

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 12 September 2018

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 in Light of Prosecution Meeting and Interview
with D-100**

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

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Others

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 54(1)(b) of the Rome Statute, Rules 10, 77 and 81 of the Rules of Procedure and Evidence ('Rules') and Regulation 23 *bis*(3) of the Regulations of the Court, issues the following 'Decision on Defence Request in Light of Prosecution Meeting and Interview with D-100'.

I. Procedural history

1. On 31 August 2018, the Defence of Mr Ongwen ('Defence') filed a request ('Request') seeking that the Chamber order the Office of the Prosecutor ('Prosecution') to: (i) disclose the full biographical and security questionnaire which was updated following the Prosecution's meeting and interview with D-100 ('D-100 BSQ'); (ii) disclose the audio/visual recording of this interview; and (iii) reprimand the Prosecution for violating the Chamber's protocol governing contacts with opposing party witnesses ('Witness Contact Protocol'), including the delay in disclosing the breach to the Defence.¹
2. On 6 September 2018, the Prosecution responded that: (i) it has already disclosed those parts of the D-100 BSQ which are disclosable; (ii) there is no audio/video recording of the meeting; and (iii) it apologises for inadvertently contacting a Defence witness and submits that the matter does not merit a formal reprimand.²

II. Analysis and conclusions

3. The Single Judge notes that the factual basis underlying the relief sought is not contested. Earlier this year, the Prosecution contacted a potential Prosecution witness for further trials which may arise out of the Situation in Uganda.

¹ Defence Request in Light of the Prosecution's Meeting and Interview with the Defence Witness D-0100, ICC-02/04-01/15-1327-Conf (with three annexes), *referencing* Annex to the Order concerning the modalities for the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, 11 November 2015, ICC-02/04-01/15-339-Anx.

² Prosecution's Response to "Defence Request in Light of the Prosecution's Meeting and Interview with the Defence Witness D-0100", ICC-02/04-01/15-1327-Conf, ICC-02/04-01/15-1332-Conf.

Prosecution investigators in the field were unaware that this person is also Defence witness D-100 in this case.³ The Prosecution therefore contacted this Defence witness directly and without prior notification to the calling party, in contravention of the Witness Contact Protocol.⁴ Nine days after the contact, the Prosecution informed the Defence of its inadvertent breach, apologised, and disclosed an extract of the D-100 BSQ.⁵

4. The Single Judge will address each part of the relief sought in turn, recalling the applicable disclosure framework referenced in past decisions.⁶

A. D-100 BSQ

5. As said by the Appeals Chamber and others, once it is established that a document is material to the preparation of the defence, pursuant to Rule 77 of the Rules, the disclosure obligation ‘extends to the entire document and not only to the “relevant” portions of information contained within such a document’.⁷
6. With this in mind, the Single Judge considers the Prosecution’s position in relation to the D-100 BSQ to be misconceived. The Prosecution states that it provided an extract of the D-100 BSQ containing ‘all disclosable matters contained therein’.⁸ Implicit in the Prosecution’s conduct is that it considers at least part of the D-100 BSQ to be material to the preparation of the defence within the meaning of Rule 77 of the Rules. But once the Prosecution makes this

³ Annex A of the Request, ICC-02/04-01/15-1327-Conf-AnxA, page 3.

⁴ Witness Contact Protocol, ICC-02/04-01/15-339-Anx, paras 26, 29.

⁵ Annex A of the Request, ICC-02/04-01/15-1327-Conf-AnxA, page 3; D-100 BSQ Extract, UGA-OTP-0284-0145.

⁶ Decision on Disclosure Issues Arising Out of First Status Conference, 7 June 2016, ICC-02/04-01/15-457, para. 4.

⁷ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor’s request for non-disclosure in relation to document “OTP/DRC/COD-190/JCCD-pt”, 27 May 2013, ICC-01/04-01/06-3031, A5 A6, para. 12. *See also* Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Bemba Defence Request for Disclosure and Lifting of Redactions Related to Collection of Telecommunication Evidence, 17 February 2016, ICC-01/05-01/13-1632, para. 20; Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Response to Prosecution Application Regarding the Disclosure of the Identities of Certain Individuals Who Will not Appear as Trial Witnesses, 28 August 2013, ICC-01/09-01/11-886, para. 8.

⁸ Annex A of the Request, ICC-02/04-01/15-1327-Conf-AnxA, page 3.

assessment, it must disclose the entirety of the D-100 BSQ and not merely its relevant extracts.

7. The Single Judge therefore concludes that the Prosecution must disclose the latest D-100 BSQ to the Defence. This said, the Single Judge notes that the practical consequences of this disclosure are expected to be modest. If the Prosecution has indeed disclosed the most relevant portions of the D-100 BSQ to the Defence already, then any new information provided from this document should necessarily be of lesser significance. Further, and as with any disclosure, the Prosecution is entitled to redact the D-100 BSQ in conformity with the regime governing redactions in this case.⁹

B. Audio/video recording of interview

8. As the Single Judge has said previously: ‘Rule 77 of the Rules limits the Prosecution’s disclosure obligations only to materials in its “possession or control”. The Single Judge cannot order the Prosecution to disclose materials it does not have [...]’.¹⁰ There is no indication from either the Response or the Prosecution’s prior correspondence with the Defence that any audio/video recording of its interview with D-100 exists.
9. Accordingly, the Single Judge rejects this part of the Request.

C. Reprimand

10. The Single Judge notes that, misled by different surnames it had in its records, the Prosecution’s inadvertent breach of the Witness Contact Protocol came from not realising that the potential Prosecution witness it contacted was a witness to be called by the Defence. The Defence had communicated D-100’s status as a

⁹ Decision on issues related to disclosure and exceptions thereto, 23 April 2015, ICC-02/04-01/15-224, *incorporated at trial by Order Scheduling First Status Conference and Other Matters*, 4 May 2016, ICC-02/04-01/15-432, para. 4.

¹⁰ Decision on Defence Request for Disclosure of Certain Requests for Assistance and Related Items, 1 February 2018, ICC-02/04-01/15-1161, para. 13.

witness clearly, and even confirmed for the Prosecution which witness code the Prosecution had given to D-100.¹¹ The Single Judge also notes that this is not the first time the Prosecution has apologised for an information management failure in this trial.¹² However, the Single Judge also considers that the combination of circumstances which led to this particular mistake is unlikely to arise again in future witness contacts.

11. The Defence submits that the timing of the Prosecution's contact risked confusing D-100 about his status as a Defence witness,¹³ but the Defence provides no information suggesting that any such confusion affects its evidence presentation in any way. The Single Judge considers that the Defence does not substantiate any prejudice suffered because of the Prosecution's contact, and the Defence is free to speak with D-100 about the contact if it wishes to do so.
12. The Single Judge expects the Prosecution to re-double its efforts to ensure no other information management failures occur. But, in the specific circumstances, the Single Judge considers that the Prosecution's apology and D-100 BSQ disclosure order is a sufficient remedy. Accordingly, the Single Judge rejects the request for any further reprimand.

¹¹ Annex B of the Request, ICC-02/04-01/15-1327-Conf-AnxB. *See also* Annex C of the Request, ICC-02/04-01/15-1327-Conf-AnxC, paras 1-3.

¹² Decision on Defence Requests Following Prosecution's Notice of Filing of an Item Received in Response to an RFA, 16 March 2018, ICC-02/04-01/15-1207, paras 8-10.

¹³ Request, ICC-02/04-01/15-1327-Conf, paras 19-22.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Request for disclosure of the D-100 BSQ in accordance with paragraph 7 of the present decision;

REJECTS the remainder of the Request; and

ORDERS the submitting party to file a public redacted version of the Request (ICC-02/04-01/15-1327-Conf) and Response (ICC-02/04-01/15-1332-Conf) – or request reclassification thereof – within 10 days of notification of the present decision.

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



Judge Bertram Schmitt, Single Judge

Dated 12 September 2018

At The Hague, The Netherlands