

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 20 April 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 Request under Paragraph 9 of Decision 1207

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

The Office of the Prosecutor

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Legal Representatives of Victims

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
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**The Office of Public Counsel for the
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States Representatives

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REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

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 68 of the Rome Statute ('Statute') and Rule 81 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Prosecution Request under Paragraph 9 of Decision 1207'.

I. Procedural history

1. On 1 February 2018, the Single Judge rejected a submission by Mr Ongwen's defence team ('Defence')¹ requesting the Chamber to order the Office of the Prosecutor ('Prosecution') to disclose, *inter alia*, a specific request for assistance relating to the death of Vincent Otti ('RFA 24').² The Prosecution had repeatedly conveyed that it had not received a final response to RFA 24 from the Ugandan authorities.³
2. On 23 February 2018, the Prosecution filed a notification ('Prosecution Notification') indicating its discovery that, contrary to its previous submissions, it *had* received substantive information in response to RFA 24, which was inadvertently missed in previous disclosure reviews.⁴ The information received contained a report from a UPDF officer and a sound recording on which part of the report was based. A redacted version of the UPDF report was provided to the Defence.⁵

¹ Public Redacted Version of "Defence Request for a Rule 77 Disclosure Order Concerning the Requests for Assistance and Other Related Items", 16 January 2018, ICC-02/04-01/15-1137-Red (with three annexes).

² Decision on Defence Request for Disclosure of Certain Requests for Assistance and Related Items, ICC-02/04-01/15-1161. Leave to appeal this decision was rejected. Decision on Request for Leave to Appeal the Decision on Defence Request for Disclosure of Certain RFAs and Related Items, 14 February 2018, ICC-02/04-01/15-1179.

³ Prosecution Response to "Defence Request for a Rule 77 Disclosure Order Concerning the Requests for Assistance and Other Related Items" (ICC-02/04-01/15-1137), 18 January 2018, ICC-02/04-01/15-1142, para. 4; Prosecution's Response to Defence Request for Leave to Appeal Decision ICC-02/04-01/15-1161, 12 February 2018, ICC-02/04-01/15-1177, para. 3.

⁴ Public Redacted Version of Prosecution's Notice of Filing of an Item Received in Response to an RFA, 22 February 2018, ICC-02/04-01/15-1189-Conf-Exp, ICC-02/04-01/15-1189-Red (with annex).

⁵ Prosecution Notification, ICC-02/04-01/15-1189-Red, paras 7 and 10 (the UPDF Report can be found at ICC-02/04-01/15-1189-Conf-Exp-AnxA).

3. On 16 March 2018, in response to a request by the Defence,⁶ the Single Judge ordered the Prosecution to provide the identity of the UPDF informant but allowed the Prosecution 5 days within which to file a substantiated request for non-disclosure (if they wished to do so) ('Decision 1207').⁷ The Prosecution subsequently sought and was granted an extension of the 5 day deadline, pending receipt of the views of the Ugandan Government.⁸
4. On 4 April 2018 the Prosecution submitted a request to withhold disclosure of the informant's identity to the Defence under Article 68 of the Statute ('Request').⁹ The Prosecution highlights the concern of the Ugandan Government that such disclosure could risk 'revenge attacks and stigmatisation against the informant as well as against the informant's family members'.¹⁰
5. On 16 April 2018, the Defence submitted its opposition to the Request ('Defence Response').¹¹ The Defence alleges that the Request does not meet the relevant legal standard, i.e. an objectively justifiable risk of danger to the safety of the person concerned.¹² Furthermore, it is submitted that withholding the informant's identity is prejudicial to Mr Ongwen's right to a fair and impartial trial.¹³

⁶ Defence Response and Disclosure Request, in light of the "Prosecution's Notice of Filing of an Item Received in Response to an RFA", 5 March 2018, ICC-02/04-01/15-1197-Conf, para. 2 (a public redacted version was notified on 16 March 2018).

⁷ Decision on Defence Requests Following Prosecution's Notice of Filing of an Item Received in Response to an RFA, ICC-02/04-01/15-1207, para. 9.

⁸ Email communication from Trial Chamber IX Communications to parties and participants, 22 March 2018 at 11:18.

⁹ Request under Paragraph 9 of Decision ICC-02/04-01/15-1207, ICC-02/04-01/15-1217 (with one confidential annex).

¹⁰ Request, ICC-02/04-01/15-1217, para. 10.

¹¹ Defence Response to the Prosecution's Request to Withhold the Identity of the UPDF Informant, ICC-02/04-01/15-1229-Conf-Exp.

¹² Defence Response, ICC-02/04-01/15-1229-Conf-Exp, paras 5-15.

¹³ Defence Response, ICC-02/04-01/15-1229-Conf-Exp, paras 16-24.

II. Relevant law and analysis

6. The Single Judge notes that Decision 1207 has already made a determination that the Prosecution is obliged to provide the identity of the informant to the Defence, subject to any restrictions on disclosure. The present decision is limited to analysing whether any such restrictions apply.
7. 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’.¹⁴ 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.¹⁵ It follows that the available information must indicate the existence of circumstances that give rise to such a risk.
8. The Single Judge is not persuaded in the present circumstances of the existence of an objectively justifiable risk to the informant. The concerns of the Ugandan Government, annexed to the Request, are set out in generic terms based primarily upon the circumstances in which the informant came to provide information to the Ugandan authorities. However, as highlighted by the Defence, other individuals with a similar background have provided testimony in the present case following disclosure of their identities to the Defence.¹⁶ The Defence is well aware of its professional obligations in relation to the handling of confidential information.¹⁷ Despite being given ample opportunity to do so, the

¹⁴ 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”, 13 May 2008, ICC-01/04-01/07-475 OA, paras 1,55 and 56.

¹⁵ Trial Chamber VII, *The Prosecutor v Jean-Pierre Bemba Gombo et al*, Decision on Modalities of Disclosure, 22 May 2015, ICC-01/05-01/13-959, para. 11.

¹⁶ Defence Response, ICC-02/04-01/15-1229-Conf-Exp, para. 13.

¹⁷ Defence Response, ICC-02/04-01/15-1229-Conf-Exp, para. 11.

Prosecution has failed to demonstrate why disclosure *only* to the Defence poses a risk to the informant and his family in this particular instance.

9. The Prosecution is therefore ordered to disclose the identity of the UPDF informant to the Defence, subject only to ensuring that any appropriate measures still deemed necessary are taken to protect the safety of the person prior to disclosure.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request;

ORDERS the Prosecution to disclose the identity of the UPDF informant and to lift all corresponding redactions in the UPDF report and the sound recording, subject to paragraph 9 above;

ORDERS the Prosecution to disclose RFA 24, the UPDF report, the sound recording, and any transcripts of the sound recording via E-Court;¹⁸ and

ORDERS the Defence to file a public redacted version of its Response (ICC-02/04-01/15-1229-Conf-Exp), 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 20 April 2018

At The Hague, The Netherlands

¹⁸ *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.