

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: **ICC-02/04-01/15**  
Date: **7 September 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**

**Public Redacted Version of “Defence Second Request for Protective Measures”, filed on  
7 September 2018**

**Source:** Defence for Dominic Ongwen

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

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## I. INTRODUCTION

1. The Defence for Mr Ongwen ('Defence') seeks reconsideration of several requests for protective measures arising from the "Decision on Defence Request for Protective and Special Measures and Rule 75 Assurances"<sup>1</sup> ('Decision') of Trial Chamber XI ('Chamber'), in which it rejected protective measures for Defence witnesses D26-0026,<sup>2</sup> D26-0027,<sup>3</sup> D26-0041 and D26-0042.<sup>4</sup> The Defence has been unable to meet with D26-0026 in the past month, but it shall file a separate request immediately after meeting with the witness.
2. In particular, the Defence respectfully asks the Chamber to reconsider this ruling as the Defence has conducted further assessments and garnered additional information about the aforementioned witnesses which, in the opinion of the Defence, necessitates a renewed request.<sup>5</sup>
3. Finally, the Defence has met with witnesses to complete the VWU forms as instructed by the Chamber, and met with another witness whom the Defence requested protective measures for in its previous request. The Defence notes that D26-0007 and D26-0117 no longer request protective measures, and D26-0086, D26-0112, D26-0118 and D26-0119 request protective measures.

## II. CONFIDENTIALITY

4. Pursuant to Regulation 23 *bis*(1) of the Regulations of the Court ('RoC'), the Defence files this request confidential because it discusses issues dealing with witness protection requests. A public redacted version shall be filed contemporaneously.

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<sup>1</sup> ICC-02/04-01/15-1301-Red.

<sup>2</sup> Decision, paras 20-22.

<sup>3</sup> Decision, paras 23-24.

<sup>4</sup> Decision, paras 43-46.

<sup>5</sup> *See generally* Decision, para. 10.

### III. PROCEDURAL HISTORY

5. On 4 June 2018, the Defence submitted its request for protective measures for some of its witnesses.<sup>6</sup>
6. On 13 June 2018, the Prosecution responded to the Defence's request.<sup>7</sup> The Prosecution objected to the request for protective measures for D26-0041 and D26-0042<sup>8</sup> and did not comment on the requests for protective measures for the remaining witnesses.<sup>9</sup> Finally, the Prosecution undertook "that it will not seek to rely on the in-court testimony of these four family members of Mr Kony as incriminating evidence in any future ICC proceeding against Mr Kony."<sup>10</sup>
7. On 5 July 2018, the Chamber issued the Decision.

### IV. APPLICABLE LAW

8. Article 64(2) of the Rome Statute requires the Chamber to "ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused...".
9. Article 64(8)(b) of the Rome Statute grants the Presiding Judge the power to "give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner."
10. Finally, the Defence incorporates by reference the submissions made in filing ICC-02/04-01/15-1273-Conf-Corr, paragraphs 6-21.

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<sup>6</sup> ICC-02/04-01/15-1273-Conf-Corr.

<sup>7</sup> ICC-02/04-01/15-1283.

<sup>8</sup> *Ibid.*, paras 6-10.

<sup>9</sup> *Ibid.*, paras 4-5.

<sup>10</sup> *Ibid.*, para. 12.

## V. SUBMISSIONS

11. A Chamber may reconsider its decision when it is manifestly unsound and its consequences are manifestly unsatisfactory,<sup>11</sup> or when new or previously unavailable information requires the Chamber to reconsider its previous ruling.<sup>12</sup>
12. The ICC Trial Chambers have found that they have the power<sup>13</sup> to reconsider interlocutory decisions<sup>14</sup> when prompted by the parties or *proprio motu*.<sup>15</sup> Trial Chambers have also been willing to consider material that was not formally admitted as relevant to whether reconsideration is merited.<sup>16</sup>
13. As noted above, the Chamber wrote “[a]s a general matter, should a request for Protective Measures be rejected, this is done without prejudice to a renewed assessment and decision on the necessity of Protective Measures should further information become available.”<sup>17</sup>
14. Finally, the Defence incorporates by reference the submissions made in filing ICC-02/04-01/15-1273-Conf-Corr, paragraphs 24 and 26.

### 1. Protective Measures for Witness D26-0112

15. Witness D26-0112 is a subsistence farmer and an *ajwaka*. [REDACTED].
16. During these early days, the Holy Spirit Movement actively hunted and killed *ajwaka* [REDACTED].<sup>18</sup> [REDACTED].

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<sup>11</sup> Trial Chamber I has accepted the possibility of reconsidering decisions in exceptional circumstances. See ICC-01/04-01/06-2705, paras.13-18. Other Chambers, like Pre-Trial Chamber II in the Uganda Situation, have concluded that there is no express statutory authority to reconsider rulings (see, e.g., ICC-02/04-01/05-60, para.18). The Prosecution notes that the Appeals Chamber has affirmed that this Court may exercise inherent judicial powers, as in its authority to issue a permanent stay of proceedings even though no article or rule expressly provides for it (ICC-01/04-01/06-772 OA4, paras.36-39).

<sup>12</sup> ICC-01/05-01/08-1691-Red, para.17. An analogous application of Article 84 also supports this submission.

<sup>13</sup> ICC-01/04-01/06-2705, para. 13 (“The starting point for considering an application of this kind is the duty on the part of a Trial Chamber to ensure the trial is fair and expeditious, pursuant to Article 64(2) of the Statute”).

<sup>14</sup> ICC-01/04-01/06-2705, para. 18, ICC-01/09-01/11-511, and ICC-01/09-02/11-863.

<sup>15</sup> ICC-01/09-02/11-863, para. 11.

<sup>16</sup> ICC-01/05-01/13-1948, para. 21.

<sup>17</sup> Decision, para. 10.

<sup>18</sup> See D26-0074 at UGA-D26-0021-0142, paras 62-66; D26-0032 at ICC-02/04-01/15-1272-Conf-AnxC, p. 61, paras 19-20; and D26-0019 at UGA-D26-0010-0352, paras 18-20.

17. The witness fears that if his identity is known, the same problems will resurface, especially since he will testify about [REDACTED]. As such, the Defence respectfully requests face and name distortion for the witness.

### *2. Protective Measures for Witnesses D26-0118 and D26-0119*

18. Since its last request for protective measures, the Defence met with D26-0118 and D26-0119 to complete the VWU forms as ordered by the Chamber. The Defence requests these protective measures together as their reasoning for requesting protective measures are for the same reasons.
19. The witnesses protected their identities as well as they could by using pseudonyms in the bush. Their identities are known to only a few. If their names and identities are revealed to the public, their attempts to conceal their past would be defeated.
20. When the witnesses returned from the bush, they had problems reintegrating back into society. They brought with them children from the bush, and they were not initially accepted back because of the stigmatisation associated with having children in the bush. They have attempted to keep the identities of their children's fathers hidden from their communities to ameliorate their problems in the society and those of their children. Their identities, especially for them and their children, need to be protected in furtherance of their desire to achieve and maintain a decent and harmonious living.
21. For the reasons stated above, the Defence respectfully requests face and name distortion for witnesses D26-0118 and D26-0119.

### *3. Protective Measures for Witness D26-0027*

22. Since its last request for protective measures, the Defence met with D26-0027 to complete the VWU forms as ordered by the Chamber.
23. Firstly, the witness went by a pseudonym name whilst in the bush. [REDACTED]. His true name is known only by a few.
24. Secondly, the witness still fears prosecution by the Government of Uganda. The witness did not return home after escaping the LRA. [REDACTED].

25. [REDACTED]. The witness kept his distance from areas known to be frequented by the LRA, and like P-0070, did not return home after his escape for fear of reprisal against his family and village. While the Defence believes that the fear of LRA reprisals in Uganda are an issue of the past, [REDACTED]. If knowledge of his true identity was revealed, it would pose a serious increased risk to the witness and his family by active LRA members.
26. Finally, [REDACTED].<sup>19</sup> [REDACTED].
27. For the reasons stated above, the Defence respectfully requests face and name distortion for witness D26-0027.

#### *4. Protective Measures for Witness D26-0086*

28. Since its last request for protective measures, the Defence met with D26-0086 to complete the VWU forms as ordered by the Chamber. The Defence met with the witness formally twice. The Defence requests face, name and voice distortion for the witness.
29. [REDACTED].
30. [REDACTED].
31. [REDACTED].
32. [REDACTED].
33. For the reasons stated above, the Defence respectfully requests face, name and voice distortion for witness D26-0086.

#### *5. Protective Measures for Witnesses D26-0041 and D26-0042*

#### **New Facts Justifying Reconsideration**

34. In rejecting the protective measures, the Single Judge noted:

that the Defence has not even contacted the expert witnesses about their views on testifying publicly in this case and that any submission on fears of both witnesses is entirely speculative. Accordingly, the Single Judge does not find an objectively

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<sup>19</sup> UGA-OTP-0191-0602-Track44, 00:00:15-00:00:31.

justifiable risk should both witnesses testify publicly and rejects the request for Protective Measures for D-41 and D-42.<sup>20</sup>

35. In its 4 June 2018 request, the Defence noted that “[d]iscussions regarding their security concerns have not been concluded with the witnesses, especially concerning fears of reprisals and isolation from the communities in which they have been practicing.”<sup>21</sup> Following those submissions and the Decision, members of the Defence met with experts D26-0041 and D26-0042 to discuss their concerns. Their concerns, which were not available at the time of the original submissions, constitute new facts that merit reconsideration, in the interests of justice, of the decision denying a pseudonym and voice distortion.

### **The Objective Risk**

36. Given the well-known mental health and humanitarian crisis in Northern Uganda, and the continuing role of the experts in treating victims, it is in the interests of the victims that the experts be given protective measures. The Defence submits that the psychological well-being of victims who are present patients of the two Defence experts in the region of Northern Uganda are at risk should the protective measures not be granted.
37. Both D26-0041 and D26-0042 have been involved professionally in treating victims of the conflict in Northern Uganda.<sup>22</sup> The doctors work in community settings coming in contact with victims of the conflict. That proximity to individuals harmed by the conflict which brings the doctors personally into harm’s way and it is precisely why their expertise is relevant to Mr Ongwen’s Defence that their identities should not be made public.
38. The measures requested are broadly in the public interest going forward. The experts work in clinics, [REDACTED], and will continue to be involved in community work. The victims who are served by the experts are victims of both LRA and UPDF crimes. It is important that in order to be effective in treating patients, they be viewed by patients as neutral, and not taking a side, particularly in clinics in Northern Uganda. The perceived non-neutrality could lead to a patient either being harmed by their community or an individual might stop important treatment.

<sup>20</sup> ICC-02/04-01/15-1301-Conf, para. 46.

<sup>21</sup> ICC-02/04-01/15-1273-Conf-Corr, para. 69.

<sup>22</sup> UGA-D26-0015-0856, see ‘hobbies’, ‘community interest’, and ‘professional specialties’.



### **The Measures should be Granted to Protect the Well-Being of the Experts' Clients**

39. Article 68(2) makes clear that the Chamber can “allow the presentation of evidence by electronic or other special means”. The procedures described in Rule 87 and 88 RPE are codified instances of some of these special means. Resort to this discretion is found within the context of sub-section (1) which requires the Court to “to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”.
40. In reviewing the courts legal documents and permitting redactions to “persons at risk on account of the activities of the Court”<sup>23</sup>, the Appeals Chamber jurisprudence has recognised that:
 

the protection not only of witnesses and victims and members of their families, but also of others at risk on account of the activities of the Court are indicative of an overarching concern to ensure that persons are not unjustifiably exposed to risk through the activities of the Court<sup>24</sup>
41. Therefore, the basis of the present request for reconsideration is on all fours similar to an issue already decided by the Appeals Chamber.
42. The Defence notes decision in the *Gbagbo* trial that found that adverse impacts on the Witness’s employability by disclosure of her identity as a witness does not fall within the scope of those interests served by protective measures<sup>25</sup> but emphasises that, in addition to that decision being from the trial level and not appeals, the focus of the present argument concerns the impact upon the clients of the experts and not their employability as such.
43. The Chamber is not precluded from considering whether the impact of publicising the names of the two experts can be based upon the interests of other individuals. In addition to the mandatory factors that the Chamber shall consider, the text of Article 68(1) refers to “all relevant factors” which makes clear that the list of factors is not exhaustive. The Defence submits that the special context of the two Defence witnesses in relation to the populations that they serve is one such factor.

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<sup>23</sup> ICC-01/04-01/07-475, 0A, para. 56.

<sup>24</sup> ICC-01/04-01/07-475, 0A.

<sup>25</sup> ICC-02/11-01/15-1155-Red, para. 9.

44. In conclusion, it is submitted that the Chamber is permitted to consider the impact upon the expert's patients and apply measures in relation to the identity of the experts to protect against those risks.

### **The Efficacy of Protective Measures**

45. The Single Judge also noted "It is reasonable to assume that their status as Defence expert witnesses is sufficiently known to the public to make any protective measures ineffectual."<sup>26</sup>
46. The Defence submits that any protective measures granted will remain effective.
47. Firstly, it is worth noting that the rates of internet usage in Northern Uganda are not as high as they are in some other regions of the world. According to the International Telecommunication Union, in 2017 Uganda ranks 152<sup>nd</sup> in the world out of 176 rated.<sup>27</sup> While indicators are improving, only 21.88% of its population are using the internet. According to the UN Development Programme in 2016: "Northern Uganda [...] still lags behind the rest of the country"<sup>28</sup>. It is thus safe to assume that internet access is not uniform across the country and the percentage of population using the internet in Northern Uganda is less than 21.88% of the population. In other words, a minority of people in the North would have had access to the names in the transcripts during the 3-month period noted by the Single Judge.
48. Secondly, despite the improvements over the last years, locating court documents on the court's website still requires a measure of technical expertise and knowledge of the courts systems.
49. The relevance of reciting these facts is that when deliberating upon whether the requested measures will mitigate against the objectively justifiable risk, it is submitted that the focus should be upon whether the measures mitigate against the risks *in the region to which the risk relates*. It cannot be assumed that due to a couple of utterances of names in relation to a report, that it is yet widely known in Northern Uganda that D26-0041 and D26-0042 are Defence witnesses.

<sup>26</sup> ICC-02/04-01/15-1301-Conf, para. 45.

<sup>27</sup> ICT Development Index: Uganda. Available at: <http://www.itu.int/net4/ITU-D/idi/2017/index.html#idi2017economytab&UGA>, accessed 3 August 2018.

<sup>28</sup> 'United Nations Development Assistance Framework for Uganda 2016-2020', p. 12. Available at: <http://www.ug.undp.org/content/dam/uganda/docs/Uganda%20UNDAF%202016-2020.pdf>.

## VI. RELIEF SOUGHT

50. For the reasons set out above, the Defence requests that the Chamber grant the request for reconsideration of protective measures and the new protective measures requests for the abovementioned witnesses.

Respectfully submitted,



.....  
Hon. Krispus Ayena Odongo  
On behalf of Dominic Ongwen

Dated this 7<sup>th</sup> day of September, 2018

At The Hague, Netherlands.