

**Cour
Pénale
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**International
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Court**

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Date: **20 December 2016**

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 “Prosecution’s second application for in-court protective measures”, 20 December 2016

Source: The Office of the Prosecutor

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

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Introduction

1. The Office of the Prosecutor (“Prosecution”) seeks in-court protective measures for radio intercept witnesses [REDACTED] (P-0003), [REDACTED] (P-0059) and [REDACTED] (P-0339). This application is made pursuant to articles 54(3)(f), 64(6)(e), 68(2) and (6), and 72 of the Rome Statute (“Statute”) and rule 87 of the Rules of Procedure and Evidence (“Rules”).
2. This application is based on requests from the Ugandan government to protect the identities of its agents primarily on grounds of national security. For each witness the Prosecution requests facial distortion, the use of a pseudonym, and limited recourse to closed session. These are the least restrictive measures to achieve the necessary protection, and they are consistent with the Accused’s rights.

Confidentiality

3. The Prosecution files this application confidentially pursuant to regulation 23*bis* of the Regulations of the Court because it contains the identities and details of the current employment of the three witnesses who are the subject of this application. The two annexes to this application are also classified as confidential because they identify the witnesses. The revelation of this information would obviate the relief sought herein. A public, redacted version of this application will be filed.

Background

4. On 13 July 2016, in its Initial Directions on the Conduct of the Proceedings, the 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".¹

5. On 26 October 2016, the Prosecution made an application for protective and special measures in relation to witnesses scheduled to give live evidence.² The Chamber rendered its decision on this application on 29 November 2016, granting the requested measures for the majority of the witnesses.³
6. On 19 and 20 December 2016, the Prosecution received two letters from the Ugandan government requesting protective measures for witnesses P-0003, P-0059 and P-0339.⁴ These are attached to this filing as annex A and B.

Applicable Law

7. The Prosecution refers to the applicable law set out in its first protective measures request⁵ and in the Chamber's 29 November 2016 decision on that request.⁶
8. In addition, the Prosecution relies on articles 54(3)(f), 68(6) and 72 of the Statute. Article 54(3)(f) permits the Prosecution to request necessary measures to be taken to ensure the confidentiality of information or the protection of any person. Article 68(6) permits a State to apply to the Court for necessary measures to be taken to protect its servants or agents and confidential or sensitive information.
9. Article 72 applies in cases where the disclosure of a State's information would, in the opinion of that State, prejudice its national security interests. Specifically, article 72(5)(d) permits the Court to use *in camera* proceedings and other

¹ ICC-02/04-01/15-497, para. 35.

² ICC-02/04-01/15-578-Red.

³ ICC-02/04-01/15-612-Red.

⁴ The letters were sent as attachments to emails. Annex A is slightly blurred likely because it was not scanned or photographed correctly.

⁵ ICC-02/04-01/15-578-Red, paras. 7-16.

⁶ ICC-02/04-01/15-612-Red, paras. 5-12.

protective measures set out in the Statute and the Rules to obtain the assistance of a State party that has raised concerns with the disclosure of information based on national security grounds.

10. The equivalent provision to article 72 of the Statute at the ICTY is rule 54*bis* of the Rules of Procedure and Evidence. It was under rule 54*bis* that the ICTY Trial Chamber in *Prosecutor v. Mladic* granted the government of Serbia's request for protective measures to be applied to documents it had provided to the Prosecution. The Chamber held that information identifying active operatives from the Serbian Security and Information Agency ("BIA") should remain confidential in order to protect Serbia's national security interests.⁷

Submissions

A. The Court should protect the identities and current employment information of radio intercept witnesses on grounds of national security

11. The Prosecution seeks protective measures for radio intercept witnesses P-0003, P-0059 and P-0339. P-0003 is scheduled to testify sixth in the Prosecution's proposed order of appearance.⁸ P-0059 is scheduled to testify fourth.⁹ P-0339 is scheduled to testify forty-ninth.¹⁰ P-0003¹¹ and P-0339¹² intercepted LRA radio communications for the UPDF during the period of the charges. P-0059 did the same for the Internal Security Organisation ("ISO") of the Ugandan government.¹³

⁷ *Prosecutor v. Ratko Mladic*, Case No. IT-09-92-T, Decision on Republic of Serbia's Motion for Protective Measures, 15 July 2014, para. 14; *see also Prosecutor v. Jovica Stanisic & Franko Simatovic*, Case No. IT-03-69-T, Second Decision on The Republic of Serbia's Motion for Protective Measures, 3 November 2009, paras. 9, 11.

⁸ ICC-02/04-01/15-613-Conf-AnxB, p. 1.

⁹ ICC-02/04-01/15-613-Conf-AnxB, p. 1.

¹⁰ ICC-02/04-01/15-613-Conf-AnxB, p. 3.

¹¹ *See* ICC-02/04-01/15-485-Conf-AnxB, pp. 3-8.

¹² *See* ICC-02/04-01/15-458-Conf-AnxB, pp. 13-15.

¹³ *See* ICC-02/04-01/15-493-Conf-AnxB, pp. 3-10.

12. Annex A is a letter signed by [REDACTED] (P-0038), [REDACTED].¹⁴ He writes that P-0003 and P-0339 “remain serving members of the UPDF dealing in sensitive and confidential work, including interception of communications by hostile entities to the state of Uganda. [...] Their identities should therefore not be revealed during the trial, as it is likely to jeopardize their personal and state interests and security”.¹⁵
13. P-0003 is [REDACTED].¹⁶ P-0339 [REDACTED].¹⁷
14. Annex B is a letter signed by [REDACTED], Director General of the ISO. He writes that “[p]rocedures used, if disclosed during open trial, may not only jeopardize the Organization’s future operations but also expose [P-0059’s] life to danger”. The Prosecution supports the Ugandan government’s request for protective measures in relation to P-0059 only insofar as they do not shield the substance of his testimony from the public. The nature of these procedures was already made public during the Prosecution’s opening statement on 6 December 2016 and in the Prosecution’s pre-trial brief.¹⁸ However, the Court can give to the effect the letter’s final paragraph, which references facial distortion and the use of a pseudonym.
15. P-0059 [REDACTED].¹⁹
16. The work that these witnesses currently do appears to be sensitive, and falls within the scope of information that governments routinely keep confidential. The requested protective measures should be granted in light of the Ugandan government’s wish to preserve the effectiveness of their ongoing military

¹⁴ P-0038 [REDACTED]. He will give live testimony in this capacity. He is currently proposed to appear sixty-second on the Prosecution’s proposed order of appearance.

¹⁵ There is a typographical error in Annex A. P-0339’s surname is written “[REDACTED]” instead of “[REDACTED]”.

¹⁶ P-0003, UGA-OTP-0246-0077 at 0079.

¹⁷ P-0339, UGA-OTP-0258-0732 at 0734.

¹⁸ ICC-02/04-01/15-533, paras. 62-88.

¹⁹ P-0059, UGA-OTP-0258-0699 at 0701.

operations, and to allow these witnesses to continue to perform their current duties without risk of interference.

17. In its 29 November 2016 decision, the Chamber granted the Prosecution's request for protective measures in relation to P-0189, [REDACTED], on the basis of professional circumstances similar to those in this request. The Court held that "it is reasonable to conclude on the basis of the witness's professional circumstances that the public disclosure of his identity and cooperation with the Court may have adverse consequences for the witness, including his security".²⁰ The Prosecution submits that the radio intercept witnesses are similarly situated and, in light of the Ugandan government's request, should be similarly protected.

B. The requested measures are the least restrictive measures to achieve the necessary protection

18. The Prosecution requests for each witness the protective measures of facial distortion, the use of a pseudonym, and limited recourse to closed session to elicit their identifying information and information related to their current employment.
19. These are the least restrictive measures to achieve the necessary protection requested. Their implementation will protect the identity and current employment information of these witnesses from being revealed to the public, which preserves the national security interests asserted by the Ugandan government.

C. The requested measures are consistent with the Accused's rights

20. The requested in-court protective measures will not adversely impact the fairness of the trial. Although the Prosecution requests that the identity and

²⁰ ICC-02/04-01/15-612-Red, para. 35.

current employment of the three witnesses be withheld from the public, that information has been known to the Defence for some time. Because these protective measures only affect how information is relayed outside the courtroom, Defence counsel will have the same opportunity and ability to question these witnesses as if the protective measures were not in place.²¹

21. The Prosecution recognises that the requested protective measures will have an impact on the public nature of the proceedings. However, that impact is limited. The vast majority of the witnesses' testimony will be given in public session. This public testimony will include their involvement in the UPDF and ISO radio interception operations, their observation of LRA radio use, their understanding of the content of the sound recordings of LRA radio communications and their identification of the persons who can be heard speaking in these recordings. It is only the limited information related to the witnesses' identity and current employment that will be elicited in closed session.²²
22. This limited restriction on the publicity of the proceedings is justified by the Ugandan government's legitimate interest in maintaining the confidentiality of their ongoing radio signalling operations and personnel.

Conclusion

23. The Prosecution requests facial distortion, the use of a pseudonym, and limited recourse to closed session during the testimony of radio intercept witnesses P-0003, P-0059 and P-0339.

²¹ Compare ICC-02/04-01/15-612-Red, para. 13 (noting that the same in-court protective measures "would have no impact on the Defence's ability to question the witnesses at trial").

²² Compare ICC-02/04-01/15-612-Red, para. 13 (noting the limited impact on publicity because "even when the identities of the witnesses would not be known to the public, most of their testimony could in any case be given in public session").



Fatou Bensouda
Prosecutor

Dated this 20th day of December 2016
At The Hague, The Netherlands