

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **18 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

Confidential

**Prosecution's Response to the Defence's Request to Rescind the In-Court Protective
Measures for Witness P-0440**

Source: The Office of the Prosecutor

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

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Introduction

1. The Prosecution opposes the Defence's request to rescind Witness P-0440's in-court protective measures¹ because the Defence has failed to demonstrate the need to do so. The fact that the Defence has reconsidered its position on the issue, more than three years after the Chamber's original decisions, does not meet the requirements for lifting the protective measures currently in place.

Confidentiality

2. The Prosecution files this response confidentially pursuant to regulation 23 *bis* of the Regulations of the Court because it responds to a confidential filing of the Defence. The Prosecution requests that the Chamber reclassify its response as public.

Submissions

The Defence Request has not demonstrated a change in circumstances

3. The Chamber rendered its decisions on in-court protective measures for Witness P-0440 in January 2017, taking into account the VWU's recommendation.² The Defence Request arrives more than three years after Witness P-0440 concluded his testimony. The Defence has failed to demonstrate any new circumstances arising in the time between the Chamber's order in January 2017 and the Defence Request in May 2020, which would justify departing from the existing in-court protective measures. The arguments³ the Defence now makes could have been made just before, during or after Witness P-0440's testimony in February 2017. In fact, at the time they were put in place, the Defence implicitly accepted the need for protective

¹ ICC-02/04-01/15-1735-Conf ("Defence Request").

² Email from the Chamber, 30 January 2017, 10:14; Email from the Chamber, 31 January 2017, 14:07.

³ Defence Request, paras. 15-31.

measures, as evident from its response to the VWU's recommendation⁴ and its questioning of Witness P-0440.⁵ There is no explanation for this volte-face.

The Chamber must seek Witness P-0440's views

4. The Defence's argument that Witness P-0440's "consent would serve no purpose"⁶ is flawed and should be dismissed. In order to modify the existing measures in place, the Chamber must (given that there is no suggestion that this is not possible) consult the Witness. This requirement is stipulated in regulation 42(4) of the Regulations of the Court as follows:

"Before making a determination under [regulation 42(3)], the Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made."

5. The Defence has failed to provide persuasive reasons for departing from the above requirement. Its claim that the existing protective measures are "unnecessary and disproportionate" is no substitute for seeking Witness P-0440's consent.

Conclusion

6. For the reasons set out above, the Defence Request should be rejected.



Fatou Bensouda, Prosecutor

Dated this 18th day of May 2020
At The Hague, the Netherlands

⁴ Defence Request, para. 8.

⁵ P-0440, ICC-02/04-01/15-T-41-CONF-ENG, pages 6-8.

⁶ Defence Request, para. 32.