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

Date: 4 April 2018

**TRIAL CHAMBER IX**

**Before: Judge Bertram Schmitt, Single Judge**

**SITUATION IN UGANDA**

***IN THE CASE OF  
THE PROSECUTOR V. DOMINIC ONGWEN***

**Public  
with Confidential Annex A**

**Request under Paragraph 9 of Decision ICC-02/04-01/15-1207**

**Source: The Office of the Prosecutor**

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

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## Introduction

1. The Prosecution hereby requests relief from the order made by the Chamber in paragraph 9 of Decision 1207<sup>1</sup> that it must provide the identity of a particular individual ('informant') to the Defence. The Prosecution has consulted the Ugandan authorities who oppose such provision, for reasons set out in a letter to be found at Confidential Annex A to this filing.

## Brief Procedural History

2. On 23 February 2018<sup>2</sup> the Prosecution informed the Chamber, parties and Participants that it was, contrary to its previous submissions, in possession of certain material - a report from a UPDF officer and a sound recording on which part of the report was based ('UPDF Report' and 'Sound Recording', respectively) - relating to a specific request for assistance ('RFA 24')<sup>3</sup> concerning the purported death of Vincent Otti.
3. Following a request filed by the Defence on 5 March 2018<sup>4</sup> for a variety of disclosure-related relief the Single Judge ruled on 16 March 2018<sup>5</sup> that the Prosecution should provide the Defence with RFA 24 itself, together with the Sound Recording.<sup>6</sup> In the same ruling<sup>7</sup> the Single Judge ordered that "the identity of the informant in the UPDF Report [...] must also be provided to

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<sup>1</sup> ICC-02/04-01/15-1207.

<sup>2</sup> 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).

<sup>3</sup> RFA/UG/0024.

<sup>4</sup> Defence Response and Disclosure Request, in light of the "Prosecution's Notice of Filing of an Item Received in Response to an RFA", ICC-02/04-01/15-1197-Conf.

<sup>5</sup> ICC-02/04-01/15-1207, para. 9.

<sup>6</sup> The Prosecution had already provided the Defence with a redacted version of the UPDF Report, while noting that it considered that this information was not material to Defence preparation, stating that the purpose was to provide transparency and an explanation for the Prosecution's previous erroneous statements. The redactions were limited to the name of the UPDF informant.

<sup>7</sup> ICC-02/04-01/15-1207, para. 9.

the Defence forthwith unless, within 5 days of notification of the present decision, the Prosecution files a substantiated request for non-disclosure.”

4. On 26 March, by email<sup>8</sup> copied to the Chamber, the Prosecution provided the Defence with copies of RFA 24, the Sound Recording (which had been subjected to minimal distortion and redactions in order to protect the identity of the informant) and English and Acholi transcripts thereof.
5. By exchange of emails<sup>9</sup> the Prosecution sought, and was granted, an extension of the 5-day deadline concerning the provision of the identity of the informant, pending the receipt of the views of the Ugandan authorities. This extension of time was until 6 April 2018. Those views have now been received in the form of the letter at Confidential Annex A.

### **Confidentiality**

6. Annex A is filed confidentially, because it sets out the circumstances in which the informant came to provide information to the Ugandan authorities and it also contains information as to the informant’s current situation. It is in the interest of both the informant and the Ugandan authorities that such details should remain confidential. Making the letter public, even in redacted form, would lead to speculation concerning the informant’s identity.

### **Submissions**

7. The Prosecution has never had contact with the informant. The Prosecution has no information (beyond that set out in Confidential Annex A) as to the informant’s current situation. The informant is not a victim or a witness in the current proceedings.

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<sup>8</sup> Prosecution email 26/3/18 12:28.

<sup>9</sup> Prosecution email 21/3/18 18.58, Defence email 22/3/18 06.48, Chambers email 22/3/18 11.18.

8. Nevertheless the Prosecution submits that the Court is under a duty to have regard to the informant's safety, well-being and privacy, under article 68 of the Rome Statute. The limitation of this duty to 'victims and witnesses' must be read in the light of the Appeals Chamber's decision in the Katanga case<sup>10</sup> that identical wording in rule 81(4) "should be read to include the words "persons at risk on account of the activities of the Court" so as to reflect the intention of the States that adopted the Rome Statute and the Rules of Procedure and Evidence, as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect that category of persons."
9. The Prosecution has no reason to believe that the informant is in possession of any information which is of relevance to the issues in the instant proceedings. The Prosecution is satisfied that rule 77 has no application so far as the informant's identity is concerned. Withholding the informant's identity from the Defence will not cause identifiable prejudice to the preparation of the Defence case.
10. As set out in more detail at Confidential Annex A, the Ugandan Government is concerned that, should the informant's identity and activities become known, there will be a risk of revenge attacks and stigmatisation against the informant as well as against the informant's family members from persons who still hold grudges concerning the armed conflict with which the instant proceedings are concerned.
11. The Ugandan Government suggests that the Court would be unable to protect the informant against these risks eventuating. In fact the Prosecution might be able to take drastic measures such as relocation. This would be contingent on the person's acceptance in the International Criminal Court

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<sup>10</sup> 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" ICC-01/04-01/07-475, paras. 1, 55 and 56.

Protection Program. To visit such measures on an individual (who is neither a victim nor a witness) when it has not been clearly demonstrated that fair trial needs require that his identity be revealed would be disproportionate. In the circumstances the Prosecution considers the Ugandan Government's concerns, should the identity of the informant become known to the Accused, to be objectively justifiable and its request for confidentiality reasonable.

### **Relief Requested**

12. The Prosecution requests that it be permitted to withhold the identity of the informant from the Defence, specifically by maintaining the redactions to the UPDF Report and the minimal distortion and redactions to the Sound Recording as already provided to the Defence. The Prosecution undertakes to keep this issue under review through the duration of these proceedings, so that should there be any change to the position as it is submitted to be in paragraph 11 hereof the matter can be reviewed and the Chamber informed.



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Fatou Bensouda,  
Prosecutor

Dated this 4<sup>th</sup> day of April, 2018  
At The Hague, The Netherlands