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

Date: 23 April 2015

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN UGANDA

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

Public

Decision on issues related to disclosure and exceptions thereto

Decision 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 the Victims

Legal Representatives of the 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

Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Cuno Tarfusser, Single Judge exercising the functions of Pre-Trial Chamber II in the present case, issues this decision under article 61(3) of the Rome Statute (the “Statute”) and rule 121(2) of the Rules of Procedure and Evidence (the “Rules”), with a view to ensuring a smooth and expeditious process of disclosure. For the purpose of the present decision, the Single Judge also notes articles 57(3)(c) and 68(1) of the Statute, and rule 81 of the Rules.

1. On 30 March 2015, the Prosecutor provided, as instructed by former Single Judge Ekaterina Trendafilova, the “Prosecution’s Observations on a Disclosure Calendar” (ICC-02/04-01/15-215). In terms of the intended timing of disclosure of evidence to the Defence, the Prosecutor makes specific commitments to disclose evidence in batches over the following months (see paragraphs 5-10). The Single Judge considers that these commitments are at present adequate to ensure that evidence is disclosed to the Defence without delay. Therefore, a formal calendar for disclosure, with specific time limits, is not warranted. Any problems with respect to disclosure should be brought to the immediate attention of the Single Judge.

2. The Single Judge is cognizant of the fact that expeditious disclosure is partly contingent on a clear and effective system applicable to exceptions to disclosure under rule 81(2) and (4) of the Rules, in particular as concerns redactions to evidence disclosed. He has taken note of the system of redaction protocols recently applied by Trial Chambers,¹ and of essentially the same regime applied by Pre-Trial Chamber I in its latest confirmation of charges

¹ Trial Chamber I, “Decision on the Protocol establishing a redaction regime”, 15 December 2014, ICC-02/11-01/11-737 and annex A; Trial Chamber VI, “Decision on the Protocol establishing a redaction regime”, 12 December 2014, ICC-01/04-02/06-411 and annex A; Trial Chamber V, “Decision on the protocol establishing a redaction regime”, 27 September 2012, ICC-01/09-02/11-495 and annex A.

proceedings.² In her observations (paragraphs 12-15), the Prosecutor proposes the application of an analogous system. The Defence did not respond to the Prosecutor's proposal.

3. The Single Judge considers that the adoption of such regime for redactions as proposed by the Prosecutor will be efficient as well as equitable. The Prosecutor is therefore permitted to disclose evidence with redactions of information falling into certain standard categories which commonly occur. Safeguards, as detailed below, shall be put in place to ensure proper judicial oversight in line with rule 81 of the Rules with a view to guaranteeing the legitimate interests of the Defence.

4. The categories of information which may be redacted by the Prosecutor without need for an application to the Single Judge are as follows:

Under rule 81(2) of the Rules

- Category A.1: Locations of witness interviews/accommodation, insofar as disclosure would unduly attract attention to the movements of the Prosecutor's staff and witnesses, thereby posing a risk to ongoing or future investigations;
- Category A.2: Identifying and contact information of the Prosecutor's, VWU or other Court staff members who travel frequently to, or are based in, the field, insofar as disclosure of this information could hinder their work in the field and thereby put at risk the ongoing or future investigations of the Prosecutor (to be further specified as A.2.1 for translators, A.2.2 for interpreters, A.2.3 for stenographers, A.2.4 for psycho-social experts, A.2.5 for other medical experts and A.2.6. for other staff members falling within this category);
- Category A.3: Identifying and contact information of translators, interpreters, stenographers and psycho-social experts assisting during interviews who are not members of the Prosecutor's staff but who travel frequently to, or are based in the field, insofar as disclosure of

² "Second decision on issues related to disclosure of evidence", 5 May 2014, ICC-02/11-2/11-67.

this information could hinder their work so that the Prosecutor could no longer rely on them, and thereby put at risk ongoing or future investigations of the Prosecutor (to be further specified as A.3.1 for translators, A.3.2 for interpreters, A.3.3 for stenographers, A.3.4 for psycho-social experts, A.3.5 for other medical experts and A.3.6. for other persons falling within this category);

- Category A.4: Identifying and contact information of investigators, insofar as disclosure of this information could hinder their work in the field thereby putting at risk the ongoing or future investigations of the Prosecutor;
- Category A.5: Identifying and contact information of intermediaries, insofar as disclosure of this information could hinder their work in the field thereby putting at risk the ongoing or future investigations of the Prosecutor;
- Category A.6: Identifying and contact information of leads and sources, insofar as disclosure of this information could result in the leads and sources being intimidated or interfered with and would thereby put at risk the ongoing or future investigations of the Prosecutor (to be further specified as A.6.1 for individual sources, A.6.2 for NGOs, A.6.3 for international organisations; A.6.4 for national governmental agencies, A.6.5 for academic sources, A.6.6 for private companies and A.6.7 for other sources);
- Category A.7: Means used to communicate with witnesses, insofar disclosure of this information may compromise investigation techniques or the location of witnesses and would thereby put at risk the ongoing or future investigations of the Prosecutor;

Under rule 81(4) of the Rules

- Category B.1: Recent contact information of witnesses, insofar necessary to protect the safety of the witness;
- Category B.2: Identifying and contact information of family members of witnesses, insofar necessary to protect their safety;
- Category B.3: Identifying and contact information of “other persons at risk as a result of the activities of the Court” (“innocent third parties”), insofar necessary to protect their safety;

- Category B.4: Location of witnesses who are admitted in the International Criminal Court Protection Programme and information revealing the places used for present and future relocation of these witnesses, including before they enter the ICCPP.

5. For each redaction so applied, the Prosecutor shall indicate the category by including the corresponding code in the redaction box, unless such indication would defeat the purpose of the redaction. The Prosecutor shall also monitor the need for redactions over time, and lift redactions as soon as they are no longer warranted.

6. In order to ensure respect of the legitimate interests of the Defence, the Prosecutor shall consider in good faith any requests of the Defence for information concerning specific redactions, or any requests to lift certain redactions. Such consultations shall take place *inter partes*. If they prove unsuccessful, the Defence may challenge specific redactions by way of an application to the Single Judge. In such case, the Prosecutor shall retain the burden of proof to justify the challenged redaction.

7. Any redactions which do not fall in the categories listed above shall be subject to an application to the Single Judge. The Single Judge also expects to be seized, by way of written application, of any request for anonymity of witnesses at this stage of the proceedings under rule 81(4) of the Rules and of any request for non-disclosure of an entire item of evidence. In cases in which an application to the Single Judge justifying the redactions is required, the Prosecutor may proceed to disclosure with redactions as proposed simultaneously with the application. Such application (redacted if necessary not to defeat its purpose) shall also be provided to the Defence. Upon receiving the necessary submissions, the Single Judge will either authorise the redactions, or order their lifting.

8. The Single Judge is of the view that the above is presently sufficient for disclosure to proceed smoothly. In order to address with the parties any issues related to the present proceedings that may require attention, a status conference will be held on 11 May 2014.

FOR THESE REASONS, THE SINGLE JUDGE

DECIDES to adopt the procedure elaborated above for exceptions to disclosure by the Prosecutor under rule 81(2) and (4) of the Rules; and

DECIDES to convene a status conference to be held on Monday, 11 May 2015 at 9.30 hours, in order to discuss:

- (i) the progress of the disclosure of evidence by the Prosecutor;
- (ii) the Prosecutor's stated intention to consider bringing "charges additional to those set out in the Warrant of Arrest" (Prosecutor's Observations, para. 7);
- (iii) the format of the charges in accordance with article 61(3)(a) of the Statute, rule 121(3) of the Rules and regulation 52 of the Regulations of the Court; and
- (iv) any other issues relevant to the pre-trial proceedings.

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



Judge Cuno Tarfusser
Single Judge

Dated this 23 April 2015

At The Hague, The Netherlands