

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **5 April 2018**

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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 "Victims' application for in-court protective and special measures", 5 April 2018, ICC-02/04-01/15-1219-Conf

Source: Legal Representatives of 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 Legal Representatives for Victims (“LRVs”) hereby seek in-court protective measures and special measures for one witness, pursuant to articles 64(6)(e) and 68 of the Rome Statute (“Statute”) and rules 87 and 88 of the Rules of Procedure and Evidence (“Rules”).
2. This application is based on the vulnerability of this witness and the need to protect his physical and psychological well-being, dignity, and privacy, as mandated by article 68 of the Statute. The LRVs seek the least restrictive measures necessary to adequately protect the witness while ensuring consistency with the Accused’s rights.

II. CONFIDENTIALITY

3. The LRVs file this application confidentially pursuant to regulation 23*bis* of the Regulations of the Court, because the filing contains sensitive information related to an LRV witness. A public redacted version will be filed in due course.

III. PROCEDURAL HISTORY

4. On 13 July 2016 in the Initial Directions on the Conduct of the Proceedings, the Single Judge indicated the Chamber’s intention to rule on applications for in-court protective measures in advance of trial whenever possible, with any such advance rulings subject to further information being provided by the Victims and Witnesses Unit (‘VWU’).¹
5. On 26 October 2016 the Prosecution submitted the “Prosecution’s application for in-court protective and special measures”, where it requested in-court protective measures or special measures for fifty-two witnesses.²

¹ ICC-02/04-01/15-497, para. 34.

² ICC-02/04-01/15-578-Conf.

6. On 29 November 2016 the Single Judge on behalf of the Trial Chamber issued the “Decision on the ‘Prosecution’s application for in-court protective and special measures’” wherein protective measures were granted to forty-five of the Prosecution’s witnesses, namely witnesses were provided with face distortion *vis-à-vis* the public and were allowed to be referred to by their respective pseudonyms in public filings. Two witnesses were also granted voice distortion *vis-à-vis* the public.³
7. On 6 March 2018 Trial Chamber IX issued its “Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests.”⁴ The Chamber noted that the Legal Representatives were required to provide within one week after the Prosecution has filed its formal notice that it concluded its evidence presentation, *inter alia*, any request for protective measures or relief under Rule 68 of the Rules.⁵

IV. APPLICABLE LAW

8. 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.”
9. Although the publicity of proceedings is a fundamental right of the accused and a necessary component of a fair and transparent trial⁶, this principle is subject to certain exceptions, including the protection of witnesses and victims.⁷
10. Indeed article 68(2) of the Statute creates an express exception to the general principle of public hearings. It authorises the Chamber to “conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means” in order to “protect victims and witnesses or an accused.”

³ ICC-02/04-01/15-612-Red (“Decision on Protective Measures”).

⁴ ICC-02/04-01/15-1199-Conf (Decision on Request to present Evidence”).

⁵ Para. 79, *Ibid*.

⁶ Articles 64(7) and 67(1) of the Statute.

⁷ Decision on Protective Measures, para. 5.

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.”

11. Rule 87 of the Rules authorises the 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, the use of pseudonyms, technical alteration of images or voices, testimony by video link, or conducting part of the proceedings in camera.
12. Rule 88 authorises the Trial Chamber to “order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2.” For instance, the attendance of a psychologist or another support person in court during the witness’s testimony.
13. Protective and special measures are also covered in regulations 94 and 94*bis* of the Regulations of the Registry. 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.
14. As stated in the Decision on Protective Measures, 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.¹⁰ Furthermore, the Single Judge held that although

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.⁸

V. SUBMISSIONS

15. As authorised by the Chamber the LRVs currently intend to call 4 witnesses. The LRVs note and respectfully agree with the Chamber’s ruling that the meaningful participation of victims as witnesses is advanced by making their testimony as public as possible.⁹

16. Having carefully evaluated the circumstances, the LRVs have concluded that 3 out of 4 of the witnesses who will testify before the Trial Chamber do not face a risk to their security, psychological well-being, privacy or dignity because of their testimony before the Chamber. However, such risks do arise in respect of witness [REDACTED] who will testify in person before the Chamber. For reasons explained in the following paragraphs of this submission, the LRVs request that this witness be granted protective and special measures intended to: (i) protect his identity from the public; (ii) protect particular portions of his testimony from public disclosure; (iii) provide psychological support to this witness during his testimony.

17. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

18. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁸ Decision on Protective Measures, para. 8.

⁹ Decision on Request to Present Evidence, para. 50.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

19. Since that experience, [REDACTED] has told his experiences to nobody other than the LRVs. Importantly, until now witness [REDACTED] has refrained from sharing with any of his family members the details of what happened to him in the bush. He is already feared by them, and is worried about being rejected by them if they know the detail of his experiences in the bush.
20. The LRVs also note that while [REDACTED] has not had the benefit of professional psychiatric or psychological support or assessment, he reports feelings which suggest that he is traumatised and that he may vulnerable to re-traumatisation as a result of testifying.
21. For these reasons, the LRVs request that witness [REDACTED] be granted in-court protective measures in the form of (i) withholding his identity from public disclosure by the use of a pseudonym and redaction of identifying information from the public records of his testimony; (ii) conduct of the testimony with face distortion and with voice distortion.
22. Given the witness's experience of stigma in his community and the fact that his immediate family members are not aware of any details of his experience in the bush about which he will testify, the requested protective measures, including voice distortion, are necessary to sufficiently ensure the witness's psychological well-being, dignity and privacy. The LRVs recognize that voice distortion, in particular, has only been ordered by the Chamber in relatively few instances. It is submitted that [REDACTED] is an exceptional case, given that particular risks arise for him if his own family is able to identify him from his evidence. While other members of his community may not be able to identify the witness from his voice,

his own family members are highly likely to be able to do so. The LRVs note that community screenings of hearing footage have been well attended, and believe there is a real risk that without voice distortion [REDACTED] own family may identify him from his testimony. Hearing [REDACTED] testify about the conduct of his own family towards him, and the stigmatization which they have contributed to may have the consequence of increasing that stigmatization or creating new difficulties between the witness and his family.

23. Moreover, the LRVs request that parts of the witness's testimony concerning particular issues are conducted in private session to protect them from public disclosure. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

24. Evidence led in respect of issues (ii), (iii) and (iv) above are likely to identify the witness or to other persons involved in the events concerned. Testifying in respect of issue (i) and (ii) are likely to be difficult and potentially retraumatizing for the witness. Even during private meetings with the LRVs he has found it extremely difficult to speak about these events. [REDACTED]

[REDACTED]

[REDACTED] For these reasons, the LRVs believe that the witness will be more comfortable testifying about these matters in private session. Witness [REDACTED] has already suffered from a considerable degree of social stigma in his community due to his abduction by the LRA. [REDACTED]

At the same time, he received no emotional support from his community or family. To the contrary, he has been ostracised and feels that because of the stigma within his community he delayed in next completing his education and

has so far been unable to build a family of his own. The treatment and attitude that the witness has faced since returning from the bush, to abduction and experiences with the LRA, constitute yet another, independent source of trauma for the witness. His testimony concerning these issues, especially if broadcasted publicly, may constitute a triggering event contributing to the witness's re-traumatization, but also poses a risk of subjecting him to further stigmatization within his community.

25. The above argumentation constitutes also a justification of the LRVs request for special measures. The witness's testimony will certainly force him to recount painful facts and experiences. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This is why the LRVs suggest that witness [REDACTED] should testify in presence of a support person. The requested special measure is intended to minimise the negative psychological impact that the appearance and testimony before the Chamber may have on the witness's psychological well-being. The LRVs have already communicated with the VWU in order to ensure that this witness is provided with psychological and emotional support before and after his testimony before the Court.

26. For all the reasons explained above, the LRVs submit that there is an objectively justifiable risk of re-traumatisation and further stigmatization if [REDACTED] he testifies without the protective and special measures requested.

VI. RELIEF SOUGHT

FOR THE FOREGOING REASONS the Legal Representative respectfully requests in-court protective and special measures in respect of witness [REDACTED]

Respectfully submitted.



Joseph A. Manoba

Legal Representatives for Victims



Francisco Cox

Dated this 5th day of April 2018

At Kampala, Uganda and at Santiago, Chile