

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **29 March 2017**

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

**Defence Response to the Prosecution Request for
Non-Standard Redactions of Item UGA-OTP-0159-0119**

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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James Stewart, Deputy Prosecutor
Benjamin Gumpert, QC

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Unrepresented Victims

**Unrepresented
(Participation/Reparation)**

Applicants

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Section**

I. SUBMISSIONS

1. The Prosecution request that non-standard redactions be granted should be rejected as the Prosecution has failed to justify the necessity of its proposed redactions. The terse response fails to set out a legal basis for the redactions and raises further questions.
2. On 15 March 2017, following several months of correspondences, the Defence requested¹ Trial Chamber IX ('Trial Chamber') to order disclosure of a range of materials related to the circumstances of hostilities between the LRA and Ugandan Government.
3. On 27 March 2017, the Prosecution responded to the Defence request.² Without addressing the legal arguments of the Defence, or clarifying whether it accepted the scope of obligations asserted by the Defence, it stated that "in order to minimise any distraction or unnecessary consumption of resources in litigating the limits of appropriate disclosure in this case"³ it had "conducted a supplementary review of all undisclosed items in the Prosecution's possession".⁴ One identified item,⁵ listing security incidents, originated from the UN ('UN Report'). The Prosecution sought permission to disclose the item and as part of the permission to disclose the item, the UN requested that names of third party organisations be redacted. Thus, the Prosecution requested three (3) non-standard redactions of this item.
4. On 28 March 2017, the Trial Chamber ordered the Defence to respond to the new request for non-standard redactions by 16h00 of 29 March 2017.⁶
5. A redaction constitutes a form of non-disclosure. Following Appeals Chamber jurisprudence full disclosure is the rule and exceptions thereof must be justified.⁷ The exceptions to non-disclosure are closely circumscribed. The Prosecution has not put forth a basis for the non-standard redactions whether stemming from the Rules of Procedure and

¹ ICC-02/04-01/15-759-Conf.

² ICC-02/04-01/15-792 ('Prosecution Response').

³ Prosecution Response, para. 3.

⁴ Prosecution Response, para. 2.

⁵ UGA-OTP-0159-0119.

⁶ Email, subject: 'Decision on Response Deadline for New Request in ICC-02/04-01/15-792', sent 9h42 on 28 March 2017 ("[...]In ICC-02/04-01/15-792, the Prosecution requests certain non-standard redactions in the course of responding to Defence request ICC-02/04-01/15-759-Conf. Having regard to Regulations 24 and 34 of the Regulations of the Court, responses may be filed to this new redactions request by 16:00 on Wednesday, 29 March 2017. [...]").

⁷ ICC-01/04-01/07-475 OA, para. 70.

Evidence⁸ ('RPE') or the *de facto* redaction protocol.⁹ In its response, the Prosecution has also not sought to explain why the redactions are necessary and proportionate to its interference with the rights of the Accused.¹⁰

6. With regards to the absence of a legal basis for the request, the Defence takes the opportunity to make three observations. Firstly, as with most requests for non-standard redactions, for obvious reasons, the Defence is unable to easily comment upon the content of the proposed redactions.
7. Secondly, the Defence notes that becoming aware of the existence of up to three organisations operating in Uganda in 2005 poses no objective threat to the individuals who worked in those organisations. Moreover, the Defence, through disclosure, is aware of multiple organisations that have assisted in investigations or interacted with international organisations or governments. To the best knowledge of the Defence, the Prosecution has not claimed that this has ever impacted upon or hindered its investigations.
8. Thirdly, the Defence notes a surprising aspect of the request for non-standard redactions. Though the Prosecution's request for non-standard redactions does not reference Rule 82 of the RPE which concerns Article 54(3)(e) material, the UN Report, which is an incident report, is titled on each page "*Article 54 Confidential United Nations DSS*".¹¹ In a prior letter that forms the basis of the initial Defence disclosure request, the Defence, referencing security incident reports, asked:

From [disclosed] correspondences, it appears at least possible that the material was obtained pursuant to an Article 54(3)(e) agreement. If this is the case, can you please confirm this so that we can proceed accordingly.¹²

To which the Prosecution responded:

With regard to your request F, the Prosecution is not withholding any information on the basis of article 54(3)(e).¹³

⁸ I.e. Pursuant to Rule 81 or Rule 82.

⁹ ICC-02/04-01/15-224.

¹⁰ ICC-01/04-01/07-475 OA, paras 70-73.

¹¹ (emphasis added).

¹² ICC-02/04-01/15-759-Conf-AnxA, p. 9, section F.

¹³ ICC-02/04-01/15-759-Conf-AnxB, p. 9.

And finally the Defence confirmed:

Thank you for your explanation and confirmation that no information is presently being withheld on the legal basis of Article 54(1)(e).¹⁴ (sic)

9. The Prosecution Response that contains the request for non-standard redactions appears to indicate that the chronological order of events to the present point was as follows (1) *inter partes* communications, (2) the formal Defence request for disclosure was filed,¹⁵ (3) in response to the Defence Request “senior lawyers on the Prosecution trial team conducted a supplementary review of all undisclosed items”¹⁶, (4) items were identified for disclosure,¹⁷ and (5) the UN was consulted regarding whether the “Article 54 Confidential” item could be disclosed.¹⁸
10. The Defence does not wish to assert dishonesty as regards to the veracity of the original response to the Defence letter;¹⁹ however, the facts coming out of the procedure do merit explanation as it appears on its face that an item’s disclosure – which was labelled ‘Article 54’ – was subject to the authorisation of the UN following that response. In any case, the disclosure of the UN Report that responds to a request made 6 months prior suggests a lack of due-diligence.
11. Despite this background, the Prosecution does not indicate that redactions are sought pursuant to Article 54(3)(e) and Rule 81(4) of the RPE. Thus, in conclusion, it is submitted, that there is no legal basis for the non-standard redactions and the material should be disclosed un-adulterated.

II. RELIEF

12. For the reasons described above, the Defence requests Trial Chamber IX to reject the request for non-standard redactions.

¹⁴ ICC-02/04-01/15-759-Conf-AnxB, p. 7.

¹⁵ ICC-02/04-01/15-759-Conf.

¹⁶ Prosecution Response, para. 2.

¹⁷ Prosecution Response, para. 2.

¹⁸ Prosecution Response, para. 5.

¹⁹ ICC-02/04-01/15-759-Conf-Conf-AnxB, p. 9.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 29th day of March, 2017

At The Hague, The Netherlands