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**International
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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

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

Public

Second Public Redacted Version of “Defence Response to “Prosecution’s application for in-court protective and special measures” (ICC-02/04-01/15-578-Conf)”, filed on 11 November 2016

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 hereby responds to “Prosecution’s application for in-court protective and special measures”¹ (‘Application’).
2. The Prosecution Application lacks sufficient detail to respond fully as it has not described the criteria necessary to grant protective measures. Also, its position as regards to particular witnesses has clearly not solidified and it is thus unfair to oblige the Defence to take a final position upon an undetailed and tentative application far out from the date of testimony.
3. Though observations are made below, the Defence reserves its rights to supplement this response at a later and more appropriate time.

II. BACKGROUND

4. On 13 July 2016, in its Initial Directions on the Conduct of the Proceedings, the Trial Chamber ordered that “[f]or all Prosecution witnesses for whom it is reasonably foreseeable that protective or special measures are required, the relevant deadline to file these applications is 28 October 2016.”²
5. On 26 October 2016, the Prosecution provided its application for in-court protective and special measures.³ Therein it provides *general* observations on three groups of witnesses, a legal basis and explanations of the measures it proposes, and an annexed table of brief comments on particular witnesses.
6. On 27 October 2016, the Trial Chamber shortened the deadline for responses by email to 11 November 2016.⁴

¹ ICC-02/04-01/15-578-Conf (‘Application’).

² ICC-02/04-01/15-497, para. 35.

³ Application.

⁴ Email, 27 October 2016, sent 11h05, subject line ‘Time limit for responses to ICC-02/04-01/15-578-Conf’.

III. CONFIDENTIALITY

7. Pursuant to Regulation 23 *bis*(2) of the Regulations of the Court ('RoC') and Regulation 24 of the Regulations of the Registry ('RoR'), this request is submitted confidential as it responds to a filing of the same classification. A public redacted version shall be filed on or before 14 November 2016.⁵

IV. SUBMISSIONS

8. Given the limited detailed argumentation provided in the Prosecution Application, and its provisional nature, the Defence submits that, out of fairness, Trial Chamber IX ('Trial Chamber') should not rule on the present matters at least until more detail and explanation from the Prosecution is forthcoming.

9. The provisional nature of the Application is apparent where the Prosecution states that it:

anticipates that additional measures, or modification of some measures, could become necessary as additional information is collected by the Prosecution and the Registry, or if circumstances change.⁶

It belabours this point over three (3) paragraphs⁷ and invites to the Trial Chamber to draw conclusions from its witness summaries without arguing how those summaries fulfil the criteria necessary for protective measures.⁸

10. Starting from the premise that much could change, the present response can only be provisional in nature as well since the Prosecution has not provided its final position and its attached annex, in many cases, provides incomplete or inconclusive reasons for the grant of protective measures.

⁵ The public redacted version shall be heavily redacted since the Prosecution has not released a public redacted version of the Application, and the Trial Chamber has not made a decision on the witnesses.

⁶ Application, para. 6.

⁷ Application, paras 56-58.

⁸ Application, para. 18.

a) The Prosecution legal arguments should be elaborated upon or rejected

11. ICC jurisprudence makes clear that the granting of protective measures are both an exception to the principle of publicity and should be made on a case-by-case basis.⁹ The starting point for evaluation of requested protective measures is that they should be granted “only on an exceptional basis, following a case-by-case assessment of whether they are necessary in light of an objectively justifiable risk and are proportionate to the rights of the accused”.¹⁰ The Prosecution submissions are an attempt to extend unclearly this jurisprudence – while referring to the jurisprudence¹¹ of other international criminal tribunals without url references¹² – which should be rejected.
12. After reciting the jurisprudence, the Prosecution makes three legal claims:
 - a. The “objectively justifiable risk” required by existing Rule 87 case law need not be a risk to the physical safety or security of the witness, but may relate to any of the interests specified in Article 68(1), namely “the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”;¹³
 - b. The Article 68(2) presumption of measures for victims of sexual violence or children who are victims or a witnesses is premised on the protection of their well-being, dignity and privacy which, if threatened, is decisive; and

⁹ See, for example, ICC-01/05-01/13-1306, para. 3, citing ICC-01/04-02/06-824-Red, paras 5-6; ICC-01/09-01/11-902-Red2, para. 14.

¹⁰ ICC-01/05-01/13-1306, para. 3; ICC-01/04-02/06-824-Red, para. 6; ICC-01/09-01/11-902-Red2, para. 13; ICC-01/04-01/07-1667-Red-tENG, para. 9.

¹¹ Application, paras 15 and 16.

¹² A failure to “file, with each document, copies of any authorities relied upon or, if appropriate, internet links”, unless “copies of decisions or orders of the Court” is a contravention of Regulation 23(3) of the Regulations of the Court. None of the cases referred to in footnotes 5, 6, and 8 originate from the ICC.

¹³ Application, para. 14.

- c. The Trial Chamber should adopt the approach of the *ad-hoc* tribunals,¹⁴ which also provide protective measures on grounds other than security.¹⁵
13. Regarding point (a), the Prosecution submits that the ICC jurisprudential requirement of an ‘objectively justifiable risk’ may “relate to any of the interests specified in article 68(1), namely ‘the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.’”¹⁶ However, it does not elaborate on the practical and conceptual difficulty of applying the jurisprudential requirement of an ‘objective risk’ to a non-corporeal thing such as a mind or dignity.
14. The most extreme cases may be intuitively clear. However, the Defence submits that an ‘objective risk’ to the psychological well-being of an individual, without more detail concerning that particular individual, cannot be easily made out. This is because the thing which is at risk is the subjective mental state of the individual in question. At the very least, an evaluation from the VWU should support such a conclusion – in other words there is an objective risk – rather than it merely being asserted by the Prosecution.
15. Also regarding Prosecution point (a), speaking of an objective risk to privacy in the abstract is unhelpful and obscures a case-by-case assessment. Testifying in public has by definition an objective impact upon individual’s privacy and privacy is not an absolute right. Therefore, it is submitted, this risk has to be balanced against the fair trial principle of publicity. If it were otherwise, no criminal trial would have public witnesses.

¹⁴ Application, para. 15.

¹⁵ Application, para. 15.

¹⁶ Application, para. 14.

16. Additionally, in its Application, the Prosecution improperly combines this protected interest¹⁷ in its analysis with two other interests – psychological well-being and dignity – without any separate explanation or discussion. The Defence submits that if there is a threat to privacy, it should be spelled out by the Prosecution and an explanation should be given as to why, for each witness's privacy, each measure should take precedence over publicity.
17. As regards to point (b), the Defence notes that no standard is set out by the Prosecution as regards to the level of threat below which the presumption should be lifted. Given that Article 68(1) prescribes that measures envisaged in Article 68(1) "shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial", there must exist a level below which the Trial Chamber should lift the measures.
18. Furthermore, Article 68(2) concerns "an exception to the principle of public hearings", but provides no guidance for witnesses for whom part of their testimony concerns sexual violence, but other parts concern other matters.
19. As regards to Prosecution point (c), the Defence notes that the jurisprudential picture is more complex than that presented. The trial chamber decision in *Tadić*, to which the Prosecution refers, and upon which other *ad-hoc* tribunals first developed their own case-law, provides as a rationale for its decision that "it is also relevant that the International Tribunal is operating in the midst of a continuing conflict".¹⁸ In other words, the context of the crimes in which the measures are granted is relevant.
20. The Prosecution has not sought to explain the contextual factors that impact upon the position it is taking. In opposition to its arguments, in Northern

¹⁷ E.g. privacy.

¹⁸ *Prosecutor v. Tadić*, 'Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses', 10 August 1995, para. 27, available at: <http://www.icty.org/x/cases/tadic/tdec/en/100895pm.htm> ('Tadić Decision').

Uganda, the prevalence of the practice of *Mato Oput*,¹⁹ often means that community members are aware of who is a victim and who has acknowledged their responsibility for serious crimes. Moreover, it is difficult to imagine that many small rural communities do not know who was formally a member of the LRA. Both of these two factors may defeat the rationale for the Prosecution's requests, yet they are not mentioned anywhere.

21. Finally, as touched upon above,²⁰ the Prosecution's submissions dodge the question of which party has the burden of establishing the objective risks and, as touched upon elsewhere in these submissions, what is the standard of proof to do so. Two preliminary points in this respect are that Article 68(1) states that "[protective] measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial" and Article 67(1) makes clear that "the accused shall be entitled to a public hearing". This indicates that the Prosecution bears the burden given that the Accused is protected by the explicit language of the Statute.

b) The risks are not individualised and the Prosecution group approach should be rejected

22. Commenting on the jurisprudence, Trial Chamber VI has stated: "[t]he Chamber considers that such case-by-case evaluation will involve a particularised analysis of the risk with respect to each witness."²¹ Other trial chambers have noted that "applications for in-court protective measures should not be 'routinely made in the expectation that they will be routinely

¹⁹ See [REDACTED] at footnote 52 for an overview of some of the aspects involved. Registered in e-court as UGA-OTP-0263-2652.

²⁰ See para. 17.

²¹ ICC-01/04-02/06-824-Red, para. 6. This approach is found within the Tadić Decision: "These concerns have been factored into the balance *on an individual basis for each witness* for whom protection is sought." (emphasis added).

granted”²². With its lacking detail and general explanations, the Prosecution Application is just this.

23. A request based upon groups like the Prosecution Application is not a case-by-case approach and should be rejected. Without a case-by-case analysis presented by the Prosecution, an assessment of whether the measures (a) address an objective risk and (b) are the least-restrictive and necessary cannot be undertaken. This assessment is further complicated by the Prosecution upfront admission that “[m]ost of those witnesses currently face no acute security risk.”²³ The Prosecution seeks to make out objective risks largely to intangible qualities of people. Such an argument merits – at the very least – a more lengthy explanation that the Prosecution has not given.
24. The Prosecution seeks in-court protective and special measures for three groups of witnesses. These are (a) witnesses who were victimised as children, (b) witnesses who are victims of sexual and gender-based violence, and (c) witnesses with other specific personal or professional circumstances.²⁴ Though the reasons given by the Prosecution for (c) are challenged below, it is worth noting that only the last group reflects a case-by-case approach as mandated by the jurisprudence.
25. As regards to groups (a) and (b), the Prosecution’s argument appears to be that the group can be described by shared characteristics of the individuals included and thus can be ruled upon *en masse* by the Trial Chamber. There are, however, five issues which, it is submitted, should lead the Trial Chamber to reject this approach.

²² ICC-01/04-02/06-824-Red, para. 5 *citing* ICC-01/09-01/11-902-Red2, para. 11, referring to transcript of hearing on 24 March 2009, ICC-01/04-01/06-T-153-Red2-ENG, page 63, lines 15 – 17 (actually referring to lines 19-21).

²³ Application, para. 4.

²⁴ Application, para. 18.

26. Firstly, regarding group (a), the Defence notes that the Prosecution submission conflates those who were victims of crimes as children but are adults now with children who are victims of crimes and still children. The latter category has almost automatic protection in judicial processes, whereas adults who were victims as children require greater judicial examination. The unspoken premise of the Prosecution's submissions is that presently adult victims are strictly equivalent to presently child victims, and therefore automatically entitled to protection. This premise sweeps away the notion of a case-by-case analysis and should be rejected. Moreover, the presumption in Article 68(2) refers to "a child who is a victim or a witness", not a child *who is now an adult*.
27. Secondly, for groups (a) and (b), when the Prosecution refers to worries of witness's concerning stigmatisation by the community,²⁵ the Prosecution has neither explained the degree to whether these are reasonable warranted fears, nor how stigmatic the testimony would be. It is submitted that there must be a threshold level of stigmatisation faced by a witness from their testimony, below which, it cannot be justified to grant measures that impact upon the rights of the Accused. Though the Defence disputes the veracity of P-200's claim, [REDACTED]²⁶ would obviously be farther down the continuum, and that submission by the Prosecution is illustrative of what the Prosecution has failed to make out with regards to its other witnesses.
28. Thirdly, as regards to group (a) – victims of sexual violence: while there is a tendency nationally and internationally to provide them various in-court measures to facilitate testimony which includes various mechanisms to shield their identity, it must be emphasised that, in some domestic practice at least, these measures are not absolute – the individual circumstances are still

²⁵ P-0200, P-0245, P-0264, P-0307, P-0410, P-0018, P-0019, P-0067, and P-0145.

²⁶ Application, para. 42.

relevant. In Canada,²⁷ the United Kingdom,²⁸ and France,²⁹ for example, victims of alleged sexual violence are not granted anonymity without consideration of the facts of the case.

²⁷ See s. 486(1) of the *Canadian Criminal Code* (“Any proceedings against an accused *shall be held in open court*, but the presiding judge or justice *may, on application of the prosecutor or a witness or on his or her own motion, order the exclusion of all or any members of the public from the court room for all or part of the proceedings, or order that the witness testify behind a screen or other device that would allow the witness not to be seen by members of the public, if the judge or justice is of the opinion that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice or is necessary to prevent injury to international relations or national defence or national security*” – [emphasis added]). Relevant factors are found in s. 486(2). Available at: <http://laws-lois.justice.gc.ca/eng/acts/C-46/page-105.html#docCont>.

²⁸ S. 17(4) of the *Youth Justice and Criminal Evidence Act 1999* states “Where the complainant in respect of a sexual offence is a witness in proceedings relating to that offence [...], the witness is eligible for assistance in relation to those proceedings” for “special measures”. S. 25, for example, provides for optional private sessions as a special measures. These measures are not automatically applied, see s. 19. Ss. 46-47 concerns reporting of the identity of the complainant. S. 46(2) provides that this restriction is optional. Available at: <http://www.legislation.gov.uk/ukpga/1999/23/contents>. S. 86 of the *Coroners and Justice Act 2009* provides for anonymity orders. S. 88(2) makes anonymity orders optional (“The court *may* make such an order only if it is satisfied that Conditions A to C below are met”, [emphasis added]). Available at: <http://www.legislation.gov.uk/ukpga/2009/25/contents>. S.4 of the *Sexual Offences (Amendment) Act 1976*, creates an initial presumption of anonymity which can be lifted for several reasons including trial fairness, available at: <http://www.legislation.gov.uk/ukpga/1976/82/enacted>.

²⁹ Article 706-58 of the *French Code de procédure pénale* (‘CPP’) states : “En cas de procédure portant sur un crime ou sur un délit puni d’au moins cinq ans d’emprisonnement, lorsque l’audition d’une personne visée à l’article 706-57 est susceptible de mettre gravement en danger la vie ou l’intégrité physique de cette personne, des membres de sa famille ou de ses proches, le juge des libertés et de la détention, saisi par requête motivée du procureur de la République ou du juge d’instruction, peut, par décision motivée, autoriser que les déclarations de cette personne soient recueillies sans que son identité apparaisse dans le dossier de la procédure. Cette décision n’est pas susceptible de recours, sous réserve des dispositions du deuxième alinéa de l’article 706-60. [...]”

Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=011E7D1B2D02C49719103C9F8D8C370C.tpdila13v_1?idSectionTA=LEGISCTA000006138133&cidTexte=LEGITEXT000006071154&dateTexte=20020305.

Pursuant to articles 222-23 to 222-26 and 222-27 to 222-30 of the CPP, alleged victims of rape and sexual violence are eligible to be granted anonymity. Respectively available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=3BFE26AF7F56ED49E366A25A393B9978.tpdila16v_1?idSectionTA=LEGISCTA000006181753&cidTexte=LEGITEXT000006070719&dateTexte=20160829 and https://www.legifrance.gouv.fr/affichCode.do;jsessionid=DDF8840077326C058D96B56012BB9650.tpdila13v_3?idSectionTA=LEGISCTA000006181754&cidTexte=LEGITEXT000006070719&dateTexte=20160829.

Even if the conditions of the article 706-58 of the CPP for granting anonymity are fulfilled, the article 706-60 states “Les dispositions de l’article 706-58 ne sont pas applicables si, au regard des circonstances dans lesquelles l’infraction a été commise ou de la personnalité du témoin, la connaissance de l’identité de la personne est indispensable à l’exercice des droits de la défense. [...]”. Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=011E7D1B2D02C49719103C9F8D8C370C.tpdila13v_1?idSectionTA=LEGISCTA000006138133&cidTexte=LEGITEXT000006071154&dateTexte=20020305.

If a witness is granted anonymity pursuant to article 706-58 of the CPP, it can be achieved at trial by distorting his voice, pursuant to article 706-61 of the CPP,

available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=011E7D1B2D02C49719103C9F8D8C370C.tpdila13v_1?idSectionTA=LEGISCTA000006138133&cidTexte=LEGITEXT000006071154&dateTexte=20020305.

However, article 706-62 of the French Code de procédure pénale states: “Aucune condamnation ne peut être prononcée sur le seul fondement de déclarations recueillies dans les conditions prévues par les articles 706-58 et 706-61.”

Available at: <https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006071154&idArticle=LEGIARTI000006577757>.

29. Fourthly, the Prosecution annex is not a sufficiently individualised approach and should be rejected. It provides some further information; however, it fails to provide substantiation – or at least point to the relevant evidence – for its claims. The invitation for the Trial Chamber to sift through the witness summaries to find the risks itself should be rejected for being a failure to properly motivate its request.
30. Finally, the consistent use of certain notes on witnesses in its annex also introduces a group for which the Prosecution has provided no explanation. This group consists of those who personally know the Accused.³⁰ Though the Defence argues for the rejection of a non-case-by-case approach, the Prosecution has not even tried to explain how these qualities of the witnesses merit the pseudonyms for which it asks.

c) *The rationale under-pinning the other measures is confused, not explained, or unnecessary*

31. When the Prosecution's submissions are taken as whole, the internal logic for given measures lacks coherence.

Pseudonyms

32. With regards to the alleged victims of sexual violence, the Prosecution has not explained why granting pseudonyms are the least intrusive measures to the trial process.
33. It is apparent from the Prosecution summaries³¹ that the sexual violence is far from the only subject upon which the Prosecution expects to question the witnesses. The Prosecution has stated that it will seek private sessions to discuss the alleged sexual violence,³² yet the Prosecution does not then explain

³⁰ P-0054, P-0097, P-0105, P-0119, P-0138, P-0189, P-0231, P-0275, and P-0330.

³¹ ICC-02/04-01/15-532-Conf-AnxC.

³² Application, para. 24.

why a less intrusive regime of no pseudonyms with targeted private sessions is un-workable.

34. Of the 25 witnesses³³ who the Prosecution notes killed or participated in attacks in its annex, it has only indicated that seven (7) have expressed³⁴ any particular fear or experience of actual threat, and the Prosecution has not even sought to explain whether these fears are justified. Moreover, given the purported eagerness of local communities in Northern Uganda³⁵ of the effort to prosecute Mr Ongwen, the Prosecution has not explained how a fear of retaliation for cooperation with the Prosecution is an objective risk or rational fear.
35. There are nine (9) witnesses in the Prosecution's chart which the Prosecution indicates knew Mr Ongwen or is known by Mr Ongwen. The Prosecution's chart does not indicate that they either killed or were victims of sexual violence.³⁶ Whether or not these also are part of the story of the witnesses, the absence of mention suggests that the Prosecution did not consider that they are relevant to the measures requested.

Voice and visual distortion

36. The Prosecution provides *an* explanation for shielding the voice of P-0006 and P-0269, namely avoiding family members from knowing about their participation, but the Prosecution does not explain why targeted closed

³³ P-0016, P-0070, P-0085, P-0119, P-0142, P-0144, P-0146, P-0200, P-0233, P-0205, P-0209, P-0224, P-0233, P-0245, P-0250, P-0252, P-0258, P-0264, P-0307, P-0309, P-0314, P-0340, P-0372, P-0379, P-0406, and P-0410.

³⁴ P-0224, P-0233, P-0245, P-0250, P-0252, P-0258, P-0264, P-0307, and P-0309.

³⁵ See for example: <https://www.ijmonitor.org/2016/11/a-reversal-of-roles-how-the-government-and-victims-in-northern-uganda-have-switched-their-positions-on-the-icc/> and <https://www.ijmonitor.org/2016/09/thousands-of-victims-in-uganda-express-willingness-to-participate-in-the-ongwen-case/>.

³⁶ P-0054, P-0097, P-0105, P-0119, P-0138, P-0189, P-0231, P-0275, and P-0330.

sessions are not appropriate for the remaining³⁷ alleged victims of sexual violence rather than total anonymity.

Closed or private sessions

37. The Defence is unable to respond in more than a provisional manner to the Prosecution's notification that it intends to "request closed or private session for some limited portions of the testimony of most of its witnesses."³⁸ However, six (6) observations are possible.
38. Firstly, it is already a practice of trial chambers that where it can be anticipated that a question may reveal a protected "witness's name or other identifying information"³⁹ that a closed or private session is adopted.
39. Secondly, there is a contradiction in the logic of having protective measures such as pseudonyms, and voice and visual distortion, and simultaneously stating that:

[Testimony concerning participation in killing and other crimes] raises a higher than normal risk of subjecting the witness to traumatising or retraumatising if broadcast publicly, due to the social stigma which such testimony may trigger and also to the intense feelings of guilt and shame the witness may feel.⁴⁰

The *raison d'être* of protective measures – including the measures to shield name and location⁴¹ – is to shield a witness's identity from the public completely. If those are successful, then there can be no stigma since the witness's identity is confidential. Without more, the logic of the Prosecution's submissions seems to cast doubt on the efficacy of the system of protected witnesses.

³⁷ P-0351, P-0352, P-0366, P-0396, P-0045, P-0187, P-0199, and P-0374.

³⁸ Application, para. 22.

³⁹ Application, para. 23.

⁴⁰ Application, para. 24.

⁴¹ Application, para. 23.

40. Thirdly, the Prosecution states that the “[p]rivate session in the circumstances anticipated by the Prosecution may be characterised as an in-court protective measure under rule 87 or as a special measure under rule 88.”⁴² Absent further explanation, such a submission should be rejected for its lack of clarity.
41. The two rules share similarities, but have different features. For example, Rule 87(1) mandates consulting the witness whereas Rule 88(1) does not. Applications for protective measures cannot be made *ex parte* whereas those for special measures can be. It is not possible for the Defence to respond further to a submission such as the Prosecution’s on this matter.
42. Fourthly, the Prosecution seeks to have the Trial Chamber characterise the use of a video-link and Rule 68(3) of the Rules of Procedure and Evidence (‘RPE’) applications as protective or special measures.⁴³ Preliminarily, it can be noted that Trial Chamber I recently indicated that a video-link was not a protective measure in and of itself.⁴⁴ As regards Rule 68(3) applications, it is submitted that it is procedurally improper to add to prior submissions⁴⁵ or seek to split arguments between motions. Such an approach unfairly leaves the Defence trying to hit a moving target and should be rejected for the prejudice it causes.
43. Fifthly, there is a 30-minute delay on the court video feed. Judges have typically explained this to witnesses before they testify. Should a witness break-down, there is time to prevent this video footage being widely distributed. The Prosecution has not explained why this could be a less intrusive measure in some circumstances.
44. Finally, the Prosecution’s position is also confused when set against its approach to redactions regarding the Article 56 materials. In those materials, it

⁴² Application, para. 25.

⁴³ Application, para. 30, *see also* para. 33.

⁴⁴ ICC-02/11-01/15-721, para. 16 (“video-link should not be viewed as a protective measure. Although it is a possible protective measure, it is also a method that facilitates live testimony when other issues arise.”)

⁴⁵ ICC-02/04-01/15-575-Conf.

proposes un-redacted accounts of alleged sexual violence.⁴⁶ If the Prosecution Application logic holds, that the public dissemination of information regarding sexual violence will stigmatise the witnesses, given that some are said to be Mr Ongwen's wives,⁴⁷ then those transcripts should not be made public. Given its proposal, the Prosecution cannot argue that episodes of alleged sexual violence should be kept in closed or private session.

Psychological support

45. In regards to psychological support measures, and as also acknowledged by the Prosecution,⁴⁸ the Defence also notes that the VWU conducts psychological assessments of all witnesses in any case before the ICC, thus there is little utility in separately requesting these measure as they are routine.
46. The Defence also notes that the Trial Chamber – as required by Rule 87(1) and Rule 88(1) of the RPE – consults the VWU, a body that is independent of the Prosecution, before granting the measures requested.
47. At the present stage of Defence investigations, there is no reason to oppose the “[m]easures intended to provide psychological support to a witness”⁴⁹ provided that a support person is not someone whose presence would be likely to impact upon the substance of the testimony of the individual. In this regard, the Defence requests provision of a summary of the relationship of the support person to the witness.
48. As both support measures are routine, the Defence fails to understand the Prosecution's specific request regarding these measures and therefore reserves

⁴⁶ See, for example, P-0099: ICC-02/04-01/15-567-Conf-Anx7, pp. 33-35; P-0101: ICC-02/04-01/15-567-Conf-Anx6, pp. 18-19; P-0214: ICC-02/04-01/15-567-Conf-Anx8, pp. 24-25; P-0226: ICC-02/04-01/15-567-Conf-Anx1, pp. 40-43; P-0227: ICC-02/04-01/15-567-Conf-Anx3, pp. 39-40; P-0235: ICC-02/04-01/15-567-Conf-Anx10, pp. 36; and P-0236: p. 23.

⁴⁷ See for example ICC-02/04-01/15-533, para. 509.

⁴⁸ Application, para. 27.

⁴⁹ Application, paras 26-27.

its rights to make further submissions should the Prosecution envisage a distinct and non-routine take on these measures.

d) Defence objections to specifically requested measures

49. The Prosecution seeks to call witness P-0189, [REDACTED], anonymously. Given that [REDACTED] are purely speculative, the basis for the Prosecution request should be rejected.
50. As regards to [REDACTED] P-0249 who [REDACTED], the Prosecution has failed to point to this evidence to substantiate its point. Accordingly, its request should be rejected.
51. P-0403 is a Prosecution *analyst*. The Prosecution basis for its request is to protect his *investigative ability*. Analysts are not field operatives. Without more information, the logic of the Prosecution's request lacks coherence and should be rejected.
52. As regards to P-0024, who purportedly saw her child burned to death, the Defence cross-references its arguments in paragraph 39 *mutatis mutandis*. If her community does not know of her cooperation, then testifying publicly about this cannot cause traumatising in the way described since she will not be identified.
53. As regards P-0200's purported [REDACTED], such a sensational claim should not be made in private. The Defence is aware of [REDACTED]. Such allegations have no part in the charges and are not corroborated by other evidence. Fairness demands that it be possible to dispense with such an allegation publicly so that Mr Ongwen does not have to carry it with him, whatever the outcome of his case.

54. Finally, Trial Chamber I has mentioned in *obiter dicta* that at typical case-specific objections to the granting of protective measures would be one where “information defeating the very purpose of the requested protective measure would be available to the non-requesting party”.⁵⁰ There are several witnesses who have gone on records and provided some detail of their experiences in the bush. Witness P-0045 [REDACTED].⁵¹ She also mentions sexual violence being visited upon her.
55. Witness P-0245, [REDACTED], appear in a video on e-court⁵² that is still available [REDACTED].⁵³ In it, P-0245, a subject of the Application, among other things, discusses being abducted and killing as a child,⁵⁴ [REDACTED],⁵⁵ he discusses [REDACTED],⁵⁶ and he discusses [REDACTED].⁵⁷ At the present stage, P-0245 has said much before a global audience. The use of protective measures is defeated by the existence of [REDACTED].

e) The measures are not consistent with the rights of the Accused

56. The Prosecution’s assertion⁵⁸ that the proposed measures do not compromise the fairness of the trial because (a) the Defence knows who the witnesses are and (b) can cross-examine them sets the bar for fairness low. Especially given the problems with the logic of the application noted above, three provisional observations are possible.
57. Firstly, the principle of publicity,⁵⁹ it is submitted, has a dual purpose. It is to show that justice is being done and is fair,⁶⁰ but also, and importantly, it makes

⁵⁰ ICC-02/11-01/15-598, para. 7. The reasoning can also be seen in Tadić Decision, para. 43.

⁵¹ Available at: [REDACTED], Accessed 7 November 2016.

⁵² UGA-OTP-0263-2652.

⁵³ [REDACTED], Available at: [REDACTED], accessed 8 November 2016.

⁵⁴ [REDACTED].

⁵⁵ [REDACTED], at 8:00.

⁵⁶ [REDACTED], at 14:15.

⁵⁷ [REDACTED], at 13:30 and slightly earlier for context.

⁵⁸ Application, para. 52.

⁵⁹ See Articles 64(7) and 67(1) of the Statute, and Regulation 20 of the Regulations of the Court.

those willing to state accusations against another accountable. In other words, the public nature of hearings acts as a filter for those who are only willing to make baseless or poorly supported accusations in private. This is particularly acute where a witness may seek to minimise his or her own responsibility for the alleged crimes of Mr Ongwen. In this way, the principle of publicity is a protection for the Accused against ill-founded accusations.

58. Secondly, and relatedly, the statement that “the requested measures, and in particular the requests for identity protection, will have some impact on the public nature of the proceedings”⁶¹ is an understatement. Of the 70 live witnesses the Prosecution is calling, the public will at present only know the identities of 22⁶² of them, or 31%. Of these 22 identified witnesses, only 16 are allegedly directly related to one or more crime-scenes.⁶³
59. Finally, the Prosecution states that “most of [the witnesses] testimony will be given in public session”;⁶⁴ however, by the Prosecution’s own admission,⁶⁵ this is not presently certain as neither the Prosecution have committed themselves to a final position nor explained the full extent of the purported need for private questioning, nor have the witnesses been given an opportunity to express their concerns or desire to testify publicly.⁶⁶

V. RELIEF

60. For the reasons above, the Defence respectfully requests Trial Chamber IX to:

⁶⁰ See ECtHR, *Werner v. Austria*, (138/1996/757/956), Judgment, 24 November 1997, para. 45 (“[The] public character [of a trial] protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of [...] a fair trial”), available at: <http://hudoc.echr.coe.int/eng?i=001-58114>.

⁶¹ Application, para. 53.

⁶² 48 will have pseudonyms, see Application, Annex A.

⁶³ P-0009, P-0045, P-0048, P-0067, P-0081, P-0172, P-0202, P-0218, P-0245, P-0249, P-0280, P-0286, P-0293, P-0304, P-0306, and P-0359.

⁶⁴ Application, para. 54.

⁶⁵ See para. 9 above.

⁶⁶ Application, para. 58.

- a. Reject the Application for lack of a case-by-case basis; and
- b. Order that a summary of the relationship of the support persons to the witnesses be provided where a witness is granted the psychological support measures of in-court accompaniment mentioned in Rule 88(2).

Respectfully submitted,



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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 13th day of December, 2016

At Kampala, Uganda