

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **24 April 2018**

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

Public Redacted Version of ‘Corrigendum to “Defence Response to the Prosecution’s Request to Withhold the Identity of the UPDF Informant”, filed on 16 April 2018’, filed on 24 April 2018

Source: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') opposes the Prosecution's "Request under Paragraph 9 of Decision ICC-02/04-01/15-1207" that it be permitted to withhold the identity of the UPDF informant from the Defence ('Request').¹
2. The Prosecution's request to maintain the redactions to a report from a UPDF officer and a sound recording ('UPDF Report' and 'Sound Recording', respectively) fails to demonstrate the existence of an objectively justifiable risk to the safety of the UPDF informant, should ■² identity be disclosed to the Defence, as opposed to the public at large. Moreover, the Defence avers that withholding the UPDF informant's identity is prejudicial to Mr Ongwen's rights to a fair and impartial trial.
3. The Request should, accordingly, be rejected and the redactions lifted.

II. CONFIDENTIALITY

4. Pursuant to Regulation 23bis(2) of the Regulations of the Court ('RoC'), the Defence files this response as confidential *ex parte*, because it refers to portions from submissions filed as confidential and *ex parte*. The Defence will file a public redacted version in due course.

III. SUBMISSIONS

A. **The Prosecution's request does not meet the legal standard of objectively justifiable risk of danger to the safety of the person concerned**

5. The Appeals Chamber in *Katanga* found that assessing the risk of danger to the safety of an individual should involve consideration of the following factors:
 - a) the alleged danger must involve an objectively justifiable risk to the safety of the person concerned;

¹ ICC-02/04-01/15-1217.

² ■

b) the risk must arise from disclosing the particular information to the Defence, as opposed to disclosing the information to the public at large.³

6. The Defence submits that, in the context of the above ruling, the Prosecution has not shown that the alleged dangers involve an objectively justifiable risk to the safety of the person concerned, if the identity of the UPDF informant is disclosed to the Defence. No risk of danger arises from disclosing the UPDF informant's identity to the Defence. The Defence is requesting disclosure only to the Defence, and not to the public at large. The concerns of the Prosecution and the Ugandan Government are thus unfounded.
7. The Prosecution requests the Trial Chamber for authorization to withhold the identity of the UPDF informant from the Defence for [REDACTED] protection under Article 54(3)(f) of the Rome Statute ('Statute'), when read together with Rule 81(4) of the Rules of Procedure and Evidence ('RPE').⁴ To substantiate its Request, the Prosecution submits that it "considers the Ugandan Government's concerns, should the identity of the informant become known to the Accused, to be objectively justifiable and its request for confidentiality reasonable".⁵
8. In particular, the Ugandan Government's concerns are:

[REDACTED]

9. In any event the Defence avers that the concerns expressed by the Ugandan Government do not meet the legal standard set by the *Katanga* ruling quoted above, and these concerns are misplaced for the reasons given below.
10. The Defence does not [REDACTED] and does not [REDACTED]
[REDACTED]. Nor does the Defence hold any grudges concerning the armed conflict in Uganda.

³ ICC-01/04-01/07-475, para. 71.

⁴ Request, paras 8, 12.

⁵ Request, para. 11.

⁶ [REDACTED]

11. To the contrary, the Defence is a party to the *Ongwen* case proceedings whose members are bound by and adhere to high ethical standards in respect of the applicable articles, rules, regulations and rulings of this Court. For this reason, under Article 8 of the Code of Professional Conduct for counsel, the Defence counsel is under an obligation to respect and actively exercise all care to ensure respect for professional secrecy and the confidentiality of information;⁷ and there is no reason so far to suggest otherwise.
12. The Prosecution and the Ugandan Government fail to distinguish between withholding the UPDF informant's identity or [REDACTED] activities during the conflict from the Defence and the public at large. The alleged risk of revenge attacks [REDACTED] is speculative and unfounded. The Prosecution and the Ugandan Government have not demonstrated that the Defence will reveal any information that would lead to revenge attacks [REDACTED] against the UPDF informant.⁸
13. Additionally, the Prosecution has called 69 live witnesses, 40 of which have received protective measures under Rule 87 of the RPE.⁹ Further, out of these above-mentioned witnesses, some were former members of the LRA who have now been integrated into the UPDF.¹⁰ The Prosecution has not shown that disclosing the identity of former LRA combatants – who are now with the UPDF – was less of a risk than disclosing the identity of the UPDF informant to the Defence.
14. There is no evidence to suggest that the protective measures given to the Prosecution witnesses have been violated by the Defence in the *Ongwen* case. Neither has the Prosecution demonstrated any risk of danger to the safety of the Prosecution witnesses that have received protective measures from this Court at the behest of, or lapses at the instance of the Defence.¹¹ This makes the Ugandan Government's concerns unwarranted and the Prosecution's request to withhold the UPDF informant's identity from the Defence unnecessary and disproportionate.

⁷ See Articles 7 and 8 of the Code of Professional Conduct for counsel.

⁸ Request, para. 10; [REDACTED].

⁹ See ICC-02/04-01/15-612-Conf: (Prosecution witnesses P-0403, P-0016, P-0205, P-0330, P-0379, P-0309, P-0264 P-0352, P-0018, P-0142, P-0314, P-0024, P-0249, P-0269, P-0252, P-0144, P-0054, P-0189, P-0340, P-0070, P-0233, P-0138, P-0231, P-0275, P-0396, P-0351, P-0006, P-0250, P-0145, P-0200, P-0366, P-0372, P-0374, P-0410, P-0307, P-0406, P-0448, P-0085, P-0209, and P-0187).

¹⁰ See e.g. [REDACTED].

¹¹ The Prosecution called a number of witnesses who currently serve in Ugandan national security organs (e.g. [REDACTED]).

15. In sum, the Prosecution did not present any reasonable concerns that substantiate an objectively justifiable risk to the safety of the UPDF informant, should [REDACTED] identity become known to the Defence. Instead, the Prosecution presented displaced allegations, showing a lack of professional trust concerning the conduct of its adversary in the *Ongwen* case proceedings. The Request should, accordingly, be rejected.

B. Withholding the UPDF informant's identity from the Defence is prejudicial to Mr Ongwen's rights to a fair and impartial trial

16. The Defence opposes the Prosecution's submissions that "[it] has no reason to believe that the informant is in possession of any information which is of relevance to the issues in the instant proceedings"¹² and that "[w]ithholding the informant's identity from the Defence will not cause identifiable prejudice to the preparation of the Defence case"¹³ for the following reasons.
17. First, the UPDF informant's identity, together with the UPDF Report and the Sound Recording may be relied upon as evidence during the presentation of the Defence case. The Defence avers that the UPDF informant's identity and activities are relevant to the defence of duress, and may show the innocence of Mr Ongwen, or mitigate his guilt.¹⁴
18. In particular, the Ugandan Government specifies that the UPDF informant [REDACTED]
[REDACTED].¹⁵ It also appears that the UPDF informant [REDACTED]¹⁶ and [REDACTED]
[REDACTED] that may be relevant for the *Ongwen* case proceedings.¹⁷
19. In fact, the UPDF informant [REDACTED]
[REDACTED]
[REDACTED], in order to control the actions of, *inter alia*, Mr Ongwen under duress.¹⁸ This is the reason why the UPDF informant's identity is relevant to the defence of duress and other related defences, and thus must be disclosed.

¹² Request, para. 9.

¹³ Request, para. 9.

¹⁴ See Article 67(2) of the Statute.

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ See ICC-02/04-01/15-1197-Conf, para. 25(a); ICC-02/04-01/15-1174-Conf, para. 22; [REDACTED]
[REDACTED].

20. [REDACTED]
[REDACTED].¹⁹ [REDACTED]
[REDACTED]
[REDACTED].

21. Second, the Prosecution knew the identity of the UPDF informant since at least 23 November 2007.²⁰ Following the Prosecution's RFA [REDACTED], the Ugandan Government collected and provided the UPDF Report and the Sound Recording – including the UPDF informant's identity – to the Prosecution, knowing that it may assist the Prosecution with its case against, *inter alia*, Mr Ongwen.²¹ Now, after more than 10 years, the Ugandan Government and the Prosecution make every effort to withhold the UPDF informant's identity from the Defence. The Defence notes the fact that the case against Mr Ongwen was severed from the rest of the LRA commanders in *The Prosecutor v. Kony et al.* only after his surrender but the investigations were targeted against all the suspects collectively.

22. The Defence submits that an authorization for non-disclosure is an exception to the overriding principle of full disclosure.²² Given that the Prosecution failed to substantiate its Request and the Defence has already been provided with the corresponding materials,²³ the Defence submits that – like the Prosecution – it must be given access to the complete information in order to ensure fair and expeditious conduct of the *Ongwen* case proceedings.²⁴

23. Finally, the Defence submits that withholding the UPDF informant's identity affects the substantive content of the Prosecution's Request *vis-à-vis* the Ugandan Government's letter.²⁵ On the one hand, the Prosecution submits that "[t]he informant is not a victim or a witness in the current proceedings".²⁶ On the other hand, the Ugandan Government claims that [REDACTED]

¹⁹ ICC-02/04-01/15-1197-Conf, para. 25(c).

²⁰ ICC-02/04-01/15-1189-Conf-Exp, para. 1.

²¹

[REDACTED]

²² ICC-01/04-01/07-475, para. 70.

²³

[REDACTED]

²⁴ ICC-02/04-01/15-1207, para. 8.

²⁵ See ICC-02/04-01/15-1217-Conf-AnxA.

²⁶ Request, para. 7.

[REDACTED]
[REDACTED]²⁷ The Defence submits that such contradiction, without any clarification is self-defeating to the Prosecution's and Ugandan Government's arguments. The only remedy to this is a disclosure of the UPDF informant's identity to the Defence and the Trial Chamber.

24. Considering that the Statute and the RPE stress the significance of disclosure to the defence,²⁸ the Defence avers that the Request to withhold the UPDF informant's identity from the Defence is unnecessary, disproportionate and not counter-balanced *vis-à-vis* Mr Ongwen's rights to a fair and impartial trial.

IV. CONCLUSION AND RELIEF SOUGHT

25. In light of the above, the Defence opposes the Prosecution Request and respectfully requests the Trial Chamber to:
- a) **REJECT** the Prosecution Request;
 - b) **ORDER** the Prosecution to lift the redactions applied to the UPDF informant's identity; and
 - c) **ORDER** the Prosecution to disclose the RFA [REDACTED], the UPDF Report, the Sound Recording, and the transcripts of the Sound Recording *via* eCourt.



.....
Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 24th day of April, 2018
At Lira, Uganda

²⁷ [REDACTED]

²⁸ See Article 67(2) of the Statute, Rule 77 of the RPE; *see also* ICC-01/04-01/07-475, para. 61.