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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

IN THE CASE OF

THE PROSECUTOR v. DOMINIC ONGWEN

Public

Observations on the organisation of victims' legal representation

Source: Victims' Legal Representatives

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

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I. LEGAL BASIS AND INTRODUCTION

1. This document is filed pursuant to rule 91(2) of the Rules of Procedure and Evidence (the “RPE”) and the oral order of the Trial Chamber made at the status conference of 23 May 2016.¹ It is made by the external counsel (the “Legal Representatives”) on behalf of the 1434 participating victims whom they represent. This follows communications between the Legal Representatives and counsel from the Office of Public Counsel for Victims (the “OPCV”) which failed to produce a consensus on a possible joint submission.

II. PROCEDURAL HISTORY

2. On 27 November 2015 and on 24 December 2015 the then Single Judge in Pre Trial Chamber II issued two decisions on victims’ participation in which he admitted victims to participate in the proceedings and arranged for their legal representation.²
3. On 2 May 2016 the case was transferred to Trial Chamber IX.³
4. On 13 May 2016 and 18 May 2016 the Legal Representatives and OPCV respectively filed their submissions ahead of the status conference to be held on 23 May 2016, including on the question of victims’ legal representation.⁴
5. At the status conference on 23 May 2016 the Chamber observed that the legal representatives of victims, while identifying difficulties in the current arrangements for the representation of victims, had not proposed solutions, and

¹ Transcript, 23 May 2016, ICC-02/04-01/15-T-25-ENG, p29.

² *Prosecutor v. Dominic Ongwen*, Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15-350, 27 November 2015; *Prosecutor v. Dominic Ongwen*, Second decision on contested victims’ applications for participation and legal representation of victims, ICC-02/04-01/15-384, 24 December 2015. See also: *Prosecutor v. Dominic Ongwen*, Decision on issues concerning victims’ participation, ICC-02/04-01/15-369, 15 December 2015.

³ *Prosecutor v. Dominic Ongwen*, Decision constituting Trial Chambers VIII and IX and referring to them the cases of *The Prosecutor v. Ahmad Al Faqi Al Mahdi* and *The Prosecutor v. Dominic Ongwen*, ICC_02/04-01/15-430, 2 May 2016.

⁴ *Prosecutor v. Dominic Ongwen*, Corrected Version of Submissions on Items Defined for the Status Conference on 23 May 2016, ICC-02/04-01/15-433-Corr, 23 May 2016; *Prosecutor v. Dominic Ongwen*, Common Legal Representative’s submissions pursuant to the “Order Scheduling First Status Conference and Other Matters”, ICC-02/04-01/15-437, 18 May 2016.

ordered the victims' legal representatives to file observations on this matter by 6 June 2016. The Single Judge indicated that this was to be done jointly if possible.⁵

6. On 1 June 2016 the Legal Representatives emailed the OPCV with a proposal for the arrangement of victims' legal representation which could form the basis of joint observations. It reflected the content of the proposal made in paragraphs 36 to 50 of the present observations. On 2 June 2016 counsel from the OPCV responded indicating, *inter alia*, that "having been designated by the chambers to act as Common Legal Representative in the case I do not intend to further comment on the system of common legal representation". As a result she indicated that a joint submission would not be possible.

III. THE CURRENT STATUS OF VICTIMS' LEGAL REPRESENTATION

(i) Overview of existing of legal representation in the case

7. At the pre-trial stage 2026 victims were accepted to participate in the proceedings.⁶ Of these, some 1434 victims had designated Joseph A. Manoba and/or Francisco Cox as their legal representatives. The then Single Judge recognised these appointments under rule 90(1).⁷
8. The remaining 592 participating victims had not nominated a legal representative in the proceedings. Of these individuals 545 had never previously participated in or been represented in proceedings before the court. Forty-seven (47) had been accepted to participate in the Situation in Uganda, and in that context the OPCV had been appointed to represent them. The Single Judge appointed Paolina

⁵ Transcript, 23 May 2016, ICC-02/04-01/15-T-25-ENG, p29.

⁶ *Prosecutor v. Dominic Ongwen*, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15-350, 27 November 2015; *Prosecutor v. Dominic Ongwen*, Decision on issues concerning victims' participation, ICC-02/04-01/15-369, 15 December 2015, para.10; *Prosecutor v. Dominic Ongwen*, Second decision on contested victims' applications for participation and legal representation of victims, ICC-02/04-01/15-384, 24 December 2015, para.22.

⁷ *Prosecutor v. Dominic Ongwen*, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15-350, 27 November 2015, para. 17; *Prosecutor v. Dominic Ongwen*, Second decision on contested victims' applications for participation and legal representation of victims, ICC-02/04-01/15-384, 24 December 2015.

Massidda of the OPCV to represent all of these 592 victims.⁸ The Single Judge also expected that Ms Massidda would engage one or more assistants based in Uganda,⁹ and this has been done.

(ii) Distribution of the participating victims between legal teams

9. The following table provides an approximate¹⁰ overview of how the currently participating victims are distributed between communities and legal teams. These numbers are based on information known to the Legal Representatives about their own clients, and information contained in public Registry reports regarding the groupings of participating victims overall.

	Legal Representatives	OPCV	Total
Lukodi	1208	414	1622
Abok	116	1	117
Odek	84	23	107
Pajule	0	126	126
Other areas	26	28	54
Total	1434	592	2026

(iii) Arrangements for communication with clients

10. To date the Legal Representatives are operating in the field through the combined efforts of Joseph A. Manoba and one Acholi-speaking field assistant. These team members with occasional presence of Francisco Cox visit clients to meet with the victims directly, but also maintain contact through 'focal points' within the victim communities (themselves participating victims) that are recognized leaders of the

⁸ *Prosecutor v. Dominic Ongwen*, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15-350, 27 November 2015, para.19; *Prosecutor v. Dominic Ongwen*, Second decision on contested victims' applications for participation and legal representation of victims, ICC-02/04-01/15-384, 24 December 2015, para. 20.

⁹ *Prosecutor v. Dominic Ongwen*, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15-350, 27 November 2015, para.23.

¹⁰ The figures are approximate because they are based on a categorisation of victim groupings undertaken by the Registry based on application forms, rather than on information specifically provided in relation to victims' communities or place of residence. However, because the VPRS groupings are likely to accurately reflect victims' residence in the great majority of cases, the Legal Representatives believe these figures give a very good approximation of victim numbers by community.

different victims groups. These 'focal points' have proven to be instrumental in facilitating timely and effective communications between the victims and the Legal Representative as well as organizing the meetings with the victims. The Legal Representatives believe that this network of victim 'focal points' will enable them to continue efficiently representing the relatively large number of victims, and that they could do so even if the number of victims they represent increased substantially.

(iv) Problems with the current arrangement of legal representation

11. In their filings ahead of the 23 May 2016 status conference both the Legal Representatives and the OPCV identified difficulties with the current arrangement of legal representation. The OPCV focused on situations in which members of a single family are separately represented.¹¹ The Legal Representatives identified a broader problem whereby the communities themselves are divided along lines which bear no relationship to their interests in the case or any other objective factor.¹²
12. The Legal Representatives agree with the OPCV that the separate representation of family members is problematic. The Legal Representatives have been informed by some clients that child members of their families are participating in the proceedings and are represented by the OPCV, while some adult members of their families are represented by the Legal Representatives. Clearly in such cases the joint representation of families is preferable, unless there is some basis on which to believe that a conflict of interests between the family members exists. To the best of the Legal Representatives' knowledge there is no such conflict in the case of any families' currently participating (see further below at paragraph 44).
13. However, the Legal Representatives consider that the current arrangement of legal representation is problematic not only because it has led to separate

¹¹ *Prosecutor v. Dominic Ongwen*, Common Legal Representative's submissions pursuant to the "Order Scheduling First Status Conference and Other Matters", ICC-02/04-01/15-437, 18 May 2016, para.40.

¹² *Prosecutor v. Dominic Ongwen*, Corrected Version of Submissions on Items Defined for the Status Conference on 23 May 2016, ICC-02/04-01/15-433-Corr, 23 May 2016, para. 25.

representation within families. The current arrangement also means that victims within one community are represented by different legal teams, without a clear rationale for that division.

14. The following problems have been observed as a result of this:

- (a) Victims generally do not know which other members of their community are represented together with them, and which are represented by the other legal team. This might be otherwise if there was some principled reason for the division of legal representation (for example if all those who had been abducted by the LRA were represented separately from those who suffered from other kinds of crimes). The present division of representation makes it extremely difficult for members of the community to know who is represented by which team, especially in those communities where large numbers of victims are participating.
- (b) Victims generally do not understand why they are represented separately, although efforts have been made to explain this.
- (c) It is difficult to arrange meetings with only clients of one legal team: community leaders and persons assisting them to organize meetings must keep track of large numbers of participants and carefully identify which team of lawyers represents each person; in any event, because of points (a) and (b) identified above, participating victims represented by one team of lawyers will likely fail to understand why they are not being included in a meeting being held by the other legal team, and may seek to attend it in any event.
- (d) Although some level of confidentiality should ideally be maintained within the group of victims represented by a single team of lawyers concerning the discussions held among them and with their legal representatives, this is difficult to achieve where victims are differently represented and, as set out in (a), do not know which other members of their community form a part of their group for legal representation purposes and which are separately represented.

Victims may share matters discussed with their lawyers with others whom they wrongly believe to be represented jointly with them.

- (e) Where tight-knit communities exist and are led by an elaborately organised victims' leadership team, those leaders must be involved in arranging and facilitating community meetings. This process is complicated where those community leaders are themselves participating victims represented by one team (as such leaders in Lukodi are represented by the Legal Representatives). Difficulties and confusion have been created where the other team wishes to arrange meetings through these same individuals.

(v) Victims' views regarding their current legal representation

15. During meetings between the Legal Representatives and their clients the question of legal representation has frequently been raised by the participating victims. Two principle views have consistently been advanced by the victims to the Legal Representatives:

16. First, victims complain that the use of two different teams of lawyers is problematic. As one victim (a/05451/15) explained:

“What I want to raise because it is a concern of the community that having two group of lawyers is confusing people. And we decided to have only one team of lawyers that would mean if information is to be brought to us, the people would not be divided, because this is dividing people.”

17. Secondly, victims insist that they wish to continue with the legal representatives whom they have chosen. As explained by another participating victim (a/06927/15):

“As a victim who has suffered harms during the war I think it was our decision to appoint the two lawyers. Therefore we feel it's very important to continue with them in this case since the process that we founded on we have not changed.”

(vi) Principles to be applied in the arrangement of legal representation

18. Given the practical challenges identified above and the stated views of the participating victims, the Legal Representatives consider that it would be appropriate to reorganize legal representation to address the issues identified. In particular there would be significant advantages in re-organizing legal representation so that communities are not divided along arbitrary lines.
19. The Legal Representatives submit that any effort to rearrange the legal representation of victims must be done through means which:
- (i) comply with the provisions of the Court's legal texts;
 - (ii) are objective, fair and transparent; and most importantly
 - (iii) which prioritize the victims' free and informed choice about their legal representation.
20. The Legal Representatives note that the latter point reflects the consistent approach of the Court's legal texts which require that victims' own views and preferences should determine their legal representation. This principle is clearly embodied in rule 90(1) and (2) of the RPE, in regulation 79 of the Regulations of the Court, and in regulation 112 of the Regulations of the Registry.
21. The Legal Representative's proposals for how this could be achieved are set out below. The Legal Representatives note that these proposals do *not* involve a suggested *outcome* for the representation of victims. Given the principle that victims themselves should make decisions concerning their legal representation, the Legal Representatives do not consider it appropriate for lawyers to decide among themselves on the representation of the participating victims. Lawyers involved or potentially involved in a case may be perceived as having a personal interest in the outcome of victims' legal representation. In this context the Legal Representatives consider that they are ethically bound to report their clients stated position to the Court, but that ultimately an independent and objective process should be undertaken in order to verify the wishes of the victims and

decide on the arrangement of legal representation. This is in conformity with the Court's legal texts as set out below.

IV. RELEVANT LEGAL FRAMEWORK

(i) *Applicable legal principles*

22. The Legal Representatives observe that any re-organization of victim's legal representation must be done in accordance with the applicable legal texts.

23. Principles concerning the legal representation of victims are contained in rule 90 of the RPE.

24. According to this scheme victims are generally free to choose their legal representatives (rule 90(1)). The one and only exception is where "there are a number of victims" and the Chamber considers it necessary to arrange common legal representation for the purpose of "ensuring the effectiveness of the proceedings". As the Single Judge at pre-trial explained it, a chamber may disturb victims' freedom of choice "only for reasons of practicality."¹³

25. This exception, permitting the arrangement of common legal representation, is contained in rule 90(2) and (3).¹⁴ That these two paragraphs of rule 90 are intended to be read together is clear from their wording: paragraph (2) provides the circumstances in which common legal representation can be arranged, and explains that in such circumstances the Chamber may "request the victims.... if necessary with the assistance of the Registry, to choose a common legal representative or representatives." Paragraph (3) explains what shall occur "[i]f the victims are unable to choose a common legal representative", a clear reference to paragraph (2).

26. It is clear that the RPE's drafters intended rule 90(2) and (3) to apply in circumstances where the representation of multiple victims was creating practical problems. They also clearly intended that in such circumstances victims' are first

¹³ *Prosecutor v. Dominic Ongwen*, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15-350, 27 November 2015, para.17.

¹⁴ *Ibid.*

to have a chance to choose their own legal representative (with the assistance of the Registry if necessary). If that fails, rule 90(3) permits the Chamber to request that the Registrar choose one or more common legal representatives.

27. However, unless and until rule 90(2) and (3) are engaged, victims' right to choose their own counsel remains paramount under rule 90(1).

(ii) *Legal characterisation of the current representation scheme in the present case*

28. In the present case, no action has been taken under rule 90(2) or (3) and therefore victims retain the right to choose their legal representative(s) under rule 90(1).

29. The Legal Representatives note that although counsel from the OPCV have been referred to as "common legal representatives", the material question is the process by which she was designated, namely regulation 80 of the Regulations of the Court.¹⁵ This question is important because only rule 90(2) and (3), and not regulation 80, can override victims' free choice of counsel. Rule 90(2) and (3) are clearly intended as exceptions to the principle of a victim's free choice of legal representation,¹⁶ In contrast, regulation 80 is subordinate to the RPE,¹⁷ and cannot override either the principle of free choice of counsel in rule 90(1) or the carefully regulated exceptions to it in rule 90(2) and (3).

30. In the present case, regardless of what terminology is used to refer to counsel from the OPCV, it is clear that she was appointed under regulation 80 and outside the framework of rule 90(2) and (3).

(iii) *Legal avenues for arranging legal representation in the case*

31. Because common legal representation under rule 90(2) and (3) has not been undertaken in the present case, victims currently maintain their right to choose a legal representative under rule 90(1). As a result, victims' legal representation

¹⁵ *Prosecutor v. Dominic Ongwen*, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15-350, 27 November 2015, para.19.

¹⁶ *Prosecutor v. Dominic Ongwen*, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15-350, 27 November 2015, para.17.

¹⁷ Regulations of the Court, regulation 1(1).

could only be modified in conformity with the court's legal text by using one or more the following legal bases:

- (i) Victims represented by the OPCV have not yet formally exercised their right to choose a legal representative, and therefore the Chamber remains free to modify their legal representation under regulation 80 of the Regulations of the Court.
- (ii) Individual victims remain free to elect to change their legal representation pursuant to rule 90(1).
- (iii) The Chamber may act under rule 90(2) and (3) to arrange common legal representation.

32. The Legal Representatives' submissions on the appropriateness of each of these options are set out below.

V. OPTIONS FOR ARRANGING LEGAL REPRESENTATION

(i) Use of regulation 80 by the Chamber

33. For the reasons explained above, regulation 80 is subordinate to rule 90(1) of the RPE and can only be used where victims have not freely chosen a legal representative. In the present case it may therefore be used to appoint new counsel or those victims currently represented by the OPCV, but cannot be used in respect of the victims represented by the Legal Representatives since they have freely chosen their lawyers. Should the Single Judge consider it appropriate to do so, he could appoint the Legal Representatives to represent some or all of the victims currently represented by the OPCV. For example, this could be done to achieve consistency in representation within the communities of Lukodi, Abok and Odek.

34. This option is legally available to the Single Judge, and the Legal Representatives confirm that they are available and able to represent victims currently represented by the OPCV.

35. Nonetheless, the Legal Representatives do not recommend this approach to the Single Judge. It would not allow for a comprehensive reorganization of legal representation into a coherent system. While practical issues within communities would be resolved, separate representation of victims between different communities would not facilitate the creation of a coherent strategy for victims in the case, and as explained below at 43, the maintenance of separate two legal teams engaging separately in the proceedings would present an unnecessary drain on Court time and resources (even where one team is not dependent on Court-funded legal aid). Most significantly, this approach would not provide the participating victims with an opportunity to express their views on their own legal representation. From this perspective the Legal Representatives consider this to be a less suitable option for the reorganization of legal representation than those set out below.

(ii) Individual victim decisions on legal representation

36. Because common legal representation has not been arranged under rule 90(2) and (3), victims remain free to individually choose their legal representative. One means by which to address the problem of families and communities being represented separately would be to simply provide all the affected victims with the means by which to elect to change their legal representation should they wish to do so.

37. The Legal Representatives note that victims may not appoint the OPCV to represent them.¹⁸ Conversely, they see no reason why victims would not be permitted to expressly renounce their existing legal representation and request that the Chamber appoint the OPCV, should they wish to do so. The Legal

¹⁸ *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on the role of the Office of Public Counsel for Victims and its request for access to documents, ICC-01/04-01/06-1211, 6 March 2008, para.30; *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Decision on the Observations on legal representation of unrepresented applicants, ICC-01/05-01/08-651, 9 December 2009, paras 8-9; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on common legal representation of victims for the purpose of trial, ICC-01/05-01/08-1005, 10 November 2010, para.29.

Representatives would support any process to facilitate voluntary rearrangement of this kind.

38. However, the Legal Representatives consider that this approach is unlikely to entirely resolve the problem of divided legal representation in families and communities. In meetings with their clients the Legal Representatives have been informed by their clients, sometimes in strong terms, that the latter wish to continue with their present legal representation. (This is the case even when victims are told that legal aid is not available to the Legal Representatives' and their team.) In her communication with the Legal Representatives counsel from the OPCV also indicated that her clients have told her they wish to maintain their current legal representation. Experience before the Court has demonstrated that victims are often reluctant to change legal representation once it is established. It may be surmised that even if victims are open to changing representation, they are unlikely to express that directly to their existing counsel. For this reason, if the Single Judge wishes to adopt this approach, the Legal Representatives consider it may be useful to request that the Registry undertake the process of speaking with individual victims to ascertain whether they wish to change their legal representation. The Legal Representatives would welcome to this course of action.

39. Despite this, the Legal Representatives remain doubtful that the problems identified above (at paragraph 14) could be entirely resolved by this approach. There may remain at least a small number of victims who take a different approach on legal representation, in which case communities (and possibly even families) would remain divided.

(iii) Arrangement of common legal representation under rule 90(2) and (3)

40. The Legal Representatives consider that a preferable approach would be to initiate the process set out in rule 90(2) and (3). This is both the correct approach on principle, and the approach which would entail the best practical consequences.

41. The Legal Representatives note that the rules clearly intend that when practical difficulties arise from the representation of multiple participating victims, the approach used to resolve this should be that set out in rule 90(2) and (3). Even if policy considerations militated against the use of that approach, as the Single Judge has recently ruled, such considerations cannot justify setting aside the clear intention of the RPE's drafters.¹⁹
42. In any event, policy considerations actually support the implementation of the process set out in rule 90(2) and (3). In contrast to the option outlined above, the arrangement of common legal representation pursuant to rule 90(2) and (3) has clear advantages:
43. First, it would enable a comprehensive reorganization so as to provide a coherent arrangement of legal representation. Accordingly, victims would be represented either together, or in groups which represented conflicting or distinct interests between them. Reducing the number of groups in which victims are represented has clear advantages: it not only promotes a more coherent case strategy, but also saves substantial resources. In particular, it avoids the additional cost of the time spent by the parties and Chambers where multiple legal teams participate in hearings and file submissions, responses and replies.
44. Of course, if conflicts of interest exist between participating victims, they must be represented separately.²⁰ However, it is not clear that such a conflict exists in the present case. The Registry appears to have taken the view that all participating victims can be represented together.²¹ A different view was taken by the OPCV in

¹⁹ *Prosecutor v. Dominic Ongwen*, Decision on the "Request for a determination concerning legal aid" submitted by the legal representatives of victims, ICC-02/04-01/15-445, 26 May 2016, para.12.

²⁰ RPE, rule 90(4).

²¹ *Prosecutor v. Dominic Ongwen*, First Report on Applications to Participate in the Proceedings, ICC-02/04-01/15-303, 18 September 2015, para.22; *Prosecutor v. Dominic Ongwen*, Second Report on Applications to Participate in the Proceedings, ICC-02/04-01/15-327, 26 October 2015, para. 6; *Prosecutor v. Dominic Ongwen*, Third Report on Applications to Participate in the Proceedings, ICC-02/04-01/15-344, 18 November 2015, para. 6; *Prosecutor v. Dominic Ongwen*, Fourth Report on Applications to Participate in the Proceedings, ICC-02/04-01/15-365, 7 December 2015, para.5.

2008 regarding the Uganda situation and *Kony et al.* case.²² The Legal Representatives note that stigmatisation of former LRA abductees and forced LRA wives can occur. However, divisions within these groups also exist, as do common interests with persons outside them. Take the following scenario for example: *Victim X is abducted from IDP Camp A, and subsequently participates in an attack against IDP Camp B. During the attack on Camp B, Y is abducted, and then participates in later attacks.* It might be suggested that X has a conflict of interest with members of Camp B and should be represented separately. Nevertheless, if this is so, then X also has a conflict of interest with Y and difficult questions arise: Should X and Y not also be represented separately from each other? Is it preferable for X to be represented together with Y but for both to be represented separately from their family members who lived in the same camps as them but were not abducted? The Legal Representatives believe that the nature of the present case makes it different from *Katanga* and *Ntaganda* in which it was considered appropriate to represent child soldiers separately.²³ According to Trial Chamber IV, a conflict of interest exists where “where “the situation or the specificity of the victims is so different that their interests are irreconcilable.”²⁴ The Legal Representatives’ meetings with their clients have led them to believe that any differences of interest among victims who were abducted and other community members are not so substantial as to be “irreconcilable”. They therefore believe that a single group of victims could be constituted for the purpose of legal representation, something which would increase the coherence and efficiency of the proceedings, while reducing their cost.

²² *Prosecutor v. Dominic Ongwen*, OPCV Report on legal representation of victims, ICC-02/04-01/15-358, 28 November 2008, para.16.

²³ *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Order on the organisation of common legal representation of victims, ICC-01/04-01/07-1328, 22 July 2009, para.12(c); *The Prosecutor v Bosco Ntaganda*, Pre-Trial Chamber I, Decision Requesting the VPRS and the OPCV to take steps with regard to the legal representation of victims in the confirmation of charges hearing and in the related proceedings, ICC-01/04-02/06-150, para.8; *The Prosecutor v Bosco Ntaganda*, Pre-Trial Chamber I, Decision Concerning the Organisation of Common Legal Representation of Victims, ICC-01/04-02/06-160, 2 December 2013, para.10.

²⁴ *The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Trial Chamber IV, Decision on common legal representation, ICC-02/05-03/09-337, 25 May 2012, para.42.

45. In any event, if distinct groups of victims are considered to have conflicting interests, this is also a reason to invoke rule 90(2) and (3). This would be the only way to remove conflicts existing *within* the currently constituted groups and instead create groups for the purpose of representation which reflect the distinct or conflicting interests of the victims.
46. Although invoking rule 90(2) and (3) would necessarily risk overriding wishes of some victims regarding their legal representation, the procedures set out in rule 90(2) and (3) (as well as in the Regulations of the Court and the Registry) would mean that this was done in a way which gave the victims an opportunity to agree on their own legal representative, or was at least based on consultations with victims. Moreover, the disadvantages in this lack of choice would be mitigated by the use of a proper process. As well as having its basis in victims' own views, this process would ensure that if victims cannot agree on a choice of a common legal representative, one would be chosen through a fair and objective process designed to best further the victims' interests.
47. The Legal Representatives therefore propose to the Single Judge that he initiate a process of common legal representation under rule 90(2). The Registry should be required to facilitate discussions among victims to determine whether they can choose a common legal representative. The Registry should offer victims the opportunity to choose the Legal Representatives, counsel from the OPCV, or another legal representative entirely. The Registry should also consult victims for their views on the arrangement of legal representation in the event that they are unable to agree on a legal representative. The Legal Representatives respectfully submit that the Single Judge should set a deadline pursuant to rule 90(3) within which this process must be completed, and by which time if agreement among the victims has not been reached, rule 90(3) is invoked.
48. Under rule 90(3), if victims cannot choose a common legal representative, the Single Judge should request the Registrar to do so. As advocated by the Single Judge at Pre-Trial, a "transparent and competitive process organised by the

Registry” should be used.²⁵ While rule 90(3) does not itself require a transparent and competitive process, this has become the established practice of the Registry.²⁶ It has the benefit of making the process as fair and objective as possible. This is important in order to ensure that the result is the best one in the interests of the victims. In this process the Registry is bound to apply the objective criteria established in the Regulations of the Registry.²⁷ Any counsel wishing to be appointed as common legal representative should be reviewed in that process on an equal and objective footing, with this also applying to counsel from the OPCV.

49. The Legal Representatives anticipate that the Single Judge may be concerned that applying this process would lead to delays in the proceedings. There are several reasons why the Single Judge need not be troubled by this concern:

- (i) The Registry can be given a limited time period (perhaps one month) to attempt to assist victims to choose a legal representative and at the same time to carry out consultations in the event that agreement cannot be reached among the victims. Since the Registry has already worked extensively in the victim communities and indeed has spoken with victims on these issues,²⁸ this should be feasible.

²⁵ *Prosecutor v. Dominic Ongwen*, Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15-350, 27 November 2015, para.20.

²⁶ *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Report on the organization of common legal representation, ICC-02/05-03/09-187, 5 August 2011, para.7; *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Proposal for the common legal representation of victims, ICC-02/05-03/09-203, 25 August 2011, paras 16-21; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Proposal for the common legal representation of victims, ICC-01/09-01/11-243, 1 August 2011, paras 24-29; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammad Hussein Ali*, Proposal for the common legal representation of victims, ICC-01/09-02/11-214, 5 August 2011, paras 24-29; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Recommendation for the position of Common Legal Representative of victims, ICC-01/09-01/11-467, 5 November 2012, paras 10-17; *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Recommendation for the position of Common Legal Representative of victims, ICC-01/09-02/11-517, 5 November 2012, paras 10-17; *Prosecutor v. Laurent Gbagbo*, Proposal for the common legal representation of victims, ICC-02/11-01/11-120, 16 May 2012, paras 11-16.

²⁷ Regulations of the Registry, regulation 112(2).

²⁸ *Prosecutor v. Dominic Ongwen*, First Report on Applications to Participate in the Proceedings, ICC-02/04-01/15-303, 18 September 2015, paras 21-24; *Prosecutor v. Dominic Ongwen*, Second Report on Applications to Participate in the Proceedings, ICC-02/04-01/15-327, 26 October 2015, paras 6-7; *Prosecutor v. Dominic Ongwen*, Third Report on Applications to Participate in the Proceedings, ICC-

- (ii) In the event that victims are unable to choose their own legal representative, a competitive process should be able to be completed within a further two months. This would still enable common legal representation to be arranged at least three months before the start of trial.
- (iii) If the Registry selects a common legal representative not currently active in the case, continuity is able to be ensured by making use of members of the existing legal teams who are already familiar with the case, and by utilising the mandate of OPCV under regulation 81(4) of the Regulations of the Court. This will ensure that a newly appointed team can be trial-ready within a few months or even weeks. The Legal Representatives assure the Single Judge that they will make themselves available, as will members of their existing team, to carry out this assistance function during a transfer to a new common legal representative if that should occur.
- (iv) Ultimately, while it is true that the arrangement of common legal representation may take up to three months, it will have the longer term impact of saving time at trial. This is because victims' legal representation will be consolidated enabling victims' participation to be carried out meaningfully while using less time in the proceedings.

50. For all of these reasons the Legal Representatives consider that the arrangement of common legal representation should be initiated by the Single Judge, pursuant to rule 90(2) and (3). In order to ensure that this process is completed as early as possible before trial it should be commenced immediately.

02/04-01/15-344,18 November 2015, paras 6-7; *Prosecutor v. Dominic Ongwen*, Fourth Report on Applications to Participate in the Proceedings, ICC-02/04-01/15-365, 7 December 2015, paras 5-6.

VI. CONCLUSION

51. The Legal Representatives respectfully submit that the Single Judge should immediately initiate a process of arranging common legal representation under rule 90(2) (and if necessary rule 90(3)).

Respectfully submitted,



Joseph Akwenyu Manoba



Francisco Cox

Dated this 6th day of June 2016

At Kampala, Uganda and Santiago, Chile