

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **22 May 2020**

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 *Ex Parte* Annexes 1 – 13 and Confidential Annex A

Prosecution's Communication of the Disclosure of Evidence

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

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Victims and Witnesses Section

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**Victims Participation and Reparations
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Other

Introduction

1. The Office of the Prosecutor (“Prosecution”) provides notice of the disclosure of evidence pursuant to rule 77 of the Rules of Procedure and Evidence.

Submission

2. On 22 May 2020, the Prosecution disclosed to the Defence “Trial Rule 77 package 134” containing 28 items/189 pages.

Request

3. The Prosecution requests authorisation to apply non-standard redactions to the 27 documents (“27 Documents”) identified for disclosure in the Decision on Defence Request for Remedies in Light of Disclosure Violations decision.¹ As per the jurisprudence in this case regarding non-standard redactions,² the Prosecution is also disclosing the 27 Documents, with the redactions proposed in this request, simultaneously with this request.

4. 13 of the 27 Documents are appended to this submission as Confidential *Ex Parte* annexes 1 - 13. 8 of the 27 Documents do not contain non-standard redactions; the remainder are audio files (“Audio Files”) to which redactions have been applied by editing the relevant file. In Annexes 1-13, the text to which non-standard redactions were applied has been highlighted for ease of review. Regarding the Audio Files, the non-standard redactions are to conversations related to the perceived security concerns of the witness and his/her family at the time of the interview. If the Chamber wishes to review the relevant audio files³, the time stamps of the redactions can be provided.

¹ ICC-02/04-01/15-1734, p. 18. (“ORDERS the Prosecution to disclose the 27 original items as listed in ICC-02/04-01/151723-Conf-AnxB”)

² See further, ICC-02/04-01/15-432, para. 4.

³ See ICC-02/04-01/15-1723-Conf-Exp-Anx22 to ICC-02/04-01/15-1723-Conf-Exp-Anx29.

5. The Prosecution requests pursuant to rule 81(4), authorisation to redact, in the 27 Documents, information regarding the Prosecution's system of witness protection. The text to which redactions are proposed is of potential general application better to manage the safety of the persons concerned. They provide detail about and insight into the OTP's collection of sensitive security data, assessment of such data, and the consequent taking of protective measures. The imposition of these redactions, which are the least intrusive measures available in this instance, would cause no prejudice to the Defence. They reduce the need for more intrusive measures that are highly disruptive to the lives of witnesses and their family members, and are time consuming and costly to implement.

6. Notably, the issues raised in this filing are of systemic importance beyond the confines of the documents at hand. The Prosecution has a system of witness and victim protection in order to fulfil its duties under, inter alia, article 68 of the Rome Statute. This system involves collection of sensitive security data, assessment of such data, and the consequent taking of protective measures. These processes allow the Prosecution to plan and execute risk mitigation measures for large numbers of witnesses / contacted individuals. To ensure the effectiveness of this system, it is vital that the details of the system are not shared beyond the dictates of operational necessity. Dissemination of the above information outside the office increases the ease with which the OTP witness protection system can be side-stepped by external actors.

7. In a prior decision ("Prior Decision on Redactions") regarding non-standard redactions to a biographic data and security questionnaire, the Single Judge noted that:

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'. 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.⁴

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’. 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’.⁵

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.⁶

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.⁷

8. The above findings of the Single Judge are directly relevant to the instant request, since the non-standard redactions proposed in this request are analogous to those authorised in the Prior Decision on Redactions.

9. In light of the above, the Prosecution requests authorisation for the proposed non-standard redactions to the 27 Documents.

Confidentiality

10. Annex A attached to this communication contains the list of evidence that has been disclosed to the Defence. The Prosecution requests that this annex be received as “Confidential” since it relates to *inter partes* disclosure. The Prosecution further requests that Annexes 1 to 21 be received as “Confidential, Ex Parte” since they

⁴ ICC-02/04-01/15-1348, Para 11.

⁵ ICC-02/04-01/15-1348, Para 12.

⁶ ICC-02/04-01/15-1348, Para 13.

⁷ ICC-02/04-01/15-1348, Para 14.

contain information to which redactions have been applied in the course of *inter partes* disclosure.

A handwritten signature in blue ink, appearing to read 'Fatou Bensouda', is written over a horizontal line.

Fatou Bensouda, Prosecutor

Dated this 22nd day of May 2020
At The Hague, The Netherlands