

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 15 October 2018

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

Public redacted version

**Decision on Defence Second Request for Protective Measures and Defence
Request for Redaction of Transcripts in Relation to D-41 and D-42**

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Benjamin Gumpert

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 ('Single Judge' and 'Chamber', respectively) of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 68 of the Rome Statute ('Statute'), Rules 86 and 87 of the Rules of Procedure and Evidence ('Rules') and Regulation 23 *bis* of the Regulations of the Court, issues the following 'Decision on Defence Second Request for Protective Measures and Defence Request for Redaction of Transcripts in Relation to D-41 and D-42'.

I. Procedural history and submissions

1. On 7 September 2018, the defence for Mr Ongwen ('Defence') filed a request seeking in-court protective measures for seven of its witnesses (D-112, D-118, D-119, D-27, D-86, D-41, and D-42) ('Request').¹
2. With respect to witnesses D-27, D-41, and D-42, the Defence requests that the Chamber reconsider its decision rejecting protective measures for these witnesses.² The Defence submits that it has conducted further assessments and gathered additional information that necessitate a renewed request for protective measures for these witnesses.³ The Defence notes that it has met with the witnesses and completed the VWU forms as requested by the Chamber, which has resulted in the need to make initial requests for protective measures for D-86, D-112, D-118, and D-119.⁴
3. On 14 September 2018, the Office of the Prosecutor ('Prosecution') filed its response ('Response').⁵ The Prosecution does not oppose the Request with

¹ Defence Second Request for Protective Measures, ICC-02/04-01/15-1333-Conf-Exp. A public redacted version was filed on the same day, ICC-02/04-01/15-1333-Red.

² Request, ICC-02/04-01/15-1333-Red, paras 1-2, *referring to* Decision on Defence Request for Protective and Special Measures and Rule 75 Assurances, 5 July 2018, ICC-02/04-01/15-1301-Conf. A public redacted version of the decision was filed the same day, ICC-02/04-01/15-1301-Red.

³ Request, ICC-02/04-01/15-1333-Red, para. 2.

⁴ Request, ICC-02/04-01/15-1333-Red, para. 3.

⁵ Prosecution Response to Defence Second Request for Protective Measures ICC-02/04-01/15-1333-Conf-Exp, ICC-02/04-01/15-1337-Conf-Exp.

respect to witnesses D-112, D-27, D-118, and D-119.⁶ The Prosecution, however, submits that witnesses D-86, D-41, and D-42 should not be granted protective measures.⁷

4. On 21 September 2018, the Defence filed a request seeking the redaction of witnesses D-41's and D-42's names from a number of transcripts ('Request for Redactions').⁸

II. Preliminary matters

5. The Single Judge notes that the Defence has filed a public redacted version of its Request. The Single Judge orders the Prosecution to request reclassification as public or to file a public redacted version of its Response, keeping in mind the redactions implemented in the public redacted version of the Request and in this decision.
6. The Defence characterises its Request as concerns witnesses D-27, D-41, and D-42 as requests for reconsideration.⁹ The Single Judge notes, however, that he previously stated that 'should a request for Protective Measures be rejected, this is done without prejudice to a renewed assessment and decision on the necessity of Protective Measures should further information become available'.¹⁰ Accordingly, the Single Judge does not consider that a determination on the renewed request must meet the higher standard of a reconsideration decision.

⁶ Response, ICC-02/04-01/15-1337-Conf-Exp, para. 5.

⁷ Response, ICC-02/04-01/15-1337-Conf-Exp, paras 6-19.

⁸ Defence Request for Redaction of Transcripts in Relation to D26-0041 and D26-0042, ICC-02/04-01/15-1343-Conf.

⁹ Request, ICC-02/04-01/15-1333-Red, paras 1-2

¹⁰ Decision on Defence Request for Protective and Special Measures and Rule 75 Assurances, 5 July 2018, ICC-02/04-01/15-1301-Red, para. 10.

7. Finally, the Single Judge notes that the Chamber already rendered a decision granting the protective measures of pseudonym, face distortion, and voice distortion for D-112.¹¹

III. Analysis

8. The Single Judge recalls the decision on the Prosecution's request for protective and special measures.¹² He incorporates the general considerations made in respect of protective measures,¹³ underlining once again the balance which needs to be struck between the publicity of the proceedings and the protection of witnesses pursuant to Article 68(1) and (2) of the Statute, as well as the necessity to demonstrate an 'objectively justifiable risk' in order to justify the granting of in-court protective measures.
9. In determining whether protective measures are necessary, the Single Judge will conduct a case-by-case assessment for each witness.
10. It is recalled that, as a general matter, should a request for protective measures be rejected, this is done without prejudice to a renewed assessment and decision on the necessity of protective measures should further information become available.

(i) *Witnesses D-118 and D-119*

11. The Single Judge notes that witnesses D-118 and D-119 initially had problems reintegrating into society because they had children in the bush and as a result they have kept their own identities and the identities of their children's fathers hidden.¹⁴ The Defence maintains that pseudonym and face distortion are

¹¹ [REDACTED].

¹² 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 filed on the same day, ICC-02/04-01/15-612-Red.

¹³ Protective and Special Measures Decision, ICC-02/04-01/15-612-Red, paras 5-8.

¹⁴ Request, ICC-02/04-01/15-1333-Red, paras 19-20.

required so that the witnesses can return to their communities and avoid the stigmatisation associated with having children in the bush.¹⁵ The Single Judge further notes that the Prosecution does not oppose the Request with respect to these witnesses.¹⁶

12. Considering the stigmatisation the witnesses and their children would suffer should it become known that they bore children in the bush, the Single Judge finds that there is an objectively justifiable risk warranting protective measures. Accordingly, protective measures in form of face distortion, use of a pseudonym and private session for any information which could lead to the identification of witnesses D-118 and D-119 are granted.

(ii) *Witness D-27*

13. The Defence explains that D-27 did not [REDACTED] after escaping the LRA¹⁷ and [REDACTED].¹⁸ The witness also fears prosecution by the Government of Uganda.¹⁹ While the Defence believes LRA reprisals in Uganda are an issue of the past, [REDACTED].²⁰ The Defence further argues that, [REDACTED].²¹ The Defence requests a pseudonym and face distortion for this witness.²² The Prosecution does not object to the Defence's request for protective measures with respect to this witness.²³

14. In light of [REDACTED] against the witness and the fact that [REDACTED], the Single Judge finds that there is an objectively justifiable risk warranting protective measures. Accordingly, and noting that this request is unopposed by

¹⁵ Request, ICC-02/04-01/15-1333-Red, paras 20-21.

¹⁶ Response, ICC-02/04-01/15-1337-Conf-Exp, para. 5.

¹⁷ Request, ICC-02/04-01/15-1333-Red, para. 24.

¹⁸ Request, ICC-02/04-01/15-1333-Conf-Exp, para. 25.

¹⁹ Request, ICC-02/04-01/15-1333-Red, para. 24.

²⁰ Request, ICC-02/04-01/15-1333-Conf-Exp, para. 25.

²¹ Request, ICC-02/04-01/15-1333-Conf-Exp, para. 26.

²² Request, ICC-02/04-01/15-1333-Red, para. 27.

²³ Response, ICC-02/04-01/15-1337-Conf-Exp, para. 5.

the Prosecution, protective measures in form of face distortion, use of a pseudonym, and private session for any information which could lead to the identification of witness D-27 is granted.

(iii) Witness D-86

15. The Defence submits that D-86 is [REDACTED].²⁴ The witness also [REDACTED].²⁵ [REDACTED].²⁶ [REDACTED].²⁷ The Defence requests a pseudonym, face distortion, and voice distortion for this witness.²⁸

16. The Prosecution opposes the Request with respect to this witness.²⁹

17. The Single Judge notes that the witness has [REDACTED]. The Single Judge further notes that the witness's security concerns in relation to his prospective testimony centres on one discrete topic, [REDACTED], as opposed to the whole of his forthcoming testimony. As concerns the issue of whether [REDACTED], the Single Judge finds this assertion unsubstantiated and speculative. The Single Judge therefore finds that the protective measures requested are too expansive in light of the security concerns articulated in the Request. Accordingly, the Single Judge rejects the request for protective measures for D-86. However, should the Defence wish to explore certain limited aspects of the witness's testimony in private session, it may seek to do so.

(iv) Witnesses D-41 and D-42

18. The Defence requests that witnesses D-41 and D-42, who are scheduled to testify as expert witnesses for the Defence, receive protective measures. The Defence argues that the witnesses require protective measures because they provide

²⁴ Request, ICC-02/04-01/15-1333-Conf-Exp, para. 29.

²⁵ Request, ICC-02/04-01/15-1333-Conf-Exp, para. 31.

²⁶ Request, ICC-02/04-01/15-1333-Conf-Exp, para. 32.

²⁷ Request, ICC-02/04-01/15-1333-Conf-Exp, para. 32.

²⁸ Request, ICC-02/04-01/15-1333-Conf-Exp, para. 33.

²⁹ Response, ICC-02/04-01/15-1337-Conf-Exp, paras 6-9.

mental health services to victims of both LRA and UPDF crimes in Northern Uganda and, in order to effectively treat their patients, they must be viewed as not taking any particular side in the conflict.³⁰ The Defence argues that any perceived non-neutrality impacts the experts' patients and could result in these patients being harmed by their community or an individual stopping important treatment.³¹ Although both witnesses have been named in the proceedings so far, the Defence asserts that it is not widely known that they are witnesses for the Defence.³² The Defence asserts that protective measures will mitigate the risk to the experts' patients.³³

19. The Prosecution opposes the Request with respect to these witnesses.³⁴
20. The Single Judge finds the risk to the experts' patients to be purely speculative. There is no substantiation that the experts' patients would discontinue treatment solely on account of the fact that the experts testified at the request of the Defence. There is also no substantiation that patients' communities would harm them for seeking treatment from the experts should the experts testify for the Defence. If the Defence generally concedes that reprisals between factions are largely a thing of the past in Northern Uganda,³⁵ it would appear even more unlikely, without further substantiation, that communities would turn on their own for seeking or obtaining treatment from an expert that testified at the request of the Defence. Accordingly, the Single Judge does not find an objectively justifiable risk should both witnesses testify publicly and rejects the request for protective measures for D-41 and D-42.

³⁰ Request, ICC-02/04-01/15-1333-Red, paras 36-38.

³¹ Request, ICC-02/04-01/15-1333-Red, paras 38, 39-44.

³² Request, ICC-02/04-01/15-1333-Red, paras 45-49.

³³ Request, ICC-02/04-01/15-1333-Red, para. 49.

³⁴ Response, ICC-02/04-01/15-1337-Conf-Exp, paras 10-19.

³⁵ See Request, ICC-02/04-01/15-1333-Red, para. 25.

21. The Single Judge notes that both witnesses have been identified as expert witnesses for the Defence in open session. The Single Judge notes that the Defence has made belated requests for redactions of transcripts that have provided identifying information regarding witnesses D-41 and D-42.³⁶ In light of the fact that the request for protective measures for D-41 and D-42 has been rejected, the Single Judge sees no corresponding need to redact the transcripts so as not to identify these witnesses.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

ORDERS the Prosecution to request reclassification as ‘public’ or file a public-redacted version of its Response (ICC-02/04-01/15-1337-Conf-Exp) within five days of the notification of the present decision;

ORDERS that, in accordance with Rule 87 of the Rules, witnesses D-118, D-119 and D-27 be referred, in their capacity as witnesses in these proceedings, only by their respective pseudonyms in public filings and public sessions of the trial, and provide their testimony before the Chamber with face distortion vis-à-vis the public and in private session for any information which could lead to their identification;

REJECTS the request for protective measures in relation to witnesses D-41, D-42, and D-86; and

REJECTS the Request for Redactions.

³⁶ Request for Redactions, ICC-02/04-01/15-1343-Conf, para. 9.

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

A handwritten signature in black ink, appearing to read 'BS', written over a horizontal line.

Judge Bertram Schmitt, Single Judge

Dated 15 October 2018

At The Hague, The Netherlands