

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 7 June 2016

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

Public

Decision on Disclosure Issues Arising Out of First Status Conference

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court issues the following 'Decision on Disclosure Issues Arising Out of First Status Conference', in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 67(2) of the Rome Statute ('Statute') and Rules 76, 77 and 81 of the Rules of Procedure and Evidence ('Rules').

1. On 23 May 2016, the Chamber held a status conference in order to set the date of the trial ('Status Conference').¹ This status conference was preceded by written submissions² from the Office of the Prosecutor ('Prosecution')³ and the defence for Mr Ongwen ('Defence').⁴
2. On 30 May 2016, the Chamber, *inter alia*, set a deadline of 6 September 2016 for the Prosecution to have reviewed all materials in its possession and disclose all materials falling under its disclosure obligations ('6 September Deadline').⁵
3. In the course of the written submissions and status conference, multiple disclosure issues arose. In the present decision, the Single Judge will proceed to address all these issues which are not the subject of separate written submissions.⁶
4. At the outset, the Single Judge notes the Prosecution's disclosure obligations pursuant to Article 67(2) of the Statute and Rules 76 and 77 of the Rules, as well

¹ Transcript of Hearing, ICC-02/04-01/15-T-25-ENG.

² See Order Scheduling First Status Conference and Other Matters, 4 May 2016, ICC-02/04-01/15-432.

³ Prosecution Submissions in Accordance with the Scheduling Order of 4 May 2016, 18 May 2016, ICC-02/04-01/15-438 ('Prosecution Submissions').

⁴ Public Redacted Version of "Defence Submissions in Advance of the 23 May 2016 Status Conference", 18 May 2016, ICC-02/04-01/15-439-Red2 ('Defence Submissions') (with four annexes; confidential *ex parte* and confidential redacted versions of main filing notified same day).

⁵ Decision Setting the Commencement Date of the Trial, ICC-02/04-01/15-449, para. 7.

⁶ Specifically, the present decision will not address the Prosecution's request for disclosure pursuant to Rule 79 of the Rules or the Legal Representatives for Victims' arguments against disclosing the identities of victim applicants. Prosecution's request to order the Defence to comply with rule 79, 16 May 2016, ICC-02/04-01/15-435; Joint Submissions on the non-disclosure of victims' identities, 31 May 2016, ICC-02/04-01/15-451. These issues will be resolved by way of separate decisions.

as the redaction regime applicable to this case.⁷ An inquiry pursuant to Rule 77 of the Rules has two stages.⁸ First, it must be determined, on a *prima facie* basis,⁹ whether the objects in question are ‘material to the preparation of the defence’. The phrase ‘material to the preparation of the defence’ must be interpreted broadly and ‘understood as referring to all objects that are relevant for the preparation of the defence’.¹⁰ Second, if the information is material to the preparation of the defence, the Chamber must consider whether any restrictions on disclosure are justified under the Statute and/or Rules.

5. The Single Judge also recalls that the Chamber informed the parties that it expects them to first engage in *inter partes* consultations before seizing the Chamber for relief. If this is not done, the relief sought may be dismissed *in limine*.¹¹

A. Remaining items in the Prosecution’s collection of materials in relation to the Uganda situation investigation (‘Uganda Collection’)

6. The Defence requests immediate disclosure of all remaining materials in the Uganda Collection, including ‘materials allegedly relating to all suspects, possible suspects and investigations into the UPDF, NRM and the Government of Uganda’.¹² The Prosecution responds that the Uganda Collection is being

⁷ Decision on issues related to disclosure and exceptions thereto, 23 April 2015, ICC-02/04-01/15-224.

⁸ Appeals Chamber, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”, 28 August 2013, ICC-02/05-03/09-501 OA4 (‘Banda and Jerbo OA4 Decision’), para. 35.

⁹ Banda and Jerbo OA4 Decision, ICC-02/05-03/09-501, para. 42.

¹⁰ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433 OA11, paras 77-80; Banda and Jerbo OA4 Decision, ICC-02/05-03/09-501, para. 38.

¹¹ Status Conference, ICC-02/04-01/15-T-25-ENG, page 3 line 22 to page 4 line 1.

¹² Defence Submissions, ICC-02/04-01/15-439-Red2, para. 4; Status Conference, ICC-02/04-01/15-T-25-ENG, page 8 lines 2-15.

reviewed for disclosure and that everything falling under its disclosure obligations will be disclosed.¹³

7. The Single Judge is not persuaded that any judicial action is required at this time. The Defence asks for the Prosecution to disclose materials in a collection being actively reviewed for disclosure. The Single Judge has no reason to doubt the exercise of the Prosecution's obligations, and the Defence gives no indication that it has unsuccessfully engaged in *inter partes* communications in relation to any particular part of the Uganda Collection. This request is dismissed *in limine*.

B. Acholi translations of witness statements

8. The Prosecution indicates that some transcripts and witness statements relied upon, and disclosed to the Defence, may not be available in Acholi (the language of the accused) before the 6 September Deadline. The Prosecution proposes to provide some of these translations after the deadline, provided that the witness concerned not be called to give evidence until the Defence has been in possession of the relevant material for a period of three months.¹⁴ The Defence does not challenge the overall propriety of the Prosecution's proposal, but submits that the deadline should be four months instead of three.¹⁵
9. The Single Judge notes that the proposal to provide Acholi translations after the 6 September Deadline is unopposed – all that is disputed is the applicable timeframe. The 6 September Deadline was designed in order to give the Defence three months from full disclosure to prepare for trial. After considering three months sufficient to prepare for trial following full disclosure, the Single Judge

¹³ Prosecution Submissions, ICC-02/04-01/15-438, para. 4. Status Conference, ICC-02/04-01/15-T-25-ENG, page 9 line 20 to page 10 line 15.

¹⁴ Prosecution Submissions, ICC-02/04-01/15-438, para. 10; Status Conference, ICC-02/04-01/15-T-25-ENG, page 16 lines 5-11. The Prosecution's submission pre-dates the decision setting the 6 September Deadline. However, given that the date selected by the Chamber is only one day after the deadline proposed by the Prosecution, it is understood that the Prosecution's submissions equally apply to the 6 September Deadline.

¹⁵ Status Conference, ICC-02/04-01/15-T-25-ENG, page 14 line 25 to page 16 line 2.

fails to see why a four month deadline is required to assess Acholi translations of statements already provided in a working language by the 6 September Deadline.

10. Accordingly, as a general rule and notwithstanding Regulation 35 of the Regulations of the Court, the Single Judge directs the Prosecution to disclose all Acholi translations of statements falling under its Rule 76(3) obligations by no later than three months prior to the testimony of the witness concerned. The Single Judge is mindful that such a deadline may limit the flexibility of the trial, and expects: (i) the Prosecution to provide these translations well before this deadline whenever possible and (ii) both parties to cooperate and reach compromise solutions when, despite the passing of this deadline, the Defence nevertheless has adequate time and facilities to prepare.
11. As a final matter on Acholi translations, the Single Judge notes that the Defence requests the revocation of a Pre-Trial Chamber Single Judge order concerning Acholi translations.¹⁶ The only justification given is that '[t]his is a different stage of the proceeding, and Mr Ongwen has the undeniable right to Acholi translations of all statements made by witnesses which the Prosecutor intends to call at trial or to attempt to present as evidence.'¹⁷ In the absence of any dispute as to how the Prosecution is exercising its Rule 76(3) obligations during the trial phase, the Single Judge fails to see why any revocation is necessary.¹⁸ This request is dismissed *in limine*.

¹⁶ Defence Submissions, ICC-02/04-01/15-439-Red2, para. 15, *referring to* Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 27 February 2015, ICC-02/04-01/15-203, paras 35-36.

¹⁷ Defence Submissions, ICC-02/04-01/15-439-Red2, para. 15.

¹⁸ It is noted that, to the extent the Pre-Trial Chamber Single Judge's order does not require the Prosecution to translate the *entirety* of every witness statement, the Defence conceded that this continues to be acceptable for certain information. Status Conference, ICC-02/04-01/15-T-25-ENG, page 14 line 25 to page 15 line 12.

C. Requests for assistance

12. The Defence requests the disclosure of all requests for assistance ('RFAs') made by the Prosecution during its investigation into the Uganda situation.¹⁹ The Prosecution responds that: (i) although the disclosable material obtained by RFAs must be provided to the Defence, the RFAs themselves are not disclosable, absent a specific justification and (ii) RFAs are internal work product.²⁰
13. The Single Judge considers that the Prosecution's submissions suggest that it misconstrues its obligations in relation to RFAs. The materiality of RFAs are assessed on a case-by-case basis, and the Single Judge is not persuaded that all RFAs in the Uganda situation must be disclosed by default. However, the Prosecution's arguments understate the fact that it is imperative that the Defence be able to test the reliability of the procedure employed in collecting the evidence against them.²¹ It is also incorrect to say that RFAs are internal work product – they are Prosecution requests for information to States and other third parties, and external correspondence does not qualify under Rule 81(1) of the Rules.²²
14. The Single Judge understands that a case-by-case assessment in the present case requires that, at least to the extent that RFAs in the Uganda situation investigation led to information which the Prosecution relies upon as incriminating evidence against Mr Ongwen, they must be disclosed as being

¹⁹ Defence Submissions, ICC-02/04-01/15-439-Red2, para. 22; Status Conference, ICC-02/04-01/15-T-25-ENG, page 9 lines 7-17.

²⁰ Status Conference, ICC-02/04-01/15-T-25-ENG, page 11 line 12 to page 12 line 6.

²¹ Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba et al.*, Public redacted version of Decision on the Bemba Defence Request for Disclosure of Communication with the Dutch Authorities, 12 January 2016, ICC-01/05-01/13-1542-Red, para. 11.

²² Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba et al.*, Decision on Arido Defence Request for Disclosure of Documents Related to the Cooperation between the Prosecution and the Cameroonian Authorities, 25 February 2016, ICC-01/05-01/13-1658, para. 6; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba et al.*, Decision on Bemba Defence Request for Disclosure and Lifting of Redactions Related to Collection of Telecommunication Evidence, 17 February 2016, ICC-01/05-01/13-1632, para. 19.

material to the preparation of the defence. The Prosecution may redact these RFAs in accordance with the applicable redaction regime.

D. Attributions of radio intercepts

15. The Defence requests that the Prosecution attribute the speakers on the intercepted radio communications disclosed in this case.²³ The Prosecution responds that this is not a disclosure issue, and that it endeavours to establish with certainty who is speaking as best it can.²⁴
16. The Single Judge agrees with the Prosecution that this is, strictly speaking, not a disclosure issue. The Single Judge understands the Prosecution's submission to be that they will indicate who is speaking on radio intercepts when this can be confirmed. The Single Judge considers this sufficiently responsive to the Defence request, and dismisses it as moot.

E. Electronic visual presentation

17. The Prosecution proposes to make available to the participants and Chamber 'electronic visual representations of the four attack locations derived from the use of drone photography/video and three dimensional laser scanning'.²⁵ The Prosecution submits that they have not been completed yet, and proposes to disclose them no later than 10 working days before the commencement of the trial. The Defence indicates that its position on these materials depends on whether they are actually going to be evidence.²⁶ The Prosecution subsequently confirmed that it would like for them to be in evidence.²⁷

²³ Status Conference, ICC-02/04-01/15-T-25-ENG, page 8 lines 16-23.

²⁴ Status Conference, ICC-02/04-01/15-T-25-ENG, page 10 line 16 to page 11 line 11.

²⁵ Prosecution Submissions, ICC-02/04-01/15-438, para. 8.

²⁶ Status Conference, ICC-02/04-01/15-T-25-ENG, page 19 lines 14-17.

²⁷ Status Conference, ICC-02/04-01/15-T-25-ENG, page 19 line 20 to page 20 line 11.

18. The Single Judge notes that the 6 September Deadline only applies to material in the Prosecution's possession. The Prosecution's request is therefore not for late disclosure *per se*, but rather to make a late addition to its list of evidence. The Single Judge will not make any ruling on whether the Prosecution will be permitted to add materials to its list of evidence in the abstract. When the Prosecution has these 'electronic visual representations' in hand and has disclosed them to the Defence, it may request relief only at that point. This request is dismissed *in limine*.

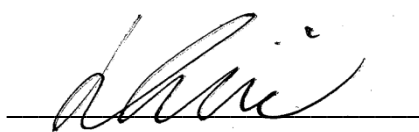
FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

DIRECTS the Prosecution to provide Acholi translations falling under Rule 76(3) of the Rules to the Defence in accordance with paragraph 10 of the present decision;

DIRECTS the Prosecution to disclose its RFAs in accordance with paragraph 14 of the present decision and

DISMISSES the remainder of the relief sought.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to be 'B. Schmitt', written over a horizontal line.

Judge Bertram Schmitt, Single Judge

Dated 7 June 2016

At The Hague, The Netherlands