

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/04-01/15
Date: **2 February 2018**

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 Annex

Victims' requests for leave to present evidence and to present victims' views and concerns in person

Source: Legal Representatives of Victims

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

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I. INTRODUCTION

1. This filing is made in compliance with the Single Judge's "Preliminary Directions for any LRV or Defence Evidence Presentation"¹ ("Preliminary Directions") of 13 October 2017 which required that by 2 February 2018 the Legal Representatives of Victims ("LRVs") file a final list of proposed witnesses and evidence along with justifications for why leave should be granted to present evidence.
2. The LRVs hereby submit the list of witnesses which they propose to call following the close of the Prosecutor's case, subject to the leave of the Chamber. The LRVs submit that the expected evidence affects the victims' personal interests; is complementary to, rather than duplicative of, the evidence already presented; and is not inconsistent with fair trial rights of the Accused.
3. The LRVs additionally request leave for victims to present their views and concerns in person during the course of the victims' case. Victims represented by the LRVs have expressed a desire to have their views on the proceedings heard directly by the Chamber. The LRVs submit that the presentation by victims of their views and concerns is consistent with and would further the clearly intended objectives of Article 68(3) of the Statute, and would also assist the Chamber in producing its judgment pursuant to Article 74 of the Statute in the present case.

II. CONFIDENTIALITY

4. Pursuant to Regulation 23*bis* (2), the LRVs submit this filing together with a confidential Annex. The Annex has been classified as confidential as it contains the names of proposed witnesses. The majority of these are participating victims and have had their identities protected from the public in these

¹ "Preliminary Directions for any LRV or Defence Evidence Presentation" (Trial Chamber IX), 13 October 2017, ICC-02/04-01/15-1021.

proceedings.² Some of the proposed witnesses may ultimately not require protective measures; however it is considered that their identities should not be known to the public until such time as the request for leave has been considered by the Chamber.

III. PROCEDURAL HISTORY

5. On 13 October 2017, the Single Judge issued the Preliminary Directions wherein he, *inter alia*, directed that “[B]y 14 December 2017, the LRVs and the Defence must provide a preliminary list of witnesses and an estimate of how many hours of witness examination it will require.”³
6. The Single Judge further noted that “the Chamber is not provisionally inclined to hear victims present unsworn, non-evidentiary ‘views and concerns’ before its Judgment.”⁴
7. On 14 December 2017, the LRVs submitted their “Victims’ Preliminary List of Witnesses and confidential annex” in which they proposed to present evidence from six participating victims and two expert witnesses.⁵ The LRVs further stated that they were in the process of considering whether to call victims to present views and concerns in person, and if so, a reasoned request would be made in their 2 February 2018 submissions.⁶

IV. OVERVIEW OF SUBMISSIONS

8. The LRVs request the Chamber’s leave to present both evidence and victims’ views and concerns. In particular, they request leave to (i) call six participating victims and two expert witnesses to present oral evidence. It is submitted that in

² ‘Decision on Disclosure of Victims’ Identities’, Trial Chamber IX, 17 June 2016, ICC-02/04-01/15-471, paras. 11 and 12.

³ *Ibid*, para. 3.

⁴ Preliminary Directions, para.2 (ii).

⁵ ‘Victims’ preliminary list of witnesses’, 14 December 2017, ICC-02/04-01/15-1106+Conf-Anx, para.4.

⁶ *Ibid*, paras. 9-11.

the alternative a portion of this evidence could be submitted pursuant to rule 68 of the Rules of Procedure and Evidence (“RPE”).

9. Additionally, the LRVs respectfully request that at least two participating victims be permitted to provide views and concerns in person *before Judgment*.
10. The Appeals Chamber has held, and it has been acknowledged by other chambers of this Court, that while ‘the right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility and relevance of the evidence’ lies primarily with the parties, victims may be authorised to present evidence in order to assist the Chamber in its determination of the truth.⁷
11. A number of requirements have been identified for the presentation of evidence by victims. In addition to the demonstration of personal interests that are affected by the current proceedings, it has been specified primarily that: (i) the presentation of evidence must be consistent with the rights of the accused, including to a fair, expeditious and impartial trial and the right to have adequate time and facilities to prepare his or her defence; (ii) the hearing of the victims’ evidence must be considered appropriate, taking into account its relevance to the issues of the case and capacity to assist the Chamber in its understanding of the case or evidence heard so far; and (iii) victims are not allowed to testify anonymously.⁸

⁷ *The Prosecution v. Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432 (‘Appeals Chamber Judgment of 11 July 2008’), paras 86-105, in particular paras 93-98. See also Decision on victims’ participation, 18 January 2008, ICC-01/04-01/06-1119, para. 108; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, ICC-01/04-01/07-1788-tENG (‘*Katanga* Decision on the modalities of victim participation at trial’), paras 81-99; *Bemba* Decision on Victims, ICC-01/05-01/08-2138 para. 18.

⁸ See Appeals Chamber Judgment of 11 July 2008, ICC-01/04-01/06-1432, para. 104; see also, 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”, 16 July 2010, ICC-01/04-01/07-2288, paras 3 and 114; *Bemba* Decision on victims, ICC-01/05-01/08-2138, para. 23; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 1 December 2009, ICC-01/04-01/07-1665-Corr (‘*Katanga* Directions on conduct of the proceedings’), paras 20, 22; *Katanga* Decision on the modalities of victim participation at trial, para. 87.

12. While previous chambers have considered whether victims' evidence would assist the Chamber in establishing the truth. It is respectfully submitted that this factor should not be given undue weight. To do so would result in what Judge Steiner, rightly criticized as "*a utilitarian approach towards the role of victims before the Court, which has no legal basis and appears to unreasonably restrict the rights recognized for victims by the drafters of the Statute.*"⁹
13. The LRVs further submit that the question as to the number of victims who might be authorised to appear in person before the Court should be determined given the total number of the participating victims.¹⁰

V. REQUEST FOR LEAVE TO PRESENT EVIDENCE

14. Bearing in mind this approach from the existing jurisprudence, but with particular reference to the requirements set by the Single Judge in the present case, the LRVs have sought to ensure that the evidence they propose to present adheres to the abovementioned criteria.¹¹ Particular attention has been directed to ensuring that the areas of evidence to be covered are not duplicative of material presented by the Prosecution, or which have insufficient connection to the crimes charged.¹²
15. With this in mind, the factual matters on which the LRVs propose to present evidence have been identified as follows:

⁹ See the "Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, ICC-01/05-01/08-2138", No. ICC-01/05-01/08-2140, 23 February 2012, para. 11.

¹⁰ *Idem*, paras. 18-23.

¹¹ Preliminary Directions, para. 2.i.

¹² Trial Chamber III in *Bemba* and Trial Chamber II in *Katanga*, in evaluating applications for oral testimony by victims considered the following criteria:(a) whether the proposed testimony relates to matters that were already addressed by the Prosecution in the presentation of its case or would be unnecessarily repetitive of evidence already tendered by the parties; (b) whether the topic(s) on which the victim proposes to testify is sufficiently closely related to issues which the Chamber must consider in its assessment of the charges brought against the accused; (c) whether the proposed testimony is typical of a larger group of participating victims, who have had similar experiences as the victim who wishes to testify, or whether the victim is uniquely apt to give evidence about a particular matter; and (d) whether the testimony will likely bring to light substantial new information that is relevant to issues which the Chamber must consider in its assessment of the charges. See *Bemba* Decision on victims, ICC-01/05-01/08-2138, para. 24, *Katanga*, Directions on conduct of the proceedings, ICC-01/04-01/07-1665-Corr, para. 30

(i) The infliction of sexual violence on men and boys

16. Sexual violence committed by the LRA was not limited to violence against women and girls. A significant number of male participating victims were either victims of rape, forced to carry out rapes, or forced to abuse the corpses of killed abductees in sexualised ways. The LRVs submit that it is important for the Chamber and the public to hear evidence relating to sexual violence against men in the charged locations, for two reasons:
17. Firstly, the LRVs believe that hearing this evidence will assist the Chamber in forming a comprehensive and holistic understanding of the forms of violence used by the LRA, including the manner in which abductees were terrified into acquiescence. Sexual violence against women has been demonstrated to be about power and dominance. This is also true of sexual violence against men.¹³ The true nature of the crime is the humiliation, emasculation, homo-sexualisation and “feminisation” of the victim.¹⁴ Sexual violence against men (as with women) in conflict settings is usually motivated significantly less by sexual gratification than by an attempt to exert power and dominance over the victim and the victim’s community.¹⁵
18. Furthermore, previous studies of forced recruitment in Uganda and elsewhere have presented the forcible commission of violence (typically killing or the desecration of dead bodies) as a key feature of initiation into the group, one that serves several purposes: terrorising the youth to break down his psychological defences, raising the spectre of punishment by his community if he were to return, and desensitizing the recruit to violence.¹⁶ The use of sexual violence

¹³ S. Sivakumaran, Sexual Violence Against Men in Armed Conflict, *The European Journal of International Law*, Vol 18, no. 2 (2007) at p. 267.

¹⁴ S. Mouta, Sexual Violence against Men and International Law- Criminalising the Unmentionable, *International Law Review*, Volume 13, Issue 3, p.691. See also p.677, for an in-depth discussion on how international law has a tendency to leave out men as victims, but readily views them as perpetrators.

¹⁵ Dustin Lewis, *Unrecognized Victims: Sexual Violence Against Men in Conflict Settings Under International Law*, 27 *Wis. Int'l L.J.* 1 (2009) at p.7, citing A. N Groth, *Men who Rape: The Psychology of the Offender* 2 (1979); S. Brownmiller, *Against our Will, Men, Women and Rape* 3 (1975).

¹⁶ C. Blattman and J. Annan, ‘On the nature and causes of the LRA abduction: what the abductees say’, in T. Allen and K. Vlassenroot (eds), *The Lord’s Resistance Army; Myth and Reality*, at p.140, citing Honwana

against male abductees (including by forcing them to commit sexual violence against others) can be viewed as a particular form of this practice; while the rape of men during LRA attacks appears to have been a particular form of terrorising and psychologically subjugating local populations.

19. Victim accounts indicate that such violence not only had specific objectives but also particular impacts on its survivors. Understanding these forms of harm will assist the Chamber, in the event of a conviction and in understanding how the construction of terror by the LRA was used as a mechanism for maintaining control over the local population.
20. Secondly, there are broader reasons for the trial to encompass the hearing of evidence on this subject. It is widely recognised that men's experience of sexual violence is under-reported, particularly in those societies where male victims of sexual violence are subjected to particular forms of stigma and shame. Addressing this subject in the course of the public proceedings which are being widely followed in Uganda and internationally will give much needed recognition to this type of harm and its particularly damaging significance in times of conflict.
21. The LRVs recognise that the charges confirmed against Dominic Ongwen in respect of sexual and gender-based crimes (charges 50-68) are specifically concerned with crimes against women and girls. However it is submitted that the acts of sexual violence committed against men at a minimum fall within several of the other crimes confirmed. Those which occurred during attacks on IDP camps are covered by the charges of attacks on civilian population, torture, cruel treatment, other inhumane acts and persecution. Those which were experienced by child abductees are linked to the charges concerning the conscription and use of child soldiers, since such acts of violence were a means by which to terrorise, shame and thereby control these children. Additionally, men and boys who were

(2006); *Child Soldiers in Africa*, Philadelphia: University of Pennsylvania Press, and Singer (2005), *Children at War*, New York, Pantheon Books.

forced against their will to commit acts of sexual violence against women and girls can be seen as indirect victims of charges 62 to 68 (torture and rape through sexual violence).

22. The LRVs note, however, that while the proposed evidence is sufficiently linked to the charges in question, its principal purpose is not to establish the elements of those crimes. The LRVs believe that the Prosecution has already discharged its burden for those charges at least insofar as they concern sexual violence against women. What the proposed evidence intends to do is to complement the Prosecution's evidence, by demonstrating that such crimes were also committed against men and boys, and the ways in which these victims experienced particular forms of harm as a result.

(ii) Forced desecration of bodies

23. In a study conducted by Blattman and Annan¹⁷, a survey was carried out with 462 former LRA abductees who were interviewed about their time with the LRA. The study found that 8 percent of those who were abducted for a period of two weeks were forced to abuse dead bodies; 19 percent of those who were abducted for a period of 2 weeks to 3 months were forced to abuse dead bodies; 39 percent of those abducted for a period of 3 months to 1 year were forced to abuse dead bodies; and 20 percent of those who had been abducted for over a year were forced to abuse dead bodies. In total, 22 percent of the 462 males that had been abducted were forced to abuse dead bodies.¹⁸
24. A number of the participating victims represented by the LRVs experienced these practices first hand during their time as abductees in the Sinia Brigade. They suffered particular forms of harm as a result. Through expert and survivor

¹⁷ Blattman and Annan, *Ibid*, P.140.

¹⁸ Blattman and Annan, *supra* note 16, Table 7.1, at p. 136. In addition, Vinci has emphasized the use of fear by the LRA leadership against the new abducted in a process he calls 'initiation through traumatization.' See A. Vinci, *The Strategic Use of Fear by the Lord's Resistance Army, Small Wars and Insurgencies*, Volume 16, 2005, Issue 3, at pages 360-381.

evidence, the LRVs would propose to present evidence about this practice and in particular its objectives and consequences.

25. In the same way as the material discussed above in relation to sexual violence, these acts are clearly linked to the charges in the case. However again, the purpose of calling evidence on this subject is not to discharge the burden of proof which the Prosecutor has already amply met, but rather to add additional perspectives on the ways in which forms of psychological pressure were applied to abductees, as well as their consequences.
26. The LRVs also note that in practice, this form of violence sometimes overlapped with the forms of sexual violence against men discussed above. In order to ensure expedition in the proceedings, the LRVs propose to present witness evidence which addresses both these topics.

(iii) Stigma experienced by returned abductees

27. In evidence led by the Prosecution the Chamber has already heard mention of the stigma experienced by those who were abducted into the LRA and forced to join its number for a period of time. Substantial literature has been devoted to this subject. Indeed it is argued that many of the atrocities which abductees were forced to perform by the LRA were specifically directed at ensuring that they would fear exclusion and retribution from their communities and therefore have additional reason not to seek to escape.
28. The LRVs consider that it is vital for the Chamber – and the public – to hear first-hand evidence of this form of harm. It is among the areas that should be carefully considered in the design of a reparations program if the Accused is convicted.
29. However the LRVs note that to date the evidence of Prosecution witnesses on this matter has been piecemeal and unclear in some cases. Although expert evidence was led, no individual survivor has spoken in depth about his or her

experience of stigma on returning to his or her community. Nor have community members been willing to address the issue. The LRVs believe that there are good reasons for this. Indeed the very nature of the delicate relationship between the returnees and their community mean that the subject becomes taboo. Community and family members who have been involved in imposing stigmatization on victims will be understandably reluctant to acknowledge this publicly. The stigmatized victims themselves are also understandably fearful of drawing attention to the treatment and perhaps making it worse by levelling a public accusation of this kind against their communities.

30. There are therefore few individuals who are willing to publicly speak about this issue and it is understandable that such evidence was not forthcoming from Prosecution witnesses who have been principally selected for their ability to prove the elements of the crimes charged. In contrast the LRVs have been in a position to specifically seek out victims willing to speak about this issue.

(iv) Impact of the crimes on education

31. Among the many challenges faced by victim communities in Northern Uganda, one of the most frequently mentioned by the victims themselves is the loss of their educations. Children's education was impacted in various ways through the conflict, and even more specifically it was impacted in particular ways by the LRA crimes which are the focus of this case. Children abducted by the LRA did not have the opportunity to go to school and the LRA attacks resulted in devastating loss and damage to school properties and resources, including the relocation of schools and the taking-over of school properties for alternative uses, leaving a lasting legacy on school results in the region. Furthermore, teachers were attacked, intimidated and often unable to perform at their usual capacity and those children who were unable to attend school lost friends, family and many of the social contacts and support networks essential for a complete education. While some prosecution witnesses have spoken already to the fact that

they were personally unable to attend school for several years, the court is yet to hear the full picture of the impact of the LRA crimes on education in the affected communities. The evidence proposed to be called on this subject would avoid duplicating the aspects already sufficiently covered by the Prosecution, and focus on the other means by which education was disrupted by the crimes charged.

(v) Interrelated and cumulative nature of harms

32. Significant evidence has already been led in these proceedings regarding various forms of harm, and as set out above, the LRVs seek leave to present evidence on some further forms of harm which have not been materially addressed by the Prosecution.
33. However the LRVs also consider it important for the Court to have a contextual understanding of the generational harm experienced by communities in Northern Uganda, including the unending cycles of violence and abductions these communities have had to live with for decades. These cycles of violence were experienced by individuals, families and communities and the harm that they suffered cannot be seen in isolation from each other. Furthermore, the impact that the conflict has had on family life continues to linger, with many parents wondering whether their children will ever return from the bush, whilst others struggle to help the children who have returned.
34. In order to provide the Chamber with a comprehensive understanding of the harm experienced the LRVs seek to adduce both expert evidence on this issue, as well as evidence from a senior community leader who has witnessed the impact of the crimes charged in his community over time. These two sources of evidence would complement each other. The LRV would propose to lead such evidence in a manner which also complements the evidence already given by Prosecution witnesses: subjects already sufficiently covered would not be addressed, but rather focus would be made on the gaps in existing evidenced concerning harm.

35. Evidence relating to the above four subject areas is proposed to be adduced through 6 live witnesses, including two witnesses of fact and two experts. Details of each proposed witness are set out in confidential Annex 1 to this filing.
36. In the event that the Chamber is not inclined to grant this request in its entirety, the LRVs respectfully submit that in the alternative any evidence not heard *viva voce* could be received under rule 68, which would contribute to the expeditiousness of the proceedings.

VI. REQUEST FOR LEAVE FOR VICTIMS' TO PRESENT VIEWS AND CONCERNS IN PERSON

37. The LRVs respectfully request the Chamber for leave to present victims' views and concerns in person. The jurisprudence before the Court to date has drawn a distinction between presentation by individual victims of evidence on the one hand, and the expression of their views and concerns in person on the other.¹⁹
38. The LRVs note the Chamber's indication that it is "not provisionally inclined" to allow victims to present views and concerns in person "before its Judgment."²⁰ The LRVs are grateful to the Chamber for identifying these provisional reservations and thereby allowing the LRVs to properly address them. In the following submissions the LRVs will set out their justification for requesting that views and concerns be presented by victims in person before judgment: First by setting out the practice of the Court on this issue; secondly addressing why it is important that views and concerns be heard directly from victims at all; thirdly by addressing why this should occur in the present case before judgment; and lastly by setting out the LRVs' proposal for the presentation of views and concerns in this case.

¹⁹ See "Decision on the presentation of views and concerns by victims a/0542/08, a/0394/08 and a/0511/08" (Trial Chamber III), ICC-01/05-01/08-2220, 24 May 2012, paras. 7-8 and paras. 9-11. 71 See "Order issuing public redacted version of the "Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial"" (Trial Chamber I), ICC-01/04-01/06-2032-Anx, 9 July 2009, paras. 17, 25-27.

²⁰ Preliminary Directions, para. 2.i.

(i) *Practice of the Court to date*

39. In the *Lubanga* case, Trial Chamber I recognised: '[t]he unequivocal statutory right for victims to present their views and concerns in person when their personal interests are affected [...] if the Court considers that course appropriate [and in as much as it does not] undermine the integrity of these criminal proceedings.'²¹ Trial Chamber I drew a distinction between the process of victims expressing their views and concerns, and the process of victims giving evidence:

“The former is, in essence, the equivalent of presenting submissions, and although any views and concerns of the victims may assist the Chamber in its approach to the evidence in the case, these statements by victims (made personally or advanced by their legal representatives) will not form part of the trial evidence. In order for participating victims to contribute to the evidence in the trial, it is necessary for them to give evidence under oath from the witness box. There is, therefore, a critical distinction between these two possible means of placing material before the Chamber.’²²

40. A similar approach has followed in subsequent cases, including *Bemba*²³ the Kenya cases,²⁴ and *Ntaganda*.²⁵ The views and concerns of victims, presented in person, have been heard in both the *Bemba* and *Ntaganda* cases. In no case to date has a request for the presentation of views and concerns in person been made and rejected by a Trial Chamber, although the Chambers have managed the extent of such material.

²¹ See “Order issuing public redacted version of the “Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial”” (Trial Chamber I), ICC-01/04-01/06-2032-Anx, 9 July 2009, paras. 17, 25-27.

²² *Idem*, paras. 17, 25-27. See also “Decision on the Modalities of Victim Participation at Trial”, ICC-01/04-01/07-1788-tENG, paras. 69-71.

²³ See “Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims” (Trial Chamber III), ICC-01/05 01/08- 2138, 22 February 2012, especially para. 20; and “Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims” (Trial Chamber III), No. ICC-01/05-01/08-2027, 21 December 2011, especially paras. 12-15.

²⁴ See “Decision on victims’ representation and participation”, (Trial Chamber V), 3 October 2012, ICC-01/09-02/11-498, paras. 55-57.

²⁵ See ‘Public redacted version of “Decision on the request by the Legal Representative of the Victims of the Attacks for leave to present evidence and victims’ views and concerns” (10 February 2017, ICC-01/04-02/06-1780-Conf)’, (Trial Chamber VI), 15 February 2017, ICC-01/04-02/06-1780-Red, especially at para. 10.

(ii) Reasons for permitting the presentation of victims' views and concerns in person

41. Victim participation is often cited as one of the key innovations of the Statute.²⁶ Much has been written about the restorative function of victim participation at the Court and the potential the system has for providing victims with a sense of agency within the criminal justice process.²⁷
42. The language of Article 68(3) is heavily inspired by the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.²⁸ Its preamble observes that “millions of people throughout the world suffer harm as a result of crime and the abuse of power and *that the rights of these victims have not been adequately recognized.*”²⁹ This goal has been further highlighted in ICC strategic documents, which state that the ICC could serve “not only a punitive but also a restorative function.”³⁰
43. Restorative justice encompasses several concepts, one of which is that through participation a victim can obtain validation or recognition of the harm suffered they have suffered.³¹ The LRVs contend that allowing victims to present their views and concerns in person is not only well established practice before this Court, but is also a key tenet of restorative justice.³²
44. Numerous common-law jurisdictions, including the United Kingdom, the United States of America, Australia, Canada and Uganda have recognised the rights of victims within the criminal justice process and Victim Impact Statements

²⁶ See T. van Boven, ‘The Position of the Victim in the Statute of the International Criminal Court’, in H. Von Hebel et al. (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (1999), p.87.

²⁷ See S. A. Fernandez de Gurmendi and H. Friman, ‘The Rules of Procedure and Evidence of the International Criminal Court’, (2001) 3 *Yearbook of International Humanitarian Law* 289, p. 312.

²⁸ Resolution 40/34 adopted by the General Assembly of the United Nations on 29 November 1985.

²⁹ Emphasis added. Preamble, UN Declaration, available at:

<http://www.un.org/documents/ga/res/40/a40r034.htm>

³⁰ See ICC, Report of the Court on the Strategy in Relation to Victims, ICC-ASP/8/25, 10 November 2009, p.3.

³¹ See, for example, R. E. Barnett, ‘Restitution: A New Paradigm of Criminal Justice’, *Ethics* 87 (4) (1977) :279-301. See also, J. A. Wemmers, ‘Where Do They Belong? Giving Victims a Place in the Criminal Justice Process,’ *Criminal Law Forum* 20(3) (2009), 395-416; E. Weitekamp, *Reparative Justice: Towards a Victim Orientated System*, 1 *Eur. J. Crim. Pol’t Res.*, 70-93 (1993).

³² See Wemmers, *Idem.*, p. 401.

("VIS") are commonly allowed to be presented before judgment or at sentencing.³³

45. Arguably the role of victims before this Court goes further and the LRVs recall that the participation of victims in the proceedings before the Court shall be *"effective and significant as opposed to purely symbolic."*³⁴
46. These arguments are far from theoretical. The value to be gained by victims in presenting their views to the Court in person is a matter of real and practical consequence to our clients. Indeed, the LRVs note that during their numerous field missions, victims have frequently expressed the desire to communicate directly with the Judges and inform them personally of the harm they have suffered.
47. The LRVs firmly believe that permitting victims to present their views and concerns in person allows for the recognition of victims, and can be tremendously empowering for them and others within the communities that they represent. In contrast, a narrow approach which distils the role of victims down to that of 'mere' witnesses risks contravening the spirit and meaning of Article 68(3) of the Statute.

(iii) The need for views and concerns to be presented by victims before judgment

48. The LRVs recognises that the Chamber's expressed reticence on the subject of views and concerns presented in person relates not to whether this should occur

³³ Code of Practice for Victims of Crime (Victims' Code), October 2015, United Kingdom; in the United States of America, forty-nine of the fifty states have enacted legislation or state constitutional amendments which permit the reading of a Victim Impact Statement at the sentencing phase of criminal proceedings; Crimes Amendment (Victim Impact Statements) Bill 2006, The Parliament of the Commonwealth of Australia; and The Constitution (Sentencing Guidelines for Courts of Judicature (Practice) Directions, 2013, First Schedule: Form A- Victim impact statement, Uganda.

³⁴ See "Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", ICC-01/04-01/06-1432, para 97; the "Decision on victims' representation and participation" (Trial Chamber V), ICC-01/09-01/11-460, 3 October 2012, para. 10; "Decision on victims' representation and participation" (Trial Chamber V), ICC-01/09-02/11-498, 3 October 2012, para. 9; "Decision on common legal representation of victims for the purpose of trial" (Trial Chamber III), ICC-01/05-01/08-1005, 1st December 2010 (dated 10 November 2010), para. 9(a).

at all, but whether it is appropriate before judgment.³⁵ However the LRVs submit that there are compelling reasons for the Chamber to hear from victims directly before it produces its judgment.

49. First, hearing from the victims at this stage enables the Judges to take their views and concerns into account when writing its judgement. While the matters which would be presented by the victims are not evidence as such, and will not influence the Chamber's findings of fact, they may nonetheless assist the Chamber in other ways. For example, understanding which matters are of importance or particular concern to the victims can assist the Chamber in identifying areas in the written judgment which must be explained with particular care and attention so as to be understood and respected by victim communities. Similarly, it may direct the Chamber's attention to some non-factual matters which should be addressed in its judgment.
50. Secondly, allowing victims to present their views and concerns during the course of the trial itself ensures that due importance is given to this procedure. There is a danger that relegating views and concerns to possible subsequent proceedings on sentencing or reparations results victims voices being understood as of secondary or subsidiary importance. This is particularly so given that for many victims the key moment in the trial is the decision on guilt or innocence, and there is therefore a desire to address the Chamber at this fundamental stage.
51. Thirdly, there is of course always a possibility that the Accused may be acquitted. If that occurs and the Chamber has not allowed the victims to present views and concerns in person before judgment, the important objectives set out above would be thwarted.
52. Finally, of course there are certain topics on which victims views may be less relevant during trial than at a later point. For example, views which are very specific to sentencing or reparations *could* be heard during subsequent

³⁵ Preliminary Directions, para. 21.

proceedings for those purposes. However in the present case a wider range of topics is expected to be presented, which are of a nature that it would be useful for the Chamber to hear prior to producing its judgment.

53. The LRVs of course recognise that in determining the appropriate stage at which views and concerns might be heard, the Chamber is required to consider any prejudice to the rights of the Accused. It is submitted that no interference with defence rights would arise by hearing the victims' views and concerns prior to judgment. This has been done without difficulty in two other cases before the Court. Naturally the material presented must be appropriately delimited. However the Chamber is certainly capable of ensuring that it does not hear or take into account any inappropriate material from this process.

54. As to the appropriate point in the proceedings for this material to be heard, the LRVs note that in *Bemba* and *Katanga*, the Chambers heard views and concerns from victims together with the victims' evidentiary case. Alternatively, in *Lubanga*, although views and concerns were ultimately not sought to be presented, Trial Chamber I intimated that it might consider the appropriate moment for them to be during closing submissions.³⁶ The LRVs consider that it is preferable for victims' views and concerns to be heard at the earliest opportunity, so that they can be borne in mind in all subsequent parts of the proceedings. However if the Chamber does not consider it appropriate to hear victims' views and concerns in person during the presentation of the victims' case, it may consider as an alternative hearing these views and concerns during closing submissions. As indicated below, in either event the material would be relatively short and would not disrupt proceedings or significantly add to their duration.

(iv) Proposed approach in the present case

55. The LRVs recognise that any presentation of victims' views and concerns must be proportionate in order that it not interfere with the Accused's right to an

³⁶ Transcript, 8 May 2009, ICC-01/04-01/06-T-171-ENG, pp37-38.

expeditious trial. It is clear that the *individual* views of thousands of victims cannot be heard. However in a society in which clear social leadership structures exist, this need not present an obstacle to the Court hearing victims' voices. It is submitted that hearing directly from community leaders is the most appropriate means by which to ensure that the Court hears victims' voices in a manner which is meaningful for both the Court and the victims concerned.

56. The LRVs therefore propose that two community leaders be permitted to present the views and concerns of their communities on key issues. The LRVs have a strong preference that two community leaders be heard since this would permit the Court to hear both from a male and a female leader, and both from an Acholi and a Langi leader.

57. Based on discussions with the communities in question the LRVs anticipate that some of the key issues which would be addressed by the views and concerns would be:

- (i) The desire of the victim communities to see "justice" done, and what this concept means to them;
- (ii) The views of the victims regarding the role and importance of the ICC proceedings in comparison to local and traditional justice mechanisms and the relevance of a fair and impartial trial to victims;
- (iii) The fears held by victims about what will happen in their communities if Ongwen is acquitted, any steps that the Court can do about this in terms of messaging in its judgment.

58. The estimated time for the presentation of views and concerns is one hour each from each of the victim community leaders (therefore a total of two hours). In the interests of expeditiousness and bearing in mind the rights of the Accused, the LRVs would be open to considering whether the presentation of views and concerns could occur by way of video-link.

FOR THE FOREGOING REASONS the LRVs respectfully

REQUESTS the Chamber's leave to call leave:

- a) to call eight live witnesses, including six factual witness and two expert witnesses; or in the alternative for the evidence of these witnesses to be submitted pursuant to rule 68 and;
- b) to present two participating victims to express the views and concerns of their communities to the Chamber in person either during the victims' case or, in the alternative, during closing submissions at the end of trial.



Joseph A. Manoba
Legal Representatives for Victims



Francisco Cox

Dated this 2nd day of February 2018

At Kampala, Uganda and at Santiago, Chile.