

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date of the original: **26 February 2015**

Date of the redacted version: **15 April 2015**

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

SITUATION IN UGANDA

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

Public redacted version

**Decision Concerning the Redaction and Transmission of Documents to the
Defence**

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Fatou Bensouda, Prosecutor

Benjamin Gumpert, Senior Trial Lawyer

The Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Division of Court Services

Marc Dubuisson

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”),¹ issues this decision on the “Prosecution’s Application for Redactions to the Documents submitted at the 28 January 2015 Statute Conference and to its Transcripts”² (the “First Application”) and on the “Prosecution’s Application to Maintain the Redactions in the ‘Prosecutor’s Amended Application for Warrants of Arrest Under Article 58’”,³ as integrated by the “Prosecution’s Further Application to Maintain the Redactions in the ‘Prosecutor’s Amended Application for Warrants of Arrest Under Article 58’”⁴ (the “Second Application”).

I. Procedural History

1. On 8 July 2005, the Chamber, in its previous composition, issued the “Decision on the Prosecutor’s application for the warrants of arrest under Article 58”,⁵ along with a warrant of arrest for Dominic Ongwen (“Mr. Ongwen”),⁶ for his alleged responsibility for crimes against humanity and war crimes. At the time, Mr. Ongwen was prosecuted together with others in the case of the *Prosecutor v. Joseph Kony et al.* (ICC-02/04-01/05).
2. On 16 January 2015, Mr. Ongwen consented to appear voluntarily before the Court and, on the same day, was transferred to the custody of the Court.⁷
3. On 21 January 2015, Mr. Ongwen arrived at the detention centre of the Court.⁸ The same day, the Chamber designated Judge Ekaterina Trendafilova as Single Judge.⁹

¹ Pre-Trial Chamber II, Decision Designating a Single Judge, 21 January 2015, ICC-02/04-01/15-185.

² ICC-02/04-01/15-192-Conf-Exp and its two confidential *ex parte* annexes. A public redacted version is also available, ICC-02/04-01/15-192-Red.

³ ICC-02/04-01/15-195 and its two confidential *ex parte* annexes.

⁴ ICC-02/04-01/15-198 and its confidential *ex parte* annex A.

⁵ Pre-Trial Chamber II, Decision on the Prosecutor’s application for the warrants of arrest under Article 58, 8 July 2005, ICC-02/04-01/15-5.

⁶ Pre-Trial Chamber II, Warrant of Arrest for Dominic Ongwen, 8 July 2005, ICC-02/04-01/15-6.

⁷ ICC-02/04-01/15-189-Conf-Exp, para. 4; ICC-02/04-01/15-189-Conf-Exp-Anx2.

⁸ ICC-02/04-01/15-189-Conf-Exp, para. 18.

⁹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, 21 January 2015, ICC-02/04-01/05-415.

4. On 26 January 2015, Mr. Ongwen made his initial appearance before the Single Judge during which, *inter alia*, Mr. Ongwen was informed of his rights provided under the Rome Statute (the “Statute”).¹⁰

5. On 28 January 2015, the Single Judge held an *ex parte* status conference only with the Prosecutor (the “28 January 2015 Status Conference”), during which the Prosecutor provided information regarding, *inter alia*, issues related to the investigation, the collection and disclosure of evidence.¹¹

6. On 2 February 2015, the Single Judge received the First Application, in which the Prosecutor requests authorisation to redact information in the transcript of the 28 January 2015 Status Conference as well as in document ICC-02/04-01/15-191-Conf-Exp-Anx, which was circulated during that status conference.¹² The information to be redacted concerns: (i) providers of information pursuant to article 54(3)(e) of the Statute; (ii) two suspects in the case of the *Prosecutor v. Joseph Kony et al.* (the “*Kony et al. case*”); (iii) internal security processes of the Office of the Prosecutor; and (iv) witness protection issues.¹³

7. On 6 February 2015, the Single Judge issued the “Decision Severing the Case Against Dominic Ongwen”,¹⁴ wherein she decided, *inter alia*, to sever the case against Mr. Ongwen from the *Kony et al. case*.¹⁵

8. On 9 February 2015, the Single Judge received the Second Application, in which the Prosecutor seeks authorisation from the Single Judge to lift a number of redactions (while keeping certain sensitive information redacted) from the “Prosecutor’s Amended Application for Warrants of Arrest Under Article 58”¹⁶ (the “Article 58 Application”), in order to transmit to the Defence a lesser redacted

¹⁰ Pre-Trial Chamber II, Transcript of Hearing, 26 January 2015, ICC-02/04-01/15-T-4-ENG.

¹¹ Pre-Trial Chamber II, Transcript of Hearing, 28 January 2015, ICC-02/04-01/15-T-5-CONF-EXP-ENG and ICC-02/04-01/15-T-5-CONF-EXP-FRA.

¹² ICC-02/04-01/15-192-Conf-Exp, para. 12.

¹³ ICC-02/04-01/15-192-Conf-Exp, paras 8-11.

¹⁴ Pre-Trial Chamber II, Decision Severing the Case Against Dominic Ongwen, 6 February 2015, ICC-02/04-01/05-424.

¹⁵ Pre-Trial Chamber II, Decision Severing the Case Against Dominic Ongwen, 6 February 2015, ICC-02/04-01/05-424, p. 7.

¹⁶ ICC-02/04-01/15-3-US-Exp.

version thereof.¹⁷ Additional information, in particular the reasons for lifting certain redactions, was provided on 17 February 2015.¹⁸

II. Applicable Law and Determination by the Single Judge

9. The Single Judge notes articles 21(1)(a), (2) and (3), 54(3)(e), 57(3)(c), 67 and 68 of the Statute, rules 81 and 121 of the Rules of Procedure and Evidence (the “Rules”) and regulation 23 *bis* of the Regulation of the Court (the “Regulations”).

10. The present decision is classified as confidential *ex parte*, as it refers to the existence of documents and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated as confidential *ex parte*, Prosecutor only.

11. As previously held by the Single Judge, one of the fundamental fair trial guarantees, is the right of the suspect to be informed promptly and in detail of the nature, cause and content of the charges as well as the right to have adequate time and facilities for the preparation of his defence, pursuant to article 67(1)(a) and (b) of the Statute and rule 121(1) of the Rules.¹⁹ These rights are triggered as of the person’s first appearance and continue to apply throughout the proceedings; the effective exercise of these rights entitles Mr. Ongwen to receive, as soon as practicable, the Article 58 Application, its relevant annexes and any other documents on the basis of which the warrant of arrest was issued.

12. The availability of said material is, however, to be considered in light of other competing interests. In this respect, the Single Judge recalls her duty, pursuant to articles 57(3)(c) and 68(1) of the Statute, to take appropriate measures to protect victims and witnesses and to preserve the integrity of the proceedings as a whole

¹⁷ ICC-02/04-01/15-195, para. 13.

¹⁸ ICC-02/04-01/15-198 and ICC-02/04-01/15-198-Conf-Exp-AnxA.

¹⁹ Pre-Trial Chamber II, Decision on the Prosecutor’s Request and Amended Request for Redactions to Applications for Warrants of Arrest, 3 July 2014, ICC-01/04-02/06-58-Red3, para. 11 (original decision registered on 7 May 2013).

without impinging on the rights of the suspect.²⁰ Among the possible protective measures is the application of redactions to information appearing in documents.

13. The Single Judge observes that the requests made by the Prosecutor in the First Application and the Second Application are premised on rule 81 of the Rules. Although this rule governs primarily restrictions to disclosure of evidence, this Chamber has previously acknowledged that the underlying principles of this rule may apply to redactions of documents that are not used as evidence.²¹ Accordingly, the Single Judge considers that restricting the disclosure of certain documents to the Defence by providing redacted versions thereof may be permitted “when there is an objectively identifiable risk to the relevant protected interest”.²² Such measure(s) must also “be necessary to reduce that risk [and] proportionate to the rights of the [Defence]”.²³ The Single Judge will therefore assess the First Application and the Second Application according to these guiding principles.

The First Application

14. In her First Application, the Prosecutor seeks authorisation to redact, pursuant to article 54(3)(e) of the Statute and rules 81(1), (2) and (4) of the Rules, information in the French²⁴ and English²⁵ transcripts of the 28 January 2015 Status Conference as

²⁰ Pre-Trial Chamber II, Decision on the Prosecutor’s Request and Amended Request for Redactions to Applications for Warrants of Arrest, 7 May 2013, ICC-01/04-02/06-58-Red3, para. 12.

²¹ Pre-Trial Chamber II, Decision on the Prosecutor’s Request and Amended Request for Redactions to Applications for Warrants of Arrest, 7 May 2013, ICC-01/04-02/06-58-Red3, para. 14; Pre-Trial Chamber II, Decision on the Confidential Redacted Version of the Article 58 Application, 22 July 2011, ICC-01/09-01/11-216-Red, para. 10.

²² Pre-Trial Chamber II, Decision on the Confidential Redacted Version of the Article 58 Application, 22 July 2011, ICC-01/09-01/11-216-Red, para. 11. See also Appeals Chamber, “Judgment on the Appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’”, 13 May 2008, ICC-01/04-01/07-475, paras 67 and 71-73.

²³ Pre-Trial Chamber II, Decision on the Prosecutor’s Request and Amended Request for Redactions to Applications for Warrants of Arrest, 7 May 2013, ICC-01/04-02/06-58-Red3, para. 14; Pre-Trial Chamber II, Decision on the Confidential Redacted Version of the Article 58 Application, 22 July 2011, ICC-01/09-01/11-216-Red, para. 11. See also Appeals Chamber, “Judgment on the Appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’”, 13 May 2008, ICC-01/04-01/07-475, paras 67, 72.

²⁴ ICC-02/04-01/15-T-5-CONF-EXP-FRA.

well as in a document that was circulated in the course of the hearing and subsequently registered in the record of the case as ICC-02/04-01/15-191-Conf-Exp-Anx. More specifically, the Prosecutor requests authorisation to redact four distinct categories of information in these two documents, namely: (i) information concerning the Prosecutor's information providers, within the framework of article 54(3)(e) of the Statute and rule 81(2) of the Rules;²⁶ (ii) information regarding the reported deaths of Vincent Otti and Okot Odhiambo, pursuant to rule 81(1) and (2) of the Rules;²⁷ (iii) information related to the internal security processes of the Office of the Prosecutor, pursuant to rule 81(1) and (2) of the Rules;²⁸ and (iv) information relevant to witness protection, pursuant to rule 81(4) of the Rules.²⁹

15. With regard to the first category of information, the Prosecutor submits that she "relies on these providers to collect evidence" and "does not wish to expose these providers to any pressure should information regarding their cooperation with the [Prosecutor] become public".³⁰ The Prosecutor confirms that she "is in contact with these providers to discharge [...] [her] disclosure obligation and as part of [...] [her] investigation into crimes allegedly committed by Mr Ongwen and other suspects".³¹

16. Mindful of the principles highlighted above, the Single Judge considers that at this stage of the proceedings, the redactions sought by the Prosecutor in respect of the information providers within the meaning of article 54(3)(e) of the Statute are justified and proportionate to the rights of the suspect. The Prosecutor is still in the process of trying to secure the information providers' consent to disclose a considerable amount of material and, at the same time, to generate potential evidence in order to fulfil her obligations arising out of article 54(1)(a) of the Statute

²⁵ ICC-02/04-01/15-T-5-CONF-EXP-ENG.

²⁶ ICC-02/04-01/15-192-Red, para. 8; ICC-02/04-01/15-192-Conf-Exp-AnxA, p. 13; ICC-02/04-01/15-192-Conf-Exp-AnxB, p. 20, line 13 to p. 21, line 22, p. 35, lines 2-22.

²⁷ ICC-02/04-01/15-192-Conf-Exp, para. 9; ICC-02/04-01/15-192-Conf-Exp-AnxA, p. 4; ICC-02/04-01/15-192-Conf-Exp-AnxB, p. 26, lines 13-15, p. 27, lines 1-2, p. 27, line 7 to p. 28, line 8.

²⁸ ICC-02/04-01/15-192-Red, para. 10; ICC-02/04-01/15-192-Conf-Exp-AnxA, pp. 8-9.

²⁹ ICC-02/04-01/15-192-Conf-Exp, para. 11; ICC-02/04-01/15-192-Conf-Exp-AnxA, p. 11; ICC-02/04-01/15-192-Conf-Exp-AnxB, p. 32, lines 15-18, p. 33, line 7 to p. 34, line 6.

³⁰ ICC-02/04-01/15-192-Red, para. 8.

³¹ ICC-02/04-01/15-192-Red, para. 8.

to investigate incriminating and exonerating circumstances equally. That said, the Single Judge does not deem withholding this information to be prejudicial to or inconsistent with the rights of the Defence as the suspect will have access to the relevant evidence and have the possibility to challenge them. Thus, the information concerning the information providers may be withheld from the Defence.

17. With regard to the second category of information concerning the alleged death of Vincent Otti and Okot Odhiambo, the Single Judge is of the view that the Prosecutor fails to demonstrate how withholding the existence of investigative steps to clarify the fate of the two suspects can prejudice such investigation. Moreover, the Single Judge recalls that Mr. Ongwen may know of the fate of the two suspects considering that they have been high-rank members of the Lord's Resistance Army (the "LRA") throughout many years. As such, the redactions sought in the Transcripts of the 28 January 2015 Status Conference (page 27, line 7 to page 28, line 8 of the English version) and in document ICC-02/04-01/15-191-Conf-Exp-Anx (page 5) must be rejected, as they are neither justified nor proportionate to the rights of the Defence.

18. As for the third category of information related to the Prosecutor's internal security processes, the Prosecutor contends that this information concerns [REDACTED] and, as such, they constitute internal work products falling under rule 81(1) of the Rules.³²

19. The Single Judge observes that the information sought for redactions relating to internal security processes includes [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]. Disclosing such information to the Defence would prejudice the Prosecutor's ongoing investigation as the information pertains to (i) potential witnesses and (ii) the Prosecutor's investigative activities currently undertaken. Accordingly, the Single Judge

³² ICC-02/04-01/15-192-Conf-Exp, para. 10.

considers that the requested redactions are adequate to minimize this risk and are limited to what is strictly necessary to overcome any risk of prejudice to the Prosecutor's ongoing investigation. Moreover, the redactions are not prejudicial to or inconsistent with the rights of the suspect. As a result, the Single Judge opines that the redactions are warranted and justified according to rule 81(2) of the Rules. In addition, as this information concerns the security of potential witnesses, rule 81(4) constitutes an appropriate basis for redactions. Accordingly, the redactions sought are justified and proportionate to the rights of the Defence, as revealing such information would prejudice ongoing or further investigations in respect of crimes allegedly committed in that location and would put the potential witnesses at risk.

20. Lastly, with regard to fourth category of information related to witness protection, the Prosecutor submits that information regarding witnesses "[REDACTED] [REDACTED] or received support from the Victims and Witnesses Unit is sensitive and should not be shared with the Defence",³³ on the premise that such redactions, if granted, will be revisited by the Prosecutor at a later stage.³⁴

21. The Single Judge observes that no identifying information appears in the excerpts for which redactions are sought. However, the Single Judge is mindful of the preliminary stage of the investigations, as resumed after the initial appearance of the suspect, and the need to ensure the safety of the witnesses. Thus, the Single Judge considers that, pursuant to rule 81(4) of the Rules, the redactions sought are justified and proportionate to the rights of the Defence, as the information to be redacted concerns [REDACTED] [REDACTED] and, as such, may be withheld from the suspect in order to ensure the safety of [REDACTED] witnesses at this stage.

³³ ICC-02/04-01/15-192-Conf-Exp, para. 11.

³⁴ ICC-02/04-01/15-192-Red, para. 11.

The Second Application

22. In the Second Application, the Prosecutor concurrently submits two requests, namely (i) to lift “the large majority of the previous redactions” and (ii) to “maintain the remaining redactions” to the Article 58 Application, so that a much lesser redacted version of that document may be transmitted to the Defence.³⁵

23. The Single Judge observes that the redactions sought by the Prosecutor in the Second Application were already applied in 2008 as ordered by this Chamber. More specifically, the Chamber at the time considered it necessary, pursuant to article 57(3)(c) and 68(1) of the Statute, to withhold certain information from the Defence “[...] which could result in the disclosure of the identity or the location of victims and witnesses, as well as to any other detail which, if revealed, could jeopardize their security or the effectiveness of protective strategies or measures taken by the Court or by other entities”.³⁶

24. With regard to the first limb of the Second Application, namely the request to lift certain redactions, the Prosecutor contends that: (i) the general situation in Northern Uganda has improved in the last few years and the LRA has moved away from Uganda; (ii) much of the information for which redactions are sought to be lifted is important for the suspect to understand fully the charges against him, as provided for in article 67(1)(a) of the Statute; and (iii) some of the Prosecutor’s witnesses have died.³⁷

25. Having reviewed, in light of the Prosecutor’s submissions, the considerable amount of information for which redactions are sought to be lifted, the Single Judge considers that such lifting is justified. The disclosure of such information to the Defence does not pose any risk to witnesses, their family members, innocent third parties or does not prejudice the Prosecutor’s investigation as the information concerned is either of general character, or of public knowledge. In fact, the Single

³⁵ ICC-02/04-01/15-195, para. 3.

³⁶ Pre-Trial Chamber II, Order to the Prosecutor to file redacted versions of documents in the record, 12 November 2008, ICC-02/04-01/15-134, para. 11.

³⁷ ICC-02/04-01/15-198, para. 5.

Judge agrees with the Prosecutor that the vast amount of this information relates to facts that are essential for Mr. Ongwen to know the grounds for which his arrest warrant was issued and, more generally, to understand the contours of the case against him at this stage of the proceedings. This information includes for example the movements of armed groups and armed forces on the ground, identifying information of their members, locations of alleged crimes, descriptions of events, age of alleged victims of crimes, their recollection of facts, the injuries caused to them and facts related to the suspects in the *Kony et al case*.

26. As for the request to maintain some of the redactions previously applied, the Prosecutor seeks authorisation, pursuant to rule 81(2) and (4) of the Rules, to maintain the redactions of potentially identifying information concerning witnesses, their family members and innocent third parties.³⁸ The Prosecutor submits that “at this stage, she has not been able to contact [her] [...] witnesses or to assess their security situation”.³⁹ Accordingly “it would create unnecessary risks to disclose information that might endanger witnesses and their family members prior to the completion of this process”.⁴⁰

27. Based on the justifications provided by the Prosecutor at the time, as upheld by this Chamber, the Single Judge considers that the basis for redactions remains valid to date. Thus, the Single Judge sees no reason to depart from that determination and will refrain from ruling anew on the same redaction proposals. The redactions sought by the Prosecutor will therefore be kept in the Article 58 Application.

28. Lastly, the Single Judge considers it appropriate to order *proprio motu* the Prosecutor to redact two excerpts in the transcripts of the 28 January 2015 Status Conference, namely the information on page 5, lines 3-15 and on page 46, lines 1-22 of the English version and the corresponding passages in the French version of said transcript. The Single Judge is of the view that these excerpts shall be withheld from the Defence on the basis that they pertain to: (i) either an exchange of opinions

³⁸ ICC-02/04-01/15-195, para. 4.

³⁹ ICC-02/04-01/15-195, para. 10.

⁴⁰ ICC-02/04-01/15-195, para. 10.

between the Single Judge and the Prosecutor;⁴¹ or to (ii) the personal acknowledgment of the Single Judge's mandate as a Judge of this Court.⁴²

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) Partly Grants** the First Application, to the extent specified in paragraphs 15-21;
- b) Authorises** the Prosecutor to redact the excerpts proposed to document ICC-02/04-01/15-191-Conf-Exp-Anx except at page 5;
- c) Orders** the Registry to redact the following excerpts of document ICC-02/04-01/15-T-5-CONF-EXP-ENG (and its corresponding French version) and to file as soon as practicable confidential redacted versions thereof:
 - page 5, line 3 to line 15;
 - page 20, line 13 (from "which") to page 21, line 22;
 - page 26, line 13 (from "not") to line 15;
 - page 27, line 1 (from "Also") to line 2 (until "Court");
 - page 27, line 7 to page 28, line 8;
 - page 32, line 15 to line 18;
 - page 33, line 7 to page 34, line 6;
 - page 35, line 2 to line 22;
 - page 46, line 1 to line 22;
- d) Grants** the Second Application;
- e) Authorises** the Prosecutor to lift the redactions from the Article 58 Application as proposed in document ICC-02/04-01/15-198-Conf-Exp-AnxA;

⁴¹ Pre-Trial Chamber II, Transcript of Hearing, 28 January 2015, ICC-02/04-01/15-T-5-CONF-EXP-ENG ET, p. 5, lines 3-15.

⁴² Pre-Trial Chamber II, Transcript of Hearing, 28 January 2015, ICC-02/04-01/15-T-5-CONF-EXP-ENG ET, p. 46, lines 1-22.

- f) **Orders** the Prosecutor to file as soon as practicable confidential redacted versions of the Article 58 Application and document ICC-02/04-01/15-191-Conf-Exp-Anx in the record of the case.

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

[signed]

Judge Ekaterina Trendafilova
Single Judge

Dated this Thursday, 26 February 2015

At The Hague, The Netherlands