

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **24 July 2020**

**TRIAL CHAMBER IX**

**Before: Judge Bertram Schmitt, Single Judge**

**SITUATION IN UGANDA**

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

**Public**

**Decision on Defence Request for Leave to Appeal the Decision on 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**

Fatou Bensouda

James Stewart

**Counsel for the Defence**

Krispus Ayena Odongo

**Legal Representatives of Victims**

Joseph Akwenyu Manoba

Francisco Cox

Paolina Massidda

**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**

*Amicus Curiae*

**REGISTRY**

---

**Registrar**

Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**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 Article 82(1)(d) of the Statute, issues the following ‘Decision on Defence Request for Leave to Appeal the Decision on Variation of Protective Measures of Witness P-0440’.

## **I. Procedural history and submissions**

1. From 1 to 3 February 2017, P-0440 testified before the Chamber.<sup>1</sup> While he was initially denied protective measures, the witness eventually testified with the protective measures of voice- and image-distortion, use of a pseudonym and the redaction of any identifying information.<sup>2</sup>
2. On 12 May 2020, the Defence filed a request to rescind the in-court protective measures for the witness (the ‘Initial Request’).<sup>3</sup> It submitted that the measures are not justified since there is no objectively justifiable risk<sup>4</sup> and argued that the measures are disproportionate with regard to the principle of publicity.<sup>5</sup>
3. On 18 May 2020, the Office of the Prosecutor (the ‘Prosecution’) provided its response, submitting that the Initial Request should be rejected.<sup>6</sup> On 26 May 2020, the Registry filed its observations, providing an update on the current situation of P-0440 and arguing that the current protective measures are still necessary.<sup>7</sup>
4. On 12 June 2020, the Single Judge issued a decision rejecting the Initial Request (the ‘Impugned Decision’).<sup>8</sup> The Single Judge recalled that the decision whether P-0440 should be granted protective measures, was taken pursuant to the Chamber’s constant

---

<sup>1</sup> Transcripts of hearings, 1 to 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.

<sup>2</sup> For an overview, see Decision on Defence Request for Variation of Protective Measures of Witness P-0440, 12 June 2020, ICC-02/04-01/15-1742-Conf, paras 1-4. A public redacted version was filed on the same day, ICC-02/04-01/15-1742-Red. Transcript of hearing, 1 February 2017, ICC-02/04-01/15-T-39-Red2-ENG, page 59, lines 18-22.

<sup>3</sup> 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.

<sup>4</sup> Initial Request, ICC-02/04-01/15-1735-Conf, paras 15-24.

<sup>5</sup> Initial Request, ICC-02/04-01/15-1735-Conf, paras 25-32.

<sup>6</sup> 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.

<sup>7</sup> 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. A public redacted version was filed on 18 June 2020, ICC-02/04-01/15-1735-Red.

<sup>8</sup> Decision on Defence Request for Variation of Protective Measures of Witness P-0440, ICC-02/04-01/15-1742-Conf. A public redaction version was filed on the same day, ICC-02/04-01/15-1742-Red.

jurisprudence and considered whether an objectively justifiable risk existed and whether granting the measures was proportionate to the rights of the accused.<sup>9</sup> Further, the Single Judge found that the Defence did not argue that the circumstances giving rise to the protective measure had changed, that no such changes were apparent<sup>10</sup> and that the continuation of these measures was not disproportionate to the rights of the Defence.<sup>11</sup>

5. On 22 June 2020, the Defence requested leave to appeal the Impugned Decision<sup>12</sup> in relation to the following issue:

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 (the 'Issue').<sup>13</sup>

6. The Defence argues that the Single Judge applied Regulation 42 of the Regulations of the Court (the 'Regulations') wrongly, when finding that the Defence did not make any submission that the circumstances relating to the security of the witness had changed.<sup>14</sup> Further, it submits that it presented extensive arguments on the principle of publicity and that the Impugned Decision gave these submissions insufficient consideration<sup>15</sup> and that it wrongly held that the witness's testimony is for the most part public.<sup>16</sup> Lastly, the Defence argues that the Single Judge erred in finding that the Defence did not oppose the protective measures in question, since it stated at the relevant point in time that it 'does not make any submission' and 'leaves the decision to the judges'.<sup>17</sup>
7. On 25 June 2020, the Prosecution filed its response (the 'Response').<sup>18</sup> It submits that the Request should be rejected because the Issue does not constitute an appealable issue pursuant to Article 82(1)(d) of the Statute, since it is either a mere disagreement with or a

---

<sup>9</sup> Impugned Decision, ICC-02/04-01/15-1742-Red, para. 9.

<sup>10</sup> Impugned Decision, ICC-02/04-01/15-1742-Red, para. 10.

<sup>11</sup> Impugned Decision, ICC-02/04-01/15-1742-Red, para. 11.

<sup>12</sup> Defence Request for Leave to Appeal the 'Decision on Defence Request for Variation of Protective Measures of Witness P-0440', ICC-02/04-01/15-1744.

<sup>13</sup> Request, ICC-02/04-01/15-1744, para. 3.

<sup>14</sup> Request, ICC-02/04-01/15-1744, paras 4-5.

<sup>15</sup> Request, ICC-02/04-01/15-1744, paras 6-7.

<sup>16</sup> Request, ICC-02/04-01/15-1744, paras 8-9.

<sup>17</sup> Request, ICC-02/04-01/15-1744, para. 10.

<sup>18</sup> Prosecution's Response to the "Defence Request for Leave to Appeal 'Decision on Defence Request for Variation of Protective Measures of Witness P-0440'", ICC-02/04-01/15-1745.

misreading of the Impugned Decision.<sup>19</sup> The Prosecution further submits that the Issue also does not fulfil the remaining criteria to be granted leave for appeal.<sup>20</sup>

## II. Analysis

8. At the outset, the Chamber recalls the interpretation of Article 82(1)(d) of the Statute as set out in detail previously.<sup>21</sup>
9. First, the Defence submits that the Impugned Decision applied a wrong ‘standard’ for Regulation 42 of the Regulations.<sup>22</sup> Yet, the Impugned Decision discussed the potential reasons for the requested variation of protective measures and noted that the Defence did not make any submissions with regard to one of such reasons – that there is a change in the concerned person’s security situation. Since the protective measures were granted on the basis of finding an objectively justifiable risk, a change in the security situation could have been one reason why the Initial Request might have been granted. The Impugned Decision did not say that this was a mandatory submission, but analysed whether the Initial Request was substantiated.
10. The Defence’s arguments that it did not ‘oppose’ the initial decision on protective measures but merely made ‘no submissions’ and left the decision to the judges are irrelevant for the Issue and the Request at large.
11. The Defence further misinterprets the Impugned Decision when submitting that it does not contain any consideration or analysis of the right to a public hearing.<sup>23</sup> The Impugned Decision first states that there exist redacted versions of the transcription of the witness’s testimony, which makes the overwhelming part of the testimony public. It then concludes that for these reasons the protective measures are not disproportionate to the accused’s right to a public hearing.<sup>24</sup>

<sup>19</sup> Response, ICC-02/04-01/15-1745, paras 1-2.

<sup>20</sup> Response, ICC-02/04-01/15-1745, paras 7-10.

<sup>21</sup> Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, paras 4-8; Decision on Defence Request for Leave to Appeal the Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b), 5 September 2018, ICC-02/04-01/15-1331, para. 8.

<sup>22</sup> Request, ICC-02/04-01/15-1744, para. 4.

<sup>23</sup> Request, ICC-02/04-01/15-1744, para. 7.

<sup>24</sup> Impugned Decision, ICC-02/04-01/15-1742-Red, para. 11.

12. The Defence disputes this assessment and continues to argue that the extent of P-0440's publicly available testimony is insufficient.<sup>25</sup> However, this is a repetition of the Initial Request<sup>26</sup> and a mere disagreement with the Impugned Decision and cannot form the basis for an appeal. Accordingly, the Single Judge finds that the Issue, as formulated by the Defence, does not represent an appealable issue pursuant to Article 82(1)(d) of the Statute.
13. Additionally, it needs to be stressed that – irrespective of whether the other requirements of Article 82(1)(d) of the Statute are fulfilled – an immediate resolution by the Appeal Chamber does not, in the opinion of the Single Judge, materially advance the proceedings at the current stage of the trial. The Chamber is currently in deliberation of its decision pursuant to Article 74 of the Statute. No advancement of the proceedings would be achieved by granting leave on this Issue now instead of letting the Defence raise it in a possible appeal against the Article 74 decision.
14. Considering the above, the Single Judge rejects the Request.

**FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY  
REJECTS the Request.**

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

  
**Judge Bertram Schmitt, Single Judge**

Dated 24 July 2020

At The Hague, The Netherlands

<sup>25</sup> Request, ICC-02/04-01/15-1744, paras 8 and 9.

<sup>26</sup> Initial Request, ICC-02/04-01/15-1735-Conf, para. 31.