Anx; and
 - d. This filing be reclassified as public.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 15th day of December, 2017

At Gulu, Uganda