

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 31 January 2019

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

**CLRV's Response to "Defence Request for Orders to the Prosecution in Relation to
Information Concerning Mr Ongwen's Family"**

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The Common Legal Representative of Victims¹ (the "CLRv") opposes the "Defence Request for Orders to the Prosecution in Relation to Information Concerning Mr Ongwen's Family" (the "Request").²

2. The CLRv submits that the order requested is overly broad and unnecessary since (i) she has provided in the past relevant information to the Defence on a case-by-case basis when appropriate and within the limits of her obligations under the Code of Professional Conduct for Counsel (the "Code of Conduct");³ and (ii) the CLRv has no legal or professional obligation to automatically provide the kind of information identified in the Request to the Accused or his Defence without her clients' consent and in the absence of any statutory provision or specific order by the Chamber.

II. PROCEDURAL BACKGROUND

3. On 18 January 2019, the Defence filed the Request.⁴

4. On 30 January 2019, the Prosecution filed its Response to the Request.⁵

¹ See the "Decision on contested victims' applications for participation, legal representation of victims and their procedural rights" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, p. 19; the "Decision on issues concerning victims' participation" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; the "Second decision on contested victims' applications for participation and legal representation of victims" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-384, 24 December 2015, pp. 20-22; and the "Decision on the 'Request for a determination concerning legal aid' submitted by the legal representatives of victims" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-445, 26 May 2016, para. 13.

² See the "Defence Request for Orders to the Prosecution in Relation to Information Concerning Mr Ongwen's Family", No. ICC-02/04-01/15-1414-Conf, 18 January 2019 (the "Request").

³ See the Code of Professional Conduct for Counsel, Doc No. ICC-ASP/4/Res.1, adopted at the 3rd plenary meeting on 2 December 2005 ("the Code of Conduct").

⁴ See the Request, *supra* note 2.

⁵ See the "Prosecution Response to the 'Defence Request for Orders to the Prosecution in Relation to Information Concerning Mr Ongwen's Family'", No. ICC-02/04-01/15-1425-Conf, 30 January 2019 (the "Prosecution's Response").

III. CONFIDENTIALITY

5. The present submission is filed confidential following the classification chosen by the Defence. A public redacted version will be filed in due course.

IV. SUBMISSIONS

6. In the Request, the Defence alleges a delayed disclosure by the Prosecution of a note related to family members of the Accused and *"requests remedies to prevent future harm and prejudice to Mr Ongwen and his family. [...] [including] (a) an order for production of further information in relation to Mr Ongwen's family and (b) an order for the Prosecution and OPCV – who are de facto gate-keepers of information – to promptly provide information about the well-being of Mr Ongwen's family as soon as it comes into their possession or control."*⁶

7. The CLRV notes, at the outset, that the majority of the submissions in the Request exclusively concern the Prosecution as the Defence does not allege any wrongdoing or failure of some sort on the part of the CLRV in relation to the alleged harm and prejudice to Mr Ongwen. In fact, it acknowledges "[t]he OPCV's [...] 'ongoing commitment – known to the Defence – to assist as far as possible in matters related to Mr Ongwen's children'. The prior inter partes provision of information and prospective assistance is noted and the Defence is grateful for it".⁷

8. Yet, the Defence further asserts that *"the OPCV has not committed to bringing to the attention of the Defence all future information concerning the well-being or health of Mr Ongwen's children"*.⁸ Consequently, the Defence requests the Chamber to order the CLRV, along with the Prosecution, to: (i) promptly communicate *"all information*

⁶ See the Request, *supra* note 2, para. 2.

⁷ *Idem*, para. 73 (emphasis added).

⁸ *Ibidem* (emphasis added).

concerning the well-being of Mr Ongwen's family upon receiving it"; and (ii) "disclose any further information received concerning negative impacts upon the well-being of Mr Ongwen's children and information concerning family members whose lives may impact upon Mr Ongwen's children's welfare".⁹

9. Strikingly, the Defence fails to establish whether the CLRV is under any legal or professional obligation to provide said "all future information" concerning the well-being or health of Mr Ongwen's children. This formulation of the Request and the corresponding reliefs sought are too general and deprived of legal basis.

10. In fact, the CLRV has in the past communicated certain information concerning the well-being or health of Mr Ongwen's children when appropriate, and within the limits of Articles 9(2) and 29(2) of the Code of Conduct¹⁰.

11. The Defence now argues that "[w]hether framed as matter of 'adequate preparation for trial', 'production of evidence', 'other relevant matters', or ensuring the 'fairness or expeditiousness' of the trial, the requested orders to the OPCV will protect trial fairness and expeditiousness". However, the Defence fails to offer any explanation why and how these notions of fair trial abruptly oblige the CLRV to communicate "all future information" concerning the well-being or health of Mr Ongwen's children. Neither does the Defence provide even a single reference to any provision of the Rome Statute (the "Statute") or the Rules of the Procedure and Evidence (the "Rules") in support of its claims allegedly incumbent upon the CLRV.

12. Moreover, the information that the Defence seeks from the CLRV is not evidence *per se*. Pursuant to the Chamber's decisions on the modalities of victim

⁹ *Ibid.*, para. 82 (emphasis added).

¹⁰ See the Code of Conduct, *supra* note 3. Article 9(2) - "In his or her relations with the client, counsel shall take into account the client's personal circumstances and specific needs, in particular where counsel is representing victims of torture or of physical, psychological or sexual violence, or children, the elderly or the disabled." Article 29(2) - "Counsel shall have particular consideration for victims of torture or of physical, psychological or sexual violence, or children, the elderly or the disabled" (emphasis added).

participation,¹¹ the CLRV did not collect nor did she present evidence in order to incriminate or exonerate the Accused during the trial. Even if the Defence insists that the information sought qualifies as “either exculpatory pursuant to Article 67(2) or relevant to the preparation of the Defence pursuant to Rule 77”,¹² the CLRV does not have any obligation to provide such material to the Accused or his Defence. In particular, the CLRV recalls that the Appeals Chamber held that:

*“[...] neither the Statute nor the Rules of Procedure and Evidence expressly oblige the Victims to disclose exculpatory evidence to the accused. Rather, article 67 (2) of the Statute provides that the Prosecutor is responsible for disclosure of exculpatory evidence. In addition, rule 77 of the Rules of Procedure and Evidence provides that the Prosecutor shall disclose evidence which is material for the preparation of the defence, and evidence which will be used at trial. [...] As the Appeals Chamber has previously underscored: [...] the regime for disclosure contained in rules 76 to 84 of the Rules which sets out the specific obligations of the parties in this regard is a further indicator that the scheme is directed towards the parties and not victims. [...] The Appeals Chamber also recalls that the drafting history of the Statute supports the notion that the Prosecutor’s disclosure obligations to the accused are linked to the Prosecutor’s role in conducting the investigation, and stem from the Prosecutor’s obligation to investigate incriminating and exonerating circumstances equally under article 54 (1) (a) of the Statute. In contrast, [...] pursuant to article 68(3) of the Statute, the victims’ role in the proceedings is significantly more limited. The Appeals Chamber considers that imposing a general disclosure obligation on the victims to disclose evidence to the accused would disregard the limited role of the victims of presenting their views and concerns where their personal interests are affected. Bearing in mind the differing roles of the victims vis-à-vis the parties, the Appeals Chamber finds that it is inappropriate simply to extend the Prosecutor’s statutory obligations to victims participating in the proceedings. [...] Having concluded that there are no statutory obligations on participating victims to disclose all exculpatory information in their possession, and having found that internationally recognised human rights do not support Mr Katanga’s position that such an obligation generally must be imposed on participants in the proceedings, the Appeals Chamber finds that the Trial Chamber did not err in not imposing a general obligation on the Victims to disclose all evidence in their possession, whether incriminating or exculpatory”.*¹³

¹¹ See, for example, the “Preliminary Directions for any LRV or Defence Evidence Presentation (Trial Chamber IX), No. ICC-02/04-01/15-1021, 13 October 2017; and the “Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests” (Trial Chamber IX), No. ICC-02/04-01/15-1199-Conf, 6 March 2018.

¹² See the Request, *supra* note 2, para. 61.

¹³ See the “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’” (Appeals Chamber), No. ICC-01/04-01/07-2288 OA11, 16 July 2010, paras. 72 to 75 (footnotes omitted).

13. Furthermore, the information shared between the CLRV and her clients is essentially privileged in accordance with Rule 73 of the Rules and Article 69(5) of the Statute.¹⁴ The CLRV is further bound by the confidentiality of information concerning her clients pursuant to Article 8 of the Code of Conduct, according to which she is allowed to communicate certain information obtained through the exercise of her professional duties only where such communication is provided for by a particular provision of the Statute, the Rules, the Regulations of the Court or the Code of Conduct or ordered by the Court.¹⁵ Thus, depending on the nature of the information to be provided, the CLRV is often under the obligation to firstly seek consent of her clients before releasing it to the parties or third persons.¹⁶

14. Especially, since the individuals concerned in the Request are victims of sexual and gender based crimes allegedly committed by the Accused, the CLRV must be extra cautious to their vulnerability and consider the best interest of the child involved,¹⁷ particularly when assessing the opportunity to provide certain information in her possession by virtue of her mandate of legal representation. In fact, the privacy, dignity and well-being of the concerned individuals and of the minors involved must be carefully weighed.

¹⁴ See Rule 73 of the Rules - *"Privileged communications and information Without prejudice to article 67, paragraph 1 (b), communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure, unless: (a) The person consents in writing to such disclosure; or (b) The person voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure."*; Article 69(5) of the Rome Statute - *"The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence."*

¹⁵ See Article 8(4) of the Code of Conduct, *supra* note 3.

¹⁶ See Rule 73(1)(a) of the Rules.

¹⁷ See Articles 3 and 9 of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990. See also Article 4 of the African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990).

15. Therefore, the CLRV submits that any initial assessment or further decision on whether to provide certain information pertaining specifically to the well-being or health of Mr Ongwen's children to the Accused or his Defence must be made only: (i) on a case-by-case basis; (ii) with the consent of the dual status individual concerned; (iii) taking into account the best interests of the child concerned; and (iii) measured against specific requirements of the statutory provisions, including the Code of Conduct.

16. Consequently, the CLRV strongly rejects the notion argued by the Defence that the Chamber should make so called "catch-all" or an extremely general order on provision of "*all future information*" concerning the well-being or health of Mr Ongwen's children without any specific legal basis or consent given, either contemporaneously or in advance, by the concerned individuals.

17. The context of this case is exceptionally unique and thus warrants a custom-tailored approach when communicating personal information – possibly privileged – concerning dual status/vulnerable individuals to the Accused and his Defence. In this regard, the CLRV wishes to draw the Chamber's attention on the fact that, considering the unique and specific circumstances of this case as emphasized, even a consent given could be questioned due to the specific cultural background of the persons involved and the particular dynamic of their relationships.¹⁸ At this point in

¹⁸ See the testimony of Expert Witness of UGA-PCV-0001, Professor Reicherter, transcript of the hearing held on 14 May 2018, No. ICC-02/04-01/15-T-175-CONF-ENG ET, p. 31, lines 13 to 23: "[...] women who are rape survivors and women who have PTSD, whether or not they are well reintegrated into their community, often have a very different parenting style than people who do not have PTSD that are not rape survivors, right. So their parenting will often be quite different than someone who is non-traumatised and not a rape survivor. And now you are, in your question, you are adding an element of reintegration or stigmatisation around them that's imposed from their family or community which would make—which would emphasise that problem, make it much, much worse, make it much more difficult for a women to parent in a normal sense and would add risk for the dyad of mother/child and definitely add risk for that child's well-being going forward."; see also the testimony of Expert Witness UGA-PCV-0002, Professor Wessells, transcript of the hearing held on 15 May 2018, No. ICC-02/04-01/15-T-176-ENG ET WT, p. 23, lines 12-19: "So to put it bluntly, a mother who has suffered trauma or a father who has suffered trauma acts differently as a parent. So fathers tend to project and to send a lot of their own feelings onto their children. They behave differently. They don't create the boundaries and the spaces that ordinary parenting might do. And they model certain things. Someone who

time, the CLRV does not doubt the Accused's genuine paternal interests; however, in light of the very nature of his situation and the circumstances in which he became the father of the concerned children, care must be taken.¹⁹ In Acholi culture, the figure of the father is as such that,²⁰ especially in vulnerable family constellation, this factor may influence the relationships dynamic and hence, the possible genuineness of the consent.

18. Finally, the CLRV endorses the arguments submitted by the Prosecution in relation to the risk of witness interference and the need to preserve the integrity of the proceedings.²¹

has trauma may be distrustful of the world, they may see the world as a very dangerous place, and children pick this up. They learn from watching their parents. So they observe, they learn, they imitate the same patterns. So this is what we call an indirect modality of transmission." See also the Report of Expert Witness UGA-PCV-0001, Professor Reicherter, p. 6: "A growing body of inquiry, investigation, and literature with female survivors of rape and gender-based violence perpetrated by the LRA in Uganda has documented the presence of common outcomes of trauma and sexual assault known to the psychiatric community. Such findings include the presence of PTSD, depression, anxiety, and dissociation [...]; loss of perceived control [...]; shame [...]; increased sexual risk/vulnerability [...]; erosion of traditional cultural, parental, and familial protective factors [...]; and impaired psychosocial development and functioning of children who are products of rape/forced pregnancy [...]" p. 8: "Sexual violence causes terror and destabilization by undermining feelings of individual and community safety and security. [...] Feelings of danger, threat, and helplessness are not only experiences at the time of the rape itself and its immediate aftermath, but also resurface well into the future, even when objective safety is re-established [...]" p. 28: "Criminal law and transitional justice processes (as well as the bulk of scientific inquiry) have largely focused on the individual psychopathology associated with sexual violence, with less attention devoted to intergenerational and systematic effects thought to stem from rape and gender-based crimes. This is surprising given the common knowledge that internal working models of parenting are influenced by developmental experiences and are played out in interactions with one's own children. Findings indicate that sexual violence has long-term repercussions for mental health, parenting relationships, and child adjustment in the succeeding generation [...]" p. 29: "Parents who are depressed and suffering from PTSD have greater difficulty comforting their children, are more likely to ask children to take on an adult role, are less likely to bond well with their children, and are more likely to abuse and neglect their children [...]."

¹⁹ See the "Prosecution Response to the "Defence Request for Production of Correspondence Addressed to Mr Ongwen"", No. ICC-02/04-01/15-1424-Conf, 28 January 2019, paras. 2, 14 and 16.

²⁰ In the Acholi culture, traditionally, the husband and father is the undisputed head of the household. See the Report of Expert Witness UGA-PCV-0003, Professor Musisi, 10 March 2018, p. 16: "In humans, emotional expression is influenced by culture. How emotions are experienced, expressed, perceived, and regulated varies as a function of culturally sanctioned normative behavior in a particular society. Culture provides structure, guidelines, expectations, and rules to understand and interpret behaviors consequent to the expressed and experienced emotions to enhance relationships and avoid antagonisms or discord. Culture affects emotional display and cultures socialize children to regulate their emotions according to accepted (good) cultural norms and reject unacceptable (bad) behaviors for example in instances of success, discipline, kindness, cruelty etc. The Acholi are traditionally a proud people who [...] uphold [...] respect of elders, social order and morality"; p. 17: "Acholi patriarchy demands that the head of household is a man. He is obligated to provide for and protect the family and in turn must be obeyed by the wife and children."

²¹ See the Prosecution's Request, *supra* note 5, paras. 22 and 26.

19. The CLRV will continue to strictly abide by relevant statutory provisions and the Code of Conduct and will, when appropriate, with the consent of her clients and taking into account the best interest of the child concerned, provide information to the Defence following the practice put in place till now.

V. CONCLUSION

20. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Chamber to reject the Request.



Paolina Massidda
Principal Counsel

Dated this 31th day of January 2019

The Hague (The Netherlands)