

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 25 June 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

Prosecution's Response to the "Defence Request for Leave to Appeal 'Decision on Defence Request for Variation of Protective Measures of 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 Defence Request¹ for leave to appeal the Decision on Defence Request for Variation of Protective Measures of Witness P-0440² should be rejected. The Defence Request identifies no appealable issue arising from the Impugned Decision, merely states a disagreement with and misreads the Chamber's determination,³ and fails to satisfy the remaining requirements of article 82(1)(d).

Submissions

There is no Appealable Issue

2. The issue proposed by the Defence for the exceptional measure of interlocutory appeal—whether the “Decision, based on regulation 42 of the Regulations of the Court, is consistent with the Trial Chamber's responsibility to ensure the trial is public under articles 21(3), 64(7) and 67(1) of the Statute”⁴—is not appealable within the meaning of article 82(1)(d). Instead, the Defence's claim that the Trial Chamber erred by finding that there was “no apparent change in the circumstances of the Witness's situation that would justify a variation of his protective measures”⁵ is a mere disagreement with or misreading of the Impugned Decision.
3. As the Appeals Chamber has emphasised, the protection of witnesses, victims and persons at risk, including by non-disclosure of their identities to the public, is fact-intensive, and requires “a careful assessment ... on a case by case basis with specific regard to the rights of the [accused].”⁶ By necessary implication, the modification of such protection calls for a similar approach.⁷ In the end, the

¹ ICC-02/04-01/15-1744 (“Defence Request”).

² ICC-02/04-01/15-1742-Red (“Impugned Decision”).

³ ICC-01/04-168 OA3, para. 9.

⁴ Defence Request, para. 3.

⁵ Defence Request, paras. 4-5 (quoting Impugned Decision, para. 10).

⁶ ICC-01/04-01/07-475, para. 2.

⁷ See also ICC-01/12-01/18-586-Red, paras. 6-20.

determination of which specific factors are most relevant falls within a Chamber's discretion. Having already assessed the need for protective measures for P-0440 once, it was entirely reasonable for the Trial Chamber to assess whether there was any change in P-0440's situation such that the Trial Chamber's initial decision should be revisited. The Defence's mere disagreement with the Trial Chamber's assessment in this regard does not constitute an appealable issue.

4. The Chamber also did not "require" the Defence to justify "apparent change", as the Defence asserts;⁸ rather, the Chamber merely took the Defence's lack of substantiation into account, along with other factors,⁹ when assessing whether the protective measures in place should be revised.
5. Moreover, the Defence's assertion that P-0440's "allegations against Mr Ongwen remain withheld from the public's scrutiny" is unfounded. The public redacted version of P-0440's testimony contains numerous references to Mr Ongwen,¹⁰ and the essential core of P-0440's evidence—namely, his identification of Mr Ongwen's voice on intercepted radio communications related to charged attacks—is available to the public.¹¹
6. Finally, it was reasonable for the Chamber to take into account that the Defence did not oppose the initial decision providing for protective measures.¹² Contrary to the Defence assertion,¹³ there is no meaningful distinction between "not opposing" protective measures and "making no submission" in relation to protective measures.

⁸ Defence Request, para. 5.

⁹ See Impugned Decision, paras. 9-11 (citing various factors).

¹⁰ See, e.g., ICC-02/04-01/15-T-40-Red, pp. 11, 15-16, 18, 26-43 (a non-exhaustive list of pages from the public redacted transcript of the second day of P-0440's testimony where the witness discusses, *inter alia*, acts and conduct of Mr Ongwen during the charged period).

¹¹ See ICC-02-01/15-T-40-Red, pp. 22-24, 26-39.

¹² Impugned Decision, para. 10.

¹³ See Defence Request, para. 9.

The Proposed Issue Does Not Satisfy the Cumulative Article 82(1)(d) Requirements

7. Even if the Defence had identified an appealable issue, the Defence Request fails to fulfill the remaining cumulative requirements of article 82(1)(d).
8. First, resolution of the proposed issue would not significantly affect the fair and expeditious conduct of the proceedings. The Defence had the opportunity to raise any issue relating to the fairness of the redactions to P-0440's testimony over 3 years ago, when it commented on the proposed lesser redacted version of P-0440's testimony. The Defence's proposals for lifting redactions at that point were minor in nature (affecting only 26 lines of P-0440's 136-page testimony¹⁴) and granted by the Chamber in full.¹⁵ If the "key principles of publicity and access to the proceedings"¹⁶ were significantly impacted by the redactions to P-0440's testimony, the Defence should have raised its concerns then, particularly given that the only indication of a "changed circumstance" now cited by the Defence is the content of P-440's own testimony.¹⁷
9. Second, the outcome of the trial cannot be affected since the Chamber will consider P-0440's testimony in full; the extent of redactions vis-à-vis the public is irrelevant to the Chamber's determination of Mr Ongwen's guilt or innocence.
10. Third, interlocutory appeal would not materially advance these proceedings, because the proposed issue relates only to the public's access to portions of testimony and not to the Trial Chamber's consideration of that evidence. The Defence remains free to raise this issue in a potential appeal against the Judgment.

¹⁴ See ICC-02/04-01/15-819-Anx2, pp. 2-3, email from Defence to the Chamber and Parties, dated 14 March 2017 at 12:44 hrs.

¹⁵ See ICC-02/04-01/15-819-Anx2, pp. 2; T-39-Red2, pp. 65, lns. 13-25; 67, ln. 19 – 68, ln. 6 (all lines are unredacted as requested by the Defence).

¹⁶ Defence Request, para. 6.

¹⁷ Defence Request, para. 11.

Conclusion

11. For the reasons stated above, the Prosecution requests that the Defence Request be rejected.



Fatou Bensouda, Prosecutor

Dated this 25th day of June 2020

At The Hague, the Netherlands