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**International
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No.: **ICC-02/04-01/15**

Date: **18 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

**CLRV Response to “Defence Application for In-Court Protective Measures,
Special Measures and Rule 75 Notice”**

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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I. INTRODUCTION

1. The Common Legal Representative of the victims¹ (the “CLR”) does not oppose the “Defence Application for In-Court Protective Measures, Special Measures and Rule 75 Notice” (the “Application”) in relation to the measures requested for the 19 fact witnesses.²

2. The CLR opposes the Application in the part requesting protective measures for the two mental health experts called by the Defence. In this regard, she submits that the requirements for granting in-court protective measures pursuant to rule 87 of the Rules of Procedure and Evidence (the “Rules”) are not met.

3. Moreover, in relation to the requested application of rule 75 of the Rules, the CLR contends that said provision does not apply to the four witnesses for whom the Defence requests assurances since they do not qualify to be “a spouse, child or parent” of Mr Ongwen who is the only accused in this trial proceeding.

II. PROCEDURAL BACKGROUND

4. On 13 October 2017, the Single Judge issued the “Preliminary Directions for any LRV or Defence Evidence Presentation” and instructed, *inter alia*, the Defence to submit its final List of Witnesses, List of Evidence, Rule 68(2)(b) requests, bar table

¹ 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; and the “Decision on the ‘Request for a determination concerning legal aid’ submitted by the legal representatives of victims” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-445, 26 May 2016, para. 13.

² See the “Defence Application for In-Court Protective Measures, Special Measures and Rule 75 Notice”, No. ICC-02/04-01/15-1273-Conf, 04 June 2018 (the “Application”).

motion and request for protective measures (the “Defence’s Final Lists”) three weeks after the closing of the Prosecution case.³

5. On 6 March 2018, the Chamber issued the Decision on the Legal Representatives’ requests to present evidence and decided, *inter alia*, to modify the deadline provided in the Preliminary Directions for submitting the Defence’s Final Lists to 31 May 2018.⁴

6. On 13 April 2018, the Prosecution filed its notice of the completion of evidence presentation.⁵

7. On 23 May 2018, the Defence requested the Trial Chamber to extend by two days the deadline for submitting the Defence’s Final Lists due to the delays caused by technical reasons.⁶ On 24 May 2018, the Chamber granted via email the request and extended the relevant deadline to 4 June 2018.⁷ On 4 June 2018, the Defence filed its Application.⁸

8. On 13 June 2018, the Prosecution filed its Response to the Application.⁹

9. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this response is filed confidential following the classification chosen by the Defence.

³ See the “Preliminary Directions for any LRV or Defence Evidence Presentation” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1021, 13 October 2017, paras. 3-4.

⁴ See the “Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests”, No. ICC-02/04-01/15-1199-Conf, 06 March 2018, para. 84. A public redacted version of the decision was filed on the same day. See No. ICC-02/04-01/15-1199-Red.

⁵ See the “Notice of the Prosecution’s completion of evidence presentation”, No. ICC-02/04-01/15-1225, 13 April 2018.

⁶ See the email sent by the Defence on 23 May 2018 at 18:44.

⁷ See the email sent by the Chamber 24 May 2018 at 09:58.

⁸ See the Application, *supra* note 2.

⁹ See the “Prosecution Response to Defence Application for Protective Measures, Special Measures and Rule 75 Notice”, No. ICC-02/04-01/15-1283-Conf, 13 June 2018.

III. SUBMISSIONS

A. Request For Protective Measures

10. The CLRV does not oppose the requested protective measures for the 19 fact witnesses and leaves it to the discretion of the Chamber. On the contrary, she opposes the part of the Application requesting protective measures for the two experts on mental health to be called by the Defence.

11. The CLRV recalls that the Chamber has already established the principles governing protective and special measures in its “Decision on the ‘Prosecution’s application for in-court protective and special measures’” (the “Decision on Protective Measures”) which states in particular that:

“[T]he publicity of proceedings is a fundamental right of the accused and a necessary component of a fair and transparent trial. At the same time, this general principle is not absolute and is subject to certain exceptions, one of which is indeed the protection of victims and witnesses. [...] Article 68(1) of the Statute requires the Chamber to ‘take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses’. Importantly, protection of victims and witnesses is not limited to their physical safety and security, but extends to their psychological well-being, privacy and dignity. Article 68(2) provides an express exception to the general principle of publicity in order to protect, inter alia, victims and witnesses. [...] 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 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. [...] This need for protective measures must be assessed on a case-by-case basis. This entails consideration of the specific circumstances of each of the witnesses concerned.”¹⁰

¹⁰ See the “Decision on the ‘Prosecution’s application for in-court protective and special measures’” (Trial Chamber IX), No. ICC-02/04-01/15-612-Conf, 30 November 2016, paras. 5 – 9. (the “Decision on Protective Measures”). A public redacted version of this decision was issued on the same day. See

12. In its Application, the Defence requests the use of pseudonyms and face distortion for mental health experts UGA-D26-P-0041 and UGA-D26-0042 (both referred to as the “experts”).¹¹ The Defence argues that these experts will be testifying on personal and intimate information on Mr Ongwen’s medical status which will be explored in private session.¹² The Defence contends also that the names of these experts have been discussed in the case without disclosing the fact that they are Defence witnesses.¹³ Moreover, the Defence adds that discussions regarding their security concerns have not been concluded, especially concerning fears of reprisals and isolation from the communities in which they have been practicing.¹⁴

13. The CLRV opposes the grant of protective measures for these experts even on provisional basis since the Defence fails to demonstrate objectively justifiable risks or an existence of circumstances for which in-court testimony, in the absence of adequate protective measures, creates or unduly increases an impermissible danger to any of the legitimate interests of the experts protected under article 68 of the Rome Statute, including their physical security and safety or their psychological well-being, privacy and dignity as required by the standard practice of the Chamber.¹⁵ Indeed, these experts are obviously neither crime-base witnesses, who may be in need of protective measures,¹⁶ nor are they State servants or agents.¹⁷

14. Moreover, various experts recently called both by the Prosecution and the Legal Representatives have testified at trial in public and without any protective

ICC-02/04-01/15-612-Red. See also the “Decision on Victims’ Application for In-Court Protective and Special Measures” (Trial Chamber IX), No. ICC-02/04-01/15-1227, 16 April 2018, paras. 6-7.

¹¹ See the Application, *supra* note 2, para. 69.

¹² *Idem.*

¹³ *Ibidem.*

¹⁴ *Ibid.*

¹⁵ See *supra* footnote 10.

¹⁶ See the Decision on Protective Measures, *supra* note 10, paras. 15–22, 23–32, 38–44 and 45–47.

¹⁷ See the “Decision on Prosecution Request for Protective Measures for P-3, P-59 and P-339” (Trial Chamber IX), No. ICC-02/04-01/15-651, 12 January 2017, paras. 5–7.

measures.¹⁸ In addition, the Defence's assertion that the names of its experts have been discussed in the case without disclosing their status as Defence witnesses is factually incorrect. During the testimonies of the Prosecutions' expert witnesses, the names of these two individuals were explicitly called out as the Defence experts¹⁹ or were easily understood to be referring to as Defence experts during questioning.²⁰ Lastly, the Defence's argument concerning fears from reprisals and isolation from the communities in which the experts have been practicing is unsubstantiated as it offers no evidence showing that, on the basis of their professional circumstances, the public disclosure of their identities and cooperation with the Court may have adverse consequences for them, including their safety and security.²¹

15. Therefore, the CLRV submits that, as a standard practice before the Chamber, the use of private sessions for exploring personal and intimate information on Mr Ongwen's health status shall suffice in order to address the privacy concerns raised by the Defence. Consequently, the protective measures requested for UGA-D26-P-0041 and UGA-D26-0042 should be rejected.

B. Rule 75 Assurances

16. In its Application, the Defence requests the Chamber to provide notice under rule 75 of the Rules to witnesses D-0006, D-0110, D-0130 and D-0131 who are allegedly family members of Mr Kony.²² The Defence acknowledges that rule 75 of the Rules explicitly refers to "*an accused*" and his or her family members²³. Yet, the

¹⁸ See Transcripts No. ICC-02/04-01/15-T-166-ENG to No. ICC-02/04-01/15-T-168-ENG (P-445), No. ICC-02/04-01/15-T-162-CONF-ENG and ICC-02/04-01/15-T-163-CONF-ENG (P-446), No. ICC-02/04-01/15-T-169-ENG and No. ICC-02/04-01/15-T-170-ENG (P-447), No. ICC-02/04-01/15-T-174-ENG (V-0001), No. ICC-02/04-01/15-T-175-ENG (PCV-0001), No. ICC-02/04-01/15-T-176-ENG (PCV-2) and No. ICC-02/04-01/15-T-177-ENG (PCV-3).

¹⁹ See Transcript No. ICC-02/04-01/15-T-162-CONF-ENG, p. 18 lines 22-24. The public redacted version of this transcript is not yet released. Nonetheless, this discussion took place in an open session.

²⁰ See Transcripts No. ICC-02/04-01/15-T-163-CONF-ENG, p. 56, lines 1-18, No. ICC-02/04-01/15-T-169-ENG, p. 19 line 12-p. 22 line 8, p. 24 line 15-p. 26 line 20, p. 37 line 4-p. 39 line 1, p. 45 line 14-p. 52 line 1, p. 69 line 24-p. 73 line 15 and No. ICC-02/04-01/15-T-170-ENG, p. 24 line 1-p. 25 line 10.

²¹ See the Decision on Protective Measures, *supra* note 10, paras. 33-37.

²² See the Application, *supra* note 2, para. 4.

²³ *Idem*, para. 74.

Defence argues that Mr Kony is one of the suspects in the *Kony et al.* case before the Court and Mr Ongwen is charged under article 25(3)(a) of the Rome Statute as an indirect co-perpetrator with Mr Kony and others.²⁴ Thus, the Defence argues that “*this fulfils ‘the accused’ prerequisite and thus warrants the application of Rule 75 privilege to specific Defence witnesses.*”²⁵ Moreover, and, in somewhat confusing fashion, the Defence seems to contend that these witnesses should also be covered by rule 73(2) of the Rules.²⁶ Nonetheless, the Defence requests the Chamber to provide assurances to said witnesses only under 75 of the Rules.²⁷

17. The CLRV takes note of the Prosecution’s observations in this regard.²⁸ However, she opposes this part of the Application. Firstly, rules 73 and 75 foresee wholly different scenarios and thus set out separate legal regimes²⁹ which should not be compounded in the manner done in the Application. The privileged communication between certain categories of professionals/individuals and the protection against incrimination by family members of an accused person, respectively governed by these distinct rules, are typically mutually exclusive. Considering a situation in which these two rules would overlap and operate simultaneously will stretch one’s imagination too far away from the actual facts of this case.

18. In relation to the relief sought by the Defence pursuant to rule 75 of the Rules, the text of said provision is clear and without any ambiguity. It explicitly refers to “*a spouse, child or parent of an accused person*”, even excluding other family ties that are

²⁴ *Ibidem*, para. 76.

²⁵ *Ibid.*

²⁶ *Ibid.*, paras. 73, 75 and 78.

²⁷ *Ibid.*, p. 18.

²⁸ See the “Prosecution Response to Defence Application for Protective Measures, Special Measures and Rule 75 Notice”, *supra* note 9, paras. 11-12.

²⁹ See DONALD K. PIRAGOFF – *Evidence in LEE (R.S.)* (Ed) *Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, 2001, pp. 357-369, 397-399.

not so close to trigger the privilege against incrimination of family members.³⁰ In point of fact, the accused person in this trial is Mr Ongwen.

19. The fact that Mr Kony is charged as a co-perpetrator in another case does not automatically transform him into the accused person in these proceedings. Nor does it extend the protection against incrimination by family members afforded in favour of Mr Kony's family to Mr Ongwen who does not share any family ties with said witnesses. Thus, there is no reason to deviate from the clear meaning of rule 75 of the Rules. Granting assurances to said witnesses who are not a spouse, child or parent of Mr Ongwen will be wholly unjustified and legally erroneous.

20. Consequently, the assurances under Rule 75 of the Rules sought by the Defence vis-à-vis witnesses D-0006, D-0110, D-0130 and D-0131 should be rejected.

IV. CONCLUSION

21. For the foregoing reasons, the Common Legal Representative of the victims requests the Chamber to reject the Application in the parts related to the request for protective measures for the two mental health experts and for assurances under rule 75 of the Rules.



Paolina Massidda
Principal Counsel

Dated this 18th day of June 2018
At The Hague (The Netherlands)

³⁰ See the "Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12" (Pre-Trial Chamber I), No. ICC-01/04-01/07-412, 18 April 2008, p. 9.