

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: 23 June 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**

**Public Redacted Version of “Defence response to Prosecution’s request for non-standard redactions to document UGA-OTP-0284-0102”,  
filed on 20 September 2018 as ICC-02/04-01/15-1342-Conf**

**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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**Detention Section**

**Victims Participation and Reparations Other  
Section**

## I. INTRODUCTION

1. The Defence opposes the Prosecution's *Confidential Redacted Version of "Prosecution's request for non-standard redactions to document UGA-OTP-0284-0102"*, 17 September 2018 ('Redactions Request').<sup>1</sup>
2. The Defence submits that the Single Judge has already made a determination that the biographic data and security questionnaire bearing the ERN UGA-OTP-0284-0120 ('BSQ') is material to the preparation of the defence within the meaning of Rule 77 of the Rules of Procedure and Evidence ('RPE') and must be disclosed to the Defence, subject to the regime governing redactions in this case.<sup>2</sup>

## II. CONFIDENTIALITY

3. Pursuant to Regulation 23bis (2) of the Regulations of the Court, the Defence files this response confidentially because it responds to a request which is labelled as confidential. The Defence shall file a public redacted version after the Prosecution or when ordered by the Single Judge.

## III. APPLICABLE LAW

4. According to Article 68 of the Rome Statute ('Statute') the Trial Chamber shall "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. [...]. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."
5. Pursuant to Rule 77 of the RPE the Prosecution shall "subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence."
6. Rule 81(4) of the RPE establishes that the Chamber shall "take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance

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<sup>1</sup> ICC-02/04-01/15-1339 (with Confidential Annex A).

<sup>2</sup> ICC-02/04-01/15-1335, para. 7.

with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.”

7. In this regard, the Appeals Chamber in the *Katanga* case also found that “permitting redactions to be made on this basis pursuant to rule 81(4) in principle necessarily does not mean that they will be granted wherever sought. [...] a careful assessment will need to be made, in each case, to ensure that any measures restricting the rights of the Defence that are taken to protect individuals at risk are strictly necessary and sufficiently counterbalanced [...].”<sup>3</sup>
8. The Appeals Chamber in the *Katanga* case held that “[t]he overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of non-disclosure of information is the exception to this general rule.”<sup>4</sup>

#### IV. SUBMISSIONS

9. Having regard to Article 68 of the Statute, Rule 77 and 81 of the RPE, and the Single Judge’s *Decision on Prosecution Request under Paragraph 9 of Decision 1207* (‘1234 Decision’),<sup>5</sup> the Defence opposes the Prosecution request in relation to the application of non-standard redactions for the following reasons.

##### A. The entirety of the BSQ is material to the preparation of the defence under Rule 77

10. The Appeals Chamber in the *Lubanga* case found that:

[O]nce it is established that a document is material to the preparation of the defence, pursuant to rule 77 of the Rules of Procedure and Evidence, the disclosure obligation extends to the entire document and not only to the "relevant" portions of information contained within such a document.<sup>6</sup>

11. Moreover, the Single Judge in this case and in relation to the impugned BSQ held that:

[T]he 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’. Implicit in the Prosecution’s conduct is that it considers at least part of the D-100 BSQ to be material to the

<sup>3</sup> ICC-01/04-01/07-475, para. 59.

<sup>4</sup> ICC-01/04-01/07-475, para. 70; *see also*, ICC-02/04-01/15-224.

<sup>5</sup> ICC-02/04-01/15-1234, paras 6-8.

<sup>6</sup> ICC-01/04-01/06-3031, para. 12; *see also*, ICC-01/05-01/13-1632, para. 20; ICC-01/09-01/11-886, para. 8.

preparation of the defence within the meaning of Rule 77 of the Rules. But once the Prosecution makes this assessment, it must disclose the entirety of the D-100 BSQ and not merely its relevant extracts.<sup>7</sup>

12. With this in mind, the Prosecution's attempt to re-litigate the relevance and/or materiality of the BSQ to the preparation of the Defence by stating that "[i]t is vital to note at the outset that the text in D-0100's BSQ for which redactions are proposed contains no-case relevant information"<sup>8</sup> must be rejected.
13. It is the entirety of the BSQ's text that must be disclosed to the Defence under Rule 77 of the RPE. This includes the section on "[REDACTED]",<sup>9</sup> the section on "[REDACTED]",<sup>10</sup> the section on "[REDACTED]",<sup>11</sup> and the section on "[REDACTED]".<sup>12</sup>
14. In order to justify the application of non-standard redactions to the sections on "[REDACTED]" and "[REDACTED]", the Prosecution states that they relate "to protection and nothing else".<sup>13</sup> The Defence does not find any reason why information related to the protection of Defence Witness D-0100 should be withheld from the Defence. On the contrary, the disclosure of any such information to the Defence, Trial Chamber and VWU shall facilitate D-0100's upcoming testimony. In relation to the "[REDACTED]" section, [REDACTED] with D-0100 will be governed by ICC-02/04-01/15-339-Anx. Considering that the Prosecution waited over three years to re-contact D-0100, the scheduling of a future contact might reveal insight into the Prosecution's state of mind about the witness. The Defence finds this information relevant to its preparation.
15. Finally, in relation to the sections on "[REDACTED]" and "[REDACTED]", the Prosecution submits that they "feature no entries at all for the listed questions since D-0100 is not [REDACTED]".<sup>14</sup> The lack of entries in the impugned sections does not relieve the Prosecution from its obligation to disclose the entirety of the BSQ to the Defence under Rule 77 of the RPE.

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<sup>7</sup> ICC-02/04-01/15-1335, para. 6.

<sup>8</sup> Redactions Request, para. 8.

<sup>9</sup> Annex A to the Redactions Request, p. 3.

<sup>10</sup> Annex A to the Redactions Request, p. 4.

<sup>11</sup> Annex A to the Redactions Request, p. 6.

<sup>12</sup> Annex A to the Redactions Request, p. 7.

<sup>13</sup> Redactions Request, para. 8.

<sup>14</sup> Redactions Request, para. 8.

**B. The non-standard redactions do not meet the legal standard of objectively justifiable risk of danger to the safety of the person concerned**

16. The Appeals Chamber in the *Katanga* case held 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 objective justifiable risk to the safety of the person concerned;
- b) the risk must arise from disclosing the particular information to the Defence, as opposed to disclosing the information to the public at large.<sup>15</sup>

17. Additionally, the Trial Chamber in the *Ongwen* case held that:

Rule 81(4) of the Rules concerns restrictions on disclosure, *inter alia*, in accordance with Article 68 of the Statute. The duty of the Court to protect ‘victims and witnesses’ under Article 68 should be read to include ‘persons at risk on account of the activities of the Court’. However, non-disclosure should still be warranted by the existence of an objectively justifiable risk to the safety of the person concerned, as a result of disclosure to the Defence specifically – and not only the public in general – and be proportionate to the rights of the accused. It follows that the available information must indicate the existence of circumstances that give rise to such a risk.<sup>16</sup>

18. In essence, the Prosecution requests authorisation to apply non-standard redactions to the BSQ of Defence Witness D-0100 under Article 68(1) of the Statute and Rule 81(4) of the RPE. In particular, it requests to withhold certain sections of the D-0100’s BSQ because “[t]heir dissemination outside the OTP creates an objective risk for the protection system of the OTP, and hence for the safety and security of vulnerable witnesses and other persons who are contacted by the Prosecution.”<sup>17</sup>

19. Non-disclosure of certain sections of D-0100’s BSQ must be warranted by the existence of an objectively justifiable risk to the safety of D-0100, as a result of disclosure to the Defence specifically, and not only the public in general, and be proportionate to the rights of the accused.<sup>18</sup> Neither the Prosecution’s request, nor the available information in the BSQ indicate that a risk of danger arises from disclosing the redacted BSQ’s sections to the Defence, as opposed to the public.

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<sup>15</sup> ICC-01/04-01/07-475, para. 71.

<sup>16</sup> ICC-02/04-01/15-1234, para. 7.

<sup>17</sup> Redactions Request, para. 10.

<sup>18</sup> ICC-02/04-01/15-1234, paras 7-8.

20. The Defence concludes that the Prosecution has not demonstrated that the disclosure of the information in the sections on “[REDACTED]”, “[REDACTED]”, “[REDACTED]”, and “[REDACTED]” has an objectively justifiable risk of prejudicing “the protection system of the OTP, and hence the safety and security”<sup>19</sup> of D-0100. The reasons stated by the Prosecution may convince the Trial Chamber to find that such information should not be accessible to the public, but at issue is whether or not Defence Witness D-0100 could be prejudiced by the Defence having access to such information. Accordingly, the Prosecution’s request should be rejected and the non-standard redactions lifted.

### C. Sufficient Remedy

21. The Defence also notes that the Single Judge ordered the Prosecution to disclose the entirety of the BSQ as a sufficient remedy for the Prosecution’s information management failures.<sup>20</sup> The Redactions Request withholds information from four out of seven pages of the BSQ and renders the remedy insufficient and disproportionate to the rights of the accused.

## V. RELIEF SOUGHT

22. For the reasons stated above, the Defence requests that the Trial Chamber:

**REJECT** the Redactions Request;

**ORDER** the Prosecution to lift the non-standard redactions to the BSQ; and

**ORDER** the Prosecution to disclose the BSQ *via* E-Court.<sup>21</sup>

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<sup>19</sup> Redactions Request, para. 10.

<sup>20</sup> ICC-02/04-01/15-1335, para. 12; *see also*, ICC-02/04-01/15-1207, paras 8-10.

<sup>21</sup> In accordance with Annex 1 to the Decision Setting the Regime for Evidence Disclosure and Other Related matters, 27 February 2015, ICC-02/04-01/15-203-Anx1, applicable at trial by virtue of Order Scheduling First Status Conference and Other Matters, 4 May 2016, ICC-02/04-01/15-432, para. 4.

Respectfully submitted,



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Hon. Krispus Ayena Odongo  
On behalf of Dominic Ongwen

Dated this 23<sup>rd</sup> day of June, 2020  
At Kampala, Uganda