

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: **ICC-02/04-01/15**
Date: **9 September 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

Defence Response to the Request for Protective Measures for P-0045

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

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor
Benjamin Gumpert, QC

Counsel for the Defence

Krispus Ayena Odongo
Chief Charles Achaleke Taku

Legal Representatives of the Victims

Joseph Akwenyu Manoba
Francisco Cox

Common Legal Representative for Victims

Paolina Massidda
Jane Adong

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Paolina Massidda
Orchlon Narantsetseg
Caroline Walter

States' Representatives

The Office of Public Counsel for the Defence

Xavier-Jean Keita

Amicus Curiae

REGISTRY

Registrar

Herman Von Hebel

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

Victims Participation and Reparations Section

Other

Marcus Wagemakers, Duty Counsel for P-0045

I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby responds to the application for protective measures for P-0045 ('Application').¹ The Defence opposes protective measures for P-0045.
2. The Defence reasons that if the Application was made ten years ago, Duty Counsel would be absolutely correct with the objectively justifiable risks listed in the Application on behalf of Witness P-0045. Fortunately, after Operation Lighting Thunder and the forceful exit of the LRA from the DRC into CAR, the dangers of collective punishment and witch-hunts surrounding the LRA are a thing of the past, and thus do not fall within the purview of objectively justifiable risks which necessitate protective measures.

II. BACKGROUND

3. On 26 October 2016, the Prosecution requested protective measures for a majority of its live witnesses.² Witness P-0045 was not one of these many witnesses. On 11 November 2016, the Defence responded, largely arguing on the lack of specificity, generalisations and the "group method" in which the Prosecution requested protective measures.³ On 30 November 2016, the Single Judge granted protective measures for 45 of the 48 requested individuals.⁴
4. On 8 September 2017, Trial Chamber IX ('Chamber'), the Parties and Legal Representatives for Victims were notified of the Application.⁵

III. CONFIDENTIALITY

5. Pursuant to Regulation 23 *bis*(2) of the Regulations of the Court, and only because of this regulation, the Defence files this response as confidential. The Defence's position

¹ ICC-02/04-01/15-975-Conf.

² ICC-02/04-01/15-578.

³ ICC-02/04-01/15-590-Conf.

⁴ ICC-02/04-01/15-612-Conf, para. 45. The Defence notes that the three witnesses whom protection measures were not granted were later granted protective measures.

⁵ ICC-02/04-01/15-975-Conf. Duty Counsel was courteous and emailed an advance copy of the filing to the Chamber, Parties and Participants before notification.

is that this response can be classified as public, and requests an order from the Chamber to that effect.

IV. SUBMISSIONS

A. Applicable Standard for Review

6. In determining requests for protective measures, the Chamber stated, through the Single Judge, that:

In determining whether in-court protective measures are warranted, the Chamber must ensure that any such measure is demanded by an ‘objectively justifiable risk’ and is proportionate to the rights of the accused. While the Single Judge understands that the concept of ‘risk’ necessarily involves a certain level of speculation and prediction, the available information must still indicate the existence of circumstances for which in-court testimony, in the absence of adequate protective measures under Rule 87 of the Rules, creates or unduly increases an impermissible danger to any of the legitimate interests of witnesses protected under Article 68 of the Statute – be it their physical security and safety or their psychological well-being, privacy and dignity.⁶

7. The Defence does not aver that this is a request based on changed circumstances.

B. The Chamber should reject the requested protective measures in the Application.

8. The Defence submits that the Application fails to identify contemporaneous objectively justifiable risks to Witness P-0045.
9. Duty Counsel extrapolated key issues related to the duress which persons in the LRA faced when determining whether to escape and return home.⁷ As discussed recently by P-0245 during his testimony,⁸ proximate to the time of P-0045's escape, terror existed amongst the entire LRA that if someone tried to escape and was caught, he or she would be killed. In furtherance to this terror, if the person escaped successfully, the escapee's family and possible village could face annihilation.

⁶ ICC-02/04-01/15-612-Red, para. 8. (internal citations omitted)

⁷ See Application, pp 3-4.

⁸ ICC-02/04-01/14-T-100-Conf ENG ET, p. 27, ln 22 to p. 28, ln 11 and p. 31, ln 1 to p. 32, ln 3 (in public session). See also P-0205, ICC-02/04-01/15-T-49-Conf ENG ET, p. 3, ln 14 to p. 4, ln. 3 (in public session) and P-0142, ICC-02/04-01/15-T-72-Conf ENG ET, p. 46, ln 21 to p. 47, ln 2 (in public session).

10. This was when P-0045 escaped. If her testimony before the Chamber happened before Operation Lighting Thunder, the Defence would side with Duty Counsel. Fortunately for P-0045 and the rest of the witnesses, collective punishment by orders of Joseph Kony no longer poses an objectively justifiable risk to those living in Uganda.
11. This point is further demonstrated by the many former LRA who appeared on Mega Radio FM in Dwog Paco statements. Kony told people in the LRA that the Government of Uganda forced escapees to make these statements right before they were killed. This LRA scare-tactic has been shown to be wrong.
12. Duty Counsel has failed to demonstrate contemporaneous objectively justifiable risks which outweigh Mr Ongwen's right to a public trial. The Defence therefore requests that the protective measures requested in the Application are denied.

V. RELIEF

13. The Defence requests the Chamber to reject Duty Counsel's request for protective measures for P-0045.
14. Additionally, as stated above in paragraph 5, the Defence requests an order from the Chamber to reclassify this document as public.

Respectfully submitted,



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

Dated this 9th day of September, 2017
At Kampala, Uganda