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**International
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Date: **13 June 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

Confidential

**Prosecution Response to Defence Application for Protective Measures, Special
Measures and Rule 75 Notice**

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 Defence has made an Application for in-court protective measures for 21 witnesses, special measures for 1 witness, and rule 75 assurances for 4 witnesses ("Application").¹ The Prosecution does not question the concerns raised by the Defence in relation to 19 fact witnesses discussed in the Application. However, the Defence request for protective measures for its two mental health experts—D-0041 and D-0042—is unfounded and should be rejected.

2. In relation to the request for rule 75 assurances for a person whom the Prosecution would characterise as a forced wife and three persons asserted to be children of Joseph Kony, while the Prosecution does not endorse the Defence's broad interpretation of rule 75 or rule 73(2) privilege, the Chamber need not determine those issues. No such assurances are necessary here. The Prosecution hereby undertakes that it will not seek to rely on the in-court testimony of these four family members of Mr Kony as incriminating evidence in any future ICC proceeding against Mr Kony.

Confidentiality

3. This document is classified as confidential pursuant to Regulation 23bis of the Regulations of the Court.

Submissions

A. The Prosecution Does Not Oppose Requested Measures for the 19 Fact Witnesses.

¹ ICC-02/04-01/15-1273.

4. While some of the Defence's protective measure requests in relation to the 19 fact witnesses are more substantiated than others, the Prosecution has no objection to the requested measures.

5. The Defence acknowledges that it has not completed all the VWS witness identification forms,² and may file other requests for protective measures.³ The Prosecution will make observations on any further requests at that time.

B. The Defence Request for Protective Measures for its Mental Health Experts is Unfounded.

6. The Defence request for protective measures for its two mental health experts ("Defence Experts")—D-0041 and D-0042—should be rejected. The request is unfounded and, in any event, granting such measures would fail to achieve the aim of concealing the experts' identities since their identities are already a matter of public record.

7. First, the suggestion that the Defence Experts might have "fears of reprisals and isolation from the communities in which they have been practicing"⁴ is speculative and not an objectively justifiable basis for protective measures. Concerns about reputational damage alone cannot justify protective measures for experts. The experts' authority is bound up in who they are, including their educational background and professional experience. The identity of the Defence Experts is a matter of genuine public interest and should not be shielded merely because it might be embarrassing for them to have their methodology or reasoning criticised in public. This is particularly so here, given the importance of the mental health issues in this case.

² Application, para. 27; *see contra*, ICC-02/04-01/15-1272-Conf-Red, para. 51(e).

³ Application, para. 27.

⁴ Application, para. 69.

8. Second, the identity of the Defence Experts is already readily apparent to the public. During the recent testimony by the Prosecution mental health experts, the names of the Defence Experts were mentioned repeatedly in open session, on six separate days.⁵ On 20 March 2018 alone, D-0041 and D-0042 were mentioned by name 14 times and 8 times, respectively.⁶ The Defence itself mentioned D-0041's name 4 times⁷ and D-0042's name 3 times on that day.⁸

9. Furthermore, contrary to the Defence submission,⁹ it is in fact "obvious" that D-0041 and D-0042 are witnesses *for* the Defence. Indeed, on various occasions, D-0041 and D-0042 were explicitly referred to as the "Defence experts" or their joint report referred to as the "Defence report". A few examples are provided below.

) P-0446: "Q: Did you see evidence that that approach was adopted by the Defence experts in this case, doctors [reference to the last names of D-0041 and D-0042]? A: I did not."¹⁰

) P-0447: "Q: Thank you, Professor. I want to now turn to the reports by [reference to the last names of D-0041 and D-0042] . . . And I would like you to comment on the information contained in their report, so I will make some cites. And in page 18 of your report you are referring to the Defence report which cites some witnesses to whom its compilers had spoken who had known Mr Ongwen while he was in the LRA."¹¹

) P-0447: "Q: Now, let's turn to the report of [reference to the titles and last names of D-0041 and D-0042]. And they also make assertions about Mr. Ongwen's capacity to understand and control his conduct. So we are going to examine some of the material and to see what your observations are. If we turn to tab 7 of the binder in front of you, of

⁵ ICC-02/04-01/15-T-162; ICC-02/04-01/15-T-163; ICC-02/04-01/15-T-166; ICC-02/04-01/15-T-167; ICC-02/04-01/15-T-169; ICC-02/04-01/15-T-170.

⁶ For D-0041, ICC-02/04-01/15-T-163, pp. 49, 56, 57, 61, 64, 70, 82-83, 99; For D-0042, ICC-02/04-01/15-T-163, pp. 56-57, 61, 64, 70. Note that this count excludes the neutral reference to D-0041 as author of a relevant publication. ICC-02/04-01/15-T-163, p. 39, ln. 23.

⁷ ICC-02/04-01/15-T-163, pp. 56, 57, 61, 64.

⁸ ICC-02/04-01/15-T-163, pp. 56, 61, 64.

⁹ Application, para. 69.

¹⁰ ICC-02/04-01/15-T-162, p. 18, lns. 22-24.

¹¹ ICC-02/04-01/15-T-169, p. 37, lns. 4-11.

binder 1, yes, tab 7. A: Okay. Q: All right. And if we go to page 12 and paragraph C of the defence report, page 12, paragraph C.”¹²

10. While the name of one other mental health professional was also discussed during the testimony of the Prosecution’s mental health experts, he was specifically referred to as the Court-appointed expert,¹³ or separately from the “Defence experts”,¹⁴ so there is no possible confusion as to whether he could be a Defence expert. In sum, it is too late for protective measures to serve any purpose.

C. The Defence Request for Rule 75 Assurances for Four Relatives of Mr Kony Should Be Rejected as Unnecessary.

11. The Defence seeks to reassure D-0006, D-0110, D-0130, and D-0131 before they testify that they will not be forced to give answers that may legally prejudice their family member, Mr Kony, thereby encouraging them to feel free to tell the complete truth.¹⁵ However, this objective can be satisfied without the need to offer special assurances to these witnesses under rule 75 or rule 73(2).

12. The Prosecution hereby undertakes that it will not seek to rely on the in-court testimony of these four family members of Mr Kony as incriminating evidence in any future ICC proceeding against Mr Kony. The Prosecution is prepared to repeat this undertaking in the presence of the witnesses, and thereby place it on the public record when the witnesses come to testify, if the Chamber so directs.

¹² ICC-02/04-01/15-T-169, p. 45, lns. 14-20.

¹³ See, e.g., ICC-02/04-01/15-T-162, p. 27, lns. 8-9.

¹⁴ ICC-02/04-01/15-T-162, p. 28, lns. 13-14 (“Much of the information in the reports by Dr de Jong and the Defence experts concern symptoms currently reported by Mr Ongwen.”); p. 38, lns. 22-23 (“Now at paragraphs 53 and 87 of your report you comment on suggestions by Dr de Jong, and also by the Defence experts, that Mr Ongwen may have been concealing or covering up his depression.”).

¹⁵ Application, para. 79.

Conclusion

13. For the reasons set out above, the Prosecution:

-) defers to the Chamber with respect to the request for protective and special measures for 19 fact witnesses;
-) opposes the Defence request for protective measures for D-0041 and D-0042; and
-) opposes the Defence request for rule 75 measures as unnecessary in the circumstances, given the Prosecution's undertaking not to seek to rely on the witnesses' in-court testimony in any future ICC proceeding against Mr Kony.



Fatou Bensouda, Prosecutor

Dated this 13th day of June 2018

At The Hague, The Netherlands