

**Cour
Pénale
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**International
Criminal
Court**

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No.: **ICC-02/04-01/15**
Date: **17 September 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
with CONFIDENTIAL Annexes A, B, and C**

Public Redacted Version of “Defence Request in Light of the Prosecution’s Meeting and Interview with the Defence Witness D-0100”, filed on 31 August 2018

Source: Defence for Dominic Ongwen

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor
Benjamin Gumpert, QC

Counsel for the Defence

Krispus Ayena Odongo
Chief Charles Achaleke Taku
Beth Lyons

Legal Representatives of the Victims

Joseph Akwenyu Manoba
Francisco Cox

Common Legal Representative for Victims

Paolina Massidda
Jane Adong

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Paolina Massidda
Caroline Walter
Orchlon Narantsetseg

States' Representatives

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

Xavier-Jean Keita

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verril

Detention Section

**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. It is with consternation that the Defence for Dominic Ongwen ('Defence') informs Trial Chamber IX ('Trial Chamber') that the Prosecution breached the Protocol on the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant ('Witness Protocol')¹ by meeting and conducting an interview with Defence witness D-0100, on 22 July 2018.²
2. In fact, it is the Prosecution Senior Trial Lawyer, Mr Gumpert, who informed the Defence more than a week after the meeting and interview with D-0100 about the breach of the Witness Protocol. He stated:

This meeting was an inadvertent breach of the witness protocol, for which I apologise.³

3. In light of the Prosecution's breach of the Witness Protocol and its prejudicial effect on the upcoming testimony of witness D-0100, the Defence requests the Trial Chamber to order the Prosecution to disclose a) the full bio and security questionnaire ('BSQ') which was updated following the Prosecution's meeting and interview with D-0100;⁴ b) the audio/video recording of the Prosecution's meeting and interview with D-0100; and c) reprimand the Prosecution for violating paragraph 26 of the Witness Protocol, including the delay in disclosing the breach to the Defence.⁵

II. CONFIDENTIALITY

4. Pursuant to Regulation 23*bis* of the Regulations of the Court, the Defence files this request confidentially because it concerns internal communication between the Defence and the Prosecution. The request also refers to and names the Defence witness D-0100. A public redacted version will be filed in due course.

¹ ICC-02/04-01/15-339-Anx.

² Confidential Annex A: E-mail communication from Benjamin Gumpert to the *Ongwen* Defence, 'Meeting with D-0100', 1 August 2018, at 3:07 PM.

³ Confidential Annex A: E-mail communication from Benjamin Gumpert to the *Ongwen* Defence, 'Meeting with D-0100', 1 August 2018, at 3:07 PM.

⁴ UGA-OTP-0284-0102.

⁵ Witness Protocol, para. 26.

III. SUBMISSIONS

Meeting and interview with D-0100

5. On 1 August 2018, more than one week later, the Prosecution wrote an e-mail to the Defence about an event which took place on 22 July 2018.⁶ In particular, it informed the Defence:

[REDACTED].⁷
6. The Defence understands that accidental meetings may occur. However, in the context of the circumstances discussed below, the Prosecution's meeting and interview with Defence witness D-0100 could and should have been avoided had the Prosecution exercised due diligence.
7. These are the circumstances. First, on 22 March 2018, exactly four months before the Prosecution's meeting with D-0100, a member of the *Ongwen* Prosecution team, Mr Elderfield, exchanged three e-mails and a telephone call about D-0100 with a member of the *Ongwen* Defence team, Mr Obhof. Mr Obhof confirmed to Mr Elderfield *via* e-mail that D-0100 and P-0220 is the same person.⁸
8. Second, D-0100 was listed by the Defence three times on its list of witnesses,⁹ yet the Prosecution failed to identify him as the Defence witness D-0100 before the impugned meeting and interview. In the 2 July 2018 updated list, the Defence specifically noted the correct spelling of '[REDACTED]'.
9. Third, throughout the *Ongwen* case proceedings, the Prosecution has used the following names for D-0100: [REDACTED],¹⁰ [REDACTED],¹¹ [REDACTED],¹² and [REDACTED].¹³

⁶ Confidential Annex A: E-mail communication from Benjamin Gumpert to the *Ongwen* Defence, 'Meeting with D-0100', 1 August 2018, at 3:07 PM.

⁷ Confidential Annex A: E-mail communication from Benjamin Gumpert to the *Ongwen* Defence, 'Meeting with D-0100', 1 August 2018, at 3:07 PM.

⁸ Confidential Annex B (UGA-D26-0017-0095): E-mail communication from Julian Elderfield to Thomas Obhof, 'P-0100 [REDACTED]', 22 March 2018, 14:32.

⁹ ICC-02/04-01/15-1107-Conf-Exp-AnxA, p. 3; ICC-02/04-01/15-Conf-AnxA, p. 2; and e-mail update on 2 July 2018.

¹⁰ UGA-OTP-0236-0369.

¹¹ UGA-OTP-0236-0381, UGA-OTP-0236-0385, and UGA-OTP-0265-0306.

¹² UGA-OTP-0258-0349.

¹³ UGA-OTP-0284-0145.

Moreover, D-0100's National ID Card, which the Prosecution noted in his statement of 25 June 2016, has the name '[REDACTED]'.¹⁴

10. Fourth, according to the investigation note from the Prosecution's meeting and interview with D-0100, it appears that D-0100 met previously with the Defence. In particular, it notes: "[REDACTED]".¹⁵
11. The circumstances above show that the Prosecution and its investigators should have been well aware who D-0100 is. It had enough information and explicit confirmation from the Defence that D-0100 and P-0220 is the same person. Whether the meeting and interview with D-0100 was inadvertent, or not, is irrelevant. The meeting and interview occurred, it violated the Witness Protocol, and its impact on D-0100's upcoming testimony cannot be undone.¹⁶

Violation of the Witness Protocol

12. The Witness Protocol defines a witness as "a person whom a party or participant intends to call to testify or on whose statement a party or participant intends to rely."¹⁷
13. Contrary to Mr Gumpert's explanation that "D-0100/P-0220 continues to hold the status of '**witness**' in [the Uganda] situation,"¹⁸ the Defence avers that [REDACTED] is a person who was only assigned an identifying code P-0220. He cannot hold the status of Prosecution witness if the Prosecution does not intend to call him to testify or rely on his statement.¹⁹ The Defence fails to recognize to what entity Mr Gumpert's refers to by '**witness**'. Either the impugned person is a witness, or is not.
14. The *Ongwen* case is part of the Uganda situation. It is the only ongoing case within the Ugandan situation in which the Prosecution was requested to present its list of witnesses. The Prosecution has never indicated – in the *Ongwen* case – that it intends to call P-0220/D-0100 to

¹⁴ UGA-OTP-0265-0306, p. 0306.

¹⁵ UGA-OTP-0284-0110.

¹⁶ Confidential Annex C: Letter from the *Ongwen* Defence to the Prosecution, 'RE: Meeting between Prosecution Investigators and D-0100', 10 August 2018.

¹⁷ Witness Protocol, para. 4(f); *See also*, ICC-02/04-01/15-339-Anx.

¹⁸ Confidential Annex A: E-mail communication from Benjamin Gumpert to the *Ongwen* Defence, 'RE: Meeting with D-0100', 14 August 2018, at 13:53. (Bold added).

¹⁹ Witness Protocol, para. 4(f).

testify as its *viva voce* witness or to rely on his statement as Rule 68 witness.²⁰ Therefore, the only status that [REDACTED] holds is the Defence witness D-0100.

15. Paragraph 26 of the Witness Protocol further establishes:

Except under the conditions specified in this section, a party or participant shall not contact or interview a witness of another party or participant (the “calling party or participant”) if the intention to call the witness to testify or to rely on his or her statement has been communicated to the party or participant, or if this intention is otherwise clearly apparent.²¹

16. In order to avoid the violation of the Witness Protocol, the Prosecution and its investigators could rely on exceptional conditions to the above rule. The Prosecution neither requested the Defence to inquire with D-0100 if he consents to meet with the Prosecution.²² Nor did it apply to the Trial Chamber and request that the VWU be instructed to attempt to contact D-0100.²³

17. Mr Gumpert further stated that:

[REDACTED].²⁴

18. Mr Gumpert’s statement is misleading. As demonstrated above, the Prosecution had all the information necessary to inform the interaction with D-0100. The Prosecution’s obligations, if any, could have been legitimately carried out would the Prosecution and its investigators followed the relevant provisions of the Witness Protocol.

Irreversible and prejudicial impact on D-0100’s upcoming testimony

19. The Defence is particularly concerned about the following communication between the Prosecution and D-0100:

[REDACTED].²⁵

20. And that:

[REDACTED].²⁶

²⁰ ICC-02/04-01/15-532-Conf-AnxB.

²¹ Witness Protocol, para. 26.

²² Witness Protocol, para. 28.

²³ Witness Protocol, para. 30.

²⁴ Confidential Annex A: E-mail communication from Benjamin Gumpert to the *Ongwen* Defence, ‘RE: Meeting with D-0100’, 14 August 2018, at 13:53.

²⁵ UGA-OTP-0284-0110-R01.

21. The Defence submits that it is incorrect and potentially confusing for the Defence witness to be told by the Prosecution – the opposing party – that he is still a Prosecution witness. The fact that D-0100 himself asked the Prosecution “to know his status now”²⁷ further highlights the Defence concerns.
22. Moreover, the fact that the Prosecution informed D-0100 that he may be used in future in case against Joseph Kony is explicable, but untimely and potentially confusing for D-0100. At this point, almost one month before the start of the Defence case, it is important that D-0100 is able to understand that he is a witness in the *Ongwen* case, and not the *Kony et al.* case.

Disclosure of related materials

23. The Defence trusts the Prosecution that the above-described incident was inadvertent. Nonetheless, this inadvertent event concerns the Defence witness who is set to testify before this Trial Chamber. It is essential for the Defence to be able to access and review any related materials that reflect the impugned meeting and interview with D-0100. Therefore, as a remedy, the Defence requests the Trial Chamber to order the Prosecution to disclose the following materials.
24. The Defence requests the disclosure of the full BSQ which was updated following the Prosecution’s meeting and interview with D-0100.²⁸ The Defence requested the Prosecution to disclose the full BSQ during the *inter partes* communication.²⁹ However, the Prosecution refused to disclose the BSQ.³⁰ Instead, it disclosed ‘Information extracted from UGA-OTP-0284-0102’ which does not reveal any substantive information about the Prosecution’s meeting and interview with D-0100, and is insufficient.³¹
25. The Defence also requests the Trial Chamber to order the Prosecution to disclose any audio/video recording of the meeting and interview with D-0100. The Defence requested for the

²⁶ UGA-OTP-0284-0110-R01.

²⁷ UGA-OTP-0284-0110-R01.

²⁸ UGA-OTP-0284-0102.

²⁹ Confidential Annex C: Letter from the *Ongwen* Defence to the Prosecution, ‘RE: Meeting between Prosecution Investigators and D-0100’, 10 August 2018.

³⁰ Confidential Annex A: E-mail communication from Benjamin Gumpert to the *Ongwen* Defence, ‘RE: Meeting with D-0100’, 14 August 2018, at 13:53.

³¹ UGA-OTP-0284-0145.

disclosure of the audio/video *via* its letter to the Prosecution.³² In this regard, Mr Gumpert responded “this **contact** was not recorded in any electronic form.”³³ The Defence fails to understand what does Mr Gumpert considers by ‘**contact**’. Therefore, the Defence either requests for the disclosure of the audio/video of the meeting and interview with D-0100, or a solemn declaration that there is no audio/video recording of the impugned meeting and interview with D-0100.

IV. RELIEF SOUGHT

26. For the reasons stated above, the Defence requests the Trial Chamber to order the Prosecution to:
 - A. **DISCLOSE** the full bio and security questionnaire which was updated following the Prosecution’s meeting and interview with D-0100;³⁴
 - B. **DISCLOSE** the audio/video recording of the Prosecution’s meeting and interview with D-0100; and
 - C. **REPRIMAND** the Prosecution for violating paragraph 26 of the Witness Protocol, including the delay in disclosing the breach to the Defence.³⁵

³² Confidential Annex C: Letter from the *Ongwen* Defence to the Prosecution, ‘RE: Meeting between Prosecution Investigators and D-0100’, 10 August 2018.

³³ Confidential Annex A: E-mail communication from Benjamin Gumpert to the *Ongwen* Defence, ‘RE: Meeting with D-0100’, 14 August 2018, at 13:53. (Bold added).

³⁴ UGA-OTP-0284-0102.

³⁵ Witness Protocol, para. 26.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 17th day of September, 2018

At The Hague, Netherlands