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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul Cano Pangalangan

SITUATION IN UGANDA

**IN THE CASE OF
*THE PROSECUTOR v. DOMINIC ONGWEN***

Public

**Public redacted version of the CLRV's Response to Defence Request to Meet
Selected Individuals (ICC-02/04-01/15-1581-Conf)**

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 to Meet Selected Individuals” (the “Request”).² Amongst the six persons concerned, the CLRv is representing five of them, who are dual status individuals: P-0099 (a/02101/16), P-0214 (a/02119/16), P-0227 (a/02112/16), P-0235 (a/02115/16) and P-0236 (a/02149/16).

2. The CLRv submits that the Request should be rejected in its entirety, in as much as the queries by the Defence have already been answered by both the Prosecution and the CLRv, and the CLRv firmly posits that further inquiry with the vulnerable witnesses concerned would be highly inappropriate. Nonetheless, should the Chamber grant the Request, the CLRv suggests that contact with the relevant persons should be made by the CLRv herself (for the five dual status individuals she represents) or, eventually, by the Victims and Witnesses Unit (the “VWU”) together with the CLRv, in order to minimise the anticipated psychological harmful impacts it will have on said vulnerable witnesses. In this regard, the VWU is the appropriate body to provide an assessment of the respective current vulnerability of the individuals concerned in accordance with its mandate.

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 to Meet Selected Individuals”, No. ICC-02/04-01/15-1574-Conf, 27 August 2019 (the “Request”).

II. PROCEDURAL BACKGROUND

3. On 5 June 2015, the Single Judge of Pre-Trial Chamber II orally instructed the Registrar to put in place restrictions *ad interim* with regard to Mr Ongwen's access to the telephone and his visits.³ On 3 August 2015, the Single Judge of said Chamber issued the "Decision concerning the restriction of communications of Dominic Ongwen", confirming the restrictions, underlining that the information available indicated the reasonable suspicion that there had been attempts by the Accused to exercise via telephone conversations some form of influence on persons who possess information relevant to the case.⁴ This Decision was upheld on 30 May 2016.⁵

4. In September and November 2015, pursuant to article 56 of the Rome Statute (the "Statute"), the Single Judge of Pre-Trial Chamber II heard witnesses P-0099, P-0101, P-0214, P-0226, P-0227, P-0235 and P-0236 via video-link and in the presence of the Prosecution and the Defence (the CLRV had not yet been appointed at that time)⁶. On 10 August 2016, Trial Chamber IX (the "Chamber") recognised the article 56 Evidence as formally submitted.⁷

5. On 10 August 2016, the Single Judge of Trial Chamber IX issued the "Decision on Prosecution 'Request for an order that Mr Ongwen cease and disclose payments

³ See the "Decision concerning the restriction of communications of Dominic Ongwen" (Single Judge, Pre-Trial Chamber II), No. ICC-02/04-01/15-283-Conf, 3 August 2015, para. 2. Pursuant to Pre-Trial Chamber II's instruction, this decision has been reclassified as "Public" on 29 September 2015.

⁴ *Idem*.

⁵ See the "Decision on issues related to the restriction of communications of Dominic Ongwen" (Single Judge Pre-Trial Chamber II), No. ICC-02/04-01/15-450-Conf, 31 May 2016.

⁶ P-0226 and P-0227 testified between 15 and 19 September 2015. Between 9 and 17 November 2015, P-0099, P-0101, P-0214, P-0235 and P-0236 testified. See respectively the transcripts of the hearings, No. ICC-02/04-01/15-T-8-Conf to No. ICC-02/04-01/15-T-11-Conf; and No. ICC-02/04-01/15-T-13-Conf to No. ICC-02/04-01/15-T-17-Conf. For the audio-visual recordings of the hearings, see No. ICC-02/04-01/15-351-Conf-Anx1 and Conf-Anx2; No. ICC-02/04-01/15-354-Conf-Anx1 and Conf-Anx2; No. ICC-02/04-01/15-355-Conf-Anx1; No. ICC-02/04-01/15-358-Conf-Anx1 and Conf-Anx2; No. ICC-02/04-01/15-356-Conf-Anx1; No. ICC-02/04-01/15-357-Conf-Anx1; and No. ICC-02/04-01/15-352-Conf-Anx1.

⁷ See the "Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute" (Trial Chamber IX), No. ICC-02/04-01/15-520, 10 August 2016.

to witnesses and that the Registry disclose certain calls made by Mr Ongwen’”.⁸ In said ruling, noting the existing agreement between the Defence and the Prosecution about issues related to the health of the Accused’s children, the Single Judge ordered the latter to consult with the VWU on how Mr Ongwen could contribute to the welfare of his children while mitigating the risk of witness interference.⁹ Giving an example, the Single Judge suggested that *“it may be permissible for Mr Ongwen to support his family indirectly when (i) money is provided by Mr Ongwen to the Registry to give to potential witnesses in Mr Ongwen’s family; (ii) the amount and circumstances of the transfer would not unduly influence any potential witness’s testimony and (iii) the Prosecution has sufficient advance notice of the transfer”*.¹⁰ At the time, the CLRV was not yet appointed.

6. On 12 February 2019, the Single Judge issued the “Decision on Request for Disclosure and Related Orders Concerning Mr Ongwen’s Family” (the “Decision on Disclosure Concerning Mr Ongwen’s Family”).¹¹ In said ruling, the Single Judge noted that *“the Prosecution and CLRV generally would disclose information like that sought by the Defence when the children’s mothers wish or agree to provide it to the accused”* and concluded that *“the failure to provide the Family Information sought by the Defence is in accordance with the law, necessary and proportionate”* and *“is therefore a justifiable interference with Mr Ongwen’s rights”*.¹²

⁸ See the “Decision on Prosecution ‘Request for an order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen’” (Single Judge, Trial Chamber IX), No. ICC-02/04-01/15-521, 10 August 2016.

⁹ *Idem*, para. 18.

¹⁰ *Ibidem*, para. 19.

¹¹ See the “Decision on Request for Disclosure and Related Orders Concerning Mr Ongwen’s Family” (Single Judge, Trial Chamber IX), No. ICC-02/04-01/15-1444, 12 February 2019 (the “Decision on Disclosure Concerning Mr Ongwen’s Family”).

¹² *Idem*, paras. 35 and 36.

7. On 27 August 2019, the Defence submitted the Request¹³ asking the Chamber to order the VWU to contact P-0099, P-0101, P-0214, P-0227, P-0235 and P-0236 and facilitate requests for meetings with the Defence.

8. On 30 August 2019, the Prosecution submitted its Response, opposing the Request and making alternative submissions as to how the Chamber should deal with this matter.¹⁴

III. CONFIDENTIALITY

9. Pursuant to regulation 23bis (2) of the Regulations of the Court, 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

10. In the Request, the Defence indicates that it *“wishes to speak with [the] women [who are former wives of the Accused] to discuss issues and problems related to the upbringing of their children and grandchildren”*¹⁵ and *“to determine whether they would like to visit Mr Ongwen and to explain to them the applicable procedures they must follow to facilitate any request”*.¹⁶ The Defence also argues that, in the previous correspondence leading to the Request, it *“requested the Prosecution to inquire with them if the children would like to contact Mr Ongwen”*.¹⁷ Finally, and subsequently, the Defence also mentions that although *“the meetings requested [...] are not meant to be a phishing*

¹³ See the Request, *supra* note 2.

¹⁴ See the “Prosecution’s Response to “Defence Request to Meet Selected Individuals” (ICC-02/04-01/15-1574-Conf)”, No. ICC-02/04-01/15-1577-Conf, 30 August 2019.

¹⁵ See the Request, *supra* note 2, para. 2.

¹⁶ *Idem*, paras. 2 and 28. In paragraph 2, the Defence mentions that it *“wants to enquire and verify consistent allegations that these women desire to talk to Mr Ongwen about these issues [related to the upbringing of their children and grandchildren, consistent with Mr Ongwen’s parental rights to ensure that the children are raised in a manner consistent with internationally recognised rights of children, traditional norms and the appropriate station in life of these children].”*

¹⁷ *Ibidem*, para. 32.

expedition to gather information related to alleged conduct towards these persons [...] such information may materialise in the normal course of events”.¹⁸

11. At the outset, the CLRV recalls the terms of the Decision on Disclosure Concerning Mr Ongwen’s Family which provides clear guidance as to the framework applicable in this instance:

- i) *“The Single Judge notes the various decisions establishing the contact restrictions regime which prevents Mr Ongwen from soliciting the Family Information directly from the family members in question” and “considers them to be ‘in accordance with the law’ for purposes of assessing interference with the right to family life”*;¹⁹
- ii) *“As to the necessity of the measures, the Single Judge considers both the reasons for the contact restrictions regime and the nature of the charges in this case to be relevant”*;²⁰
- iii) *“With this in mind, the Single Judge is not persuaded by the Defence’s arguments that unfettered access to the Family Information is necessary to ensure his children’s right to health. To the contrary, unwanted involvement by the accused in the lives of these alleged victims and their children risks further victimisation and harm to the health and development of the children concerned”*;²¹
- iv) *“These procedures [i.e. the contact restrictions regime] give Mr Ongwen reasonable flexibility to speak with his family members when they want to speak with him and there are no concerns about compromising the fairness of the proceedings”*;²²
- v) *“These statements [i.e. the stand taken by the Prosecution and the CLRV so far in relation to these requests] suggest that the Prosecution and CLRV*

¹⁸ *Ibid.*, para. 34.

¹⁹ See the “Decision on Request for Disclosure and Related Orders Concerning Mr Ongwen’s Family”, *supra* note 11, para. 27.

²⁰ *Idem*, para. 28.

²¹ *Ibidem*, para. 30 (we underline).

²² *Ibid.*, para. 33 (we underline).

generally would disclose information like that sought by the Defence when the children's mothers wish or agree to provide it to the accused";²³

- vi) "[C]onsidering the support framework already in place to ensure that appropriate funds and assistance get to the children concerned, the Single Judge likewise sees no unjustifiable interference with Mr Ongwen's children's rights to health and family. For these same reasons, the Single Judge considers there to be no further humanitarian, compassionate or 'interests of justice' grounds justifying disclosure outside the standard framework".²⁴

12. In light of this ruling, the CLRV reiterates her position conveyed to the Defence when it first introduced its request via email²⁵ – which, incidentally, at the time, aimed only at three of the six witnesses concerned, was subsequently broadened to five of them by virtue of merging two apparently distinct emails - and finally encompasses the six of them in the current Request.

13. At that time, the CLRV supported the Prosecution's position that *"it would be inappropriate for these victim witnesses to be re-interviewed, or indeed contacted in any way by the defence after their testimony without an explicit and considered determination by the Chamber that such contact is justified, and outweighs the already-established need to protect them and limit their involvement in these proceedings"*.²⁶ She also indicated that *"P-0099, P-0214, P-0227 and P-0235 are extremely vulnerable individuals who benefited from the procedure of Article 56 of the Rome Statute [...] for reasons commanded notably by specific incidents with the potential to taint the Witnesses' evidence and the possible recurrence of similar events"*. In this regard, the Defence was given the opportunity to question these Witnesses at the time and in the framework of this procedure. As a consequence, *should the Defence be minded to seek to enter in contact with the latter for the purpose of re-interviewing*

²³ *Ibid.*, para. 35 (we underline).

²⁴ *Ibid.*, para. 36.

²⁵ See email sent by the Defence on 5 July 2019, at 13:47.

²⁶ See email sent by the Prosecution on 19 July 2019, at 16:57 (we underline).

them, the CLRV strictly opposes such request as clearly running against the interests of the victims concerned".²⁷

14. In previous exchanges related to the request, the CLRV also informed the Defence that: "*As far as P-0099 and P-0227 are concerned, they have not indicated to [her team] the wish for their children to meet with Mr Ongwen*".²⁸

15. In essence, the CLRV's position remains the following:

- i. If the Request solely aims at inquiring with the witnesses concerned whether they would like to express a wish in relation to meeting with Mr Ongwen: as long as her clients have not indicated to her their wish for themselves or for their children to meet with the Accused, the CLRV sees no compelling reasons as to why her clients should be prompted in this regard and firmly opposes such a request for the reasons developed *infra*.²⁹ Moreover and importantly, there exists no legal justification for such a request;
- ii. If the Request aims in any way at re-interviewing these witnesses, the CLRV similarly strictly opposes it for the reasons developed *supra*.³⁰
- iii. Should the Chamber be mindful to grant the Request and order the witnesses concerned to be contacted for the purposes of verifying their respective wish, the CLRV suggests the procedure that should be put in place in doing so.

²⁷ See email sent by the CLRV on 19 July 2019, at 17:16 (not underline in the original email).

²⁸ See the email sent by the CLRV on 14 June 2019, at 12:47.

²⁹ See paragraphs 16 to 25 of the current submission; see also paragraphs 11 and 14.

³⁰ See paragraphs 11 to 13 of the current submission.

1. The CLRV maintains her position according to which the witnesses concerned should not be contacted as requested

16. The CLRV notes that, according to the information made available by the Defence in its Request, the agreement between the latter and the Prosecution dating November 2016 provides that *“if a witness asks for help from Mr Ongwen’s family, and Mr Ongwen wishes to send a support payment, it would disclose any such request, including the amount sought, to the Prosecution. Both Parties agree that any disbursement to the families will be done in a fair and even handed manner, which may take into account special circumstances.”*³¹

17. In this regard, the CLRV reiterates that, in the current instance, in her knowledge, none of her clients concerned by the Request have asked for help from Mr Ongwen, let alone for a meeting with the latter (circumstance also confirmed by the Prosecution)³² – save for [REDACTED] who already met with the Accused together with her children.

18. The CLRV further recalls that she has in the past communicated certain information concerning the well-being or health of Mr Ongwen’s children when appropriate and in accordance with the provisions of articles 9(2) and 29(2) of the Code of Professional Conduct for counsel.³³

³¹ See the Request, *supra* note 2, para. 14 (we underline).

³² *Idem*, Confidential Annex B, page 3, which corresponds to the email sent by the Prosecution on 14 June 2019, at 15:24.

³³ See the Code of Professional Conduct for counsel, Resolution ICC-ASP/4/Res.1), adopted at the 3rd plenary meeting on 2 December 2005, by consensus, available at the following: <https://www.icc-cpi.int/resource-library#counsel>, last access 1st September 2019. Article 9(2) in the relevant part provides as follows: *“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) in the relevant part provides as follows: *“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).

19. As stated in her earlier submissions,³⁴ the CLRV wishes to draw the Chamber's attention on the fact that, considering the unique and specific circumstances of this case, even a consent given by the persons concerned could be questioned due to the specific cultural background of the individuals involved and the particular dynamic of their relationships.³⁵ At this point in 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

³⁴ 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, para. 17.

³⁵ 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 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." [emphasis added] See also the Report of Expert Witness UGA-PCV-0001, Professor Reicherter, UGA-PCV-0001-0020, 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 [...]" [emphasis added] 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 [...]" [emphasis added]

concerned children, care must be taken.³⁶ In Acholi culture, the figure of the father is as such that,³⁷ especially in vulnerable family constellation, this factor may influence the relationships' dynamics and, hence, the possible genuineness of the consent eventually provided by someone who can be considered in a position of inferiority with respect to the one requesting said consent. In this regard, the CLRV informs the Chamber that both her and the team's Field Counsel based in Uganda have noticed throughout the years of relationships with the persons concerned, that the latter somehow feel that it is their duty to maintain some form of relationship with Mr Ongwen, because in their culture they cannot refuse said encounter.

20. Moreover, the CLRV emphasizes that despite the very inadequate and inexperienced comment passed lightly by the Defence in its Request,³⁸ the individuals concerned *are* vulnerable witnesses and have been considered so by the Court from the beginning of their involvement in these proceedings (as the application of the very specific procedure foreseen in article 56 of the Statute indicates).

21. The Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial³⁹ defines vulnerability in the following terms:

³⁶ 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.

³⁷ 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*" [emphasis added]; 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.*" [emphasis added]

³⁸ See the Request, *supra* note 2, para. 33: "*Finally, the Prosecution's and Legal Representative's claims of these women being vulnerable are completely unfounded, which is evidenced by [REDACTED].*"

³⁹ See the "Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial" (Trial Chamber IX), No. ICC-02/04-01/15-504-Anx1, 22 July 2016, para. 19, ft 1 (we underline). The CLRV notes that this paragraph corresponds to paragraphs 5 and 6 of the "Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses" proposed by the Registry (see No. CC-02/04-01/15-478-Anx1, 17 June 2016; but which was

“For the purposes of this protocol witnesses are considered to be vulnerable if they face an increased risk to suffer psychological harm through the process of testifying, and/or to experience psychosocial or physical difficulties which affect their ability to testify. The vulnerability of a witness can be determined by different factors: factors related to the person: age (children or elderly), personality, disability (including cognitive impairments), mental illness or psychosocial problems (such as trauma-related problems and/or lack of social support); factors related to the nature of the crime: in particular victims of sexual or gender-based violence, children that are victims of violence, and victims of torture or other crimes involving excessive violence; factors related to particular circumstances, such as significantly increased stress or anxiety due to relocation/resettlement or fear of retaliation, adaptation difficulties related to cultural differences or other factors.”

22. The CLRV submits that her five clients concerned by the Request do meet the criteria specified in said Protocol, and notably by virtue of the following: psychosocial problems such as trauma-related issues directly stemming out of their particular status as victims of sexual or gender-based violence allegedly directly perpetrated by Mr Ongwen; psycho-social difficulties directly related to their victimisation as a whole and to their giving birth to children fathered by Mr Ongwen and facing reintegration difficulties because of it; and, as much as the Request concerns these children, their age, personal trauma and difficulties faced in their families and communities due to the circumstances of their birth. In addition, in these particular instances, the witnesses concerned are victims of serious offences against the person and to which the proceedings notably relate.

23. In its assessments of the witnesses concerned in preparation for the Article 56 hearings, the VWU will have evaluated the *then* mental health status of said individuals and identify any *then* special needs. From her regular interactions with

not formally adopted in this case following the Chamber’s Decision in this regard, see No. ICC-02/04-01/15-504); and further directly stems from the letter of Regulation 94bis 2 of the Regulations of the Registry.

the witnesses concerned and from the content of their respective testimony, the CLRV submits that they are still vulnerable and face an increased risk to suffer psychological harm should the Request be granted.

24. It is precisely because of their specific vulnerability, taken additionally in the context of the still strong patriarchal society in which they are living in Uganda,⁴⁰ that the CLRV submits that any willingness expressed by her clients in relation to Mr Ongwen cannot be considered genuine *prima facie* and would need to be further investigated and weighted – even more so if such a willingness was not the fruit of a spontaneous request they would have voiced but would have been the result of them being prompted about it as requested by the Defence. In this regard, the Defence’s reference to them hearing “*information from family members in Coorom*”⁴¹ not only is irrelevant in as much as such information does not come from the witnesses directly - as far as the CLRV and the Prosecution are aware of, but is also to be taken in the particular cultural context in which it may have arisen. Likewise, the Defence’s assertion that some of Mr Ongwen’s “*children are begging [the latter] for money during one of the quarterly phone conversations*”⁴² appears equally unsubstantiated and irrelevant in as much as it would then concerns witnesses and witnesses’ children already in contact with the latter and thus not related to the Request.

25. For these reasons, the CLRV does not find it appropriate for said witnesses to be prompted as requested by the Defence and reiterates her assurance that should such a wish or request be verbalised by her clients, she will inform the Prosecution and the Defence, and envisage with the parties what appropriate course of action should be followed then.

⁴⁰ See paragraph 19 of the current submission, as well as footnote 37.

⁴¹ See the Request, *supra* note 2, para. 25.

⁴² *Idem*.

2. Should the Chamber grant the Request, a specific procedure ought to be followed in order to minimise the anticipated harmful impact on the vulnerable witnesses concerned

26. Preliminarily, the CLRV notes that when the Defence requested an order for the Registrar to verify the accuracy of a statement or representation made by [REDACTED] with the latter,⁴³ the Chamber did not consider it appropriate for the Registry to make enquiries on behalf of the Defence.⁴⁴ In a further Decision issued by email, the Chamber clarified that “*the Defence [was] free to request an interview [with REDACTED] in accordance with the procedure prescribed in the protocol [the Protocol on contacting witnesses of the opposing party, No. ICC-02/04-01/15-339-Anx]”, in the specific circumstances at hand, which were as followed:*

- i. The Defence and the Accused had prior extensive contacts with [REDACTED] when [REDACTED];
- ii. At that moment, after consultations held between the Defence, the Prosecution and the CLRV, it was agreed that the Accused would transfer money to [REDACTED];⁴⁵
- iii. A member of the Defence team was involved in [REDACTED];
- iv. Finally, contrary to the Defence’s assertions,⁴⁶ the Chamber underlined that any further possible interview with [REDACTED], aiming at clarifying a statement [REDACTED] made to the Accused [REDACTED], would happen in the presence of the CLRV should the witness wish so [thereby reflecting the very clear terms of the Protocol on Mechanisms for exchange of information on individuals enjoying dual status⁴⁷].⁴⁸

⁴³ See the email sent by Defence on 11 January 2019, at 15:03.

⁴⁴ See the email sent by the Legal Officer of the Chamber on 8 May 2019, at 15:38.

⁴⁵ See the email sent by the Defence on 30 November 2018, at 16:11.

⁴⁶ See the email sent by the Defence on 9 May 2019, at 19:50.

⁴⁷ See the “Protocol on Mechanisms for exchange of information on individuals enjoying dual status”, No. ICC-02/04-01/15-504-Anx2, 22 July 2016, in particular points 5 and 9. a).

⁴⁸ See the email sent by the Legal Officer of the Chamber on 10 May 2019, at 14:20.

27. In light of the specific circumstances recalled above, the CLRV submits that contrary to what the Defence is portraying,⁴⁹ the current request to meet with the other five witnesses cannot be compared to the one previously entertained in relation to [REDACTED]. Indeed, not only willingness had been demonstrated by witness [REDACTED] for [REDACTED] the Accused; but also the further contacts between the latter and the Defence occurred exclusively in a framework aiming at facilitating such contacts. As a result, and not surprisingly, the responses provided by the Prosecution and the CLRV to the Defence's further requests to meet with the other former wives of Mr Ongwen (first with [REDACTED] and [REDACTED]⁵⁰, then with [REDACTED] and [REDACTED]⁵¹) - who had never mentioned any wish to meet with the latter -, were different.⁵²

28. Additionally, it is to be noted that the situation of [REDACTED] - who are covered by the Request - is also different, in as much as Mr Ongwen is already financially supporting [REDACTED].⁵³ Moreover, Mr Ongwen is already in contact by telephone with the children of [REDACTED], following a procedure for which the Prosecution is the entity establishing the contact between the witness and the Registry, which in turns then facilitates the calls. As a result, the CLRV does not understand why [REDACTED] are covered by the Request, since their willingness and current wishes are catered for through specific procedures already in place, and there appears evidently no need to verify their intentions in this regard.

29. As for the three others witnesses concerned by the Request, in relation to the procedure eventually to be adopted, the CLRV notes that, on the one hand, both the Protocols on contacting witnesses of the opposing party and on Mechanisms for

⁴⁹ See the Request, *supra* note 2, paras. 25 et al.

⁵⁰ See the email sent by the Defence on 11 June 2019, at 14:27.

⁵¹ See the email sent by the Defence on 5 July 2019, at 13:47.

⁵² See the emails sent by the Prosecution on 19 July at 16:57; on 16 July 2019 at 12:59; on 5 July 2019 at 14:44; and on 14 June 2019 at 15:24. See also the emails sent by the CLRV on 19 July 2019 at 17:16, on 5 July 2019 at 15:34 and 13:52; and on 14 June 2019 at 12:47.

⁵³ See the Request, *supra* note 2, para. 27 and footnote 28, for the references to the CLRV's position in this regard.

exchange of information on individuals enjoying dual status set out a clear procedure when a non-calling party wishes to contact a witness.⁵⁴ On the other hand, the CLRV is aware – although she never was given access to the exact terms or to the very document itself, despite the interests of some of her clients being directly concerned,⁵⁵ – of an agreement between the Prosecution and the Defence dated 24 November 2016 in relation to specific requests for financial support from Mr Ongwen's families.

30. In light of possibly various existing regimes with regard to establishing contacts with the witnesses and in order to guarantee the protection of the well-being, dignity, privacy and security of the vulnerable witnesses concerned by the Request, and who are her clients, the CLRV submits that should the Chamber orders such verifications to take place the preferred procedure should be:

- i. If the Chamber is minded to grant the Request for the purpose of verifying the concerned witnesses' wishes, the content of the verification ordered should be defined by the Chamber itself;
- ii. If the concerned individual is a dual status, contacts and verifications as ordered should be made by the CLRV who has maintained a trust relationship and has regular interactions with her clients; moreover, the team's Field Counsel speaks their language which undoubtedly facilitates all contacts with them. The CLRV argues that as much as such verification might have a harmful impact on the persons concerned, such impact could be minimised if it was directly done by her, rather than by the VWU which, to the CLRV's knowledge, has not maintained a similar regular contact with them;

⁵⁴ See the "Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial", *supra* note 39; and the "Protocol on Mechanisms for exchange of information on individuals enjoying dual status", *supra* note 47.

⁵⁵ See the Request, *supra* note 2, para. 14 and ft 13.

- iii. In this regard, the CLRV notes the Prosecution's proposal in accordance to which the VWU, as a neutral body, should be the one facilitating such contacts and indicates that, should the Chamber follow such a proposal, the CLRV should then be present when contact is established and at eventual subsequent meetings. In establishing such contacts then, their clear and narrow purpose ought to be expressly explained and it shall be clear that no discussion pertaining to the evidence they have given or to the evidence more generally will be entertained.

31. Indeed, the CLRV sees no valid reasons why such inquiries, as destabilising as they may prove to be, should be made by the Defence at all;⁵⁶ and submits that the CLRV and the Prosecution, should the witnesses mention any will or desire to be in contact with the Accused, and as has been the practice so far, are the appropriate channels of communication to facilitate any possible contact (via the Registry) and logistics or financial support provided by Mr Ongwen to the children of the witnesses concerned.

32. In addition, the CLRV agrees with the Prosecution⁵⁷ and requests that should such contacts be ordered by the Chamber, the VWU be required to provide a new vulnerability assessment of the witnesses concerned, specifically taking into consideration the cultural dynamics laid out in the current submission.⁵⁸

⁵⁶ *Idem*, para. 35. Incidentally, in view of the Defence's suggestion, the CLRV reminds the Defence again that she does represent five of the witnesses concerned, and not only the three of them mentioned by the Defence in this paragraph.

⁵⁷ See the "Prosecution's Response to "Defence Request to Meet Selected Individuals", *supra* note 14, paras. 10 and 11.

⁵⁸ The CLRV further notes that the Defence appears to support the fact that "[t]he word *family* must be interpreted through local and traditional customs of Northern Uganda, not of Western society." See the "Defence Response to the Prosecution Filing ICC-02/04-01/15-482-Conf", No. ICC-02/04-01/15-490-Conf, 4 July 2016, para. 47 ad ft 66.

33. Finally, the CLRV would be grateful if the Chamber would remind the Defence of its professional obligations before gratuitously reproaching the CLRV alleged behaviours which are unsubstantiated.⁵⁹

V. CONCLUSION

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



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Principal Counsel

Dated this 17th day of September 2019

At The Hague, The Netherlands

⁵⁹ See the Request, *supra* note 2, paras. 7 and 30.