

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/04-01/15
Date: 2 November 2018

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN*

Public

**Decision on Defence Request for Leave to Appeal the Decision on Defence
Second Request for Protective Measures and Defence Request for Redaction of
Transcripts in Relation to D-41 and D-42**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Counsel Support Section

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Detention Section

**Victims Participation and Reparations
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Others

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 82(1)(d) of the Rome Statute ('Statute'), issues the following 'Decision on Defence Request for Leave to Appeal the Decision on Defence Second Request for Protective Measures and Defence Request for Redaction of Transcripts in Relation to D-41 and D-42'.

1. On 7 September 2018, the defence for Mr Ongwen ('Defence') filed a request seeking in-court protective measures for seven of its witnesses (D-112, D-118, D-119, D-27, D-86, D-41, and D-42) ('Second Request for Protective Measures').¹ On 14 September 2018, the Office of the Prosecutor ('Prosecution') filed its response submitting that D-86, D-41, and D-42 should not be granted protective measures.²
2. On 15 October 2018, the Single Judge issued his decision on the Second Request for Protective Measures, which *inter alia*, rejected the request for protective measures for D-41 and D-42 ('Impugned Decision').³ The Single Judge found the risk to the experts' patients to be purely speculative.⁴ He considered that there was no substantiation that the patients would discontinue treatment or their communities would harm them on account of the fact that the patients received treatment from an individual having testified on behalf of the Defence.⁵

¹ Defence Second Request for Protective Measures, ICC-02/04-01/15-1333-Conf-Exp. A public redacted version was filed on the same day, ICC-02/04-01/15-1333-Red.

² Prosecution Response to Defence Second Request for Protective Measures ICC-02/04-01/15-1333-Conf-Exp, ICC-02/04-01/15-1337-Conf-Exp.

³ Decision on Defence Second Request for Protective Measures and Defence Request for Redaction of Transcripts in Relation to D-41 and D-42, ICC-02/04-01/15-1367-Conf, paras 8-21. A public redacted version was filed the same day, ICC-02/04-01/15-1367-Red.

⁴ Impugned Decision, ICC-02/04-01/15-1367-Red, para. 20.

⁵ Impugned Decision, ICC-02/04-01/15-1367-Red, para. 20.

3. On 22 October 2018, the Defence filed a request for leave to appeal the Impugned Decision ('Request for Leave to Appeal').⁶ The Defence seeks leave to appeal the following issue:

Whether the Single Judge failed to consider all required circumstances in assessing the degree of the objective risk required by the Appeals Chamber jurisprudence.⁷

4. On 26 October 2018, the Office of the Prosecutor responded to the Request for Leave to Appeal, submitting that it be rejected.⁸
5. The Single Judge recalls the interpretation of Article 82(1)(d) of the Statute as set out in detail in previous decisions.⁹
6. The Single Judge does not consider the issue presented by the Defence to be an appealable issue under Article 82(1)(d) of the Statute. The Defence asserts that the Single Judge failed to consider all required circumstances, yet the Request for Leave to Appeal does not enumerate those circumstances. Rather, the Defence asserts that the Impugned Decision is inconsistent with the Single Judge's decision concerning non-standard redactions, and thus shows that the required circumstances were not considered or the criterion of objective risk was misapplied.¹⁰ The Single Judge notes that, in determining whether

⁶ Defence Request for Leave to Appeal 'Decision on Defence Second Request for Protective Measures and Defence Request for Redactions of Transcript in Relation to D-41 and D-42' (ICC-02/04-01/15-1367-Conf), ICC-02/04-01/15-1380.

⁷ Request for Leave to Appeal, ICC-02/04-01/15-1380, para. 1.

⁸ Prosecution's Response to Defence Request for Leave to Appeal Decision ICC-02/04-01/15-1367, ICC-02/04-01/15-1385.

⁹ Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, paras 4-8. *See also* Decision on the Defence Request for Leave to Appeal the Decision on the Confirmation of Charges, 29 April 2016, ICC-02/04-01/15-428, paras 5-9.

¹⁰ Request for Leave to Appeal, ICC-02/04-01/15-1380, para. 11, *referring to* Decision on Prosecution's Request for non-standard redactions to document UGA-OTP-0284-0102, 26 September 2018, ICC-02/04-01/15-1348, para. 12. In this decision on non-standard redactions, the Single Judge considered that there was an objectively justifiable risk of harm to 'witnesses who have had contact with the Prosecution's system of witness protection'.

protective measures are necessary, he conducts a case-by-case assessment.¹¹ Thus, with each assessment, differences in the size of the protected group or the specificity of harm do not provide axiomatic evidence of an appealable issue. This is particularly so when the Single Judge's analysis did not centre on the size of the protected group or the specificity of the harm.¹²

7. The Defence also asserts that the Impugned Decision misrepresented its position on the current state of the conflict in Northern Uganda.¹³ Contrary to the Defence's assertions, the Single Judge did not draw from the Defence's initial request for protective measures, but rather its submissions in the Second Request for Protective Measures.¹⁴ In this way, the Single Judge considered the Defence's most recent information concerning the possibility of reprisals as presented by the Defence in its Second Request for Protective Measures.
8. The Defence additionally asserts that the Impugned Decision requires the Defence to provide proof of 'harm already done'.¹⁵ The Single Judge found that the Defence failed to provide substantiation for the assertion that the experts' patients would be harmed by their community or would discontinue treatment solely on the basis that the experts would testify at the request of the Defence, particularly in light of the Defence's characterisation of the current state of the conflict in Northern Uganda.¹⁶ Nowhere in the Impugned Decision is it required that the Defence prove anything beyond the objectively justifiable risk required by the jurisprudence.

¹¹ See Impugned Decision, ICC-02/04-01/15-1367-Red, para. 9.

¹² Impugned Decision, para. 20, *citing* Second Request for Protective Measures, ICC-02/04-01/15-1333-Red, para. 25.

¹³ Request for Leave to Appeal, ICC-02/04-01/15-1380, paras 3-5.

¹⁴ Impugned Decision, ICC-02/04-01/15-1367-Red, para. 20, *citing* Second Request for Protective Measures, ICC-02/04-01/15-1333-Red, para. 25.

¹⁵ Request for Leave to Appeal, ICC-02/04-01/15-1380, paras 7-9.

¹⁶ Impugned Decision, ICC-02/04-01/15-1367-Red, para. 20.

9. In light of the above, the Single Judge finds that the issue presented by the Defence does not arise from the Impugned Decision and therefore does not constitute an appealable issue. The Single Judge additionally notes that he has expressed a willingness to make a renewed assessment on the necessity of protective measures should further information become available.¹⁷ Therefore, the fair and expeditious conduct of proceedings as well as the material advancement of these proceedings would be best served by the Defence providing additional information to the Trial Chamber if and when that information becomes available.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request for Leave to Appeal.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Single Judge

Dated 2 November 2018

At The Hague, The Netherlands

¹⁷ Impugned Decision, ICC-02/04-01/15-1367-Red, para. 10.