

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: **English**

No.: ICC-02/04-01/15  
Date: 03 January 2017

**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***

**Confidential**

**Response to the Prosecution's Second Application for in-court protective measures**

**Source:** Office of Public Counsel for Victims

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

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**Legal Representatives of the Victims**

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**Legal Representatives of the Applicants**

**Unrepresented Victims**

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**The Office of Public Counsel for  
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**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

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**REGISTRY**

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**Registrar**

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**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. The Common Legal Representative<sup>1</sup> supports the Prosecution's Second Application for in-court protective measures for witnesses P-0003, P-0059 and P-0339 (the "Second Application")<sup>2</sup> on the basis that the measures sought are necessary to protect national security matters raised by the Ugandan Government and are not prejudicial to or inconsistent with the rights of the Accused.

## II. PROCEDURAL HISTORY

2. On 26 October 2016, the Prosecution filed its First Application, seeking in-court protective measures for 52 witnesses (the "First Application").<sup>3</sup> On 11 November 2016, the Common Legal Representative filed her response, supporting the First Application.<sup>4</sup>

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<sup>1</sup> See the "Decision on contested victims' applications for participation, legal representation of victims and their procedural rights" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, p. 19; the "Decision on issues concerning victims' participation" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; the "Second decision on contested victims' applications for participation and legal representation of victims" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-384, 24 December 2015, pp. 20-22; the "Decision concerning 300 Victim Applications and the Deadline for Submitting Further Applications", (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-543, 26 September 2016, para. 8 and p. 5; and the "Decision Concerning 610 Victim Applications (Registry Report ICC-02/04-01/15-544) and 1183 Victim Applications (Registry Report ICC-02/04-01/15-556)" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-586, 04 November 2016, p. 8, paras. 9, 15 and 16.

<sup>2</sup> See the "Prosecution's second application for in-court protective measures", with Confidential Annexes A and B, No. ICC-02/04-01/15-642-Conf, 20 December 2016 (the "Second Application").

<sup>3</sup> See the "Prosecution's application for in-court protective and special measures", No. ICC-02/04-01/15-578-Conf, 26 October 2016 (the "First Application").

<sup>4</sup> See the "Common Legal Representative's Response to the Prosecution's application for in-court protective and special measures", No. ICC-02/04-01/15-589-Conf, 11 November 2016 (Pursuant to the Chamber's instruction dated 17 November 2016, this document was reclassified as "public").

3. On 30 November 2016, the Single Judge of Trial Chamber IX issued the "Decision on the 'Prosecution's application for in-court protective and special measures'", partially granting the First Application.<sup>5</sup>

4. On 20 December 2016, the Prosecution filed its Second Application seeking in-court protective measures for witnesses P-0003, P-0059 and P-0339.<sup>6</sup>

5. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this response is filed confidential following the classification chosen by the Prosecution. A public redacted version will be filed in due course.

### III. SUBMISSIONS

6. The Common Legal Representative reiterates her observations on the law applicable to in-court protective measures for witnesses as submitted in her response to the First Application filed on 11 November 2016.<sup>7</sup>

7. In relation to the measures sought for witnesses P-0003, P-0059 and P-0339 based on their professional engagements in the military and security apparatus of the Government of Uganda, the Common Legal Representative submits that said circumstances constitute a key factor in determining the need for protective measures pursuant to article 68(6) of the Rome Statute. Indeed, this specific provision purposefully covers situations where a State's officials or agents could be in the

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<sup>5</sup> See the "Decision on the 'Prosecution's application for in-court protective and special measures'" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-612-Red, 30 November 2016.

<sup>6</sup> See the "Second Application", *supra* note 2.

<sup>7</sup> See the Common Legal Representative's Response to the Prosecution's application for in-court protective and special measures, *supra* note 4, paras. 8-25.

position of disclosing confidential or sensitive information, including information which could endanger the integrity and status of State officials themselves.<sup>8</sup>

8. Due to their present appointments relating to national defence and ongoing military and intelligence operations<sup>9</sup>, the identities of the witnesses concerned fall squarely within the meaning of confidential or sensitive information relevant to the protection of national security, pursuant to article 68(6) read in conjunction with article 72(1) of the Rome Statute.

9. Nonetheless, the protective measures sought in the Second Application seek to protect the identities of witnesses solely with regard to the general public. The granting of said measures will not curtail the Defence's knowledge of the witnesses' identity and its ability to question the witnesses will not be affected. Moreover, the public will still be able to listen to the major parts of the testimonies. Therefore, the measures sought will not cause prejudice to the Defence and remain consistent with the Accused's right to a fair and public trial, as enshrined in article 67 of the Rome Statute.

10. Concerning the request for closed sessions for limited portions of the witnesses' testimony, including in circumstances where questioning might reveal the name or other identifying information, the Common Legal Representative also supports this component of the Second Application. In fact, protective measures such as image and voice distortion and the assignment of pseudonyms need to be combined with limited closed sessions in order not to defeat their purpose and to ensure effective protection of the identities of the witnesses concerned.

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<sup>8</sup> See DAVID DONAT-CATTIN - "Article 68" in TRIFFTERER (O.) (Ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edition, C.H. Beck, 2008, pp. 1293-1294.

<sup>9</sup> See RODNEY DIXON, HELEN DUFFY AND CHRISTOPHER K. HALL - "Article 72" in TRIFFTERER (O.) (Ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edition, C.H. Beck, 2008, p. 1366.

#### IV. CONCLUSION

For the foregoing reasons, the Common Legal Representative respectfully requests the Chamber to grant the Second Application.

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line underneath the name.

**Paolina Massidda**  
**Principal Counsel**

Dated this 3<sup>rd</sup> day of January 2017

At Genoa, Italy