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Pénale
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**International
Criminal
Court**

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

Date: **25 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***

Public

**Public redacted version of
‘Corrected version of “Defence Application for In-Court Protective Measures, Special
Measures and Rule 75 Notice” (ICC-02/04-01/15-1273-Conf), filed on 4 June 2018’, filed
on 25 June 2018**

Source: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby seeks in-court protective measures for 21 witnesses and special measures for one witness, pursuant to Articles 64(4)(e) and 68 of the Rome Statute ('Statute') and Rules 87 and 88 of the Rules of Procedure and Evidence ('RPE').
2. The current application is based on the vulnerability of these witnesses and the necessity to protect their physical and psychological well-being, dignity, and privacy, as mandated by Article 68 of the Statute. For each witness, the Defence requests the least restrictive measures possible in order to achieve the necessary protection.
3. The Defence also reserves its right to request for additional measures, or modification of some measures, should newly available information or circumstances require.¹
4. Furthermore, the Defence seeks notice to four witnesses pursuant to Rule 75 of the RPE.

II. CONFIDENTIALITY

5. The Defence files this application confidentially pursuant to Article 68 of the Rome Statute and Regulation 23bis(1) of the Regulations of the Court ('RoC'), because the application contains sensitive information related to Defence trial witnesses.

III. APPLICABLE LAW

1. Relevant legal provisions

6. Article 68(1) of the Statute requires the Chamber to "take appropriate measures to protect the safety of, physical and psychological well-being, dignity and privacy of victims and witnesses." Protection of victims and witnesses is not limited to their physical safety and security, but extends to their psychological well-being, privacy and dignity.² The Trial Chamber is required

¹ ICC-02/04-01/15-612, para. 12 ("[A]ny rejection of requests for protective measures in the present decision is without prejudice to the Chamber, on its own motion or upon request, reconsidering the need for an order under Rule 87 of the Rules should new or additional information be made available to it at a later stage").

² ICC-02/04-01/15-612, para. 6.

to have regard to all relevant factors, including age, gender, and health, as well as the nature of the crime, especially where the crime involves sexual or gender violence against children.³

7. Article 68(2) of the Statute provides an express exception to the general principle of public hearings.⁴ It authorises the Trial Chamber to “conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special measures”⁵ in order to “protect victims and witnesses or an accused.”⁶ The same provision makes the implementation of such measures mandatory “in the case of a victim of sexual violence or a child who is a victim or a witness unless otherwise ordered by the Court.”⁷
8. Rule 87 of the RPE authorises the Trial Chamber to take measures to protect the identity of a victim or witness (or another person at risk) from the public or media. Such measures include, but are not limited to (i) the participants in the proceedings be prohibited from disclosing to third parties the identity of a victim or a witness or any other identifying information; (ii) pseudonyms be used for a victim or a witness or any other identifying information; (iii) testimony be provided with technical alteration of pictures or voice and/or by video link; and (iv) part of the proceedings be conducted in private or closed session.⁸
9. Protective and special measures are also addressed in Regulations 94 and 94*bis* of the Regulations of the Registry (‘RoR’). Regulation 94 identifies measures to protect the identity of witnesses, including pseudonyms, face distortion, voice distortion, private and close session, video links and such other measures as may be technically feasible.
10. Regulation 94*bis* of the RoR recognises that special measures under Rule 88 of the RPE may facilitate a witness’s appearance to testify as well as protect him or her from “psychological harm by reason of the process of appearing before the Court.” It includes a non-exhaustive list of factors that may assist in assessing the vulnerability of witnesses, such as having been a victim of sexual or gender-based violence or violence against children, or expressing fear or retaliation. Regulation 94*bis*(3) of the RoR also identifies a number of specific special

³ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Second Edition, Oxford University Press, 2016, p. 1058.

⁴ ICC-02/04-01/15-612, para. 6.

⁵ Article 68(2) of the Statute.

⁶ Article 68(2) of the Statute.

⁷ Article 68(2) of the Statute.

⁸ ICC-02/04-01/15-612, para. 7.

measures, such as the use of video link, the presence of an accompanying support person, or measures designed to adapt the questioning of the witness to his or her needs and capacity.

2. *Relevant case law*

11. The Trial Chamber V in the *Ruto and Sang* case held that “Article 68(1) and (2) of the Statute, which read in unison with Article 64, (2) and (6)(e) of the Statute and Rule 87 of the Rules, give power to the Trial Chamber to order protective measures 'to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses' and to hold 'any part of the proceedings in camera'.”⁹
12. The present Trial Chamber found that “independently from the burden of any moving party to sufficiently substantiate any motion to the Chamber, the Single Judge emphasises that the safeguarding of the legitimate protected interests of witnesses, victims and other persons otherwise at risk on account of the testimony of a witness is a duty placed on the Court as a whole, including on the Chamber.”¹⁰
13. The Trial Chamber V and the Trial Chamber VI in the *Ntaganda* further held that protective measures should be granted “only on an exceptional basis, following a case-by-case assessment of whether they are necessary in light of an objectively justifiable risk and are proportionate to the rights of the accused.”¹¹ The Defence notes that such case-by-case evaluation should involve a particularised analysis of the risk with respect to each witness.¹²
14. According to this Trial Chamber, when determining whether protective measures are warranted, the Trial Chamber must ensure that any such measure is demanded by an objectively justifiable risk and is proportionate to the rights of the accused.¹³ The Trial Chamber also held that in the absence of adequate protective measures under Rule 87 of the RPE, the available information must still indicate the existence of circumstances for which in-court testimony “creates or unduly increases an impermissible danger to any of the legitimate

⁹ ICC-01/09-01/11-902-Red2, para. 11.

¹⁰ ICC-02/04-01/15-612, para. 10.

¹¹ ICC-01/09-01/11-902-Red2, para. 13; ICC-01/04-02/06-824-Red, para. 6.

¹² ICC-01/04-02/06-824-Red, para. 6.

¹³ ICC-02/04-01/15-612, para. 7; *see also* ICC-02/04-01/15-1234, para. 8.

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.”¹⁴

15. The Trial Chamber VI in the *Ntaganda* case held that “having noted the nature of the expected testimony of the Witness and his reported fears of retaliation in connection with testifying as a Defence witness, the Chamber considers that granting the requested measures would, as noted by the VWU, reduce the risk of reprisals and minimise the need to deploy intrusive risk reduction or protection measures post-testimony.”¹⁵
16. Finally, in relation to special measures under Rule 88 of the RPE, the Defence avers that the Trial Chamber has broad discretion to apply appropriate measures for vulnerable witnesses.¹⁶ The Trial Chamber I in the *Lubanga* case held that “this provision enables the Court, when it is necessary to provide protection to victims, witnesses or the accused, to use any appropriate “special means”, which will include reading part, of all, of a witness’s statement in open Court or in private, so long as these steps do not detract from the fairness of the proceedings.”¹⁷

3. Rule 75 Notice

17. Rule 73(2) of the RPE empowers the Trial Chamber to recognize additional classes of privilege relationships based on three criteria: a) when there is a reasonable expectation of privacy and non-disclosure; b) confidentiality is essential to the nature and type of relationship; and c) recognition of the privilege would further the objectives of the Statute and the Rules. Sub-rule 3 then indicates the candidates for recognition of confidentiality.¹⁸
18. Rule 75 of the RPE provides that a family member has the dispensable right to refuse to testify if his or her testimony would incriminate family members.¹⁹ Sub-rule 1 restricts the family privilege to a spouse, child or parent of an accused person.²⁰

¹⁴ ICC-02/04-01/15-612, para. 8.

¹⁵ ICC-02/04-01/15-2125, para. 7.

¹⁶ See, ICC-01/04-01/06-1049, para. 32: (“The Trial Chamber also draws special attention to the vulnerability of some of the people who may be called to testify. There must be awareness of the particular characteristics of a witness which may cause the court environment to be particularly foreign and uncomfortable. In the context of the present case, for example, particular attention should be paid to any children who are called as witnesses to ensure that their psychological well-being is considered as a matter of paramount importance, pursuant to Article 68 of the Statute and Rule 88 of the Rules.”).

¹⁷ ICC-01/04-01/06-1603, para. 17.

¹⁸ Rule 73(3) of the RPE.

¹⁹ Rule 75 of the RPE does not contain a provision relating to a situation where the alleged crime or offence is committed against the family members which is being asked to testify.

19. The Trial Chamber VII in the *Bemba et al.* case held that

[t]he Chamber is aware that Rule 75 of the Rules does not squarely apply to the present situation as this provision only concerns family members of an accused. However, the Chamber considers that the same kinds of communications between two married witnesses are covered by privilege in Rule 73(2) of the Rules. Such communications are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure. The confidentiality between married witnesses is essential to the nature and type of relationship between the person and the confidante. Finally, just as is the case with the relationships explicitly protected by Rule 75, recognizing this kind of privilege would further the objectives of the Statute and the Rules.²¹

20. The Trial Chamber VII in the *Bemba et al.* case also found that

[f]urther and importantly, treating these communications between married witnesses as privileged also protects the integrity of their relationship. The witness is in a mental and emotional dilemma between her duty to tell the truth and the fear of prejudicing or harming the family member. In a similar dilemma seen with family members of the accused, the testimony of the wife could lead to proceedings against her husband. So whenever a question is asked whose answer would lead to the danger of proceedings against the family member, the witness can refuse to answer on a case-by-case basis.²²

21. According to the United Nations Human Rights Committee, the term ‘family’, should be interpreted broadly “to include all those comprising the family as understood in the society of the State party concerned.”²³ The Defence notes that this is especially relevant bearing in mind national and cultural traditions in Uganda.

IV. SUBMISSIONS

22. The Defence hereby requests in-court protective for 21 trial witnesses and special measures for one witness.
23. In particular, the Defence requests the use of a pseudonym and face-distortion for 21 witnesses to protect their identity from the public. With respect to voice distortion, the Defence seeks this measure for UGA-D26-P-0121. Reasons for this specific request are discussed below.
24. The Defence will also seek closed or private sessions for restricted portions of the testimony of many of its witness when such information is related to:

²⁰ Rule 75(1) of the RPE.

²¹ ICC-01/05-01/13-T-37-Red-ENG WT, p. 12, lns 20-25, p. 13, lns 1-5.

²² ICC-01/05-01/13-T-37-Red-ENG WT, p. 13, lns 10-18.

²³ United Nations Human Rights Committee, CCPR General Comment No. 16: article 17 (right to privacy), 8 April 1998, para. 5.

- a. Personal data, such as where a witness lives and the names of their parents and/or children;
- b. Potentially incriminating material covered by Rule 74 of the RPE;
- c. Medical information about the witness which might cause the witness stigmatisation; and
- d. Any other unforeseeable issue which could arise.

25. Finally, the Defence suggests special measures for one of its witnesses in order to minimise the psychological and emotional impact of the witness's testimony. In particular, the Defence suggests the presence of a support person during witness UGA-D26-P-0085's testimony or the availability of mental health care before, during, and after the witness's testimony. This measure involves no restriction of information from the public.

A. General issues applicable to multiple witnesses

26. Several general areas arise which the Defence argues necessitate private/closed sessions, face distortion, name distortion and voice distortion.
- a. Some of the witnesses are former members of the Local Defence Units. They were tasked with protecting those in the IDP camps. The general fear amongst the former LDUs is being shunned by the community, and possible expulsion from the community, for testifying for the Defence after they failed their job to protect them in the camps. Furthermore, there is a general rumour around the affected areas that those who come to testify are being paid by the ICC (regardless of who the witness is).
 - b. Some of the witness are former members of the LRA. These persons have come back home and have reintegrated into their communities. Many of them have not discussed their time in the bush with family, friends and the local community. Several former LRA are worried that if the community learns about their past, they might be expelled from the community or attacked by the community.
 - c. Some of the witnesses are children of Joseph Kony. These children have been tormented by persons for the sole reason that their father is Joseph Kony. [REDACTED].

27. Finally, the Defence notes that of its witnesses, protection requirements for 21 of them are still not finalised by the Defence. The Defence has been contacting witness and completing VWU forms these past months. The Defence apprised VWU of this during a meeting in the week beginning 21 May 2018 and noted that it should have all possible forms completed by the end of June 2018. The Defence aspires to complete this task and have any other requests for protective measures filed by then.

B. Defence witnesses subject to the current application

1. UGA-D26-P-0006 – [REDACTED]

28. Witness D-0006 was taken as a wife by Joseph Kony. Upon her release from captivity, she and her children were harassed because of her position as a wife of Joseph Kony. [REDACTED].

29. [REDACTED].

30. For the abovementioned reasons, the Defence requests a pseudonym and face distortion for D-0006 and private sessions when information is given which would identify her.

2. UGA-D26-P-0007 – [REDACTED]

31. [REDACTED]. The witness has two wives and is a subsistence farmer.

32. [REDACTED].

33. [REDACTED]. The Defence asserts that for the physical wellbeing of this witness, the least restrictive measures for his protection are name distortion, face distortion and private sessions when he testifies to identifying information or any other sensitive information.

3. UGA-D26-P-0025 – [REDACTED] and UGA-D26-P-0030 – [REDACTED]

34. The witnesses were abducted into the LRA and escaped in [REDACTED]. The witnesses currently serve in the UPDF, [REDACTED].

35. The concerns emanate from their current work. The witnesses are worried that their cohorts shall treat them differently. Whilst their participation has been kept quiet to date, their worries mirror those expressed by [REDACTED]. Finally, for D-0025, his family does not live with him. The witness worries that because his work requires him to live away from them, if

anything were to befall his family, he would not be there to protect them. Currently, the locals where his family resides do not know his story from the bush, merely that he was abducted and returned home.

36. For the abovementioned reasons, the Defence requests a pseudonym and face distortion for D-0025 and D-0030 and private sessions when information is given which would identify them.

4. UGA-D26-P-0026 – [REDACTED]

37. The witness was abducted as a young child in late 1993 or early 1994 and returned home from the bush in [REDACTED].
38. The witness is a [REDACTED]. The witness has not told the people in his small village about his time in the bush. The witness worries that the villagers shall exact revenge if it is learned about his time and actions whilst in the bush. His worries are increased by the fact that his two diverse sources of income keeps him away from his family for days at a time, and that he cannot protect them when he is away from his family.
39. For the abovementioned reasons, the Defence requests a pseudonym and face distortion for D-0026 and private sessions when information is given which would identify him.

5. UGA-D26-P-0027 – [REDACTED]

40. [REDACTED].
41. [REDACTED], and has been running his business privately, the villagers in his local area are unaware of the time which he spent in the bush. The witness is worried that people might push him away from the village and/or stop engaging his business if it is found out that he was an officer in the LRA. Finally, [REDACTED].
42. For the abovementioned reasons, the Defence requests a pseudonym and face distortion for D-0027 and private sessions when information is given which would identify him.

6. *UGA-D26-P-0032 – [REDACTED] & UGA-D26-P-0135 – [REDACTED]*

43. Witnesses D-0032 and D-0135 have already received protective measures by the Chamber in Decision 612 when applied for by the Office of the Prosecutor.²⁴ The Defence asserts that the protective measures are still warranted and should remain in place.

7. *UGA-D26-P-0033 – [REDACTED]*

44. The Defence is currently in the process of obtaining information about this person during the next week. When the Defence last met the witness, he stated that he wanted face and voice distortion, but a complete assessment has not been concluded.

8. *UGA-D26-P-0036 – [REDACTED]*

45. [REDACTED]. The Defence has not yet been able to conduct a session dealing with his security concerns.
46. [REDACTED].²⁵ For this reason, the Defence requests a pseudonym and face distortion for D-0036 and private sessions when information is given which would identify him.

9. *UGA-D26-P-0072 – [REDACTED]*

47. Witness D-0072 is a former LDU stationed at Lukodi IDP Camp during the relevant period of the crimes alleged. [REDACTED].
48. [REDACTED]. His worries relate to those described above, that he failed his duty as an LDU, and admits running away during the attack. He is worried that the villagers, upon hearing this, will ostracise him from the community. He has a large family and is able to maintain their needs, but not if people stop associating with him for testifying for the Defence.
49. For the abovementioned reasons, the Defence requests pseudonym and face distortion for D-0072 and private sessions when information is given which would identify him.

²⁴ ICC-02/04-01/15-612-RED, para. 32.

²⁵ See UGA-OTP-0249-1772, UGA-OTP-0249-1788, UGA-OTP-0249-1799 (*noting* the original case number to be GEF/157/2012), UGA-OTP-0249-1816, UGA-OTP-0249-1826 and UGA-OTP-0249-1827.

10. UGA-D26-P-0075 – [REDACTED]

50. Witness D-0075 is a former member of the LRA. [REDACTED].
51. The witness currently serves in the UPDF. [REDACTED]. The witness has seen other former LRA members being ostracised because of their past and worries about the same.
52. For the abovementioned reasons, the Defence requests a pseudonym and face distortion for D-0075 and private sessions when information is given which would identify him.

11. UGA-D26-P-0076 – [REDACTED]

53. Witness D-0076 is [REDACTED]. During the relevant period of the crimes alleged at Pajule IDP Camp, the witness resided within the Pajule side of the camp.
54. The witness worries that people will not understand why he is testifying at the Court. The witness wants to come and tell his story, but he fears the potential backlash by the community for this. A disturbance with his farming could mean the collapse of his subsistence way of life. Finally, whilst the witness was only briefly an abductee of the LRA, he worries that the community members might begin to claim that he partook in the attack after he was abducted.
55. For the abovementioned reasons, the Defence requests a pseudonym and face distortion for D-0076 and private sessions when information is given which would identify him.

12. UGA-D26-P-0081 – [REDACTED]

56. Witness D-0081 is a resident of [REDACTED] and was residing at Pajule IDP Camp during the relevant period of the alleged crimes. The witness was abducted during the Pajule attack and remained in the LRA for approximately [REDACTED].
57. The witness worries that people will not understand why he is testifying at the Court. The witness wants to come and tell his story, but he fears the potential backlash by the community for this. Whilst the witness was only briefly an abductee of the LRA, he worries that the community members might begin to claim that he partook in the attack after he was abducted.
58. For the abovementioned reasons, the Defence requests a pseudonym and face distortion for D-0081 and private sessions when information is given which would identify him.

13. UGA-D26-P-0085 – [REDACTED]

59. The witness was abducted in 2001 and stayed in the LRA for around five years. [REDACTED].
60. The Defence is worried that testifying in public would cause further stigmatization to the witness. She is shy and quiet, and speaks very slowly and bashfully whilst discussing her time in the bush. In short, she appeared distressed and sessions were shorter than normal. When she came back home without a child, her community accepted her back. [REDACTED].
61. For the abovementioned reasons, the Defence requests a pseudonym and face distortion for D-0085 and private sessions when information is given which would identify her. Furthermore, because of the manner in which the witness acted during her interviews with the Defence, the Defence suggests the presence of a support person during witness D-0085's testimony or the availability of mental health care before, during, and after the witness's testimony.

14. UGA-D26-P-0110 – [REDACTED], UGA-D26-P-0130 – [REDACTED] and UGA-D26-P-0131 – [REDACTED]

62. Witnesses D-0110, D-0130 and D-0131 are children of Joseph Kony.
63. The Defence seeks name and face distortion for all three persons. As the children of Kony, these persons have been ostracised from many of the communities in which they lived, causing them to pick up and restart their lives all over. They have been able to move on with their lives by not mentioning who their father is.
64. For the abovementioned reasons, the Defence requests a pseudonym and face distortion for D-0110, D-0130 and D-0131 and private sessions when information is given which would identify them.

15. UGA-D26-P-0121 – [REDACTED]

65. Witness D-0121 is a former LDU stationed at Abok IDP Camp during the relevant period of the crimes alleged. [REDACTED].
66. The witness worries about persons from his home area ostracising him for what happened during the Abok attack. [REDACTED].

67. As the witness is an [REDACTED], many people know his voice. The witness worries that a pseudonym and face distortion will not be enough, and that locals will hear his voice and recognise him. This is evermore present because of the publicity the trial received in the affected area.
68. For the abovementioned reasons, the Defence requests face, name and voice distortion for D-0121 and private sessions when information is given which would identify him.

16. UGA-D26-P-0041 and UGA-D26-0042 – [REDACTED] and [REDACTED]

69. The Expert Witnesses will be testifying on personal and intimate information on Mr Ongwen's medical status and the Defence gives notice of its intent to explore this information in private session to preserve the dignity of Mr Ongwen. Whereas the Defence acknowledges the fact that the names of these witnesses have been discussed in the case, it is not obvious that they are Defence Witnesses. Discussions regarding their security concerns have not been concluded with the witnesses, especially concerning fears of reprisals and isolation from the communities in which they have been practicing. The Defence requests the provisional grant of pseudonyms and face distortion for both Experts until the discussions are concluded.

C. The current application and requested measures are consistent with the applicable provisions and case law

70. The Defence avers that the in-court protective measures and special measures sought will not impact upon the fair and expeditious conduct of the *Ongwen* case proceedings. While the Defence requests that the identities of 21 Defence witnesses are withheld from the public, the identities of all Defence witnesses are known to the Prosecution, Legal Representatives of the Victims ('LRV'), and Common Legal Representative for Victims ('CLR'). The *Ongwen* case parties and participants will, therefore, have same basis and ability to prepare for the examination of the impugned witnesses at trial.²⁶
71. The requested measures may – to a limited extent – impact on the public nature of the *Ongwen* case proceedings. However, the Defence avers that the measures sought are justified and are negligible and thus necessary to achieve the minimum protection of the Defence witnesses.

²⁶ ICC-02/04-0115-612, para. 13: ("The Single Judge observes that the requested protective measures exclusively concern the withholding of the witnesses' identity from the public and that these measures would have no impact on the Defence's ability to question the witnesses at trial").

D. Rule 75 Notice

72. The Defence submits that while family members of the accused may be compelled to testify in the accused's trial, they shall not be required to make statements which "might tend to incriminate that accused person." Rule 75(1) of the RPE lists "a spouse, child or parent of an accused person" as a witness appearing before the Court under the heading "Incrimination by family members".
73. Rule 73(2) of the RPE empowers the Trial Chamber to recognize additional classes of privilege relationships. In the *Bemba et al.* case, the Trial Chamber VII recognised that "communications between two married witnesses are covered by privilege in Rule 73(2) of the Rules"²⁷ because "such communications are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure."²⁸ The Defence notes that treating communications between family members as privileged protects the integrity of their relationship.²⁹
74. On the one hand, the Defence is cognisant that Rule 75 explicitly refers to 'the accused' and his/her 'family members'. On the other hand, the Defence notes that Rule 75 privilege "attaches to the witness rather than the accused"³⁰ and its implementation lies within the broad discretionary powers of this Trial Chamber.
75. Moreover, the Defence notes that treating communications between family members as privileged under Rule 73(2) protects the integrity of their relationship and deters any mental and emotional dilemma between the witness's duty to tell the truth and the fear of prejudicing or impairing the family members.³¹ Therefore, in the present circumstances, the Defence avers that Rule 73(2) and Rule 75 privileges should be granted to certain family members of Joseph Kony.
76. Joseph Kony is one of the suspects in the *Kony et al.* case before this Court. Moreover, Mr Ongwen – the accused – is charged under Article 25(3)(a) of the Statute as an indirect co-

²⁷ ICC-01/05-01/13-T-37-Red-ENG WT, p. 12, lns 22-23.

²⁸ ICC-01/05-01/13-T-37-Red-ENG WT, p. 12, lns 23-25.

²⁹ ICC-01/05-01/13-T-37-Red-ENG WT, p. 13, lns 10-15.

³⁰ Triffterer/Ambos, *The Rome Statute of the International Criminal Court, A Commentary*, Third Edition, C.H.BECK, 2016, page 1744, 57.

³¹ ICC-01/05-01/13-T-37-Red-ENG WT, p. 13, lns 11-13.

perpetrator in a number of charges with Joseph Kony and others.³² The Defence avers that this fulfils ‘the accused’ prerequisite, and thus warrants the application of Rule 75 privilege to specific Defence witnesses.

77. In particular, the Defence requests the Trial Chamber to take into consideration the personal relationship between Defence witnesses D-0006, D-0110, D-0130, D-0131 and Joseph Kony. In other words, the Defence requests the Trial Chamber not to compel these four Defence witnesses to make any statement that might tend to incriminate Joseph Kony because of the following family ties:

- a. Defence witness D-0006 [REDACTED].
- b. Defence witness D-0110 [REDACTED].
- c. Defence witness D-0130 [REDACTED].
- d. Defence witness D-0131 [REDACTED].

78. Specifically, [REDACTED] are mother and son. The Defence asserts that this type of relationship, just like a marriage, is one in which “communications are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure”³³ and are “essential to the nature and type of relationship between the person and the confidante.”³⁴ The Defence maintains that anything learned by [REDACTED] by virtue of her being the mother of [REDACTED] should fall underneath Rule 73(2) and Rule 75 protection.

79. In sum, one can assume that a witness may be hesitant to tell the complete truth if this would lead to the incrimination of a family member. For that reason, the Defence deems the application of Rule 73(2) and Rule 75 privilege to Defence witnesses D-0006, D-0110, D-0130 and D-0131 as the reasonable approach in order to make the truth-finding process in the *Ongwen* case fair and expeditious.

V. RELIEF SOUGHT

80. For all the reasons above, the Defence respectfully requests the Trial Chamber to:

³² See e.g., ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges against Dominic Ongwen, p. 73 (para.15), p. 77 (para. 27), p. 99 (para. 119), and p. 102 (para. 126); ICC-02/04-01/15-533, Prosecution’s Pre-Trial Brief, para. 139.

³³ ICC-01/05-01/13-T-37-Red-ENG WT, p. 12, lns 23-25.

³⁴ See ICC-01/05-01/13-T-37-Red-ENG, p. 13, lns 1-2.

- a) **GRANT** in-court protective measures for the abovementioned Defence witnesses;
- b) **GRANT** special measures for Defence witness UGA-D26-P-0085; and
- c) **PROVIDE** Rule 75 assurances to the following Defence witnesses: D-0006, D-0110, D-0130 and D-0131.

Respectfully submitted,



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

Dated this 25th day of June, 2018
At Kampala, Uganda