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**International
Criminal
Court**

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

Date: **29 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

Confidential

Prosecution's Response and Reply to Defence Filing 1743

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 responds and replies¹ to the Defence's filing ICC-02/04-01/15-1743 ("filing 1743").
2. The Defence's arguments for denying the proposed redactions are based on a misunderstanding of the Prosecution's obligation and ability to protect not only witnesses and other persons, but also its own internal work product, in this case and others. The proposed redactions should be allowed.
3. The Defence in filing 1743 also seeks far-reaching additional relief, including the lifting of certain standard redactions and an order that the Prosecution review its entire evidence collection. The Prosecution submits that those requests are unsubstantiated and unwarranted, and should be rejected.

Confidentiality

4. The Prosecution files this combined response and reply confidentially because the Prosecution's request and the Defence's response were filed confidentially, and because it discusses information redacted in the course of *inter partes* disclosure. A public redacted version will be filed in due course.

Submissions

Proposed non-standard redactions

5. The Defence argues that the non-standard redactions proposed by the Prosecution under rules 81(1) and (4) of the Rules of Procedure and Evidence should be disallowed. With respect, the Defence's arguments flow from a misunderstanding or underappreciation of the Prosecution's ongoing obligation and ability to protect

¹ On 23 June 2020, the Trial Chamber, by email, granted the Prosecution leave to file this combined response and reply no later than 1 July 2020.

and manage witnesses and potential witnesses, and the security and well-being of them and their families, as well as the Prosecution's own internal work product and practices, not only in this case but across cases and situations.

6. As an initial matter, the Prosecution recalls that none of the information subject to the proposed non-standard redactions itself falls under the Prosecution's disclosure obligations as information or evidence that the Prosecution used at trial, that was or is potentially exculpatory, or that was or is material to the preparation of the Defence. The provision of this information to the Defence, or conversely its redaction, is at issue only because the information is contained in the same document as disclosable information (which has already been disclosed to the Defence).² It is not surprising, therefore, that the Defence has made no showing that any of the proposed redactions would cause prejudice to the Defence.

7. The Defence argues that non-standard redactions to some of the security assessment forms are not warranted because the forms are old and the Defence can guess at their content.³ However, the Prosecution's duty to protect witness information does not wither simply by the passage of time, especially when this case has not concluded and most or all of the witnesses at issue could potentially be witnesses in a case against Joseph Kony, for whom a warrant of arrest is still outstanding. Moreover, although the Prosecution's witness management and protection practices have evolved over time, many aspects remain the same, and the institutional need to protect them is undiminished.

8. The Defence also suggests that the proposed redactions are unnecessary because some of the witnesses have already testified or are known to the Defence.⁴ Putting aside the fact that trial witnesses in this case did not testify in detail about their security and well-being arrangements, the mere fact that the Defence believes it

² ICC-02/04-01/15-1743, para. 34.

³ See, e.g., ICC-02/04-01/15-1743, para. 15-16, 30.

⁴ See, e.g., ICC-02/04-01/15-1743, para. 30.

knows, or might themselves ask the individuals about, some of the redacted information does not warrant disclosure of that information by the Prosecution, particularly where it would reveal the Prosecution's internal work product or witness management and protection practices.

9. The Defence alleges that redactions should be disallowed to UGA-OTP-0238-0699-R02 because D-0036 might be proposed as a witness on appeal in this case. That argument is entirely speculative. Moreover, any decision by D-0036 to testify does not remove or supersede the Prosecution's own interest in protecting its internal work product and witness management and protection practices, including psychosocial assessments. Here again, the Prosecution emphasises that the only information in this document falling within the Prosecution's disclosure obligations has *already* been provided to the Defence.

10. For item UGA-OTP-0283-1727-R02, the Defence speculates that it is "unfathomable" that all the proposed redactions are justified.⁵ However, the entire document is an English-Acholi transcript of a security assessment interview, a confidential and sensitive activity at the core of the Prosecution's witness protection and management activities. The only information potentially relevant to this case has been disclosed.

Requests for further relief by the Defence

11. The majority of filing 1743 relates not to the proposed non-standard redactions, but to other matters, such as standard redactions applied pursuant to the redaction protocol in this case.

12. The Prosecution notes the Defence's request for an order regarding provision of additional metadata.⁶ Such matters have always been amicably and efficiently dealt with on an *inter partes* basis. The Prosecution will resolve this issue, without an

⁵ See, e.g., ICC-02/04-01/15-1743, para. 37.

⁶ See, e.g., ICC-02/04-01/15-1743, para. 14.

order from the Chamber, and anticipates that it will be completed this week (the week of 29 June 2020).

13. Much of the remainder of filing 1743 is, in effect, a request that the Chamber remove several whole categories of information from the standard redaction protocol. The Defence attacks the continuing application of standard redactions under categories A.2.4, A.7, B.1, and B.2, primarily on the ground that the Defence already knows or could independently access some of this information.⁷

14. The Prosecution submits that these arguments are again based on a fundamental misunderstanding of the Prosecution's work and its duty of care to witnesses and other persons associated with the Court. The Prosecution's obligations to witnesses, potential witnesses, and other persons with whom it comes into contact do not inexorably diminish over time, nor end once a person has testified or a particular case is over. Even where a Defence team or others might guess at parts of a witness's identifying information or location (or those of his or her family), there are good reasons why the Prosecution would decline to confirm or supplement such information, both for the individual's sake and also for the integrity and perception of the Prosecution's own witness management and protection practices. Consequently, the mere fact that a witness has testified, that the trial hearings have concluded, or that the Defence has contacted a person, does not eliminate the basis for, or applicability of, standard redactions aimed at protecting such information.

15. It is worth noting that on several occasions during trial, the Prosecution provided contact information or assistance in contacting witnesses upon request of the Defence (subject to the consent of the witness). Although the Defence suggests now for the first time, and without elaboration, that information redacted under categories B.1 and B.2 in item UGA-OTP-0198-0249-R02 would have been "highly

⁷ See, e.g., ICC-02/04-01/15-1743, para. 28-29, 39, 44-45.

relevant to the preparation of the Defence's case" and even "vital",⁸ it does not suggest that it requested such information from the Prosecution and was refused. In any event, the Defence has offered no basis to conclude that the Prosecution should have been or should now be obliged to lift the standard redactions applicable to information provided by this individual.

16. The Defence requests lifting of the A.2.4 redaction of the name of a psychosocial expert in UGA-OTP-0238-0699-R02, on the ground that the name of another person performing similar tasks was disclosed.⁹ However, the Prosecution disclosed the name of the other expert because it was relying upon that expert's opinion in litigation regarding article 56 proceedings. The Prosecution has not similarly relied upon any opinion of the expert whose name was properly redacted in UGA-OTP-0238-0699-R02 pursuant to a standard redaction category. The Defence has offered no argument whatsoever as to why it needs this information and this request should be denied.

17. The Defence asks the Chamber to review all standard redactions applied to the disclosed items to determine whether "all 'A' redactions codes ... are still warranted", as well as all redactions under code B.1.¹⁰ The Defence offers no particular justification for such a far-reaching request, other than the arguments addressed above, primarily suggestions that the Defence already has access to some of this information, or that witnesses have testified or that the trial is over. None of those circumstances warrants the lifting of standard redactions, particularly at this stage of proceedings, in which the trial hearings have concluded but judgment is pending.

18. The Defence's final and broadest request is for the Chamber to "[o]rder the Prosecution to review the entirety of its material in the Ugandan Situation to ensure

⁸ See, e.g., ICC-02/04-01/15-1743, para. 40-41.

⁹ See, e.g., ICC-02/04-01/15-1743, para. 34.

¹⁰ See, e.g., ICC-02/04-01/15-1743, para. 44-46.

the accuracy of its previous redactions and that the redactions are still warranted.”¹¹ This request is wholly unsubstantiated and should be dismissed *in limine* for that reason alone. Furthermore, there is no objective basis to order the Prosecution to review, yet again, its entire evidence collection to assure the appropriateness of all previously applied redactions therein. All redactions applied by the Prosecution to disclosed items are subject to primary and secondary review by members of the Prosecution team. The Defence cannot force additional reviews based on mere speculation and conjecture.

Defence request for creation of transcripts and translations

19. The Defence asks the Chamber to order the Prosecution to create transcripts of seven audio files and a transcript and translation of an eighth audio file. While the Prosecution accepts that the existence of such transcripts and translation might facilitate the resolution of its request for non-standard redactions, the creation of such items requires substantial time and resources which are not warranted by the content of the items. The disclosure obligations of the Prosecution do not generally require the creation of new material, but rather the review and, where required, disclosure of existing material already in the Prosecution's possession or control. The creation of new material is particularly unjustified here, where *none* of the redacted material is itself disclosable as evidence that was used at trial, is potentially exculpatory, or is material to the preparation of the defence. The disclosable portion of the item has already been provided to the Defence.

20. The Prosecution accepts that the review of audio files is more cumbersome than a review of transcripts, but respectfully submits that it is feasible and sufficient to determine the appropriateness of the proposed non-standard redactions. With specific regard to item UGA-OTP-0227-0100-R01, should the Chamber not have access to the necessary language staff, the Prosecution is prepared to assist the

¹¹ See, e.g., ICC-02/04-01/15-1743, para. 49(l).

Chamber in identifying a qualified and available interpreter, in consultation with the Defence if necessary.

Conclusion

21. For the reasons stated above, the Prosecution reiterates its request to apply the proposed non-standard redactions, and asks that the relief sought by the Defence in filing 1743 be denied.



Fatou Bensouda, Prosecutor

Dated this 29th day of June 2020
At The Hague, the Netherlands