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Date: 14 June 2016

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

Public

Request for leave to reply to the “Defence Response to the Observations on the Organisation of the Legal Representation of the Victims”

Source: Victims’ Legal Representatives

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

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I. LEGAL BASIS

1. Pursuant to regulation 24(5) of the Regulations of the Court, the Legal Representatives of Victims (the “Legal Representatives”) hereby request leave to reply to the Defence Response to the Observations on the Organisation of the Legal Representation of the Victims¹ (the “Defence Response”).
2. The Legal Representatives respectfully submit that the possibility to seek leave to reply under regulation 24(5) is open not only to parties but to all “participants.” Leave to reply has previously been granted to participating victims.²

II. REQUIREMENTS FOR LEAVE TO REPLY

3. The Regulations of the Court are silent on the requirements for leave to reply, however previous Chambers have granted leave where “good cause” has been shown,³ including where the arguments included in a response could not have been foreseen,⁴ and/or where a reply would assist the Chamber.⁵ Good cause may also be shown where the issues at stake are novel or important.⁶ For the reasons

¹ *Prosecutor v. Dominic Ongwen*, Defence Response to the Observations on the Organisation of the Legal Representation of the Victims, ICC-02/04-01/15-463, 13 June 2016.

² *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Request of the Legal Representative of Victim a/0333/07 for Leave to Reply the Prosecution and the Defence’s Observations on the Anonymity and Modalities of Participation in the Proceedings, ICC-01/04-01/07-434, 23 April 2008; *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on request of the Legal Representative of Victims for leave to reply, ICC-01/09-02/11-979, 26 November 2014.

³ *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Defence’s Request for Leave to Reply on the Motion for Provisional Release dated 24 November 2008, ICC-01/05-01/08-294, 27 November 2008, para.3; *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on “Narcisse Arido’s request for leave to reply to the ‘Prosecution’s Response to Arido’s request for Interim Release’” ICC-01/05-01/13-543, 7 July 2014, p3.

⁴ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the request of Abdullah Al-Senussi for leave to reply, ICC-01/11-01/11-324, 26 April 2013, para.11; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on Mr Laurent Gbagbo’s request for leave to reply, ICC-02/11-01/15-284, 9 October 2015, para. 11.

⁵ *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on the defence request for leave to reply, ICC-02/05-03/09-147, 11 May 2011, para.5; *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on the prosecution request for leave to reply, ICC-01/09-02/11-530, 14 November 2012, para.5.

⁶ *Prosecutor v. Callixte Mbarushimana*, Decision on the Prosecution’s request for leave to reply to the “Defence Response to Prosecution’s Request for the Review of Potentially Privileged Material”, ICC-01/04-01/10-61, 24 February 2011, pp3-4; *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on request of the Legal Representative of Victims for leave to reply, ICC-01/09-02/11-979, 26 November 2014.

elaborated below the Legal Representatives' proposed reply would meet these criteria.

4. The Legal Representatives additionally note that leave to reply would not unnecessarily delay the proceedings. A reply could be filed by 17 June 2016.

III. ISSUES TO BE ADDRESSED IN THE REQUESTED REPLY

5. If granted leave, the Legal Representatives would, in their reply:
 - (a) Inform the Chamber of the specific grave concerns that victims have expressed upon learning of the Defence Response.
 - (b) Explain why, far from supporting the OPCV observations (as it purports to do), the Defence Request goes beyond replying to the observations of the participants and expresses a specific preference regarding the individuals they would want to represent participating victims. In doing so the Defence propose an approach which would constitute an unprecedented and extremely problematic departure from the Court's legal framework and established practice. If granted leave to reply the Legal Representatives will provide the Chamber with an analysis of the Court's jurisprudence and the drafting history of the Court's legal texts regarding the relevant question: namely, whether the *defence* may choose or propose a common legal representative for victims. Given the complexity of the jurisprudence on victims' legal representation before the Court to date, the Legal Representatives respectfully submit that the Chamber would benefit from submissions on this issue.
 - (c) Address the clearly subjective comments contained in paragraph 3 of the Defence Response which, without any substantiation, imply that the OPCV is *more* qualified to represent victims before the Court than the Legal Representatives and their team. If granted leave to reply the Legal Representatives will explain why these are not questions for the Defence or even the Chamber to assess at this time (least of all in the absence of

supporting information) but rather matters for determination by the Registry during the course of a transparent and competitive recruitment process.

(d) Correct the misstatement of fact contained in paragraph 6 of the Defence Response that OPCV's Field Counsel "underwent a competitive hiring process". In the absence of submissions from the Registry, the Legal Representatives believe the Chamber would be assisted by accurate information on this matter, both concerning the process involved in the Field Counsel's selection and that which is undertaken according to the Registry's established practice.

(e) Correct the Defence Request's mischaracterisation of the Legal Representatives' Observations on the organisation of victims' legal representation⁷ (the "Legal Representatives' Observations") as a re-litigation of an issue already determined by the Single Judge. The Legal Representatives deliberately did not address the question of legal aid in their observations, since this matter has been resolved by the Single Judge. The Chamber may therefore be assisted by legal submissions demonstrating why the Legal Representatives' Observations in fact accept and follow the Single Judge's decision of 26 May 2016⁸, rather than seeking to reopen the matters decided therein.

6. For the above reasons the Legal Representatives believe that the Chamber would be assisted by a reply on these questions.
7. The Legal Representatives also respectfully submit that the above matters are not questions which could have been foreseen by them prior to their filing of the Legal Representatives' Observations. To the best of the Legal Representatives' knowledge, during the approximately ten years during which victims have participated before this Court, no defence team has ever intervened in order to

⁷ *Prosecutor v. Dominic Ongwen*, Observations on the organisation of victims' legal representation, ICC-02/04-01/15-455, 6 June 2016.

⁸ *Prosecutor v. Dominic Ongwen*, Decision on the "Request for a determination concerning legal aid" submitted by the legal representatives of victims, ICC-02/04-01/15-445, 26 May 2016.

specifically identify a preferred team or individual to act as common legal representative of victims, and to submit that this Defence preference should supplant the expressly stated preferences of the victims themselves. Given the clear terms of rule 90(1), (2) and (3) of the Rules of Procedure and Evidence, the Legal Representatives believe that the Defence Response is so entirely without legal foundation as to have been unforeseeable.

8. Finally, the Legal Representatives submit that “good cause” for a reply is supported by the fact that the matters arising are of the most fundamental importance to their clients’ right to participate in ICC proceedings, as enshrined in article 68(3) of the Statute. Moreover the Legal Representatives’ clients are entirely alone in the proceedings in having an interest on this matter, and therefore if leave to reply is not granted, the Chamber will not be assisted by submissions from any other participant.
9. For the same reason, the Legal Representatives respectfully submit that, should the Chamber be minded to refuse leave to reply, unsupported assertions of fact contained in the Defence Response should not be relied on without first seeking verification of those matters from the Registry.

IV. CONCLUSION

10. The Legal Representatives respectfully request the Chamber to grant them leave to reply to the Defence Response by 17 June 2016.

Respectfully submitted,



Joseph Akwenyu Manoba



Francisco Cox

Dated this 14th day of June 2016
At Kampala, Uganda and Santiago, Chile