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**International
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Court**

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

Date: **8 June 2020**

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

with Confidential *Ex Parte*, available only to the Prosecution, Annexes 1-21

Prosecution's Amended Request for Non-Standard Redactions

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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Introduction

1. The Prosecution hereby amends, in part, its filing ICC-02/04-01/15-1737 of 22 May 2020. The Prosecution's request for non-standard redactions in filing ICC-02/04-01/15-1737 is hereby withdrawn and replaced by the present amended request. The notification of disclosure on 22 May 2020 remains valid, although the Prosecution has also re-disclosed some items in connection with the current amendment.

2. The Prosecution requests authorisation to apply non-standard redactions pursuant to rules 81(1) and 81(4) of the Rules of Procedure and Evidence to the 27 items identified for disclosure in the Decision on Defence Request for Remedies in Light of Disclosure Violations ("Decision on Disclosure").¹ The proposed redactions are necessary to protect internal Prosecution work product and to ensure the proper functioning and confidentiality of the Prosecution's system for assessing, monitoring, and protecting the security and welfare of witnesses, potential witnesses, and third parties.

Confidentiality

3. The Prosecution files Annexes 1 to 21 as "Confidential, *Ex Parte*, only available to the Prosecution" because they contain information to which redactions have been applied in the course of *inter partes* disclosure. Communication of the redacted information to the other Parties and Participants would render moot this request for authorisation of redactions.

Procedural Background

4. On 22 April 2020, Trial Chamber IX ("Chamber") issued the Decision on Disclosure and ordered, *inter alia*, that the Prosecution disclose 27 items ("Disclosed

¹ ICC-02/04-01/15-1734, para. 34 and p. 18. ("ORDERS the Prosecution to disclose the 27 original items as listed in ICC-02/04-01/151723-Conf-AnxB").

Items”). The Chamber ordered the Prosecution to “disclose the items in question, applying any appropriate redactions, as necessary, in accordance with the redaction protocol or, as the case may be, applying to the Chamber for any non-standard redactions”.²

5. On 22 May 2020, the Prosecution disclosed to the Defence “Trial Rule 77 package 134” containing the Disclosed Items, all of which featured standard redactions, and 26 of which featured non-standard redactions pursuant to rules 81(1) and 81(4). On the same day, the Prosecution provided notice of the disclosure of the Disclosed Items and simultaneously requested authorisation from the Chamber to apply non-standard redactions.³

6. On 26 May 2020, the Prosecution notified the Chamber, Parties, and Participants by email that filing ICC-02/04-01/15-1737 had inadvertently included only submissions related to non-standard redactions under rule 81(4) and failed to address non-standard redactions sought under rule 81(1). The Prosecution informed the Chamber that it intended to file an amended request covering both categories of non-standard redactions and including new annexes highlighting both categories. On the same day, the Chamber took note of the Prosecution’s communication, and stated that the deadline for any responses to the Prosecution’s request would be calculated from the notification of the amended request.⁴

7. In the process of revising its submissions and related annexes, the Prosecution has adjusted the labelling of some redactions to ensure consistency, and has also removed or reduced the extent of a small number of redactions. Consequently, on 5 June, the Prosecution re-disclosed the Disclosed Items. In the redacted versions of

² ICC-02/04-01/15-1734, para. 34.

³ ICC-02/04-01/15-1737.

⁴ Email communication on 27 May 2020 at 10h22 from the Chamber to the Parties and Participants.

the documents, available in eCourt, redactions proposed pursuant to rule 81(1) are marked as category C, and redactions applied pursuant to rule 81(4) as category D.⁵

Submissions

Description of Disclosed Items

8. All but one of the Disclosed Items relate directly to the Prosecution's system for assessing, monitoring, and protecting the security and welfare of witnesses, potential witnesses, and third parties potentially at risk because of their association with the Court. All but two of the Disclosed Items are standard questionnaires used by the Prosecution to assess the security and health status of witnesses, or audio recordings made during the completion of such questionnaires. Item UGA-OTP-0238-0699 is a psycho-social assessment of a potential witness, and UGA-OTP-0263-1765 is an email communication between staff members of the Office of the Prosecutor.

9. Twenty-one of the Disclosed Items are appended to this request as confidential *ex parte* Annexes 1-21. In those annexes, the information for which non-standard redactions are requested has been highlighted – in grey for rule 81(1) redactions and orange for rule 81(4) redactions. (Portions of the annexes are also subject to standard redactions; those are not highlighted in the annexes, but can be seen in eCourt.)

10. The remaining six Disclosed Items are audio files to which rule 81(1) and 81(4) redactions have been applied by editing the relevant file. These audio files have not

⁵ The items were disclosed in Trial Rule 77 Disclosure Package 135, with the requested non-standard redactions applied, pending resolution of the present request, in accordance with ICC-02/04-01/15-224, para. 7, as adopted by the Trial Chamber in ICC-02/04-01/15-432, para. 4.

been appended to this submission. However, they are already available to the Chamber in unredacted form,⁶ and available in eCourt with redactions.⁷

Justification for non-standard redactions pursuant to rule 81(4)

11. Because all but one of the Disclosed Items relate to the Prosecution's system for assessing, monitoring, and protecting the security and welfare of witnesses, potential witnesses, and third parties, the Prosecution addresses rule 81(4) first.

12. Rule 81(4) provides that the "[c]hamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families".

13. Article 68(1) of the Rome Statute provides that the "Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. [...] The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."

14. These provisions also protect third parties at risk on account of the activities of the Court.⁸

15. The non-standard redactions applied to the Disclosed Items under rule 81(4) relate to information provided by witnesses regarding their security circumstances

⁶ See ICC-02/04-01/15-1723-Conf-Exp-Anx22 to ICC-02/04-01/15-1723-Conf-Exp-Anx29.

⁷ The time stamps of the redactions to the audio files are as follows: UGA-OTP-0160-0095: Track 01 from 00:00:37 to 00:06:23, Track 03 from 00:00:33 to 00:16:30 and from 00:16:37 to 00:30:52; UGA-OTP-0158-0002: from 00:00:00 to 56:29 and from 01:07:30 to the end; UGA-OTP-0158-0034: from 00:00:00 to 01:05:30 and from 01:11:40 to the end; UGA-OTP-0158-0040: from 00:00:00 to 01:16:40 and from 01:21:54 to the end; UGA-OTP-0227-0100: from 00:00 to 00:44:10 and from 00:45:58 to the end; and UGA-OTP-0189-0020: from 00:00:00:00 to 00:08:18:05, from 00:09:33:00 to 00:09:49:00 and from 00:09:57:01 to 00:15:42:22.

⁸ ICC-02/04-01/15-1348, para. 12 & n.19.

and aspects of their background relevant to their security circumstances and welfare, as well as that of their families. In addition to information directly related to specific witnesses' circumstances, this information also reflects the structure and functioning of the Prosecution's system of witness protection and management generally.

16. The Prosecution notes that similar redactions, aimed at protecting and ensuring the effective functioning of the Prosecution's system of witness and victim protection, have been approved in the past. For example, in a prior decision in this case regarding non-standard redactions to a biographic data and security questionnaire, the Single Judge noted that:

"Concerning the 'objectively justifiable risk to the safety of the person or interest concerned', the Single Judge acknowledges that it is possible that disclosure of the Prosecution's system of witness protection may create a risk with regard to the safety of Prosecution witnesses, were the system to be 'shared beyond the dictates of operational necessity'. Problems could include the 'ease with which [the Prosecution's system of witness protection] can be side-stepped by external actors', or, the risk that the Prosecution's system of witness protection could reveal to external actors who is a Prosecution witness.

"The Appeals Chamber of this Court has confirmed that Rule 81(4) of the Rules must be read to include the words 'persons at risk on account of the activities of the Court'. The Single Judge considers Prosecution witnesses who have had contact with the Prosecution's system of witness protection to fall within this category of persons. Therefore, there is an objectively justifiable risk to the 'safety of the person or interest concerned'.

The Single Judge is persuaded that, by demonstrating how the objectively justifiable risk arises from disclosure to all actors external to the Prosecution, the Prosecution has captured how the same risk must necessarily arise from 'disclosing the particular information to the Defence' as discussed in the Appeals Chamber jurisprudence underlying the Rule 81(4) test.

The Single Judge considers the contested information to be of no relevance to Mr Ongwen's case, and that no prejudice would be caused

by its non-disclosure, stressing once again the countervailing objective risks which disclosure would cause.”⁹

17. The requested non-standard redactions under rule 81(4) are of systemic importance, beyond the confines of the Disclosed Items. The Prosecution operates a system of witness and victim protection in order to fulfil its duties under, *inter alia*, article 68 of the Statute. This system involves collection of sensitive security data from every witness the Prosecution interviews, the assessment of such data by Prosecution staff specialised in witness protection, and where necessary the development and implementation of protective measures, in consultation with the Registry’s Victims and Witnesses Section as appropriate. These processes allow the Prosecution to plan and implement appropriate risk mitigation measures for large numbers of witnesses and contacted individuals, and where necessary their families or other third persons. To ensure the effectiveness of this system, it is vital that the details of the system are not shared beyond the dictates of operational necessity. Dissemination of such information outside the Prosecution increases the ease with which external actors might circumvent or undermine that system. It also increases the potential need for more intrusive protection measures that are highly disruptive to the lives of witnesses and their families, and are time-consuming and costly to implement.

18. These considerations are most acute with respect to the individual protection assessments and related audio recordings which form the bulk of the Disclosed Items. However, the Prosecution submits that similar considerations also justify rule 81(4) redactions to item UGA-OTP-0238-0699. This item is a psycho-social assessment of a witness. Although it was conducted primarily to assess and protect the witness’s mental and physical well-being, rather than his safety and security, those interests are also protected by article 68 and rule 81(4), and the Prosecution’s practices and working methods to that end should also be maintained confidential to

⁹ ICC-02/04-01/15-1348, para. 11-14 (footnotes omitted).

ensure their effectiveness. As with the other Disclosed Items, the case-relevant information in this item has been disclosed, and redaction of the remaining information will result in no prejudice to the Defence.

19. The Prosecution notes that the proposed rule 81(4) redactions are not based on concerns about the willingness and ability of Defence counsel in this case to abide by their confidentiality obligations. Instead, the proposed redactions are based on best practices for witness protection and management, by which information potentially impacting on witness security should be disseminated outside the Prosecution only when, and to whom, necessary. Because the redacted information is not necessary to the Defence to prepare its case, and does not otherwise impact on the fairness of these proceedings, the Prosecution submits that the proposed redactions should be allowed.

Justification for redactions pursuant to rule 81(1)

20. In addition to implicating witness security, the Disclosed Items contain a large amount of internal Prosecution work product protected from disclosure under rule 81(1). The non-standard redactions to the Disclosed Items requested under rule 81(1) apply mainly to form questionnaires and checklists relating to witness security and welfare, completed by Prosecution staff or in many instances left blank. The Prosecution submits that these redactions fit within the scope of rule 81(1).

21. Rule 81(1) provides that “[r]eports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure”.

22. Chambers have held that “the Rules of Procedure and Evidence contain restrictions on disclosure for [...] internal assessments on various individuals and work processes” and that “[t]his information clearly falls within the scope of non-

disclosable material pursuant to Rule 81 (1)".¹⁰ Chambers have also noted that where the relevant redactions "do not pertain to [the witness's] statements during the interview, but to a note made by the Prosecution", they "therefore qualify as internal work product in accordance with Rule 81(1)."¹¹

23. Pre-Trial Chamber I has determined that "information relating to Prosecution's [...] techniques of investigation" is "to be considered as an internal information prepared by the Prosecution in connection with its investigation".¹² Other international criminal courts with provisions similar to rule 81(1)¹³ have adopted a practice of restricting disclosure to the Accused of material such as internal memoranda, correspondence, handwritten questionnaires, and notes of meetings.¹⁴

24. In light of this case law, the Prosecution submits that rule 81(1) extends to the proposed "category C" redactions in the Disclosed Items (highlighted in grey in Annexes 1-21). The redacted information relates to the Prosecution's "techniques" for witness management and protection. It consists primarily of questions and checklists relating to witness security and welfare, mostly contained in internal Prosecution forms clearly titled "individual protection assessment". In other words, much of the content of the Disclosed Items was generated by the Prosecution itself. Where information in the Disclosed Items came from witnesses, it was sought for the specific non-evidentiary purpose of witness protection, and obtained separately from any questioning of the witnesses regarding their case-related knowledge.

¹⁰ ICC-01/04-01/06-2585, para. 21. *See also* ICC-01/04-01/06-2656-Red, para. 13.

¹¹ ICC-01/04-02/06-1440-Red, para. 31.

¹² ICC-01/04-01/07-568, para. 31-37. *See also* ICC-01/09-01/11-743-Red, para. 29.

¹³ *See* rule 70(A) in the ICTY, ICTR, and SCSL Rules of Procedure and Evidence.

¹⁴ *Prosecutor v. Nahimana*, Decision on the Prosecutor's Ex Parte Application to exclude certain documents from Defence inspection of Microfiche Material, ICTR-99-52-T, 25 October 2002, p.3. ("[...] many documents contain internal memoranda, correspondence, and notes of meetings at the Office of the Prosecutor at a time when it was developing its investigation and prosecution strategy. Furthermore, many of the documents are in the form of handwritten questionnaires which should be excluded from inspection having the character of internal documents as defined by Rule 70 (A).")

Moreover, the forms were completed by Prosecution staff and were not subject to signature or other means of adoption by the witnesses, another indication that they were intended solely for internal administrative use, rather than evidentiary purposes.

25. Item UGA-OTP-0263-1765 is not a questionnaire relating to the security and welfare of witnesses. However, it is an internal email communication between staff members of the Office of the Prosecutor in 2005. The Prosecution submits that the redacted information – email distribution within the Office of the Prosecutor, contact information for a Prosecution staff member, and the comments and analysis of Prosecution staff members – are internal work product protected by rule 81(1). As with the other Disclosed Items, the potentially case-relevant information in the item has been disclosed, and redaction of the remaining information will result in no prejudice to the Defence.

Redactions pursuant to both rule 81(1) and rule 81(4)

26. The Prosecution notes that many of the proposed redactions would be justified on the basis of either rule 81(1) or 81(4), or both, because they relate to internal work product which reflects the functioning of the Prosecution's system for assessing, monitoring, and protecting the security of witnesses, potential witnesses, and third parties. For practical reasons, the proposed redactions have been labelled with only one redaction category even though the Chamber may consider that, in many instances, either or both bases would apply.

Conclusion

27. For the reasons stated above, the Prosecution requests authorisation for the non-standard redactions described above, including those reflected in confidential *ex parte* Annexes 1-21, pursuant to rules 81(1) and 81(4).



Fatou Bensouda, Prosecutor

Dated this 8th day of June 2020

At The Hague, the Netherlands