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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
“Reply to ‘Prosecution’s Response to the
“Defence Request for Remedies in Light of Prosecution Disclosure Violations””,
filed 28 February 2020 (ICC-02/04-01/15-1723-Conf)”, filed 7 April 2020**

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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I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby replies to the submissions of the Prosecution on the issue of "the number of duplicate records and the difficulty of this determination".¹ In a nutshell, there are technical, evidentiary, and legal problems which prevented the Defence from providing an answer previously. These are discussed below and some of these problems persist to the present.
2. At a technical level, the core submission is that different technical solutions result in different totals of how many duplicate records there are. Because of the technical complexity, the Defence assessment is tentative and may likely fail to identify all non-duplicate records. Because of the complexity, the Defence submits it is incumbent upon Trial Chamber IX ('Trial Chamber') to conduct its own examination before accepting the Prosecution's estimates. A separate difficulty of determination relates to a factual determination of what the Prosecution describes as "essentially duplicate" records.² The Defence submits that, if a record has close to 185 additional pieces of information, that it cannot be considered essentially duplicative.³ Focusing too strictly on the degree of overlap between individuals in the newly disclosed databases⁴ that can be identified in the previously disclosed databases⁵ obscures the prejudice of the late disclosure. It cannot be overemphasised that the late disclosure of individual's identities is prejudicial. However, the Prosecution approach oversimplifies the issue and ignores that if the Newly Disclosed Material contains substantially more information about an individual than the Previously Disclosed Material, then it this also becomes non-duplicative.

¹ ICC-02/04-01/15-1726, para. 1.

² ICC-02/04-01/15-1723-Conf, para. 8.

³ See footnote 26 below.

⁴ UGA-OTP-0012-0524 and UGA-OTP-0024-0111 are collectively referred to as the 'Newly Disclosed Material'. UGA-OTP-0012-0524 contains 12,296 records and indicates that the first record registered was on 1 July 2000 and according to the Prosecution covers up to the period of May 2004. UGA-OTP-0024-0111 contains 810 records from between June and August 2004.

⁵ UGA-OTP-0165-0124 and UGA-OTP-0244-0909 are collectively referred to as the 'Previously Disclosed Material'. UGA-OTP-0165-0124 comprises 5,571 records and according to the Prosecution covers the period from March 2001 to Aug 2009. UGA-OTP-0244-0909 comprises 13,075 records and according to the Prosecution contains records from between March 2001 to August 2009; however, it has records which indicate a registration date as late as August 2015.

II. BACKGROUND

3. On 28 February 2020, the Prosecution responded⁶ to a Defence request for several remedies related to a late disclosure by the Prosecution of databases originating from the Ugandan Amnesty Commission. The Prosecution response argued that the Defence had at no point contested the Prosecution's assessment of the degree of duplication between material previously disclosed and the late disclosed material. On 4 March 2020 the Defence sought leave to reply⁷ to the Prosecution in relation to this.
4. The Trial Chamber granted the Defence request for leave to reply on 13 March 2020 ordering a reply by 20 March 2020.⁸ On 16 March 2020, the Defence requested a variation of the deadline to at least 7 April 2020 for the reply given a Registry administrative order to work remotely until at least 1 April 2020 on account of public health measures.⁹ The reason for the Defence request was that providing an accurate reply required the use of the software *Microsoft Access* to analyse the relevant material. At the time, this software was not available remotely.¹⁰ The request was granted that day "[c]onsidering the exceptional circumstances".¹¹

III. CONFIDENTIALITY

5. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court, the present reply is filed confidentially due to the need to refer to the names of individuals appearing in the various confidential databases to illustrate Defence submissions.¹² A public redacted version will be filed concurrently to these submissions.

IV. REPLY

6. Although the Prosecution has stated that it "accepts that the Trial Chamber should not consider any incriminatory factual propositions from the Prosecution in relation to the

⁶ ICC-02/04-01/15-1723-Conf.

⁷ ICC-02/04-01/15-1726.

⁸ ICC-02/04-01/15-1727.

⁹ Email, sent 16 March 2020 at 14h40, subject: 'Request for variation of deadline for reply granted in ICC-02/04-01/15-1727'.

¹⁰ The Defence sought to find a work-around; however, discovered on 26 March 2020 that Microsoft Access became enabled for remote use at some point that week. This appears to have been related to work done by the Courts IT service on a piece of software used for Defence disclosure.

¹¹ Email, sent 16 March 2020 at 15h33, subject: 'Decision to vary deadline for reply granted in ICC-02/04-01/15-1727'.

¹² See footnotes 21, 22, and 34.

material provided on 8 October 2019”,¹³ the Defence submits that the Trial Chamber should not use any of the present submissions to Mr Ongwen’s detriment. These submissions are required because of the Prosecution disclosure violation and they would not have been necessary had the material been disclosed at the correct time.

A. The presumption of innocence combined with the late disclosure do not require the Defence to put forward a conclusive statement as to the degree of non-duplication

7. Like any other item of evidence, the content of a database requires interpretation. The Defence does not have a burden of proof and it does not have to advance positive factual claims. Therefore the Defence is not required to advance positive claims about the degree of non-duplication for the issue of late disclosure to be taken seriously by the Trial Chamber.
8. One of the difficulties for the Defence in contradicting the Prosecution numbers stems from the fact that for the Defence to assert that a certain number of individuals did, or did not, belong to a category, with only a limited understanding of the voluminous records contained in Newly Disclosed Material, would be risking making claims that were potentially later prejudicial to Mr Ongwen’s case. Particularly in respect to the Prosecution claims regarding the number of individuals in Sinia or the number of individuals who apparently indicated Mr Ongwen as their commander,¹⁴ the information in the disclosed material should not be reduced a blunt figure especially when the provision is rushed.
9. Although the new records include an indication of the individual’s unit, there are many indicated units in the database which have not appeared in testimony. Some could be explained as spelling variations from the interviewer; however, it is also possible that the interviewee misremembered a name – which may be relevant – or in fact that the unit existed. It is unfair for the Defence to need to advance a conclusive number. A late disclosure should not force the Defence to choose between hastily tying itself to a factual position – for it has no burden of proof – and receiving a remedy for prejudice caused by the Prosecution.
10. Similarly, there are units indicated within the Prosecution’s list of duplicates – for example ‘Coy’ and ‘H/Q’ – which within the Prosecution’s theory of LRA structure would have potentially been relevant to the numbers of Sinia or non-Sinia records represented by the Prosecution. The Defence cannot advance a claim that any given individual was, or was not, a member of Sinia without research and investigations. At the point which the Prosecution

¹³ ICC-02/04-01/15-1723-Conf, para. 28(c).

¹⁴ *Ibid.*, para. 9.

advanced its figures on 4 October 2019, the Defence had almost presented its last witnesses, investigations had effectively completed, and there was neither time nor did a budget exist for further investigations.

11. The Prosecution has taken the position that where the rebel group for an individual is indicated as “Holy”, then this was conclusive that the individual was in the LRA. Several of these individuals apparently indicated their unit commander as “Alice Lakwena” and information in the records suggests that some of these individuals were involved in an earlier period of the conflict. The Defence case presented how the length of time was an important factor in the formation of strong LRA spiritual beliefs.¹⁵
12. Thus the denial of names of individuals with experience from the early period of the LRA, which could have shed light on the effect of this during the charged period, was prejudicial. If, however, the Defence agreed with the Prosecution position that ‘Holy’ is always¹⁶ synonymous with the LRA, then this could incorrectly confirm prejudicial testimony against Mr Ongwen. This presents a difficulty in responding in an unelaborated way to a figure provided by the Prosecution and illustrates the problem of the Prosecution framing the prejudice to the Defence in terms of whether the Defence has or has not contested particular figures.
13. For these reasons, the Defence urges the Trial Chamber to conduct its own assessment and not rely solely upon the representations in an adversarial process by the Prosecution.

B. Identifying non-duplicate records across four databases

14. In addition to the legal issues mentioned above, identifying non-duplicate records across four databases was not feasible between October 2019 and February 2020 given Defence resources. On the one hand, doing the work without the aid of computer would require too many hours of work and on the other hand the complexity of programming a computer, given the issues below, could not be done in the marginal time around Defence expert witnesses and drafting closing submissions.

i. Human resources and inequality of arms

15. If done through human inspection of the records, taking an optimistic estimate of 1 minute per record, identifying the non-duplicates would have taken approximately 90 hours of

¹⁵ See for example ICC-02/04-01/15-T-197, p. 18, line 21 to p. 21, line 7.

¹⁶ ‘The LRA was *one* of the groups in Uganda referred to as “The Holy”’ (emphasis added). ICC-02/04-01/15-487-AnxA-Red, agreed fact A7.

continuous work. If only the LRA indicated individuals were checked, then the core task involved confirming whether any of 5,347 records from the two newly disclosed databases were present in any of the 15,744 previously disclosed records. Given the repetitive nature of the task, the possibility of human error doing such work is also high, thus, for a Defence team, only automated assistance with a computer was a realistic solution.

16. The programming of queries of Microsoft Access databases is a skill not common on Defence teams. Unlike the Prosecution, the Defence does not have a dedicated section or specialists with skills needed for such kinds of analysis. As illustrated by the issues above, the need for knowledge of the case itself is also important. Given the limited time seeking an outside consultant and overcoming the hurdles of obtaining legal-aid funding also would have taken resources away at a critical juncture in the case.

ii. The technical challenge of identifying non-duplicate records across four databases

17. Major discrepancies between the newly and previously disclosed databases meant that instructing a computer how to identify non-duplicative records is also not a task that could have been easily undertaken in the busy period in which the material was disclosed. The task is one of logical problem solving involving trial and error that requires extended and uninterrupted periods of focus.
18. There are several major technical issues that dramatically complicated using a computer to identify the non-duplicate records. Before greater elaboration is provided below, these are them in brief:
 - a. The largest previously disclosed database lacks an index number which is used in the newly databases to identify unique records;
 - b. There are multiple records within the individual databases which refer to the same individual;
 - c. Where the newly disclosed databases and the previously disclosed databases have shared fields of information, the information contained in records in one of them is sometimes missing; and

- d. The newly disclosed databases and the previously disclosed databases do not have all the same information.
19. The first issue is that there is no consistent unique index numbers used across all the disclosed material. The ideal way to identify duplication is where the computer can identify all records in one database that do not have a corresponding index number in another database. The field 'IndIOMInd_ID'¹⁷ has unique values¹⁸ which could have mostly¹⁹ served this purpose.²⁰ However, three quarters of the Previously Disclosed Material is contained within UGA-OTP-0244-0909, which does not have the field 'IndIOMInd_ID'.
20. Secondly, the reason that duplicate records contained within an individual database are problematic is because they may either be a genuine duplicate or in fact refer to two or more individuals with the same name. In some cases, the multiple records relate to different individuals. In other cases, it appears that a person was registered twice, or a correction was entered but the inaccurate record was not deleted.²¹ In such case, it is not clear which is the correct record. This is problem because using a computer to decide whether a record is a duplicate here would involve potentially a similar number of programmed rules as there are duplicates and this might still not be able to identify the correct record to use.
21. Thirdly, where information is missing in the Previously Disclosed Material but present in the Newly Disclosed Material, this can lead the computer to falsely identified non-duplicative records. This is because the program asks whether the information is the same between the two fields and it is not. As described below, some records which are duplicates following the Prosecution's approach are missing information about the 'Village' whereas the corresponding record in the Newly Disclosed Material contains this information.²²
22. Finally, in some cases, the newly and Previously Disclosed Material does not contain the same information, which is a problem because it is not possible to use the computer to compare records based upon a criterion. An important example discussed below is that the

¹⁷ The meaning of this field is not clear but it is a unique identification number.

¹⁸ The other possible field 'Ind_ExtIndRefID' was discovered to have duplicates and so cannot be used for this.

¹⁹ Two records in UGA-OTP-0012-0524 do not have a value for this field but could have feasibly been investigated by hand or by using one of the other techniques described in this reply.

²⁰ Using this index, one can conclude that close to none of the records in the Newly Disclosed Material are contained within the previously disclosed database UGA-OTP-0165-0124.

²¹ See for example in UGA-OTP-0244-0909: There are two records for [REDACTED] with a village indicated as [REDACTED]. The records contain a differing registration date – four months apart – and difference in age.

²² See for example the individual on the Prosecution list of non-duplicates named: [REDACTED] with IndIOMInd_ID: [REDACTED] whose name is in UGA-OTP-0012-0524 and UGA-OTP-0244-0909.

New Material has a field for date of birth²³ whereas the largest database from the Previously Disclosed Material has only 'Age'. Given the apparent imprecision of comparing a date against a presumed and uncertain year,²⁴ the Defence did not consider it correct to rely upon this field to provide a conclusive list of non-duplicates.

iii. There are many different answers to the question of how many non-duplicate records are contained within the Newly Disclosed Material

23. Firstly, how the Trial Chamber understands the meaning of non-duplicative material impacts upon the assessment of how many new records have been disclosed. The Newly Disclosed Material has considerably more fields per record. Some of the information appears to be shared, but the naming of fields is also not consistent, which could also lead to incorrect conclusions about the degree of overlap.²⁵ Because the previously disclosed database UGA-OTP-0244-0909 has significantly less information²⁶ and does not contain a unique index, in many senses virtually all the Newly Disclosed Material contains non-duplicate records. Given the technical challenges described in this reply, and the unequivocally greater amount of information in the Newly Disclosed Material, the Defence submits, and re-iterates,²⁷ that focus should be upon the extent of new information rather than the number of non-duplicates.
24. On the other hand, if focus is solely placed upon whether a record in the Newly Disclosed Material describes the same person that is reflected in a record of the Previously Disclosed Material, because of the issues described in this reply, the methodology selected will arrive at different conclusions.
25. For example, a combination of family name and first name does not suffice to identify non-duplicate records. The Newly Disclosed Material and the Previously Disclosed Material contain many duplicate names. To identify a duplicate record, a combination of fields must be selected that uniquely describes a record. Two pieces of information that are often used for

²³ An inference that is drawn from the field name: 'Ind_DOB'.

²⁴ Noting that assumptions would have to be drawn on the birth year based upon the date the Prosecution received the item.

²⁵ For example, UGA-OTP-0244-0909 has 'Village' which appears to correspond to 'Ind_VillageBirth' in the other databases.

²⁶ UGA-OTP-0244-0909 database only has 28 fields in comparison to the 211 that the Newly Disclosed Material have. Previously disclosed UGA-OTP-0165-0124 has 173 fields.

²⁷ ICC-02/04-01/15-1718-Conf, paras 42-43.

identifying individuals are date of birth and place of birth. However as discussed,²⁸ UGA-OTP-0244-0909 contains only 'Age' and so cannot be used.

26. Using family name, first name, and 'Village'²⁹ results in 231 identified non-duplicates.³⁰ Yet the result is not fully accurate because some of the individuals with the name and similar characteristics appear in the Previously Disclosed Material but without a village indicated. The Defence notes again³¹ that this information supposedly comes from the same source, and given that the Newly Disclosed Material pre-dates³² the Previously Disclosed Material according to the Prosecution, it is inconsistent with the Prosecution provided chronology that the material from a later time lacks information which seems to have existed previously.
27. There are two other fields of information in UGA-OTP-0244-0909 with comparatively distinct values which could be used to narrow down the list. These are 'Date of escape' and 'Registration Date'. These fields are not filled in across all the databases but by using the computer to identify records where the family name, first name, and the escape date or alternatively registration date match, then it is possible to identify a list of 146 individuals which mostly overlap with the list provided by the Prosecution.³³
28. It is not clear what process the Prosecution used to identify the non-duplicate records, but this last Defence method identifies 3 individuals³⁴ who do not appear on the Prosecution list who are indeed not duplicates in the strict understanding of the Prosecution.

iv. Conclusions

29. It is important to stress yet again that the above various results flow from different criteria for identifying non-duplicative.

²⁸ See para. 22 above.

²⁹ Which seems to correspond to 'Ind_VillageBirth'.

³⁰ This number does not include the 28 individuals whose rebel group was indicated at 'Holy' for the reasons described in para. 12 above.

³¹ ICC-02/04-01/15-1718-Conf, para. 41.

³² The Newly Disclosed Material was claimed to have been collected in June and October 2004 whereas the Previously Disclosed Material was claimed to have been collected in February 2006 and September 2015. See ICC-02/04-01/15-1718-Conf-AnxC, p. 7.

³³ For the reason described in para. 12 above, the list of 146 individuals does not include the 28 individuals indicated as 'Holy' which do not appear in any of the Previously Disclosed Materials.

³⁴ [REDACTED], registered [REDACTED], with IndIOMInd_ID: [REDACTED]; [REDACTED], no registration date, IndIOMInd_ID: [REDACTED]; and [REDACTED], registered 18 June 2004, IndIOMInd_ID: [REDACTED].

30. The Defence methodology has identified non-duplicates which the Prosecution has not. Similarly, the Prosecution on one understanding of non-duplicates has identified false positives because there are individuals in its list that have a record in UGA-OTP-0244-0909 but again lack a village indicated. Yet the Prosecution also has identified more individuals – 171 once the 28 members of ‘Holy’ are removed. The Prosecution approach is not perfect, and this raises the question of whether the Prosecution analysis may have incorrectly missed other non-duplicate records.
31. Similarly, the Defence submits that its own methods are likely in-exhaustive and probably failed to identify other non-duplicates. Given the various technical problems described above, and the variety of totals identified, it would be incorrect to conclude that the duplicates identified are the only possible non-duplicates. Rather, the numbers may reflect the minimum number of duplicates.

V. CONCLUSION

32. The Defence hereby provides the above reply granted by the Trial Chamber in Decision 1727.
- Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 7th day of April, 2020
At Kampala, Uganda