

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **13 May 2020**

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 “Motion to rescind the in-court protective measures of witness
UGA-OTP-P-0440”, filed on 12 May 2020**

Source: Defence for Mr Dominic Ongwen

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

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I. INTRODUCTION

1. Under regulation 42 of the Regulations of the Court ('RoC'), protective measures once ordered in any proceedings should continue to have full force and effect "subject to revision by a Chamber." Any application to revisit protective measures should be made to the chamber which issued the order.
2. The Defence for Dominic Ongwen ('Defence') requests that Trial Chamber IX ('Trial Chamber') rescind all in-court protective measures granted to Prosecution witness UGA-OTP-P-0440 ('P-440').¹ The protective measures provided to P-440 should be revised and lifted by the Trial Chamber, for the measures have never been warranted by an 'objectively justifiable risk' to his safety; neither are they warranted now. Besides, the measures remain disproportionate to Mr Ongwen's right to a public hearing as well as prevent the public from having access to the proceedings.²

II. CONFIDENTIALITY

3. Pursuant to regulation 23 *bis*(2) of the RoC, the Defence files this request as confidential as it discusses material classified as such by the Trial Chamber. A public redacted version shall be filed contemporaneously.

III. BACKGROUND

4. [REDACTED].³
5. On 27 January 2017, the Victims and Witnesses Unit ('VWU') sent an email⁴ to the Trial Chamber, noting: "the VWU met with the witness on 27 January 2017 for the purpose of in-court protective measures assessment. The witness is concerned for [REDACTED]."⁵ (Italics added)

¹ P-440's in-court protective measures include: voice distortion, image distortion, use of pseudonyms, use of closed and/or private session when required and redaction of any identifying information from any record that may be disseminated to the public. This motion is filed as *confidential* because it refers to confidential information about P-440 and quotes P-440's testimony taken during private sessions.

² Articles 64(7) and 67(1) of the Rome Statute ('Statute') and regulations 20 and 21 of the RoC.

³ [REDACTED].

⁴ Email from the VWU, *In-court protective measures for [REDACTED]*, 27 Jan 2017 at 15:20.

⁵ *Id.*

6. In the same email, the VWU added that: “[it] *cannot ascertain the reliability of the information that the witness provided* regarding [REDACTED].”⁶ (Italics added)
7. The VWU concluded then that: “*To mitigate potential risks* that the witness and his family may face, as a result of his testimony, the VWU recommends that the Court grants him the following in court protection measures – voice and image distortion, use of pseudonyms, use of closed and/or private session when required, and redaction of any identifying information from any record that may be disseminated to the public.”⁷ (Italics added)
8. On the same day, the Prosecution supported the VWU’s recommendation. The Defence responded that: “[it] makes not [sic] submission on the information sent by VWU today on [REDACTED] allegations and leaves the decision to the judges” and that “since this issue directly affects witnesses, the Prosecution should immediately investigate into these allegations and report back [...] on its findings. Allegations like this, if true, threatens witnesses on all sides of the proceedings and *the public nature of the proceedings*.”⁸ (Italics added). The Defence’s concerns were never addressed, and the Prosecution never reported to parties and participants of any investigations taken to support or reject P-440’s allegations.
9. On 30 January 2017, the Trial Chamber ruled that: “In view of the additional information brought forward by the VWU, and noting that the Defence did not oppose protective measures following the VWU assessment, the following protective measures are granted pursuant to Rule 87 of the Rules: image distortion, use of pseudonyms, use of closed and/or private session when required, and redaction of any identifying information from any record that may be disseminated to the public. As for voice distortion, it is not considered that the new information provided necessarily warrants such a measure. [REDACTED], it is considered that voice distortion is not necessary in this instance [...]”⁹
10. Since the Trial Chamber’s email decision was granted, [REDACTED].¹⁰ [REDACTED].¹¹ (Italics added)
11. In light of the above, on 31 January 2017, the Trial Chamber issued another email decision and held that: “[a]s for the VWU’s renewed recommendation, the Chamber is persuaded at

⁶ *Id.*

⁷ *Id.*

⁸ Email Response from the Prosecution, 27 Jan 2017 at 15:51; Email Response from the Defence, 27 Jan 2017 at 17:16.

⁹ Email from the Trial Chamber, *Second Decision on Protective Measures for [REDACTED]*, 30 Jan 2017 at 10:14.

¹⁰ [REDACTED].

¹¹ [REDACTED].

this point that voice distortion is indeed warranted as a further measure to safeguard [REDACTED].¹²

12. Witness P-440 testified against Mr Ongwen on 1, 2 and 3 February 2017.¹³ First, Presiding Judge Schmitt explained to P-440 that the following measures have been put in place for this testimony: “[REDACTED].”¹⁴

13. During his direct examination, P-440 confirmed: “[REDACTED].”¹⁵ Furthermore, P-440 responded to Counsel Taku’s questions concerning the alleged concerns that served as a basis for granting the protective measures as follows:

[REDACTED]¹⁶ (Italics added)

14. Counsel Taku continued with P-440’s cross-examination regarding the alleged personal concerns to which P-440 provided the following answers:

18 [REDACTED]¹⁷ (Italics added)

IV. SUBMISSIONS

15. The chambers of this Court have held that protective measures should be provided only on an exceptional basis, following a case-by-case evaluation of whether they are necessary in light of an ‘objectively justifiable risk’ and are proportionate to the publicity of the proceedings.¹⁸

16. The Defence was provided with the identity of P-440. The issue is thus whether the measures are necessary and proportionate to protect P-440’s identity from the public.

A. The measures are unnecessary

17. Non-disclosure of P-440’s identity to the public is not warranted by an ‘objectively justifiable risk’ to his safety. Specifically, the allegations¹⁹ put forward by P-440 do not indicate the existence of circumstances to such a risk.

¹² Email from the Trial Chamber, [REDACTED], 31 Jan 2017 at 14:07.

¹³ [ICC-02/04-01/15-T-39-Red2-ENG](#), 1 Feb 2017 (‘T-39’); [ICC-02/04-01/15-T-40-Red-ENG](#), 2 Feb 2017 (‘T-40’); [ICC-02/04-01/15-T-41-Red2-ENG](#), 3 Feb 2017 (‘T-41’).

¹⁴ T-39, p. 59. (Private session).

¹⁵ T-40, p. 70. (Private session).

¹⁶ T-41, p. 7. (Private session).

¹⁷ T-41, pp 7-8. (Private session).

¹⁸ *Ntaganda*, Decision on request for in-court protective measures, [ICC-01/04-02/06-824](#), paras 5-6; *Bemba et al.*, Decision on Prosecution request for In-Court Protective Measures, [ICC-01/05-01/13-1306](#), para. 3.

18. Although the notion of ‘risk’ may encompass a certain level of speculation, the available information must still indicate circumstances creating risk of danger to the interests of the witness. To this end, the Defence submits that the information upon which the Trial Chamber granted P-440’s measures are his personal subjective concerns not substantiated by any objective and verifiable circumstances.²⁰
19. The Trial Chamber’s explanation for [REDACTED].²¹ The ‘specific information’ included: [REDACTED].²²
20. The VWU evaluated the ‘specific information’ as follows: “[t]he VWU cannot ascertain *the reliability of the information* that the witness provided regarding [REDACTED].”²³ The Defence agrees with the VWU and adds that P-440’s concerns have never been corroborated [REDACTED].
21. In this regard, the Defence notes that [REDACTED].²⁴ [REDACTED].²⁵ [REDACTED].
22. Furthermore, the ‘specific information’ was contradicted by P-440 during his cross-examination by Counsel Taku. [REDACTED].²⁶
23. [REDACTED].
24. In sum, the in-court protective measures should have never been provided to P-440 in the first place, nor are there any circumstances that justify them now. The measures should be lifted.

B. The measures are disproportionate

25. The publicity of criminal proceedings is a fundamental aspect of a fair and transparent trial. For a court to limit the accused’s right to a public hearing as well as to exclude the public from proceedings, a compelling reason must be offered to follow such extraordinary course.

¹⁹ The Defence made no submissions on the VWU’s request and never supported it either. It referred to information from P-440 as “allegations”, cautioned about the threat to “the public nature of the proceedings” and sought that “since the issue directly affects witnesses, the Prosecution should immediately investigate [...] and report back”; see above para. 8.

²⁰ In the *Gbagbo & Blé Goudé* case, the Trial Chamber I found that the following factors are all unsuitable to trigger the application of protective measures under rule 87 of the Rules of Procedure and Evidence: “[...] (iii) a witness’s personal subjective fears and concerns or preferences not substantiated by objective, verifiable circumstances”, see Decision on the Prosecutor’s application for protective measures for Witness P-0428, [ICC-02/11-01/15-1155-Red](#), para. 9.

²¹ *Ongwen*, Decision on Defence Request for Protective and Special Measures, [ICC-02/04-01/15-1301-Red](#), para. 17.

²² See above paras 5-7 and 10.

²³ See above, para. 6. (Italics added).

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ See above, paras 13-14.

26. However, no such compelling reason was offered to order P-440's protective measures. P-440's measures remain disproportionate to the publicity of the proceedings. Specifically, they are not only prejudicial to Mr Ongwen's right to a public hearing, but also impede the public's legitimate interest in accessing the *Ongwen* proceedings.²⁷
27. It is the Defence's position that the concept of 'publicity of the proceedings' involves two parts: the defendant's right to a public hearing and the public's legitimate interest in having access to the proceedings. These two parts address vital, but different, aspects of international justice. Therefore, they need to be assessed separately.
28. Pursuant to article 67(1) of the Statute, defendants are entitled to a public hearing. One of the reasons is that the public nature of criminal proceedings assists the fact-findings mission of the judiciary; for example, by encouraging people to come forward with relevant information about the case. In order to achieve this, hearings must be open to the scrutiny of the public and press.²⁸
29. Mr Ongwen's right to a public hearing is prejudiced by the measures because P-440's identity and allegations stay concealed from the public. Public scrutiny becomes especially germane in a situation where a witness [REDACTED].
30. Under regulation 20 of the RoC, "[a]ll hearings shall be held in public". This trial is a public occasion and the public has a legitimate interest in following the *Ongwen* hearings. This is particularly valid with regard to the community of northern Uganda, which was seriously affected by the conflict between the Government of Uganda (including UPDF) and the LRA. Due to P-440's excessive measures, a community like this or other citizens have been deprived of their legitimate interest in following (and scrutinizing) the testimony of P-440.²⁹
31. A mere glance at the overly redacted testimony of P-440 indicates just how disproportionate and dramatic of an impact P-440's measures continue to have on the principle of publicity and access to the record in this case. For a public reader, the transcripts of P-440's testimony are,

²⁷ Article 67(1) of the Statute (discussing the publicity specifically as a right of the accused) as opposed to article 64(7) of the Statute or regulations 20-21 of the RoC (discussing publicity in general or with a focus on people outside the Courtroom).

²⁸ [Riepan v. Austria](#), ECtHR, Judgment, 14 Nov 2000, para. 27: "[t]he public character protects litigants against the secret administration of justice with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6§ 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society".

²⁹ See, for example, International Justice Monitor: [Defence Closing Statements Renews Discussion on Ongwen's Victim-Perpetrator Status](#), 17 March 2020; [Over 10,000 Community Members in Northern Uganda Follow Ongwen's Trial](#), 16 Dec 2019; or [Questions About Ongwen's Trial Dominate International Justice Day Celebrations in Uganda](#), 18 July 2019.

amid the heavy redactions, hardly intelligible.³⁰ To conclude, it is thus pertinent that the Trial Chamber remove P-440's in-court protective measures.

C. P-440's consent would serve no purpose

32. Regulation 42(3) of the RoC vests the Trial Chamber with a power "to obtain, *whenever possible*, the consent of the person in respect of whom the application to rescind [...] protective measures has been made." Given that the measures are unnecessary and disproportionate, the Defence submits that asking for P-440's consent would serve no purpose at this point. Moreover, further delay in withholding P-440's identity and considerable parts of his testimony from the public would be contrary to the Trial Chamber's role to keep the proceedings fair and expeditious.

V. RELIEF SOUGHT

33. For the reasons stated above, the Defence requests that the Trial Chamber rescind all in-court protective measures granted to P-440.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo

On behalf of Mr Dominic Ongwen

Dated this 13th day of May, 2020
At Kampala, Uganda

³⁰ See [T-39](#) (pages 60-61, 63-74); [T-40](#) (pages 44, 51, 64-76); and [T-41](#) (pages 3-4, 6-9, 11-12, 14-15, 22-26).