

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: **ICC-02/04-01/15**
Date: **7 February 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

Public Redacted Version of “Defence Observations on the Prosecution’s Second Submission of Rule 68(2) Witnesses”, filed on 15 January 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**

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I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby submits its observations on the Prosecution's proposed redactions to 23 witness statements and transcripts of interviews pursuant to Rule 68(2)(b) and (c) of the Rules of Procedure and Evidence.

II. CONFIDENTIALITY

2. Pursuant to Regulation 23 *bis*(2) of the Regulations of the Court, the Defence submits both this document and Annex A as confidential. The Defence shall file a public redacted version of this filing after a decision has been rendered.

III. SUBMISSIONS

a) Defence non-objections

3. The Defence does not object to the proposed redactions by the Prosecution to the following witnesses' statements: P-0001, P-0007, P-0008, P-0015, P-0026, P-0060, P-0061, P-0185, P-0196, P-0268, P-0270, P-0279, P-0281, P-0284 and P-0325.

b) Defence specific objections

4. Attached as Confidential Annex A are specific objections to redaction requests to the statements and transcripts of interviews with P-0040, P-0096, P-0274, P-0282 and P-0287.

c) Defence generalised objections to P-0035, P-0130 and P-0195

5. The Defence objects to the identity and identifying material being redacted in the statements of P-0035, P-0130 and P-0195 because Trial Chamber IX ('Chamber') has not been provided objectively justified factual circumstances that would impermissibly risk the well-being of these witnesses. The Defence respectfully requests the Chamber to order the Prosecution to resubmit these statements without redactions to their names and material which would identify the witness. The Defence does not object to other redaction requests employed by the Prosecution in those statements.
6. The redactions should be rejected because they are unjustified protective measures that would harm Mr Ongwen's rights to a public trial. Rule 68(2)(b) statements are "previously recorded

testimony”.¹ In the similar context of Rule 68(3) statements, the Presiding Judge has given guidance that:

*The procedural function of a Rule 68(3) introduction of former statement is that this former written statement [...] is part of the evidence here in the courtroom. We have just to picture for our self that as if he had said it, for example, on another hearing day viva voce here in the courtroom, this is the procedural function.*²

7. Thus while the filing of public redacted versions of Rule 68(2)(b) are not *viva voce* testimony, the balancing of security considerations and same fundamental right of the Accused to publicity of proceedings are the same as if the statements were testimony. Thus ICC jurisprudence and the prior decisions of the Chamber on protective measures can and should guide the Chamber’s decision on this matter.
8. A redaction is a form of protective measure³ and must be justified accordingly. In respect of protective measures in relation to *viva voce* evidence, the Single Judge noted that pursuant to Articles 64(7) and 67(1) of the Statute “that the publicity of proceedings is a fundamental right of the accused and a necessary component of a fair and transparent trial.”⁴
9. Whether the proposed redactions are conceived of as a notional private session or a protective measure, a prior decision of the Single Judge should be followed. In relation to similar facts the Single Judge noted:

*[...] that for a number of witnesses, the Prosecution grounds the request for in-court protective measures also on the witnesses’ fear of retaliation from Mr Ongwen’s family, associates or supporters, should their status of witnesses against him be publicly revealed. The Single Judge agrees that retaliation on account of testimony before the Court is in fact a risk from which, in accordance with Article 68 of the Statute, witnesses shall be protected from. Any such risk **shall however be objectively justified and, ordinarily, cannot be exclusively based on the witnesses’ own subjective perception.** While a direct threat is not required, there **must however exist factual circumstances** which make the Chamber believe that public disclosure of the witness’s identity would impermissibly risk an undue infringement his or her legitimate interests protected under Article 68 of the Statute.*⁵

¹ Rule 68(2)(b) chapeau.

² ICC-02/04-01/15-T-90-ENG, p. 64, lns 18-25; *see also*, ICC-02/04-01/15-T-114-ENG, p. 42, lns 14-20.

³ Rule 87(1)(a).

⁴ ICC-02/04-01/15-612-Conf, para. 6 (“The Single Judge emphasises, at the outset, that the publicity of proceedings is a fundamental right of the accused and a necessary component of a fair and transparent trial.” *Citing* Articles 64(7) and 67(1) of the Statute).

⁵ ICC-02/04-01/15-612-Conf, para. 29 (‘emphasis added’).

10. The Prosecution fails to give real or identifiable threats against witnesses P-0130 and P-0195 which necessitates the redaction of their names and identifying material. In other words, “the Prosecution has not provided any information as to whether these fears of retaliation are actually justified”.⁶
11. Witness P-0130 has general fears which are not shown to be real or identifiable threats against him because of his testimony *via* Rule 68(2)(b).⁷ Firstly, [REDACTED].⁸ Secondly, a large majority of the people of northern Uganda support Mr Ongwen and want him to come back home. Finally, there has been no direct or circumstantial information showing that [REDACTED]. As such, the Defence requests that his name and identifying material not be redacted and the Prosecution resubmit a redacted version of his statement without this material being redacted.
12. Witness P-0195 states generalities which neither the Prosecution nor the witness believe to be associated with the LRA or the Court.⁹ As explained in that document, it appears her concerns arise from random, non-related acts of criminality. Finally, the Defence notes that her husband, P-0185, is testifying *via* Rule 68(2)(b). Regardless of her fear about being in the media, any attention caused by the media will gravitate to her because of her husband’s testimony who wishes his testimony to be public. As such, the Defence requests that her name and identifying material not be redacted and the Prosecution resubmit a redacted version of her statement without this material being redacted.
13. Finally, the Defence requests [REDACTED] P-0035 [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

IV. CONCLUSION

14. The Defence hereby submits its proposed redactions and requests related to the statements and transcripts submitted in the annexes of ICC-02/04-01/15-1123.

⁶ ICC-02/04-01/15-612-Conf, para. 30.

⁷ UGA-OTP-0282-0442, p. 0445.

⁸ [REDACTED].

⁹ UGA-OTP-0282-0442, p. 0446.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 7th day of February, 2018

At Kampala, Uganda