

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/04-01/15
Date: 26 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 Prosecution's Request for non-standard redactions to document
UGA-OTP-0284-0102**

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

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**Victims Participation and Reparations
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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 ('Court') in the case of *The Prosecutor v Dominic Ongwen*, having regard to Article 68(1) of the Rome Statute ('Statute'), Rules 77 and 81(4) of the Rules of Procedure and Evidence ('Rules') and Regulation 34 of the Regulations of the Court ('Regulations'), issues the following 'Decision on Prosecution's Request for non-standard redactions to document UGA-OTP-0284-0102'.

I. Procedural history

1. On 12 September 2018, the Single Judge issued the 'Decision on Defence Request in Light of Prosecution Meeting and Interview with D-100', ordering that the Office of the Prosecutor ('Prosecution') must disclose the latest biographic data and security questionnaire for D-100 (ERN UGA-OTP-0284-0102, henceforth 'D-100 BSQ') to the defence for Mr Ongwen ('Defence'), subject to any redactions applied in conformity with the regime governing redactions in this case.¹
2. On 17 September 2018, the Prosecution filed a motion to apply non-standard redactions to the D-100 BSQ ('Request').² The Prosecution requests, pursuant to Rule 81(4) of the Rules, non-standard redactions to:
 - (a) the Protection Measures section ('Protection Measures');
 - (b) text in the Future Contact section ('Future Contact'); and
 - (c) annexes 2 and 3 of the D-100 BSQ ('Annexes 2 and 3').

¹ Decision on Defence Request in Light of Prosecution Meeting and Interview with D-100, ICC-02/04-01/15-1335, para. 7. *See also* 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.

² Prosecution's request for non-standard redactions to document UGA-OTP-0284-0102, ICC-02/04-01/15-1339-Conf-Exp (with annex; *ex parte* version filed same day). A confidential redacted version was filed on the day, ICC-02/04-01/15-1339-Conf-Red.

3. On 20 September 2018, the Defence responded to the Request, opposing it ('Response').³

II. Submissions

4. The Prosecution submits that the text proposed for redaction in D-100's BSQ 'contains no case-relevant information' and causes no prejudice to the Defence.⁴
5. The Prosecution also submits that its main concerns in the Protection Measures and Future Contact sections relate to how the Prosecution collects sensitive data, assesses such data, and the consequent taking of protective measures.⁵ The Prosecution argues that the effectiveness of these measures and the protection of Prosecution witnesses depend on the protection of such details.⁶
6. In relation to Annexes 2 and 3, the Prosecution submits that although the section features no entries for the listed questions, the text proposed for redaction is of 'potential general application better to manage the safety of the person concerned'.⁷
7. The Defence opposes all three of the Prosecution's redaction requests, arguing that the entirety of the D-100 BSQ is material to the preparation of the Defence under Rule 77 of the Rules.⁸ The Defence submits that in relation to section Annexes 2 and 3, the lack of entries does not relieve the Prosecution of its obligation to disclose the entirety of the BSQ to the Defence under Rule 77 of the Rules.⁹

³ Defence response to Prosecution's request for non-standard redactions to document UGA-OTP-0284-0102, ICC-02/04-01/15-1342-Conf.

⁴ Request, ICC-02/04-01/15-1339-Conf-Red, para. 8.

⁵ Request, ICC-02/04-01/15-1339-Conf-Red, paras 10-11.

⁶ Request, ICC-02/04-01/15-1339-Conf-Red, para. 9.

⁷ Request, ICC-02/04-01/15-1339-Conf-Red, para. 8.

⁸ Response, ICC-02/04-01/15-1342-Conf, paras 1, 9, 22.

⁹ Response, ICC-02/04-01/15-1342-Conf, para. 15.

III. Relevant law

8. The Single Judge notes that he determined in decision 1335 that the Prosecution is obliged to disclose the latest D-100 BSQ to the Defence and that the practical consequences of this disclosure are expected to be modest.¹⁰ The Single Judge determined that ‘the Prosecution is entitled to redact the D-100 BSQ in conformity with the regime governing redactions in this case’.¹¹
9. Non-standard redactions - that is, redactions not explicitly contained in the regime governing redactions in this case¹² - must be assessed on a case-by-case basis.
10. Pursuant to Rule 81(4) of the Rules, restrictions on disclosure may be warranted to ‘protect the safety of witnesses and victims’. In interpreting Rule 81(4), the jurisprudence of this Court has found that redactions may be granted if they satisfy the following requirements: (i) there is an objectively justifiable risk to the safety of the person or interest concerned,¹³ or which may prejudice further or ongoing investigations; (ii) the risk arises from disclosing the particular information ‘to the Defence, as opposed to [...] the public at large’;¹⁴ (iii) less restrictive protective measures are infeasible or insufficient; and (iv) the

¹⁰ Decision on Defence Request in Light of Prosecution Meeting and Interview with D-100, 12 September 2008, ICC-02/04-01/15-1335, para. 7.

¹¹ Decision on Defence Request in Light of Prosecution Meeting, ICC-02/04-01/15-1335, para. 7.

¹² Decision on issues related to disclosure and exceptions thereto, ICC-02/04-01/15-224; *see also* Order scheduling First Status Conference and Other Matters, ICC-02/04-01/15-432.

¹³ Trial Chamber VII, *The Prosecutor v Jean-Pierre Bemba et al.*, Decision on Modalities of Disclosure, 22 May 2015, ICC-01/05-01/13-959, (*Bemba et al.* Decision on Modalities of Disclosure), paras 23-46; Decision on Prosecution Request under Paragraph 9 of Decision 1207, ICC-02/04-01/15-1234 (*Decision 1234*), para. 7; *Also see* Appeals Chamber, *The Prosecutor v Germain Katanga*, 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”, 12 May 2008, ICC-01/04-01/07-475, OA (*Katanga* OA Judgment), para. 71(a).

¹⁴ *Katanga* OA Judgment, ICC-01/04-01/07-475, para. 71(b) (emphasis removed). The available information must indicate the existence of circumstances that give rise to such a risk. *See* Decision 1234, ICC-02/04-01/15-1234, para. 7.

redactions sought are not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹⁵

IV. Analysis

11. Concerning the ‘objectively justifiable risk to the safety of the person or interest concerned’, the Single Judge acknowledges that it is possible that disclosure of the Prosecution’s system of witness protection may create a risk with regard to the safety of Prosecution witnesses, were the system to be ‘shared beyond the dictates of operational necessity’.¹⁶ Problems could include the ‘ease with which [the Prosecution’s system of witness protection] can be side-stepped by external actors’, or, the risk that the Prosecution’s system of witness protection could reveal to external actors who is a Prosecution witness.¹⁷
12. It is uncontested that there is no objectively justifiable risk specifically to witness D-100 resulting from the disclosure of the proposed text for redaction to the Defence. Rather, the Prosecution asserts that the issue concerns a general risk broadly to the ‘safety and security of vulnerable witnesses and other persons who are contacted by the Prosecution’ in present and future proceedings ‘beyond the confines of the document at hand’.¹⁸ The Appeals Chamber of this Court has confirmed that Rule 81(4) of the Rules must be read to include the words ‘persons at risk on account of the activities of the Court’.¹⁹ The Single Judge considers Prosecution witnesses who have had contact with the Prosecution’s system of witness protection to fall within this category of persons. Therefore, there is an objectively justifiable risk to the ‘safety of the person or interest concerned’.

¹⁵ *Bemba et al.* Decision on Modalities of Disclosure, ICC-01/05-01/13-959, para. 11; *Katanga* OA Judgment, ICC-01/04-01/07-475, para 67.

¹⁶ Request, ICC-02/04-01/15-1339-Conf-Red, para 9.

¹⁷ Request, ICC-02/04-01/15-1339-Conf-Red, para. 13.

¹⁸ Request, ICC-02/04-01/15-1339-Conf-Red, para. 9.

¹⁹ *Katanga* OA Judgment, ICC-01/04-01/07-475, para. 56.

13. The Prosecution has asserted that disclosure of the Prosecution's system of witness protection to 'external actors' in general poses a risk. The Single Judge is persuaded that, by demonstrating how the objectively justifiable risk arises from disclosure to all actors external to the Prosecution, the Prosecution has captured how the same risk must necessarily arise from 'disclosing the particular information to the Defence' as discussed in the Appeals Chamber jurisprudence underlying the Rule 81(4) test.²⁰
14. Contrary to the Defence, finding the D-100 BSQ to be material to the preparation of the Defence does not necessarily mean that the contested information's relevance is beyond the scope of a Rule 81(4) analysis. The Single Judge considers such relevance to be a factor to the extent it affects the potential prejudice caused by non-disclosure.²¹ The Single Judge considers the contested information to be of no relevance to Mr Ongwen's case, and that no prejudice would be caused by its non-disclosure, stressing once again the countervailing objective risks which disclosure would cause.
15. Therefore, the Single Judge is persuaded that the Prosecution's request for redactions meets the required test.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Request.

²⁰ Paragraph 10(ii) above, *quoting Katanga* OA Judgment, ICC-01/04-01/07-475, para. 71(b) (emphasis removed).

²¹ Paragraph 10(iv) above.

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


Judge Bertram Schmitt, Single Judge

Dated 26 September 2018

At The Hague, The Netherlands