

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: **22 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**

**Defence Request for Leave to Appeal the ‘Decision on Defence Request for Variation of  
Protective Measures of Witness P-0440’**

**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. Pursuant to article 82(1)(d) of the Rome Statute ('Statute'), the Defence for Mr Dominic Ongwen ('Defence') seeks leave to appeal Trial Chamber IX's ('Trial Chamber') 'Decision on Defence Request for Variation of Protective Measures of Witness P-0440' ('Decision').<sup>1</sup>
2. The Defence incorporates by reference the jurisprudence of the International Criminal Court ('Court') with respect to seeking leave to appeal as set out in prior requests.<sup>2</sup> Furthermore, the Defence notes articles 21(3), 64(7) and 67(1) of the Statute. According to article 21(3), "application and interpretation of law [...] must be consistent with internationally recognized human rights [...]." In this regard, the Defence points out relevant international human rights instruments concerning the fundamental principle of publicity.<sup>3</sup>

## II. SUBMISSIONS

3. The Defence seeks leave to appeal the following issue arising from the Decision:
  - A. **Whether the Decision, based on regulation 42 of the Regulations of the Court, is consistent with the Trial Chamber's responsibility to ensure that the trial is held in public under articles 21(3), 64(7) and 67(1) of the Statute ('Issue')**
4. The Trial Chamber held "[t]he Defence does not make any submission regarding why the Witness's security situation has changed in the meantime" and that "[it] does not find any apparent change in the circumstances of the Witness's situation that would justify a variation of his protective measures." Although the Chamber noted regulation 42 as its legal basis for the Decision, it considered and held the Defence to a wholly different standard.
5. Regulation 42 stipulates that "protective measures once ordered [...] shall continue after proceedings have been concluded, subject to revision by a Chamber." That is it – there is nothing in regulation 42 that would require the moving party to justify "apparent change". Instead of considering whether there was any apparent change in the circumstances of P-440's situation, the Trial Chamber was required to uphold a statutory interpretation and application

<sup>1</sup> *Ongwen* (Decision on Defence Request for Variation of Protective Measures of Witness P-0440) [ICC-02/04-01/15-1742-Red](#) (12 June 2020)

<sup>2</sup> *Ongwen* (Defence Request for Leave to Appeal "Decision on Defence Request for Amendment of the Seating Schedule) [ICC-02/04-01/15-1334-Red](#) (10 September 2018) 4-10

<sup>3</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ([ICCPR](#)) art 14.1; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986 (1982) 21 ILM 58 ([African Charter](#)) art 7; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) ([ECHR](#)) art 6.1

of regulation 42 consistent with internationally recognised human rights under article 21(3) of the Statute. This, apparently, was not the case.

6. The Defence presented extensive arguments on the key principles of publicity and access to the proceedings,<sup>4</sup> yet the Trial Chamber gave a short shrift to these submissions by finding that “it does not agree with the Defence’s contention that the protective measures are disproportionate to the publicity of the proceedings.” The Chamber’s basis for this ruling was that “[i]n fact, considering the public-redacted versions of the transcripts of the Witness’s testimony, it is clear that *the overwhelming part* of the Witness’s testimony has been made public.”<sup>5</sup> These findings raise a number of serious concerns. (Italics added)
7. First, the Decision lacks any consideration or analysis of the impact on Mr Ongwen’s right to a public hearing. The Chamber merely submits that it disagrees with the Defence. Second, the Chamber disregards – entirely – the Defence’s arguments concerning the lack of victims’ access to the justice. The Chamber’s denial of the victims’ legitimate interest in following the *Ongwen* proceedings affects their rights to access to justice, effective remedies and redress.<sup>6</sup> The Chamber thus held the Defence to a non-applicable standard of “apparent change in the circumstances”, yet it omitted to consider these tenets of international criminal justice.
8. Third, the Chamber’s conclusion that “the overwhelming part of the Witness’s testimony has been made public” is not accurate. Transcript T-39 annals P-440’s testimony on pages 60-86. Out of these 27 pages, 12 pages are redacted (**44.44%**).<sup>7</sup> Transcript T-40 annals P-440’s testimony on pages 4-77. Out of these 74 pages, 13 pages are redacted (**17.57%**).<sup>8</sup> Transcript T-41 annals P-440’s testimony on pages 2-36. Out of these 35 pages, 12.5 pages are redacted (**35.69%**).<sup>9</sup> In other words, the public parts are hardly overwhelming.
9. That said, the discussion should not be about the Chamber’s benchmark of “overwhelming part”. Ultimately, this is about the content of P-440’s testimony. Amid the Chamber’s extensive measures, P-440’s identity, testimony about his role in the conflict in northern Uganda as well as his allegations against Mr Ongwen remain withheld from the public’s scrutiny.

<sup>4</sup> *Ongwen* (Motion to Rescind the in-court protective measures of witness UGA-OTP-P-0440) [ICC-02/04-01/15-1735-Red](#) (12 May 2020) 25-31

<sup>5</sup> Decision 10-11

<sup>6</sup> *Situation in Afghanistan* (Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the Majority’s decision dismissing as inadmissible the victims’ appeals against the decision rejecting the authorization of an investigation into the situation in Afghanistan) [ICC-02/17-137-Anx](#) (6 March 2020) 25

<sup>7</sup> [ICC-02/04-01/15-T-39-Red-ENG](#) 60-86

<sup>8</sup> [ICC-02/04-01/15-T-40-Red-ENG](#) 4-77

<sup>9</sup> [ICC-02/04-01/15-T-41-Red-ENG](#) 2-36

10. Additionally, the Chamber deemed it pertinent to note that the Defence did not, originally, oppose the measures. The Defence never submitted that it does not oppose the measures. For the context and clarity of the case record, the Defence quotes, again, its full e-mail response to the VWU's request for P-440's measures: "[it] makes no [*sic*] submission on the information sent by VWU today on [P-0440's] allegations and leaves the decision to the judges" and that "since the 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."<sup>10</sup> The Defence's concerns were never addressed, and the Prosecution never reported of any investigations taken to support or reject P-440's allegations.
11. *In arguendo*, assuming that a changed circumstance was needed, one was provided by the Defence in that it demonstrated how P-440 admitted during his sworn testimony that the information that served as a sole basis for granting the measures was no longer correct.<sup>11</sup>

**B. The Issue satisfies the legal criteria under article 82(1)(d) of the Statute**

12. The key premise of the Issue is whether the Decision is consistent with Mr Ongwen's right to a public hearing as well as the victims' legitimate interest in following the proceedings.
13. Publicity contributes to the achievement of the aim of article 67(1), namely a fair trial, the guarantee of which is one of the key principles of any democratic society.<sup>12</sup> This Chamber took this guarantee away from Mr Ongwen. The Decision thus significantly affects the fair and expeditious conduct of the proceedings and also the outcome of the trial. If there is a conviction based on P-440's testimony, then the basis of the conviction would be challenged by the Defence and litigated on appeal.
14. This is especially for P-0440's allegations against Mr Ongwen are protected from the public scrutiny. The disproportionality of P-0440's measures and a lack of respect for Mr Ongwen's article 67(1) right to a public hearing is further aggravated by the fact that the information

<sup>10</sup> E-mail response from the Defence (27 January 2017, at 17:16); *Ongwen* (Motion to Rescind the in-court protective measures of witness UGA-OTP-P-0440) [ICC-02/04-01/15-1735-Red](#) (12 May 2020) 8

<sup>11</sup> *Ongwen* (Motion to Rescind the in-court protective measures of witness UGA-OTP-P-0440) [ICC-02/04-01/15-1735-Red](#) (12 May 2020) 21; ICC-02/04-01/15-T-41-CONF-ENG 24-25

<sup>12</sup> *Riepan v Austria* (Judgment) [Application no 35115/97](#) (14 November 2000) 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."

(including his identity and role) serving as a basis for P-440's allegations against Mr Ongwen is still redacted. This information was elicited by the Prosecution on the first day of P-440's testimony. 44.44% of it remains, unjustifiably, withheld from the public.<sup>13</sup>

15. Similarly, the Decision significantly affects the rights of the victims in the Uganda Situation. The community members from northern Uganda have on numerous occasions highlighted why the public hearings are important for them. As one of the members aptly put it: "[i]t is very important for us victims to know what is going on at the court so that even at the end when the final ruling is made, we are able to know whether the judgment was fair and unfair. It is good to know how far the trial has gone and what each side is saying and also whether the witnesses are really truthful."<sup>14</sup> The Defence maintains that this Decision effectively denies the victims' legitimate interest "to know what is going on at the court."
16. The Appeals Chamber's review and correction of the Trial Chamber's flawed ruling has the possibility to avoid more litigation – expediting the proceedings. Thus, in the interests of implementing articles 21(3), 64(7) and 67(1), an immediate resolution of the Issue presented would materially advance these proceedings.

### III. RELIEF SOUGHT

17. For the reasons stated above, the Defence requests that the Trial Chamber

**GRANT** its request for leave to appeal the Issue arising from the Decision.

Respectfully submitted,



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Hon. Krispus Ayena Odongo

On behalf of Mr Dominic Ongwen

Dated this 22<sup>nd</sup> day of June, 2020

<sup>13</sup> [ICC-02/04-01/15-T-39-Red-ENG](#) 60-86

<sup>14</sup> International Justice Monitor ([Community Members in Lukodi Highlight the Importance of Public Screenings for Following Ongwen's Trial](#)) (23 November 2018)