

**Cour
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**International
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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 Leave to Reply to Prosecution and
CLRV Responses 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 "CLR") opposes the "Defence Request for Leave to Reply to Prosecution and CLR Responses to 'Defence Request for Orders to the Prosecution in Relation to Information Concerning Mr Ongwen's Family' (ICC-02/04-01/15-1425-Conf and ICC-02/04-01/15-1427-Conf), filed 30 and 31 January 2019" (the "Request for Leave to Reply").²

2. Preliminary, the CLR notes that the content of the Request for Leave to Reply is of such a character as to in fact already constitute a substantive reply to issues raised in response and, as such, is in clear breach of regulation 24(5) of the Regulations of the Court.

3. The CLR argues that the issues brought by either the Prosecution or herself in response to the Defence's Initial Request³ do not constitute new issues and that the Defence could reasonably have anticipated them. The CLR further submits that the Chamber would not be assisted in receiving further information on these issues.

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 Leave to Reply to Prosecution and CLR Responses to 'Defence Request for Orders to the Prosecution in Relation to Information Concerning Mr Ongwen's Family' (ICC-02/04-01/15-1425-Conf and ICC-02/04-01/15-1427-Conf), filed 30 and 31 January 2019", No. ICC-02/04-01/15-1435-Conf, 5 February 2019 (the "Request for Leave to Reply").

³ 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 "Defence's Initial Request").

II. PROCEDURAL BACKGROUND

4. On 18 January 2019, the Defence filed the “Defence Request for Orders to the Prosecution in Relation to Information Concerning Mr Ongwen’s Family” (the “Defence’s Initial Request”).⁴

5. On 30 January 2019, the Prosecution filed its Response to the Request (the “Prosecution’s Response”).⁵

6. On 31 January 2019, the CLRV submitted her Response to the Request (the “CLRV Response”).⁶

7. On 5 February 2019, the Defence filed the Request for Leave to Reply.⁷

III. CONFIDENTIALITY

8. 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

9. Preliminary, the CLRV notes that the content of the Request for Leave to Reply is of such a character as to in fact already constitute a substantive reply to issues raised in response and, as such, is in clear breach of regulation 24(5) of the

⁴ *Idem*.

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”).

⁶ See the “CLRV’s Response to “Defence Request for Orders to the Prosecution in Relation to Information Concerning Mr Ongwen’s Family””, No. ICC-02/04-01/15-1427-Conf, 31 January 2019 (the “CLRV Response”).

⁷ See the Request for Leave to Reply, *supra* note 2.

Regulations of the Court (the "Regulations"). To this effect, the CLRV refers to the jurisprudence of the Appeals Chamber clearly disapproving such practice.⁸

10. In accordance with regulation 24(5) of the Regulations, "[p]articipants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated".

11. The Defence seeks leave to reply on six issues, three identified in the Prosecution's Response and three identified in the CLRV's Response.⁹ The CLRV trusts that the Prosecution will duly address the part of the Request related to its response, and will therefore only focus on what the Defence argues with regard to her Response.

12. The CLRV submits that the three purportedly new issues arising from her Response are neither new nor could they not have been reasonably anticipated by the Defence. The CLRV further underlines that the Defence is not even attempting to demonstrate why these issues should be considered by the Chamber as new and reasonably unanticipatable, nor why, in fact, replying to these issues would be necessary to assist the Chamber in its determination of the Defence's Initial Request. The CLRV argues in addition that the Defence is misrepresenting her submissions and will address the three purported issues consecutively.

13. Firstly, the Defence contends that the CLRV advanced a "new issue" in her Response when referring to risk of witness interference which would be insufficiently explained and should be ignored by the Chamber.¹⁰ Preliminary, the

⁸ See the "Decision on requests for leave to reply" (Appeals Chamber), No. ICC-01/04-01/06-3412, 26 July 2018, para. 11.

⁹ See the Request for Leave to Reply, *supra* note 2, para. 4.

¹⁰ *Idem*, para. 11.

CLRv respectfully underlines that the Defence's recommendations as to which information should be "ignored" or not by the Chamber are at odds with the well-established Chamber's discretion as to how to exercise its power and purview in discharging its trial management functions;¹¹ the role of parties and participants is, rather, to assist the Chamber with relevant and targeted submissions.

14. Turning to the Defence's allegation, and without entertaining it on its merits, the CLRv underlines that the issue of witness interference cannot reasonably be considered as a new one. Indeed, in its Initial Request, while addressing the reasons provided by the Registry to deny the delivery of the concerned letters to the Accused, the Defence in fact itself entertained the issue of possible interference with a witness. The Defence argued as follows: "*The Defence notes additionally that there can be no basis for relying upon the fact that P-214 is a witness to deny delivery of the letters. Neither justice nor a witness will be interfered with if Mr Ongwen and his Defence receive the letter.*"¹² As a consequence, it is clear from the Defence's Initial Request that not only it had envisaged that such question could be an issue in relation to its claim, but also that it had ruled it out as a possible basis for the Registry's position. The CLRv hence submits that the issue of interferences with witnesses is clearly neither a new issue, nor one the Defence did not anticipate, but rather constitutes an issue with which the Defence wishes to express its clear disagreement. Either way, this issue cannot be considered as warranting leave to reply under the terms of regulation 24(5) of the Regulations. Additionally, being a mere disagreement between the Defence and the other party and participants, replying to these issues is clearly not necessary to assist the Chamber further in its determination of the Initial Defence's Request.¹³

¹¹ See the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute'" (Appeals Chamber), No. ICC-01/05-01/08-3636-Red A, 8 June 2018, para. 54; and the "Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'" (Appeals Chamber), 19 August 2015, No. ICC-01/09-02/11-1032 (OA 5), paras. 22-25.

¹² See the Request for Leave to Reply, *supra* note 2, paras. 25-26.

¹³ See the "Decision on Mr Ntaganda's request for leave to reply" (Appeals Chamber), No. ICC-01/04-02/06-1994 OA6, 17 July 2017, paras. 13 and 14.

15. Secondly, the Defence alleges that the issues of consent and privilege in relation to Article 56 individuals were not brought in *inter partes* discussions and therefore that it could not have anticipated them.¹⁴ The CLRV underlines that the issue of consent is a key feature of privileged communications which the Defence cannot pretend to ignore. Rule 73 of the Rules of Procedure and Evidence (the "Rules") suffices to illustrate the matter, as do the numerous articles of the Code of Professional Conduct for Counsel by which Defence counsels are equally bound. The CLRV argues that by introducing its Initial Request, in light of its content, it is not conceivable that the Defence did not have in mind the terms of rule 73(3) of the Rules, although maybe not playing in its favour. Indeed, the provision reads as follows: "*In making a decision under sub-rule 2 [communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and consequently not subject to disclosure], the Court shall give particular regard to recognizing as privileged those communications made in the context of the professional relationship between a person and his or her medical doctor, psychiatrist, psychologist or counsellor, in particular those related to or involving victims* [...]"¹⁵ Being central to the issue raised by the Defence in its Initial Request, the CLRV posits that, whichever way the Defence chooses to describe it, said issue cannot reasonably be viewed as either new or reasonably unanticipatable, and rather constitutes, yet again, a clear disagreement with the position of another participant in the proceedings.

16. Finally, the Defence alleges an inherent conflict of interest within the CLRV's proposal because the CLRV is not the children's lawyer.¹⁶ The CLRV first underlines that the Defence seems to have misinterpreted her submissions in this regard. Being minors, the children concerned are in fact represented by their mothers, who are, indeed, the CLRV's clients. In any event, as for the second issue raised by the Defence, the CLRV submits that the latter cannot be considered as new nor reasonably unanticipatable in as much as said issue forms the heart of the Defence's

¹⁴ See the Request for Leave to Reply, *supra* note 2, paras. 21 to 26 and 27.

¹⁵ See Rule 73 of the Rules of Procedure and Evidence.

¹⁶ See the Request for Leave to Reply, *supra* note 2, paras. 27 to 29.

Initial Request. The opinion of the Defence as to the existence of a conflict of interest within the CLRV's proposal is only illustrative of yet another disagreement which does not fall under the terms of regulation 24(5) of the Regulations. Indeed, the CLRV submits that said "issue" is in fact not an issue raised in her Response, but rather constitutes the interpretation or the opinion of the Defence towards the CLRV's position. Not being an issue arising from the CLRV's Response, it further cannot fall under the terms of regulation 24(5) of the Regulations.

17. The CLRV consequently posits that none of the purported 'issues' presented by the Defence are new, and in any event, said 'issues' could and should have been reasonably anticipated by the Defence, being at the core of its Initial Request. The CLRV adds that these issues are rather clearly the topic of mere disagreements expressed by the Defence¹⁷ and emphasises that according to the jurisprudence of the Court, a reply should not be used as a mean to complement original submissions. In this regard, the CLRV underlines that *"the purpose to grant leave to reply to a participant's response per regulation 24(5) of the Regulations is not to strengthen the arguments presented in the Defence original submission"*.¹⁸

¹⁷ See the "Decision on Mr Ntaganda's request for leave to reply", *supra* note 13, paras. 13-14.

¹⁸ See the "Decision on the "Defence Application for 1) Leave to Reply to Legal Representative of Victims filing 652 and Prosecution filing 653-Conf, and 2) Extension of Time to Respond to Observations of *amici* Lawyers for Justice in Libya and Redress Trust (filing 654)", and other related matters" (Pre-Trial Chamber I), No. ICC-01/11-01/11-659, 24 October 2018, para. 14 [we underline].

V. CONCLUSION

18. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Chamber to dismiss the Defence Request for Leave to Reply.

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line drawn underneath the name.

Paolina Massidda
Principal Counsel

Dated this 7th of February 2019

Abidjan (Ivory Coast)