

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: **ICC-02/04-01/15**

Date: **22 October 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**

**Defence Request for Leave to Appeal  
‘Decision on Defence Second Request for Protective Measures and Defence Request for  
Redaction of Transcripts in Relation to D-41 and D-42’ (ICC-02/04-01/15-1367-Conf)**

**Source:** Defence for Dominic Ongwen

**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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Section****Other**

## I. INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Rome Statute ('Statute'), the Defence for Dominic Ongwen ('Defence') seeks leave to appeal the Single Judge of Trial Chamber IX's ('Single Judge' and 'Trial Chamber' respectively) "Decision on Defence Second Request for Protective Measures and Defence Request for Redaction of Transcripts in Relation to D-41 and D-42".<sup>1</sup> The appellate issue is: *whether the Single Judge failed to consider all required circumstances in assessing the degree of the objective risk required by Appeals Chamber jurisprudence.*
2. The Defence incorporates by reference the jurisprudence of the Appeals Chamber with respect to seeking leave to appeal as set out in prior requests.<sup>2</sup>

## II. SUBMISSIONS

3. In paragraph 20, the Trial Chamber dismisses the Defence request for protective measures for D-41 and D-42 and, cites paragraph 25 of the Defence request<sup>3</sup> which concerns a request for protective measures for another witness implying that the Defence "concedes that reprisals between factions are largely an thing of the past in Northern Uganda..." .
4. This is a misrepresentation of the Defence position in the Impugned Decision and needs to be corrected. The Single Judge reference to reprisals appears to have been drawn from the first Defence request for protective measures<sup>4</sup> where it is stated at paragraph 69:

discussions regarding security concerns have not been concluded [as of 4 June] [...] especially concerning fears of reprisals and isolation from the communities in which they are practicing. (underlining added)

5. The Defence Request for protective measures in relation to D-41 and D-42 is premised on the position that the impact of the conflict in Northern Uganda is a continuing phenomenon.
6. Having now had additional discussions, the September Request reflected the concerns that (a) the experts' capacity to continue to serve the Northern Uganda communities could be compromised if there were no security measures, since patients seeking treatment would not

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<sup>1</sup> ICC-02/04-01/15-1367-Conf ('Impugned Decision').

<sup>2</sup> ICC-02/04-01/15-1334-Red, paras 4 to 10.

<sup>3</sup> ICC-02/04-01/15-1333-Conf-Exp ('Request').

<sup>4</sup> ICC-02/04-01/15-1273-Conf.

consider the experts as neutral; and (b) there is a continuing public health issue in Northern Uganda, which gives rise to the context for the instant request for protective measures.

7. But, the Impugned Decision is predicated on the view that the Defence claims are generally speculative. The Impugned Decision implies that if the Defence can demonstrate that a person needed treatment, or currently is in treatment with one of the experts, and that person either did not seek treatment and/or stopped treatment then it would not be speculative.
8. On its face, the impossibility of (a) obtaining such information given the privileges attached to medical treatment and information makes the standard set out in the Impugned Decision practically impossible to reach; and (b) more importantly, the harm to the patient (i.e., stopping treatment or not seeking treatment) will have already occurred.
9. The objective of protective measures is to prevent a possible harm; if it were solely based on a harm already done, then it would defeat its purpose. Admittedly, the requested measures are prophylactic in the sense that the Defence has requested measures in advance of harm.
10. The concern is informed by the Defence's understanding of the expert's decades of expertise, including living and working with victims of the conflict and continuing to do this vital work today and in the future. The Defence is asking the Trial Chamber to accept the professional experts' assessment of their situation, and grant the corresponding needed protective measures.
11. The assessment of the Defence submissions as speculative is also inconsistent with other decisions on similar subject matter which show that the Impugned Decision failed to consider required circumstances within, or alternatively misapplied, the criterion of objective risk. Non-standard redactions are a form of protective measure. In the 'Decision on Prosecution's Request for non-standard redactions to document UGA-OTP-0284-0102'<sup>5</sup> the Single Judge considered that an objective risk of a non-specified threat existed for an open-ended category. By contrast in the Impugned Decision, a specific threat – harm to patients undergoing or in need of treatment – concerning a comparatively limited category of individuals – those impacted by the conflict in Northern Uganda as oppose to all “witnesses who have had contact with the Prosecution's system of witness protection”<sup>6</sup> – was set out by the Defence and rejected by the

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<sup>5</sup> ICC-02/04-01/15-1348.

<sup>6</sup> ICC-02/04-01/15-1367-Conf, para. 12.

Single Judge. This inconsistency with a prior decision shows that the Single Judge failed to consider all required circumstances in assessing the degree of the objective request risk.

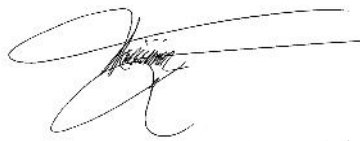
*Fairness, expeditiousness, the effect on the outcome of the case, and whether the issue will materially advance the proceedings*

12. Fairness dictates that Mr Ongwen be able to present a defence as per Article 67 and particularly Article 67(1)(e) concerning the right to obtain “examination of witnesses on his [...] behalf under the same conditions as witnesses against him”. The Article 31 affirmative defences are essential to the Defence and have a significant impact on the potential outcomes of the case. The experts are two professionals who have observed Mr Ongwen’s progression in the Detention Centre and they have unique insights to provide the Trial Chamber. The Court therefore needs to provide the conditions under which the experts can fully present their evidence. The request for protective measures is the threshold issue, and the Defence maintains that a resolution granting the request would ensure the expeditiousness of the proceedings. If the experts are unable to participate, or their capacity to provide candid testimony is effected, this impacts upon the Defence’s capacity to elicit exonerating evidence which may impact upon the fairness or outcome of the trial.
13. For these reasons, the granting of the instant request for leave to appeal and seeking the Appeal Chamber’s direction on the issue now will materially advance the proceedings.

### III. RELIEF SOUGHT

14. For the reasons stated above, the Defence respectfully requests that leave be granted by the Trial Chamber to appeal the following issue: *whether the Single Judge failed to consider all required circumstances in assessing the degree of the objective request required by Appeals Chamber jurisprudence.*

Respectfully submitted,



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Hon. Krispus Ayena Odongo  
On behalf of Dominic Ongwen

Dated this 22<sup>nd</sup> day of October, 2018  
At The Hague, Netherlands