

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 13 April 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 Victims' Application for In-Court Protective and Special Measures

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

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Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 68 of the Rome Statute ('Statute'), Rules 87 and 88 of the Rules of Procedure and Evidence ('Rules') and Regulation 94 *bis* of the Regulations of the Registry ('Registry Regulations'), issues the following 'Decision on Victims' Application for In-Court Protective and Special Measures'.

I. Procedural history

1. On 13 October 2017, the Single Judge issued preliminary directions for the presentation of evidence by the legal representatives for victims ('Preliminary Directions').¹ The Preliminary Directions stipulated that any request for protective measures should be made within one week after the Office of the Prosecutor ('Prosecution') has filed its formal notice of conclusion of evidence.²
2. On 6 March 2018, the Chamber issued its decision regarding requests made by the legal representatives for victims to present evidence ('Decision on the Legal Representatives Request to Present Evidence').³ The decision reinforced the deadline for protective measure requests as set out in the Preliminary Directions.⁴
3. On 14 March 2018, the legal representatives for victims were ordered, *inter alia*, to submit any requests for protective measures by a new deadline of 5 April 2018.⁵

¹ Preliminary Directions for any LRV or Defence Evidence Presentation, ICC-02/04-01/15-1021.

² Preliminary Directions, ICC-02/04-01/15-1021, para. 6.

³ Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, ICC-02/04-01/15-1199-Red.

⁴ Decision on the Legal Representatives Request to Present Evidence, ICC-02/04-01/15-1199-Red, para. 79.

⁵ Email communication from Trial Chamber IX Communications to parties and participants, 14 March 2018 at 9:40.

4. On 5 April 2018, the Legal Representative for Victims ('LRV') submitted a request seeking protective and special measures for witness V-2 (victim a/00613/16) ('Request').⁶ Use of a pseudonym, redaction of identifying information from public records, face and voice distortion are sought.⁷ The LRV request that specific portions of the testimony, which might reveal the witness's identity, are conducted in private session.⁸ Special measures in the form of a support person present in court and traumatising (albeit non-identifying) evidence to be elicited in private session are also requested.⁹
5. No responses were submitted in relation to the Request.¹⁰

II. Applicable law

6. The Single Judge repeats¹¹ that the publicity of proceedings is a fundamental right of the accused and a necessary component of a fair and transparent trial.¹² However, this is subject to certain exceptions and the protection of victims and witnesses amounts to one such exception.¹³
7. The Single Judge further recalls the interpretation of Articles 68(1) and (2) of the Statute, as well as Rules 87 and 88 of the Rules as set out in detail in the Decision on Protective and Special Measures.¹⁴ Requests for protective measures require a case-by-case assessment of the existence of an objectively justifiable risk to the

⁶ Victims' application for in-court protective measures, ICC-02/04-01/15-1219-Conf (the Request was notified on 6 April 2018).

⁷ Request, ICC-02/04-01/15-1219-Conf, para. 21.

⁸ Request, ICC-02/04-01/15-1219-Conf, para. 23.

⁹ Request, ICC-02/04-01/15-1219-Conf, paras 23 and 25.

¹⁰ The response deadline was shortened to 11 April 2018. Email communication from Trial Chamber IX Communications to parties and participants, 6 April 2018 at 9:57.

¹¹ Decision on the 'Prosecution's application for in-court protective and special measures', 29 November 2016, ICC-02/04-01/15- 612-Red, para. 5 ('Decision on Protective and Special Measures').

¹² Articles 64(7) and 67(1) of the Statute.

¹³ Article 68(2) of the Statute.

¹⁴ Decision on Protective and Special Measures, ICC-02/04-01/15- 612-Red, paras 6-12, 24 and 49.

witness's 'safety, physical and psychological well-being, dignity and privacy'.¹⁵ Special measures can also be ordered to facilitate the testimony of a traumatized witness.¹⁶

8. Notwithstanding the above, the Single Judge reiterates his previous guidance that in order to ensure the most meaningful participation of victims testifying as a witness and for the most effective exercise of their rights the testimony must be as public as possible. If the granting of protective measures has the consequence of substantial parts of the testimony being elicited in private session, the presentation of the evidence might not be appropriate.¹⁷

III. Analysis

A. In-court protective measures

9. In this particular instance, the Single Judge is persuaded that there is an objectively justifiable risk to the witness's well-being to warrant granting the in-court protective measures. The witness was victimised by the LRA at a young age and has faced ongoing stigmatisation within his community as a result — exacerbated in the past by the recounting of his experiences. The witness has subsequently refrained from sharing the details of his experiences in the bush with his family members. The risk of further stigmatisation, including by family members who are obviously familiar with the witness's face and voice, unduly increases the danger of further harm being suffered.
10. For the protective measures to be meaningfully implemented this includes conducting any part of the testimony which could identify the witness in private session and the redaction of any identifying information from public

¹⁵ Article 68(1) of the Statute; *See* Decision on Protective and Special Measures, ICC-02/04-01/15-612-Red, paras 8 and 24.

¹⁶ Rule 88(1) of the Rules.

¹⁷ Decision on the Legal Representatives Request to Present Evidence, ICC-02/04-01/15-1199-Red, para. 50.

records. This might entail not revealing the identities of certain other persons, or particular events which would risk the witness being identified as highlighted in the Request.¹⁸ The Request refers to specific isolated events which need to be adduced in private session but substantial parts of the witness's testimony relating to the stigmatisation faced in general can still be elicited in public and the LRV are encouraged to do so.

11. Given the above, and noting that no opposition to the requested protective measures were raised, in-court protective measures i.e. use of a pseudonym, face and voice distortion are granted.

B. Special measures

12. As previously stated,¹⁹ the Victims and Witnesses Unit ('VWU') is best placed when conducting its vulnerability assessment to determine whether special measures, such as the presence of a support person, are required.²⁰ The Single Judge reiterates the general proposition set out in the Decision on Protective and Special Measures 'to grant special measures intended to provide psychological support for witnesses in the manner to be determined by the VWU'.²¹
13. Furthermore, the VWU evaluates the witness's mental health and capacity to testify, which alerts the Court to any particular concerns of re-traumatisation. However, the question of whether additional measures such as eliciting sensitive (but non-identifying) information in private session²² are warranted will be determined on a case-by-case basis following receipt of the VWU's assessment.

¹⁸ Request, para. 23 bullet points (ii)-(iv).

¹⁹ Decision on Protective and Special Measures, ICC-02/04-01/15- 612-Red, para. 52.

²⁰ See Regulation 94 *bis* of the Registry Regulations.

²¹ Decision on Protective and Special Measures, ICC-02/04-01/15- 612-Red, para. 54.

²² Request, para. 23 bullet point (i).

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Request in respect of in-court protective measures for witness V-2;

REITERATES the approach taken in decision ICC-02/04-01/15-612-Red, paragraph 54 with regards to the granting of special measures pursuant to Rule 88 of the Rules; and

ORDERS in accordance with Rule 87 of the Rules, that witness V-2 be referred only by his pseudonym in public filings and public sessions of the trial, and provide his testimony before the Chamber with face and voice distortion *vis-à-vis* the public.

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



Judge Bertram Schmitt, Single Judge

Dated 13 April 2018

At The Hague, The Netherlands