

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **12 June 2020**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

Public redacted version of

Decision on Defence Request for Variation of Protective Measures of Witness P-0440

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

The Office of the Prosecutor

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Joseph Akwenyu Manoba

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

The Office of Public Counsel for the Defence

States Representatives

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REGISTRY

Registrar

Peter Lewis

Counsel Support Section

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Detention Section

**Victims Participation and Reparations
Section**

Others

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Regulations 42 of the Regulations of the Court (the ‘Regulations’), issues the following ‘Decision on Defence Request for Variation of Protective Measures of Witness P-0440’.

I. Procedural history and submissions

1. On 19 October 2016, the Chamber issued a decision in which it, *inter alia*, rejected a request by the Office of the Prosecutor (the ‘Prosecution’) to provide witness P-0440¹ with protective measures (the ‘Witness’).²
2. On 27 January 2017, the Witness told the VWU that he had security concerns. He stated that [REDACTED].³ The witness informed the VWU [REDACTED].⁴ Due to this information, the VWU recommended a set of protective measures for the Witness.⁵ The Prosecution and the Defence submitted their opinion on the matter via email.⁶
3. On 30 January 2017, the Chamber granted some of the protective measures recommended by the VWU, noting that the Defence did not oppose them.⁷
4. On 31 January 2017, after receiving further information, the Chamber granted the remainder of the protective measures recommended by the VWU and [REDACTED].⁸
5. On 12 May 2020, the Defence filed a request to rescind the in-court protective measures for the Witness (the ‘Request’).⁹ It submits that the measures are not justified: there is no objectively justifiable risk, since the protective measures were granted on the basis of the Witness’s subjective concerns.¹⁰ Further, the Defence argues that the measures are

¹ [REDACTED]

² Decision on the "Prosecution’s application for in-court protective and special measures, ICC-02/04-01/15-612-Conf. A public redacted version was issued on the same day, ICC-02/04-01/15-612-Red.

³ E-mail to Trial Chamber IX Communications, 27 January 2017, at 15:20.

⁴ E-mail to Trial Chamber IX Communications, 27 January 2017, at 15:20.

⁵ E-mail to Trial Chamber IX Communications, 27 January 2017, at 15:20.

⁶ E-mail to Trial Chamber IX Communications, 27 January 2017, at 15:52 and 17:16.

⁷ E-mail to the parties, participants and the Registry, 30 January 2017, at 10:14.

⁸ E-mail to the parties, participants and the Registry, 31 January 2017, at 14:08.

⁹ Motion to rescind the in-court protective measures of witness UGA-OTP-P-0440, ICC-02/04-01/15-1735-Conf. A public redacted version was filed on 13 May 2020, ICC-02/04-01/15-1735-Red.

¹⁰ Request, ICC-02/04-01/15-1735-Conf, paras 15-24.

disproportionate with regard to the principle of publicity.¹¹ Lastly, it submits that asking the Witness pursuant to Regulation 42(4) of the Regulations would ‘serve no purpose’ since the measures are unnecessary and disproportionate.¹²

6. On 18 May 2020, the Prosecution provided its response, seeking that the Request be rejected (the ‘Response’).¹³ It submits that the Defence has not shown a change of circumstance which would justify an amendment of the protective measures currently applicable to the Witness¹⁴ and that the Chamber must first contact the Witness, should it wish to vary them.¹⁵
7. On 26 May 2020, the Registry filed its observations on the Request (the ‘Observations’).¹⁶ It explains the process how it conducts its risk assessment of witnesses,¹⁷ provides an update on the current situation of the Witness¹⁸ and submits that it considers the current protective measures to be still necessary.¹⁹

II. Analysis

8. As a preliminary matter, the Single Judge notes the submission of the Prosecution regarding the classification of the Response²⁰ and instructs the Registry to re-classify this filing as ‘public’. The Registry is instructed to submit a public-redacted version of the Observations within 10 days of the notification of this decision.
9. Concerning the Request, the Single Judge notes that the Defence suggests that the initial decision providing for protective measures – which it did not oppose at the time²¹ – was wrong. However, when deciding on these Rule 87 measures, the Chamber, in accordance

¹¹ Request, ICC-02/04-01/15-1735-Conf, paras 25-31.

¹² Request, ICC-02/04-01/15-1735-Red, para. 32.

¹³ Prosecution’s Response to the Defence’s Request to Rescind the In-Court Protective Measures for Witness P-0440, ICC-02/04-01/15-1736-Conf.

¹⁴ Response, ICC-02/04-01/15-1736-Conf, para. 3.

¹⁵ Response, ICC-02/04-01/15-1736-Conf, paras 4-5.

¹⁶ Registry’s Submissions concerning the “Motion to rescind the in-court protection measures of witness UGA-OTP-P-0440”, filed by the Defence for Mr Dominic Ongwen on 12 May 2020, ICC-02/04-01/15-1735-Conf, ICC-02/04-01/15-1738-Conf.

¹⁷ Observations, ICC-02/04-01/15-1738-Conf, paras 14-18.

¹⁸ Observations, ICC-02/04-01/15-1738-Conf, para. 24.

¹⁹ Observations, ICC-02/04-01/15-1738-Conf, paras 22-26.

²⁰ Response, ICC-02/04-01/15-1736-Conf, para. 2.

²¹ E-mail to the parties, participants and the Registry, 30 January, at 10:14.

with its prior jurisprudence, considered whether an objectively justifiable risk existed and whether granting the measures was proportionate to the rights of the accused.²²

10. The Defence does not make any submission regarding why the Witness's security situation has changed in the meantime. The Single Judge also does not find any apparent change in the circumstances of the Witness's situation that would justify a variation of his protective measures. In fact, the Single Judge notes that the Witness is [REDACTED], which was an important factor in granting the protective measures.
11. Further, the Single Judge does not agree with the Defence's contention that the protective measures are disproportionate to the publicity of the proceedings.²³ The Witness's testimony is neither 'overly redacted' nor 'hardly intelligible', as asserted by the Defence.²⁴ In fact, considering the public-redacted versions of the transcripts of the Witness's testimony,²⁵ it is clear that the overwhelming part of the Witness's testimony has been made public. Accordingly, the Single Judge does not find that the protective measures currently in place are disproportionate to the rights of the Defence.
12. Since the Single Judge considers that the protective measures should not be varied, the question of whether the Chamber needs to seek the consent of the Witness, pursuant to Regulation 42(4) of the Regulations, does not arise.
13. Considering the above, the Single Judge rejects the Request.

²² Decision on the "Prosecution's application for in-court protective and special measures, ICC-02/04-01/15-612-Red, para. 8.

²³ Request, ICC-02/04-01/15-1735-Red, paras 26, 27 and 31.

²⁴ Request, ICC-02/04-01/15-1735-Red, para. 31.

²⁵ Transcript of hearings on 1, 2 and 3 February 2017, ICC-02/04-01/15-T-39-Red2-ENG, ICC-02/04-01/15-T-40-Red-ENG and ICC-02/04-01/15-T-41-Red2-ENG.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

ORDERS the Registry to reclassify the Response (ICC-02/04-01/15-1736-Conf) as ‘public’;

ORDERS the Registry to file a public-redacted version of its Observations (ICC-02/04-01/15-1738-Conf) within 10 days of the notification of this decision; and

REJECTS the Request.

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


Judge Bertram Schmitt, Single Judge

Dated 12 June 2020

At The Hague, The Netherlands