

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: **ICC-02/04-01/15**  
Date: **16 January 2018**

**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 “Defence Request for a Rule 77 Disclosure Order  
Concerning the Requests for Assistance and Other Related Items”, filed on  
16 January 2018**

**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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**Victims Participation and Reparations  
Section Other**

## I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') respectfully requests Trial Chamber IX ('Chamber') to order the Prosecution to disclose requests for assistance ('RFAs') and other associated communications related to cooperation between the Prosecution and the Ugandan authorities, which led to collection of evidence used against Mr Ongwen (collectively 'Requested Items').
2. Given that the Requested Items led to information the Prosecution relies upon as evidence against Mr Ongwen, they are material to the preparation of the defence and fall within the scope of Rule 77 of the Rules of Procedure and Evidence ('RPE') and the Single Judge of the Trial Chamber IX's ('Single Judge') "Decision on Disclosure Issues Arising Out of First Status Conference" ('Disclosure Decision').<sup>1</sup>
3. The intervention of the Chamber is, accordingly, necessary to enable the Defence to mount an effective and informed challenge to the reliability of evidence that is produced by virtue of the Requested Items, and/or to the veracity of any Prosecution witness testifying in relation to such records in front of this Chamber.

## II. CONFIDENTIALITY

4. Pursuant to Regulation 23 *bis*(1) of the Regulations of the Court ('RoC'), the Defence files this request as confidential as it discusses Prosecution's investigative practises and internal communications between the Prosecution and the Defence. A public redacted version is filed concurrently.

## III. PROCEDURAL HISTORY

5. On 10 August 2015, at the Status Conference, the Chamber encouraged the parties to first engage in *inter partes* consultations before seizing the Chamber for relief.<sup>2</sup>
6. On 30 May 2016, the Chamber 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').<sup>3</sup>

<sup>1</sup> ICC-02/04-01/14-457, paras 12-14; *see also* ICC-02/04-01/14-468.

<sup>2</sup> ICC-02/04-01/15-T-25-ENG ET, p. 3, line 22 to page 4, line 1; *see also Disclosure Decision*, para. 5.

7. On 18 May 2016, the Defence has requested the Chamber to direct the Prosecution to disclose all RFAs made by the Prosecution during its investigation into the Uganda situation.<sup>4</sup>
8. On 7 June 2016, in his *Disclosure Decision*, the Single Judge directed the Prosecution to disclose its RFAs, holding 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 material to the preparation of the defence.”<sup>5</sup>
9. On 17 October 2017, the Defence contacted the Prosecution, requesting an immediate disclosure concerning the materials related to the cooperation between the Prosecution and the Ugandan authorities.<sup>6</sup> In ‘List of RFAs and Related Materials’ that was attached to the Defence e-mail as Annex A, the Defence identified and requested the Prosecution to disclose missing RFAs, but also related materials, including responses to RFAs, official letters and other items.<sup>7</sup>
10. On 27 October 2017, the Prosecution responded to the 17 October 2017 request and confirmed that it intends to disclose all materials that it believes are disclosable under the applicable provisions of the Statute and Rules and relevant Chamber’s decisions.<sup>8</sup> After its review, the Prosecution identified and formally disclosed<sup>9</sup> one RFA response<sup>10</sup> and one RFA.<sup>11</sup> However, the Prosecution also confirmed that it: (a) fails to locate its RFA from [REDACTED],<sup>12</sup> (b) declines to disclose [REDACTED] because it relates to Vincent Otti’s reported death;<sup>13</sup> and (c) does not intend to disclose other *existing* RFAs and related materials that relate to Vincent Otti’s death.<sup>14</sup>
11. On [REDACTED]  
[REDACTED]

<sup>3</sup> ICC-02/04-01/15-449, para. 7.

<sup>4</sup> ICC-02/04-01/14-439; *see also* ICC-02/04-01/15-T-25-ENG, page 9, lines 7-17.

<sup>5</sup> *Disclosure Decision*, para. 14; *see also* ICC-02/04-01/15-468.

<sup>6</sup> *See* Annex A: “2017.10.17 – Disclosure Request – CONF”, dated 17 October 2017.

<sup>7</sup> *See* Annex B: “2017.10.17 – Annex A – CONF”, dated 17 October 2017.

<sup>8</sup> *See* Annex C: “Re: Letter to OTP about RFA Request”, First Prosecution Response, dated 27 October 2017.

<sup>9</sup> *See* Prosecution Disclosure Rule 77 Pack 71, dated 3 November 2017.

<sup>10</sup> UGA-OTP-0281-0442.

<sup>11</sup> UGA-OTP-0281-0433.

<sup>12</sup> *See* Annex B: “2017.10.17 – Annex A – CONF”, dated 17 October 2017, Tab no. 2.

<sup>13</sup> *See* Annex B: “2017.10.17 – Annex A – CONF”, dated 17 October 2017, Tab no. 26.

<sup>14</sup> *See* Annex C: “Re: Letter to OTP about RFA Request”, First Prosecution Response, dated 27 October 2017.

15 [REDACTED]

[REDACTED].<sup>16</sup>

12. On 3 November 2017, the Prosecution responded to the 17 October 2017 request a second time and confirmed that it identified one response related to RFA<sup>17</sup> and one e-mail chain<sup>18</sup> related to another RFA.<sup>19</sup> These items were formally disclosed to the Defence on 10 November 2017.<sup>20</sup>
13. On 7 November 2017, the Prosecution gave the Defence its final response to the 17 October 2017 request and concluded that it has reviewed and disclosed all materials in its possession that are related to cooperation between the Prosecution and the Ugandan authorities. It also added that “[t]he last portion of our review identified no further disclosable items beyond the two items emailed on 27 October and the two items emailed on 3 November”.<sup>21</sup> This concluded the *inter partes* consultations between the Prosecution and Defence regarding disclosure of RFAs and other related materials.

#### IV. APPLICABLE LAW

14. Rule 77 of the RPE states that the Prosecution must permit the Defence to “inspect any books, documents, photographs or other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the Defence or are intended for use by the Prosecution as evidence for the purposes of the confirmation hearing or at trial”.
15. The Appeals Chamber in *Lubanga* case has held that the expression “material to the preparation of the defence” has to be interpreted broadly<sup>22</sup> and that Rule 77 of the RPE encompassed “all objects that are relevant for the preparation of the defence”.<sup>23</sup> In particular, it noted that certain objects, while not directly linked to exonerating or incrimination evidence, may otherwise be

15 [REDACTED]

<sup>17</sup> UGA-OTP-0281-0472.

<sup>18</sup> UGA-OTP-0281-0473.

<sup>19</sup> See Annex C: “*Re: Letter to OTP about RFA Request*”, Second Prosecution Response, dated 3 November 2017.

<sup>20</sup> See Prosecution Disclosure Rule 77 Pack 72, dated 10 November 2017.

<sup>21</sup> See Annex C: “*Re: Letter to OTP about RFA Request*”, Third Prosecution Response, dated 7 November 2017.

<sup>22</sup> ICC-01/04-01/06-1433 OA 11, para. 77; ICC-01/05-01/08-1594-red, para. 19; ICC-02/05-03/09-501 OA 4, para. 35; *Disclosure Decision*, para. 4.

<sup>23</sup> ICC-01/04-01/06-1433 OA 11, para. 77; see also *Disclosure Decision*, para. 4.

material to the preparation of the defence.<sup>24</sup> This included material not directly related to the case but tending to explain the overall circumstances of a conflict.<sup>25</sup>

16. The Trial Chamber VII in *Bemba et al.* case found that “[t]he Chamber considers that material which enables the defence to assess the legality of evidence which the Prosecution intends to rely upon at trial is relevant to the preparation of the defence” and “[i]t therefore falls under the Prosecution’s disclosure obligations as set out in Rule 77 of the Rules.”<sup>26</sup>
17. The Appeals Chamber in the *Banda and Jerbo* case emphasized that even if “information that is material to the preparation of the defence is ultimately not used as evidence at the trial or may not turn out to be relevant to it. Yet, the defence is still entitled to this information on the basis of a prima facie assessment.”<sup>27</sup>
18. Accordingly, the Single Judge held that “it is imperative that the Defence be able to test the reliability of the procedure employed in collecting the evidence against them”<sup>28</sup> and that “case-by-case assessment in the present case requires that, at least to the extent that RFA 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 material to the preparation of the defence.”<sup>29</sup>

## V. SUBMISSIONS

### A. The Requested Items *exist* and are in the Prosecution’s custody

19. The Chamber has twice directed the Prosecution to review its materials and disclose all materials – including RFAs – falling under its disclosure obligations.<sup>30</sup> Yet, 16 months after the *6 September Deadline*,<sup>31</sup> the Prosecution’s Rule 77 disclosure obligations remain incomplete.

<sup>24</sup> ICC-01/04-01/06-1433 OA 11, para. 77.

<sup>25</sup> ICC-01/04-01/06-1433 OA 11, paras 76-82.

<sup>26</sup> ICC-01/05-01/13-1148, para. 10;

<sup>27</sup> ICC-02/05-03/09-501, para. 42; *see also Prosecutor v. Karemera et al., “Decision on the Prosecution’s Interlocutory Appeal Concerning Disclosure Obligations”, ICTR-98-44-AR73.11, 23 January 2008, para. 12.*

<sup>28</sup> *Disclosure Decision*, para. 13; *see also* ICC-02/04-01/15-468, para. 1.

<sup>29</sup> *Disclosure Decision*, para. 14; *see also* ICC-02/04-01/15-468, para. 1.

<sup>30</sup> ICC-02/04-01/15-449, para. 7; *Disclosure Decision*, paras 13-14; ICC-02/04-01/15-468, para. 1.

<sup>31</sup> ICC-02/04-01/15-449, para. 7.

Following the Defence disclosure request,<sup>32</sup> the Prosecution has recently disclosed to the Defence another two RFAs<sup>33</sup> and two associated communications.<sup>34</sup>

20. The Prosecution and the Defence, however, continue to disagree on the materiality of other existing and yet undisclosed records that are material to the preparation for Mr Ongwen's defence. Therefore, the Defence requests the Chamber to find that the following Items must be disclosed:

1. [REDACTED],

21. The Defence pointed out to the Prosecution that the official Prosecution letter [REDACTED], dated [REDACTED],<sup>35</sup> refers to yet undisclosed [REDACTED], from [REDACTED], and requested the Prosecution to disclose the impugned RFA and all related documents.<sup>36</sup>
22. The Prosecution confirmed the existence of [REDACTED] and responded that "we have not disclosed [REDACTED] because we have determined that it is not relevant to the case against Dominic Ongwen. It relates solely to confirmation of Vincent Otti's reported death."<sup>37</sup>
23. The Defence avers that this RFA is material to the preparation of the defence exactly because it refers to the confirmation of Vincent Otti's reported death. The materiality of Items related to Vincent Otti's death is evidenced by a number of Witnesses testifying about this event during the trial proceedings against Mr Ongwen,<sup>38</sup> and the Chamber's spoken interest during the trial proceedings in hearing how Vincent Otti died.<sup>39</sup>
24. Furthermore, on [REDACTED]  
[REDACTED].<sup>40</sup> [REDACTED]  
[REDACTED].<sup>41</sup> It is

<sup>32</sup> See Annex A: "2017.10.17 – Disclosure Request – CONF", dated 17 October 2017.

<sup>33</sup> UGA-OTP-0281-0472; UGA-OTP-0281-0433.

<sup>34</sup> UGA-OTP-0281-0473; UGA-OTP-0281-0442.

<sup>35</sup> UGA-OTP-0209-0038.

<sup>36</sup> See Annex B: "2017.10.17 – Annex A – CONF", dated 17 October 2017, Tab no. 26.

<sup>37</sup> See Annex C: "Re: Letter to OTP about RFA Request", First Prosecution Response, dated 27 October 2017.

<sup>38</sup> See, e.g.: Witness P-0205, ICC-02/04-01/15-T-49-CONF-ENG ET, pp. 29-31; [REDACTED]; [REDACTED]; Witness P-0233, ICC-02/04-01/15-T-112-CONF ENG ET, pp. 13-16. [REDACTED]; see also ICC-02/04-01/15-T-112-CONF ENG ET, p. 14.

<sup>40</sup>

<sup>41</sup>

likely that [REDACTED], and thus any information or Item related to this event is material to the preparation of the defence. Therefore, [REDACTED] must be disclosed.

2. *'Other RFAs Related to Vincent Otti's Death'*

25. In its response, the Prosecution also confirmed that it does not intend to disclose other *existing* RFAs and related materials associated with Vincent Otti's death. In particular, the Prosecution wrote "There are a number of RFAs from this situation which similarly do not relate in any way to the Ongwen prosecution and are, in our view, not material to the preparation of Mr Ongwen's defence. We do not intend to disclose such RFAs and related materials."<sup>42</sup>
26. As discussed in paragraphs 23-24, any RFAs or associated materials that are related to Vincent Otti's death are material to the preparation of Mr Ongwen's defence, and therefore must be disclosed.<sup>43</sup>

*'Missing RFA'*

27. The Defence also requested the disclosure of the Prosecution's RFA from [REDACTED].<sup>44</sup> The Defence identified *existence* of this RFA following the review of the Prosecution Facsimile, dated [REDACTED]. This Facsimile refers to a "Request for Assistance" and "a letter from Ambassador".<sup>45</sup>
28. Following the Defence disclosure request, the Prosecution informed the Defence that "I'm sorry to report that we simply have not been able to locate an RFA sent on or near that date in our records."<sup>46</sup>
29. The Defence avers that it is evident that the 'Missing RFA' was sent by the Prosecution to the Ugandan authorities for the purpose of conducting its investigation on the Ugandan territory in 2004. Given that this 'Missing RFA' was in the Prosecution's custody and may have potentially led to acquisition of evidence used against Mr Ongwen, the Prosecution's inability

<sup>42</sup> See Annex C: "Re: Letter to OTP about RFA Request", First Prosecution Response, dated 27 October 2017.

<sup>43</sup> *Supra*, paras 23-24.

<sup>44</sup> See Annex A: "2017.10.17 – Disclosure Request – CONF", dated 17 October 2017; see also Annex B: "2017.10.17 – Annex A – CONF", dated 17 October 2017, Tab. 2.

<sup>45</sup> UGA-OTP-0206-0005.

<sup>46</sup> See Annex C: "Re: Letter to OTP about RFA Request", First Prosecution Response, dated 27 October 2017.

to locate and disclose this RFA undermines the principle of full disclosure,<sup>47</sup> and thus violates the fair trial rights of Mr Ongwen.

### 3. *Associated Communications*

30. The Defence also requested the disclosure of communications associated with RFAs, such as responses to RFAs, official letters and/or e-mails.<sup>48</sup> Following the Defence request, the Prosecution formally disclosed one response to RFA<sup>49</sup> and one e-mail chain related to another RFA.<sup>50</sup>

31. In relation to other identified communications,<sup>51</sup> the Prosecution wrote that

*[...] I can inform you that we have no responses on record for several RFAs. Using the item/row numbers from Annex A to your request, we have no record of response to nos. 3, 5, 7-25, and 27-31. Often the Ugandan authorities did not respond in writing to our RFAs, and instead simply provided underlying requested information (in whole or in part) without referencing any particular RFA. It is difficult to say with absolute certainty, but it also appears that on some occasions we did not receive all information requested in the various RFAs nor did we receive information in response to every RFA sent.<sup>52</sup>*

32. The Defence appreciates the Prosecution's detailed explanation; however, it is fundamental for the Defence to know with absolute certainty that no other records exist on the Prosecution's case file that should be disclosed because of their materiality to the preparation of Mr Ongwen's defence. The RFAs cannot be separated from the associated records. Disclosing only parts of the whole procedure has the effect of curtailing the forensic picture, and thus limits the Defence from preparation of its defence. Therefore, if such records exist, they must be located and disclosed.

### **B. The Requested Items are material to the preparation of the defence**

33. Rule 77 of the RPE creates a presumption of full disclosure of any items that are material to defence preparation, and which are not exempted from disclosure by an express provision in

<sup>47</sup> ICC-01/04-01/06-3031, para. 10.

<sup>48</sup> See Annex A: "2017.10.17 – Disclosure Request – CONF", dated 17 October 2017; see also Annex B: "2017.10.17 – Annex A – CONF", dated 17 October 2017.

<sup>49</sup> UGA-OTP-0281-0442.

<sup>50</sup> UGA-OTP-0281-0473.

<sup>51</sup> See also Annex B: "2017.10.17 – Annex A – CONF", dated 17 October 2017.

<sup>52</sup> See Annex C: "Re: Letter to OTP about RFA Request", First Prosecution Response, dated 27 October 2017.

the Statute or RPE. In this regard, the ICC Appeals Chamber has repeatedly found that exceptions to this presumption are themselves very exceptional.<sup>53</sup>

34. Therefore, in order to establish the obligation to disclosure pursuant to Rule 77 of the RPE, the Defence needs to establish that a) the items sought are *prima facie* material to defence preparation; and (b) there are no provisions in the Statute or RPE which limit the requested disclosure.<sup>54</sup> The latter condition has never been invoked by the Prosecution, when requesting the disclosure of the Requested Items *via inter partes* consultations.
35. In relation to the burden placed on the Defence to establish that the Requested Items are *prima facie* material and would in fact assist with its defence preparation, the Defence refers to Single Judge's *Disclosure Decision*, which holds that “[t]he 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’.”<sup>55</sup>
36. This places a low burden of proof on the Defence. In addition, the Appeals Chamber in *Banda and Jerbo* held that “information that is material to the preparation of the defence is ultimately not used as evidence at the trial or may not turn out to be relevant to it” the Defence is still entitled to disclosure of this information under Rule 77 of the RPE.<sup>56</sup>
37. The Defence has met its burden.<sup>57</sup>
38. The Requested Items, including the RFAs and other associated communications,<sup>58</sup> are official records by which the Prosecution requested and collected evidence from the Ugandan authorities that is used against Mr Ongwen. To be able to prepare an informed and effective challenge to the reliability of the impugned evidence and to the veracity of testimonies of, *inter alia*, [REDACTED], the Defence needs to know the manner in which the Prosecution requested and collected the evidence. The Requested Items may show precautions taken by the Prosecution or the lack thereof.

<sup>53</sup> ICC-01/04-01/06-3031, para. 10; ICC-01/04-01/17-475, para. 70.

<sup>54</sup> *Disclosure Decision*, para. 4.

<sup>55</sup> *Disclosure Decision*, para. 4; *see also* ICC-01/04-01/06-1433 OA11, paras 77-80; ICC-02/05-03/09-501, para. 38.

<sup>56</sup> ICC-02/05-03/09-501, para. 42; *see also Prosecutor v. Karemera et al.*, “Decision on the Prosecution’s Interlocutory Appeal Concerning Disclosure Obligations”, ICTR-98-44-AR73.11, 23 January 2008, para. 12.

<sup>57</sup> *Supra*, paras 21-32.

<sup>58</sup> *Supra*, paras 21-32.

39. For example, the Requested Items can serve the Defence during preparation and presentation of its Defence case, drafting of the Defence Closing Brief and response to the Prosecution Closing Brief, and/or contesting the relevant testimonies of the Prosecution's witnesses.
40. It is only after combined analysis of the Requested Items and the evidence that emanated from them that the Defence will be able to fully examine the legality of procedures applied by the Prosecution, by which the evidence used against Mr Ongwen was requested, collected and transmitted.
41. In sum, the Defence avers that the Requested Items fall within the criteria of both Rule 77 of the RPE and the Court's jurisprudence concerning the materiality of the documents for the preparation of the defence. Without the disclosure of the Requested Items, the overriding principle of full disclosure remains compromised,<sup>59</sup> thus violating the fair trial rights of Mr Ongwen. The Requested Items should therefore be disclosed.

## VI. RELIEF SOUGHT

42. In light of the above, the Defence respectfully requests the Chamber to:
- a) **ORDER** the Prosecution to disclose the Requested Items.

Respectfully submitted,



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Hon. Krispus Ayena Odongo  
On behalf of Dominic Ongwen

Dated this 16<sup>th</sup> day of January, 2018  
At Kampala, Uganda

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<sup>59</sup> ICC-01/04-01/06-3031, para. 10