

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/04-01/15
Date: 1 February 2018

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

Public

**Decision on Defence Request for Disclosure of Certain Requests for Assistance
and Related Items**

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

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Counsel Support Section

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Detention Section

**Victims Participation and Reparations
Section**

Others

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 54(1)(b) of the Rome Statute ('Statute'), Rules 10, 77 and 84 of the Rules of Procedure and Evidence ('Rules') and Regulation 23 *bis* of the Regulations of the Court, issues the following 'Decision on Defence Request for Disclosure of Certain Requests for Assistance and Related Items'.

I. Procedural history and relief sought

1. On 16 January 2018, the defence for Mr Ongwen ('Defence') requested that the Chamber order the Office of the Prosecutor ('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' ('Request').¹ From viewing the Request as a whole, it appears that the Defence is specifically concerned with: (i) certain RFAs related to the reported death of Vincent Otti;² (ii) an April 2004 RFA which was in the Prosecution's custody, but is now missing;³ and (iii) communications associated with RFAs, such as responses to RFAs, official letters and/or emails.⁴
2. On 18 January 2018, the Prosecution responded ('Response'),⁵ submitting that the relief sought be rejected.

¹ Defence Request for a Rule 77 Disclosure Order Concerning the Requests for Assistance and Other Related Items, ICC-02/04-01/15-1137-Red (with three annexes) (a confidential version was filed on the same day).

² Request, ICC-02/04-01/15-1137-Red, paras 21-26.

³ Request, ICC-02/04-01/15-1137-Red, paras 27-29.

⁴ Request, ICC-02/04-01/15-1137-Red, paras 30-32.

⁵ 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), ICC-02/04-01/15-1142-Conf (with one annex).

II. Submissions, analysis and conclusions

3. The Single Judge recalls the Prosecution's relevant disclosure obligations as set out in a previous decision.⁶ As for RFAs specifically, in a previous decision the Single Judge determined that: (i) not all RFAs in the Ugandan situation must be disclosed by default, but (ii) it is imperative that the Defence be able to test the reliability of the procedure employed in collecting the evidence against them and (iii) 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.⁷
4. Following this decision, the Prosecution reports to have disclosed 52 RFAs and RFA-related items to the Defence.⁸

A. RFAs related to the reported death of Vincent Otti

5. The Defence submits that RFAs related to the reported death of Vincent Otti are material to its preparation due to the Chamber asking questions about his death during the course of the trial and the testimony many witnesses provided on this issue.⁹ The Defence argues these records are required in order to be able to prepare an informed and effective challenge to the reliability of the impugned evidence and to the veracity of witness testimonies.¹⁰
6. The Prosecution responds that an RFA related solely to Vincent Otti's death in 2007 is not material to the preparation of the defence against charges relating to Mr Ongwen's conduct between 2002-2005. The Prosecution argues that the fact

⁶ Decision on Disclosure Issues Arising Out of First Status Conference, 7 June 2016, ICC-02/04-01/15-457 ('RFA Disclosure Decision'), para. 4.

⁷ RFA Disclosure Decision, ICC-02/04-01/15-457, paras 12-14 (relying on further authorities therein).

⁸ Response, ICC-02/04-01/15-1142-Conf, para. 8, n. 8.

⁹ Request, ICC-02/04-01/15-1137-Red, paras 21-26.

¹⁰ Request, ICC-02/04-01/15-1137-Red, paras 3, 33-41.

that several witnesses mentioned this ‘notorious event’ does not make it material to the preparation of the defence, particularly since the ‘basic circumstances of Otti’s reported death do not appear to be disputed by the Parties’.¹¹

7. The Single Judge considers that the Defence has failed to establish that RFAs related to the death of Vincent Otti are material to the preparation of the defence. From its previous RFA disclosures, the Prosecution has clearly assessed that none of the RFAs related to confirming Mr Otti’s death led to any incriminating evidence in the case against Mr Ongwen. Although the Defence need not establish a direct link to incriminating or exonerating evidence when substantiating Rule 77 materiality,¹² the Defence argument that this information is required to effectively ‘challenge the reliability of the impugned evidence’¹³ appears to be untenable.
8. The Single Judge also fails to see how these RFAs can meaningfully assist in determining the ‘veracity of testimonies’ of Prosecution witnesses. The Single Judge considers that, if any evidence may affect the credibility of a Prosecution witness’s account of Mr Otti’s death, then this evidence - and any RFA used to acquire it - would become disclosable.¹⁴ However, there is nothing to suggest that the Prosecution is in possession of any such undisclosed evidence.¹⁵
9. An event in LRA history cannot be considered as material to the preparation of the defence solely because witnesses discussed it or judges were interested enough to ask questions about it. Vincent Otti’s reported death comes about two years after the time period charged in this case. The Defence makes no

¹¹ Response, ICC-02/04-01/15-1142-Conf, paras 3-5.

¹² 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, ICC-01/04-01/06-1433, OA 11, paras 76-82.

¹³ Request, ICC-02/04-01/15-1137-Red, para. 38.

¹⁴ Article 67(2) of the Statute and Rule 77 of the Rules.

¹⁵ In relation to RFA related to Otti’s death specifically identified by the Defence, the Prosecution even confirms that it never received a final response from the Ugandan authorities. Response, ICC-02/04-01/15-1142-Conf, para. 4.

submission that this event is relevant to any of the matters for which the Chamber has previously indicated it may consider evidence falling outside the charged time period.¹⁶ It is not alleged that Mr Ongwen had any role in this event.

10. If Rule 77 of the Rules extended to RFAs sent to acquire any information referenced by Prosecution witnesses across the LRA's existence, the result would be that all RFAs in the Ugandan situation would have to be disclosed by default. The Single Judge has explicitly stated that this is not required,¹⁷ and considers that the Defence has failed to satisfy its *prima facie* burden to justify disclosure. For these reasons, this part of the Defence's relief sought is rejected.

B. Missing RFA and associated communications

11. The Defence submits that the missing RFA which the Prosecution lost may have led to incriminating evidence against Mr Ongwen. It argues that the Prosecution's inability to locate and disclose this RFA undermines the principle of full disclosure and thus violates the accused's fair trial rights.¹⁸ The Defence also requests the disclosure of communications associated with RFAs, such as responses to RFAs, official letters and/or emails.¹⁹
12. In response, the Prosecution recounts its various efforts to find the materials requested by the Defence. The Prosecution confirms that it is unable to locate and disclose the missing April 2004 RFA. As regards communications associated

¹⁶ *E.g.* Transcript of Hearing, 13 June 2017, ICC-02/04-01/15-T-85-CONF-ENG, page 7 line 15 to page 8 line 9 (referencing proof of the contextual elements and modes of liability as examples for how attacks or criminal conduct outside the charged time period 'can be put forward as evidence to support the facts and circumstances in the charged time period').

¹⁷ RFA Disclosure Decision, ICC-02/04-01/15-457, para. 13.

¹⁸ Request, ICC-02/04-01/15-1137-Red, paras 27-29.

¹⁹ Request, ICC-02/04-01/15-1137-Red, paras 30-32.

with RFAs, the Prosecution explains that the Ugandan authorities did not always respond in writing to RFAs.²⁰

13. The Single Judge recalls that Rule 77 of the Rules limits the Prosecution's disclosure obligations only to materials in its 'possession or control'. The Single Judge cannot order the Prosecution to disclose materials it does not have, and there is no indication from either the Response or the Prosecution's prior correspondence with the Defence²¹ that there are any material communications associated with RFAs which have not already been disclosed.
14. As regards the missing RFA, the Single Judge considers it obviously regrettable that the Prosecution appears to have lost part of its correspondence record. However, the Single Judge notes that: (i) this is the first time the Prosecution has reported such a problem arising during this trial; (ii) nothing suggests that this RFA led to incriminating evidence against Mr Ongwen and, even if this missing RFA led to such evidence; (iii) nothing suggests that the Prosecution has not disclosed any and all disclosable information received pursuant to the missing RFA. Under the circumstances, the Single Judge does not consider that the Defence has suffered prejudice amounting to a violation of the accused's right to a fair trial. This said, and although not a failure of 'disclosure' *per se*, the Single Judge emphasises that part of the Prosecution's obligations under Article 54(1)(b) of the Statute and Rule 10 of the Rules are to preserve any correspondence it uses in the course of conducting its investigation.
15. For the reasons above, this part of the Defence's relief sought is also rejected.

²⁰ Response, ICC-02/04-01/15-1142-Conf, paras 6-11.


²¹ Annex C of the Request, ICC-02/04-01/15-1137-Conf-AnxC.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request; and

ORDERS the Prosecution to file a public redacted version of the Response (ICC-02/04-01/15-1142-Conf) within 10 days of notification of the present decision.

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



Judge Bertram Schmitt, Single Judge

Dated 1 February 2018

At The Hague, The Netherlands