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Date: **12 June 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*

Public
with Confidential *Ex Parte* Annex available to the Prosecution, VWS, the Legal Representatives of Victims and OPCV

Legal Representatives of Victims' Response to the Prosecution's request to disclose lesser redacted versions of 43 victims' applications

Source: **Legal Representatives of Victims**

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

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Legal Representatives of the Victims Mr Joseph Akwenyu Manoba Mr Francisco Cox	**Legal Representatives of the Applicants**
Unrepresented Victims	**Unrepresented Applicants (Participation/Reparation)**
The Office of Public Counsel for Victims Ms Paolina Massidda	**The Office of Public Counsel for the Defence**
States' Representatives	**Amicus Curiae**

REGISTRY

Registrar	**Counsel Support Section**
Victims and Witnesses Unit	**Detention Section**
Victims Participation and Reparations Section	**Other**

I. INTRODUCTION

1. This filing is made pursuant to Regulation 24(2) of the Regulations of the Court, in response to the Prosecution's request to disclose lesser redacted versions of 43 victims' applications of 9 June 2017 ("Prosecution Request").[1] Disclosure is said to be requested because the application forms were submitted by persons believed to be family members of victims who have the dual status of participating victim and Prosecution witnesses ("dual status victims").

2. The Legal Representatives of Victims ("LRVs") oppose the Prosecution Request in its entirety as unfounded in law. In the alternative, if the Chamber agrees with the Prosecution in principle, the LRVs submit that any disclosure obligation must be carefully limited in terms of scope and procedure.

3. Regulation 34(b) of the Regulations of the Court permits a response to be filed within 10 days. However several of the 43 application forms which are covered by the Prosecution Request concern dual status victims whose testimony is scheduled for the weeks beginning 12 and 19 June. Decisions on the disclosure of these forms will therefore need to be taken before the exhaustion of the timeframes set out in Regulation 34(b) and the LRVs note the Chamber's deadline for submissions on those application forms to be sent by 1pm on 12 June 2017.[2] These complete submissions in response to the Prosecution Request have been prepared earlier than the 10 day deadline in the hope of avoiding a continued piecemeal approach uninformed by broader contextual and legal issues. Regrettably, the haste required has not permitted the preparation of joint submissions with the Office of Public Counsel for Victims ("OPCV") on this question, although informal discussions have indicated that a common approach is held.

[1] Prosecution's request to disclose lesser redacted versions of 43 victims' applications, ICC-02/04-01/15-862, 9 June 2017.
[2] Email from Trial Chamber IX, 12 June 2017, sent at 09:33.

4. The Annex to this filing contains the LRVs' position regarding the individuals said to be linked to P-0269 and P-0252. The Annex has been drafted using as little confidential information as possible in order to facilitate the production of a redacted version should that become appropriate, but in its present form the Annex nonetheless contains information (particularly the alleged relationships to dual status victims) which may reveal the identity of the individuals involved to the Defence. This would defeat the purpose of the filing. Should the Chamber so order, a confidential redacted version can be filed.

II. PROCEDURAL HISTORY

5. On 4 March 2015 the then Single Judge of Pre-Trial Chamber II issued the Decision Establishing Principles on the Victims' Application Process.[3] It authorised the redaction of victims' identities from application forms sent to the Defence, while the Prosecution would receive unredacted versions of the forms.[4]

6. On 3 September 2015 the new Single Judge of Pre-Trial Chamber II issued the Decision concerning the procedure for admission of victims to participate in the proceedings in the present case.[5] It maintained the system of redactions previously established.[6]

7. On 27 November 2015 and 24 December 2015, the Single Judge of Pre-Trial Chamber II issued decisions admitting victims to participate in the proceedings.[7] For victims granted participating status, he ordered the legal representatives to consult their clients and report back on whether victim identities could be

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[3] Decision Establishing Principles on the Victims' Application Process, ICC-02/04-01/15-205, 4 March 2015.
[4] *Ibid*. paras 32-35.
[5] Decision concerning the procedure for admission of victims to participate in the proceedings in the present case, ICC-02/04-01/15-299, 3 September 2015.
[6] *Ibid.* para.6.
[7] Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15-350, 27 November 2015; Second decision on contested victims' applications for participation and legal representation of victims, ICC-02/04-01/15-384, 24 December 2015.

disclosed to the Defence.[8] However in respect of dual status victims the Single Judge immediately ordered the reclassification of unredacted application forms so as to grant access to the Defence.[9]

8. Both teams of victims' legal representatives made submissions before Pre-Trial Chamber II and then before Trial Chamber IX requesting that the anonymity of victims *vis-à-vis* the Defence continue to apply as the general rule.[10] The Defence requested Trial Chamber IX to order the disclosure of victims' identities.[11]

9. On 17 June 2016, the Single Judge of Trial Chamber IX issued the Decision on Disclosure of Victim's Identities.[12] It maintained the general rule of anonymity of participating victims *vis-à-vis* the Defence, but identified circumstances in which a particular victim's identity would need to be disclosed to the Defence: namely where the victim is called to appear as a witness, or where the victim presents his or her views and concerns directly before the Chamber.[13]

10. Through a series of email decisions Trial Chamber IX established a system for the disclosure of the application forms submitted by dual status victims.[14] It ordered the legal representatives or participating victims to propose any redactions which

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[8] Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15-350, 27 November 2015, para.36; Second decision on contested victims' applications for participation and legal representation of victims, ICC-02/04-01/15-384, 24 December 2015, para.23.
[9] Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15-350, 27 November 2015, para.36 and p21; Second decision on contested victims' applications for participation and legal representation of victims, ICC-02/04-01/15-384, 24 December 2015, para. 23 and p24.
[10] Communication to the Chamber pursuant to the Chamber Decisions of 27th November and 15th December 2015, ICC-02/04-01/15-395, 24 December 2015 (notified on 8 January 2016); Communication of the Common Legal Representative in compliance with the Decisions dated 27 November and 24 December 2015, ICC-02/04-01/15-400, 14 January 2016; Corrected Version of Submission on Items Defined for the Status Conference on 23 May 2016, ICC-02/04-01/15-433-Corr, 13 May 2016, paras 30-31; Joint Submissions on the non-disclosure of victims' identities, ICC-02/04-01/15-451, 31 May 2016.
[11] Public Redacted Version of "Defence Submissions in Advance of the 23 May 2016 Status Conference", ICC-02/04-01/15-439-Red2, 18 May 2016, para. 23 , Public Redacted Version of "Defence Response to 'Joint Submissions on the non-disclosure of victims' identities'", ICC-02/04-01/15-459-Red, 7 June 2016.
[12] Decision on Disclosure of Victims' Identities, ICC-02/04-01/15-471, 17 June 2016.
[13] *Ibid.* para.14.
[14] Annexes 36 and 41 to Registry Report implementing the "Decision on Publicity of Case Record", ICC-02/04-01/15-700, ICC-02/04-01/15-780-Anx36 and ICC-02/04-01/15-780-Anx41, 22 March 2017.

would need to be maintained before disclosure to the Defence. It then approved redactions proposed by the legal representatives in order to protect the identities of third parties and victims' current places of residence, and ordered the Registry to file lesser redacted versions available to the Defence.

11. On 31 May 2017 at 9:27pm the Prosecution emailed Trial Chamber IX requesting permission to disclose to the defence lesser redacted versions of three applications forms of individuals believed to be family members of two dual status victims, one of whom had testified already and one of whom was due to begin her testimony the following day.[15] The Prosecution requested that the Chamber hear oral submissions on the matter prior to the commencement of evidence the following morning.

12. On 1 June 2017 at 4.17am, 7.00am and 8.48am respectively the Defence, OPCV and the LRVs responded to the Prosecution Request, also by email. The Defence indicated that it did not oppose the Request.[16] The OPCV and LRVs indicated that they were in a position to present their submissions at that morning's hearing.[17]

13. On 1 June 2017 at 9.22am the Trial Chamber issued a decision by email stating that it did not require submissions, and granting the Prosecution's request to disclose lesser redacted versions of the applications in question.[18] The Chamber also indicated that "[a]n application of a more general nature can be made subsequently."

14. Following further urgent requests relating to P-0009 and P-0280, which were not opposed by the respective legal representatives in light of consent provided and/or the need to avoid delaying proceedings, the Chamber approved disclosure

[15] Email from Senior Trial Lawyer, 31 May 2017, sent at 21:27. (This email communication and those which followed are yet to be field in the record of the case pursuant to the Chamber's order in decision ICC-02/04-01/15-700.)
[16] Email from Legal Assistant for the Defence, 1 June 2017, sent at 04:17.
[17] Email from Counsel for the OPCV, 1 June 2017, sent at 07:00; Email from Legal Assistant for the LRVs, 1 June 2017, sent at 08:48.
[18] Email from Trial Chamber IX, 1 June 2017, sent at 09:22.

of two more victims' applications in lesser redacted form on 6 and 8 June respectively.[19]

15. On 9 June 2017 the Prosecution Request was filed.

III. SUBMISSIONS REGARDING GENERAL APPROACH

Preliminary matters

16. As the procedural history above indicates, an initial decision on the disclosure of three victims' applications was taken by the Chamber on 1 June 2017 in the absence of submissions from the legal representatives of the victims in question. The decision was made in response to an email request from the Prosecution which indicated that the disclosure was supported by a confidential Appeals Chamber decision in the *Gbagbo and Blé Goudé* case "and the practices adopted in other ongoing trials."[20] Before turning to the Prosecution Request itself the LRVs wish to address the Chamber on procedural questions relating to these events.

17. First, the LRVs are concerned by the Prosecution's reliance, in its 31 May email, on a decision of the Appeals Chamber which is classified "confidential" and in respect of which no public redacted version has been issued. Regulation 23*bis* of the Regulations of the Court requires that document marked "confidential" shall be treated according to that classification throughout the proceedings. The only participants in the present case with access to that decision are those which happen to also be involved in the *Gbagbo and Blé Goudé* case: namely the Prosecution and the OPCV. Not only do the LRVs and the Defence not have access to that decision, neither does the Chamber. In this context no assistance could be rendered by the Prosecution's reference to the decision. The parties, participants and judges are not in a position to analyse the reasoning underpinning the decision and to identify whether it is relevant in the present case or should be distinguished. The Prosecution's reference to this decision was

[19] Email from Trial Chamber IX, 6 June 2017, sent at 10:02; Email from Trial Chamber IX, 8 June 2017, sent at 14:31.

[20] Email from Senior Trial Lawyer, 31 May 2017, sent at 21:27.

inappropriate and the Chamber should disregard it when determining this matter.

18. The LRVs are also concerned by the reference in the Prosecution's email to "the practices adopted in other ongoing trials." No detail has been provided as to the practice or trials referred to, either in the email itself or in the Prosecution Request. In fact, to the LRVs' knowledge, the practice proposed by the Prosecution has not been adopted in any case other than possibly that of *Gbagbo and Blé Goudé*.

19. Secondly, the LRVs wish to record their concern that they were not provided with an opportunity to make submissions on the disclosures requested in the Prosecution's 31 May email before the Chamber took a decision.

20. As a matter of principle the statutory scheme established by the Court clearly intends that where a matter arises in proceedings which affects the personal interests of victims, the victims should be heard. This is the clear meaning of article 68(3). The principle is limited only by the rights of the accused and the imperative for a fair and impartial trial.

21. More specifically, where protective measures are requested in respect of a particular victim, Rule 87(2)(c) of the Rules of Procedure and Evidence ("RPE") requires that the request be served on the victim's legal representative, who "shall have the opportunity to respond." If the RPE grants this right to victims where a Chamber is seized of a request to grant protective measures, it surely must also have been intended that the right pertains equally where the Chamber is asked to remove or vary protective measures previously granted to a victim.

22. In line with these principles the LRVs respectfully urge the Chamber to ensure that they have an opportunity to be heard on matters of this nature in the future.

Legal basis for disclosure

23. Several chambers of the Court have been required to consider the extent to which Prosecution disclosure obligations might apply to applications for victim

participation which it has received through the process established by Rule 89(1) of the RPE. The case law supports an established principle which distinguishes between two categories of victims: dual status victims on the one hand, and all other participating victims on the other.

24. As regards dual status victims, it is well-established that their identities are to be made available to the defence. In the *Lubanga* case Trial Chamber I took the view that the application forms of this narrow category of individuals are subject to Prosecution disclosure obligations, although it did not clearly specify whether it had in mind Rule 76 (1) or Rule 77 of the RPE.[21] It has since become well-established at the Court that application forms from dual status victims are to be provided to the defence without redactions intended to protect the identity of the dual status victim.[22]

25. In contrast, chambers have repeatedly refused to apply prosecutorial disclosure obligations to victims' applications received from *non*-dual status victims.

26. In the Kenya cases Pre-Trial Chamber II held that the Prosecutor has an obligation to investigate both incriminating and potentially exculpatory material arising from victims' applications transmitted to it.[23] However it rejected the proposition that the Prosecution was obliged to disclose victim applications (or information contained therein) which might be considered potentially exculpatory. The Chamber considered that victim applications are "provided by the applicants to the Chamber only for the purpose of substantiating an application for

[21] *Prosecutor v Thomas Lubanga Dyilo*, Decision on defence application for disclosure of victims applications, ICC-01/04-01/06-1637, 21 January 2009, paras 12-13.
[22] See for example: *Prosecutor v Uhuru Muigai Kenyatta*, Order authorising disclosure of lesser redacted versions of victims' applications, ICC-01/09-02/11-710, 2 April 2013; *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Order authorising disclosure of lesser redacted versions of victims' applications, ICC-01/09-01/11-826, 24 July 2013; *Prosecutor v Bosco Ntaganda*, Decision on victims' participation in trial proceedings, ICC-01/04-02/06-449, 6 February 2015, para. 40; *Prosecutor v Laurent Gbagbo*, Decision on victim participation, ICC-02/11-01/11-800, 6 March 2015, para.56;
[23] *Prosecutor William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case, ICC-01/09-01/11-169, 8 July 2011, paras 9-11; *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case, ICC-01/09-02/11-164, paras 8-10.

participation." Instead, the victim applications could be used by the Prosecution as a basis for conducting investigations, the results of which would then become subject to disclosure. In support of this position Pre-Trial Chamber II drew support from a decision in the *Katanga* case, in which the Appeals Chamber held that the Prosecutor was bound to *investigate* information in victims' possession which might result in the gathering of potentially exculpatory and therefore disclosable material, but did *not* hold that victims' applications forms would *themselves* be disclosable.[24] Indeed, it is notable that although decisions in other cases (including the present one[25]) have also justified the provision of unredacted victim applications to the Prosecution by reference to the Prosecutor's obligations to investigate exculpatory material,[26] those chambers also did not require the Prosecutor to disclose forms which included potentially exculpatory material.

27. The Pre-Trial Chamber's reasoning in the Kenya cases extended beyond the Prosecutor's disclosure obligations in respect of potentially exculpatory material, and encompass *all* Prosecution disclosure obligations. The Pre-Trial Chamber held that victims' applications "can under no circumstances be considered as evidence subject to disclosure within the legal framework of the Court."[27]

28. None of the Court's (public[28]) jurisprudence extends specific disclosure obligations beyond dual status individuals. In respect of dual status victims none of the Court's (public) jurisprudence extends applicable disclosure obligations to the identities of persons close to them, such as their family members. This is

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[24] *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", ICC-01/04-01/07-2288, 16 July 2010, para.81.
[25] *Prosecutor v. Dominic Ongwen*, Decision Establishing Principles on the Victims' Application Process, ICC-02/0401/15-205, 4 March 2015, para 35.
[26] *Prosecutor v Laurent Gbagbo*, Second decision on issues related to the victims' application process, ICC-02/11-01/11-86, 5 April 2012, para. 42; *Prosecutor v Bosco Ntaganda*, Decision Establishing Principles on the Victims' Applications Process, ICC-01/04-02/06-67, 28 May 2013, para 44.
[27] *Prosecutor William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case, ICC-01/09-01/11-169, 8 July 2011, para. 9; *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case, ICC-01/09-02/11-164, para. 8.
[28] As noted above the LRVs are not privy to the confidential decision referred to in the Prosecution's email of 31 May 2017.

entirely consistent with the fact that the Court's case law treats those disclosure obligations not as following from the *contents* of the dual status person's application form, but from his or her personal status as a witness.

29. Indeed, far from requiring that the family members of dual status victims have their identities revealed to the defence, various chambers have specifically required that where lesser redacted versions of dual status victims' applications are disclosed to the defence, the identities of other persons at risk as a result of the activities of the Court must remain redacted. This has been specifically stated as including family members of the dual status victim where that person is being protected in his or her own right (as opposed to where the family member's identity was disclosed to prevent identification of the dual status victim).[29]

30. Against this background, it is surprising that the Prosecution Request asserts that the 43 victims' application forms "fall within the rule 77 disclosure obligation." The only reason given in the Prosecution Request as to *why* Rule 77 obligations should be applied is the factual assertion that the 43 application forms were submitted by persons believed to be family members of dual status victims. However no explanation is given as to why Rule 77 is applicable to the identities of "family members" of dual status victims. No justification is provided as to why the Chamber should depart from the established case law referred to above which has consistently applied Prosecution disclosure obligations *only* in respect of dual status individuals themselves. Nor has the Prosecution explained how it proposes to define the concept of "family members" and therefore delimit this new disclosure obligation. No basis is given for treating these individuals' identities and their application forms as more material to the preparation of the defence than other victims' identities and forms.

31. The LRVs are conscious that they do not have access to the confidential decision of the Appeals Chamber to which the Prosecution referred in its email of 31 May 2017. Nor would it be appropriate for the Prosecution to disclose the contents of

[29] *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Order authorising disclosure of lesser redacted versions of victims' applications, ICC-01/09-01/11-826, 24 July 2013, para.6 and footnote 13.

that decision while it remains confidential. However presumably if the Appeals Chamber has extended the Prosecution's disclosure obligations to encompass "family members" of dual status victims, the underlying reasoning for such a decision could nonetheless also be used as the basis for the Prosecution Request.

32. In the absence of any explanation given from the Prosecution as to why the Chamber should depart from the well-established practice of the Court, the LRVs request that the Chamber deny the Prosecution Request in its entirety.

Criteria for disclosure

33. *In the alternative*, and only to address the possibility that the Chamber may reject the LRVs' principle argument and find in favour of a disclosure obligation as proposed in the Prosecution Request, the LRVs submit that the concept of "family members" must be strictly defined so as to make the scope of any obligation clear.

34. The concept would need to be narrowly defined: the case law set out above has made clear the agreed intention of judges at this Court that the defence does not have a general entitlement to access victims' identities or their unredacted application forms. Without a clear and principled definition of "family members" there is a risk that categories of persons gradually further and further removed from dual status victims would have their application forms provided to the defence in lesser redacted form. This is particularly so in the Acholi and Lango communities where the four IDP camp attacks covered by this case took place. The LRVs have learned from their clients that in these communities family is often a flexible and imprecise concept. Clear distinctions between "immediate" and "extended" family, between biological and in-law relationships, and even between "family", "household" and "community" are frequently not drawn. Because of this, the need for the Prosecution to identify what it means by "family member" is particularly acute. In the absence of a clear definition of how "family members" differ materially from any other members of a dual status victim's community, the Prosecution's approach could require the disclosure of lesser redacted versions a very large proportion of the thousands of application forms.

Aside from requiring significant time and resources to implement, this would clearly depart from the Chamber's ruling in Decision on Disclosure of Victim's Identities, which clearly intended anonymity *vis-à-vis* the Defence to be the general rule from which exceptions were permissible, rather than vice-versa.[30]

35. Without knowing the legal basis upon which disclosure is considered necessary it is difficult to identify an appropriate definition of "family members". However the LRVs have sought to identify some possible bases on which a category of sufficient proximity to a dual status victim and that person's testimony could be identified, in the event that the Chamber considers that the applications of the persons closest to a dual status victim should be disclosed.

36. The LRVs emphasize that the following criteria should be applied *cumulatively* to ensure that unnecessary and unjustified removals of protective measures do not occur.

(a) *Verified first-degree family relationship at the time of the relevant event*

37. The LRVs propose that, if accepted, the Prosecution's proposed category of disclosable victim identities should be limited to persons who have a first-degree family relationship with the dual status victim. This would encompass first degree blood relationships: mother, father, sister, brother, daughter, and son. It would also encompass the dual status victim's spouse(s).

38. The LRVs propose that this criteria be applied as at the time of the event(s) which are the subject of the dual status victim's testimony and the family member's application form. For example, where two individuals did not know each other before 2005 but have since met and married, the LRVs do not consider that this criteria would be met.

39. The LRVs also note that great care must be taken in identifying two individuals from the affected communities as family members. Many individuals bear the same or very similar names, and it is therefore essential that assumptions about

[30] Decision on Disclosure of Victims' Identities, ICC-02/04-01/15-471, 17 June 2016.

family relationship are not made on the basis of names alone. This is among the reasons why careful procedures, involving verification by legal representatives, would also be required if the Chamber were to accept the proposed interpretation of disclosure obligations argued by the Prosecution (as explained further below).

(b) *Family member mentioned in the statement of the dual status victim*

40. A further test of whether the family member is sufficiently proximate to the dual status victim and his or her account of matters relevant to the case is whether the latter's witness statement(s) make mention of the family member. Where a family member was living in close circumstances to the dual status victim and was also present at the time of the LRA attack or abduction which forms the subject of his or he account, it can be expected that the Prosecution's witness statement(s) will have captured this information.

(c) *Family member witnessed and describes relevant events*

41. Finally, the Chamber should only consider disclosing the application forms of family members where it is clear that those persons witnessed and can describe the key events covered by the dual status victims' testimony. This could be made clear either by the dual status victim's witness statements or by either person's application form. For example, where a close family member was absent from the camp at the time of the attack in question, or where a child of the dual status victim was an infant at the time of the attack and only knows details of it from community retelling, these individuals' accounts and identities are of minimal value to the Defence. Any possible value would be insufficient to outweigh the imperative to ensure protection and well-being under article 68(1) of the Statute.

Procedure for disclosure

42. In the event that the Chamber did approve the approach proposed by the Prosecution, it would also be vital for a clear procedure to be in place for the disclosure of lesser redacted versions of application forms. The LRVs propose that this be based on the procedure adopted by the Chamber for the disclosure of dual

status victims' forms. According to that procedure notice is first given to the relevant legal representative who (a) confirms with the dual status victim whether in-court protective measures are still requested; and (b) arranges redactions in collaboration with the Victims Participation and Reparations Section, in conformity with principles approved by the Chamber.

43. In respect of family members the following steps would be required before any disclosure:

(a) *Verifying criteria*

44. Whatever the scope or criteria set by the Chamber as defining the category of disclosable applications, it would be essential that the LRVs have a chance to verify that a given victim falls within those criteria before his or her application form is disclosed to the defence.

45. The most compelling reason for this has already been alluded to: identifying individuals based only on their name is difficult or impossible in the affected communities. Where the Prosecution has identified a person as a family member based only on names there is a real risk of mistaken identity unless further steps are taken by the LRV in the community to verify identity.

46. Similarly, the LRVs have experienced instances in the communities of persons referring to each other in a way which suggests a particular type of family relationship although that relationship does not exist in a biological or legal sense. An example of this would be a woman referring to a person as her "son" although strictly speaking he is in fact the biological son of her sister and therefore her biological "nephew". The use of familial terminology is not always confined to persons who are close relatives and may sometimes be used in respect of neighbours or other close community members. It is therefore necessary to verify familial relationships referred to in witness statements, and even more so for those suggested by application forms since these are usually completed in a less rigorous manner.

47. Beyond these specific challenges, it is conceivable that in many cases the LRVs will be privy to information about victims and their families which are not known to the Prosecution. Other cases may therefore arise in which the LRVs are better placed than the Prosecution to confirm whether or not criteria are met.

(b) *Confirming that the family member knows of the dual status victim's role as a witness*

48. Ideally, when informing a victim of the proposal to provide his or her application form to the defence (see (c) below) the LRV would explain the reason for that disclosure. However the LRVs are aware that some individuals will have kept their status as Prosecution witnesses a secret. In some instances individuals do not even inform their immediate family members that they are a witness at the Court. Inadvertently revealing this fact to a family member would have a number of very undesirable effects. It could put at risk the secrecy of the person's status as a witness; it would undermine the relationship of confidence between the client and legal representative; and it may lead to breakdowns in family relationships. Caution is therefore required in all cases. For this reason the LRVs wish to ensure before broaching this subject with any family member that the individual is aware of the dual status victim's role as a prosecution witness. This should be done by speaking with the dual status person him or herself.

(c) *Informing the family member of proposed disclosure to the defence*

49. The victim whose application is proposed to be disclosed to the defence in latter redacted form should be made aware of this before the disclosure happens. This is on the one hand a matter of courtesy and respect. However as a practical matter it also provides the individual with an opportunity to raise any specific reasons for the maintenance of protective measures which might not have previously been brought to the attention of the legal representatives, the Registry or the Chamber. In case where serious protection issues are raised there will thus still be an opportunity for this information to be provided to the Victims and Witnesses Section ("VWS") and the Chamber before any disclosure. If necessary a security assessment could be carried out by the VWS.

(d) *Proposing a lesser redacted version*

50. Finally, as for dual status victims themselves, redactions should be maintained to protect the identities of certain third parties as well as information tending to reveal the current address of the person whose application form is disclosed. The victim's legal representative should have an opportunity to consider the proposed redactions before the disclosure occurs.

51. The LRVs consider that the above procedure should be followed in respect of every individual victim whose identity is sought to be disclosed by the Prosecution. However in addition to this individual-based process the LRVs consider that it may be necessary for the Chamber to request a general security assessment or an update on previous submissions from the VWS. This would particularly be required if the Chamber considers holding that a very broad basis for disclosure exists which may in theory cover all 43 individuals listed in the Annex to the Prosecution Request and potentially others. Such an assessment should not only encompass the potential risk to the victims in question, but the risk to the confidentiality of *witness* identities if such disclosure occurs, given that it will necessitate revealing Prosecution witness identities to a potentially large number of community members.

IV. SUBMISSIONS CONCERNING SPECIFIC VICTIMS

Family members of dual status victims in the present session

52. Four individuals have been identified by the Prosecution as related to dual status victims P-0269 and P-0252 who are shortly due to begin their testimony. The LRVs request the Chamber to reject the Prosecution Request in respect of these four application forms. Detailed submissions are set out in the Annex to this filing.

Other persons in the Prosecution's list of 43 victims

53. Of the other 39 individuals included in the Annex to the Prosecution Request the LRVs represent 28.

54. The LRV has undertaken preliminary reviews of the application forms of these individuals, as well as the relevant witness statements. For the reasons explained above, verification with the individuals involved is necessary, and completing this process for all individuals can be expected to take at least some weeks. However the LRVs preliminary comments based on a first review are set out here in general terms. It is believed that these may assist the Chamber in understanding the practical difficulties with the Prosecution Request. Further details can be provided should that be of assistance to the Chamber at this point.

55. First, a number of the individuals identified by the Prosecution are said to be members of the dual status victim's *extended* rather than immediate family (for example, a nephew, cousin, uncle or aunt). In at least two cases the LRVs have so far not been able to identify a familial relationship of any kind to the dual status victim.

56. In many cases it appears that the individual identified by the Prosecution would not have been in a position to witness the events described by the dual status victim. In some cases this is because it is evident that they were not together at the relevant time. In others it is because the individual in question was likely too young at the time to have any recollection of the events.

57. In a number of cases the individual in question is not mentioned in the dual status victim's witness statement.

58. In respect of these individuals the LRVs respectfully await the Chamber's decision regarding whether or not a disclosure obligation exists, and if so how its scope should be determined. If the Chamber finds that a disclosure obligation exists which may relate to some or all of these individuals the LRVs would then

propose to meet all relevant persons and provide detailed submissions as soon as practicable on whether disclosure is appropriate for these individuals.

V. CONCLUSIONS

59. The LRVs submit that the Prosecution Request has demonstrated no legal basis for the disclosure of victim application forms on the basis of a family relationship with a dual status victim. The Prosecution Request should be rejected for this reason.

60. In the alternative, if the Chamber considers that application forms of family members are disclosable to the Defence in lesser redacted form, there is a need for clear criteria to be identified as to the circumstances in which this is required. The LRV proposed the criteria set out above as cumulative requirements. Sufficient notice must be provided to legal representatives in order to carry out a number of steps before disclosure takes place.

61. Regarding the individuals identified in the Annex to the Prosecution Request, even if the Chamber finds that a legal basis for disclosure exists:

(a) The LRVs submit that since none of the individuals said to be related to P-0269 and P-0252 meet the proposed criteria set out above, none of these application forms should be disclosed to the Defence.

(b) Time will be required to verify information relating to the other 28 individuals in that list who are represented by the LRVs. This process can in any event more usefully be undertaken once the Chamber has ruled on the existence and parameters of any disclosure obligation.

Joseph Manoba Francisco Cox

Dated this 12th day of June 2017

At Kampala, Uganda and The Hague, The Netherlands