

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: ICC-02/04-01/15  
Date: 18 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***

**Confidential  
with Confidential Annex A**

**Prosecution Response to “Defence Request for a Rule 77  
Disclosure Order Concerning the Requests for Assistance and  
Other Related Items” (ICC-02/04-01/15-1137)**

**Source:** The Office of the Prosecutor

**Document to be notified in accordance with regulation 31 of the Regulations of the Court to:**

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr James Stewart  
Mr Benjamin Gumpert

**Counsel for Dominic Ongwen**

Mr Krispus Ayena Odongo  
Mr Charles Taku  
Ms Beth S. Lyons

**Legal Representatives of Victims**

Mr Joseph Akwenu Manoba  
Mr Francisco Cox  
Ms Paolina Massidda

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

Ms Paolina Massidda  
Ms Caroline Walter  
Mr Orchlon Narantsetseg  
Ms Jane Adong

**The Office of Public Counsel for the Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

---

**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Section**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

### Introduction

1. The Defence Request for a Rule 77 Disclosure Order Concerning the Requests for Assistance and Other Related Items (“Defence Request”)<sup>1</sup> should be denied, because it seeks disclosure of items which are not material to the preparation of the defence in this case or which are not in the possession or control of the Prosecution.

### Confidentiality

2. Pursuant to regulation 23bis(1) of the Regulations of the Court, the Prosecution files this response confidentially, because it responds to a confidential filing and because it discusses investigative practices and *inter partes* communications. A public redacted version will be filed in due course.

### Submissions

#### *A. Request for information confirming the death of Vincent Otti*

3. As the Trial Chamber is aware, the Prosecution’s investigation of the Uganda situation was never limited to crimes committed by Dominic Ongwen, but instead canvassed a range of alleged crimes and perpetrators, including but not limited to the other four LRA commanders for whom arrest warrants were issued in 2005. It is not surprising, therefore, that the Prosecution sought and collected evidence during its investigation of the broader Uganda situation which has no bearing on the current charges against Mr Ongwen.
4. The requested information related to Vincent Otti is a prime example. RFA/UG/0024 (“RFA 24”) was sent by the OTP to Ugandan authorities on 8 November 2007, after reports that Otti had been killed in October 2007. To this day, the Prosecution has never received a final response from the Ugandan

---

<sup>1</sup> ICC-02/04-01/15-1137.

authorities.<sup>2</sup> For that reason alone – that RFA 24 resulted in the collection of no information whatsoever, much less “information which the prosecution relies upon as incriminating evidence against Mr Ongwen”<sup>3</sup> – it falls outside the terms of ICC-02/04-01/15-457.

5. Moreover, the Defence has not articulated how an RFA relating solely to confirmation of Otti’s death in October 2007 is material to the preparation of the defence against charges relating to Mr Ongwen’s conduct in the period 2002-2005. The standard is not relevance in the abstract, but “relevan[ce] for the preparation of the defence”.<sup>4</sup> That several witnesses have mentioned this notorious event during their testimony does not make confirmation of Otti’s death material to the preparation of Mr Ongwen’s defence, particularly since the basic circumstances of Otti’s reported death do not appear to be disputed by the Parties. In the absence of any concrete indication of how RFA 24 might materially assist the Defence in the preparation of its case, the Defence Request should be denied.

*B. RFAs and “associated information” not  
in the Prosecution’s possession or control*

6. The second portion of the Defence Request raises a different issue. The Defence asks the Trial Chamber to order the Prosecution to disclose documents which it does not have.
7. The Prosecution takes very seriously its disclosure obligations under the Statute, the Rules of Procedure and Evidence, and the prior decisions of this Trial

---

<sup>2</sup> The Ugandan authorities acknowledged receipt of RFA 24 on 30 November 2007, stating that they would provide information to the OTP once their investigations of the matter were concluded. The Prosecution has received no further response. One consequence is that, unlike the arrest warrants against Raska Lukwiya and Okot Odhiambo, which were withdrawn and proceedings terminated after forensic confirmation of their deaths, the arrest warrant against Otti remains in effect.

<sup>3</sup> ICC-02/04-01/15-457, para. 14.

<sup>4</sup> Defence Request para. 35 (citing ICC-02/04-01/15-457, para. 4). The Prosecution notes that rule 77 uses the word “material” rather than “relevant”, but does not press the distinction for present purposes in light of the Single Judge’s decision in ICC-02/04-10/15-457, para. 4.

Chamber, including in particular decisions ICC-02/04-01/15-457 and ICC-02/04-01/15-468. Since the initial appearance of Mr Ongwen in January 2015, the Prosecution has reviewed more than 180,000 pages for potential disclosure. Throughout the trial, the Prosecution has routinely received and responded to *inter partes* requests from the Defence for additional disclosure, and has made follow-up searches in response to each, disclosing any newly identified disclosable information. Throughout this process, the Prosecution has adopted an expansive approach to disclosure, erring on the side of greater disclosure in close cases and sometimes double- or triple-checking to make sure that new or previously unidentified information was disclosed to the Defence.

8. In the particular context of RFAs and related items, the Prosecution has undertaken at least two major searches of its records in an effort to identify and disclose all Rule 77 and other disclosable material in its possession. First, following the Single Judge's decision in ICC-02/04-01/15-457, the Prosecution in July 2016 undertook an extensive search of its digital and hardcopy records for any and all RFAs which "led to information which the prosecution relies upon as incriminating evidence against Mr Ongwen".<sup>5</sup> Shortly thereafter, on 3 October 2016, the Defence made a follow-up *inter partes* request, prompting a detailed response from the Prosecution on 17 October 2016.<sup>6</sup> Nearly one year later, and ten months into the Prosecution's presentation of its evidence, the Defence made another *inter partes* request related to RFAs.<sup>7</sup> In an effort to put the matter to rest, the Prosecution reviewed and re-assessed its 2016 review of RFAs and associated materials. The Prosecution re-reviewed its RFA database. It also retrieved and reviewed all available emails between OTP staff and Ugandan authorities. As a

---

<sup>5</sup> ICC-02/04-01/15-457, para. 14. This 2016 search was not limited to RFAs but also included related items like responses to RFAs.

<sup>6</sup> See Annex A.

<sup>7</sup> See Defence Request, Annex C.

result of this thorough re-review, the Prosecution identified just four (marginal) items for further disclosure.<sup>8</sup>

9. With specific regard to an RFA allegedly dated or sent on 9 April 2004, the Prosecution has diligently searched its records and cannot locate such an item. The Defence's assertions of its existence are based solely on a one-page facsimile cover sheet dated 9 April 2004 referring generically to "Request for Assistance" and a letter for the ambassador. It is possible that the fax of 9 April 2004 was a retransmission of an earlier RFA dated 5 March 2004, or the transmission only of a letter to the ambassador relating to the earlier RFA, forecasting an additional RFA, or relating to other business and simply mislabelled. It is unfortunately impossible for the Prosecution to state conclusively that no 9 April 2004 RFA ever existed, given the recordkeeping practices in place in April 2004, when the OTP and the Court were in their infancy (the first ICC Prosecutor having been elected less than one year earlier).
10. Undeterred, the Defence speculates that "[g]iven 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 to locate and disclose this RFA undermines the principle [sic] of full disclosure...".<sup>9</sup> Such speculation is clearly an insufficient basis to conclude that a "missing" April 2004 RFA, or any item in the possession or control of the Prosecution, "led to information which the prosecution relies upon as incriminating evidence against Mr Ongwen" within the terms of ICC-02/04-01/15-457.
11. The Defence Request for other "associated communications" is even more speculative, as there is no reason to think that such communications ever existed, let alone remain in the possession or control of the Prosecution but are

---

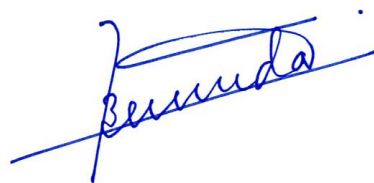
<sup>8</sup> In total, the Prosecution has disclosed 52 RFAs and RFA-related items to the Defence.

<sup>9</sup> Defence Request, para. 29 (underlining supplied by the Prosecution for emphasis).

as-of-yet undiscovered, despite the Prosecution's diligent efforts described above. As explained by the Prosecution previously (and forthrightly included by the Defence in its Request), the Ugandan authorities did not always respond in writing to RFAs from the Prosecution, and sometimes provided information without referencing any RFA. Some RFAs were never responded to (see the example of RFA 24 above), and other RFAs appear to have been only partially fulfilled. This is, of course, common whenever requests for information (or subpoenas) are served upon organisations without complete prior knowledge of what information the organisation has or does not have. In that circumstance, the drafter of the request typically asks for everything that he or she might like to receive, or might imagine the organisation to have, without the expectation that every aspect of every request can or will result in a response. This case is no different.

### Conclusion

12. In conclusion, the Prosecution submits that the items requested by the Defence are either not material to the preparation of Mr Ongwen's defence, or not in the possession or control of the Prosecution, and as such do not fall within rule 77 of the Rules of Procedure and Evidence. The Defence Request should be denied.



---

**Fatou Bensouda , Prosecutor**

Dated this 18<sup>th</sup> day of January 2018  
At The Hague, The Netherlands