

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/04-01/15
Date: 23 February 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

**With Confidential, *EX PARTE*,
only available to the Prosecution and Defence Annex A**

**Public Redacted Version of Prosecution's Notice of Filing of an Item Received in
Response to an RFA, 22 February 2018, ICC-02/04-01/15-1189-Conf-Exp**

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

Legal Representatives of Victims

Mr Joseph Akwenyu 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

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

Amicus Curiae

States Representatives

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Prosecution files this notice to rectify an inadvertent inaccuracy in Prosecution filings ICC-02/04-01/15-1142 and ICC-02/04-01/15-1177. Contrary to the assertion in those filings that the Prosecution had received no substantive information in response to its Request for Assistance [REDACTED] to the Ugandan authorities (“RFA [REDACTED]”), the information in Annex A to the present filing was received by the Prosecution in response to RFA [REDACTED] on 23 November 2007. The Prosecution apologises for its error and assures the Trial Chamber and the Defence that it is taking steps to ensure that such errors are not repeated.

Confidentiality

2. Pursuant to regulation 23*bis* of the Regulations of the Court, this submission is filed confidentially and *ex parte* available only to the Trial Chamber and the Defence because [REDACTED]. The Prosecution will file a public redacted version within one week.

Submissions

3. On 16 January 2018, the Defence requested that the Trial Chamber order the Prosecution to disclose RFAs and associated materials related to the death of Vincent Otti.¹
4. On 1 February 2018, Presiding Judge Schmitt, acting as Single Judge, rejected the request, concluding that “the Defence ha[d] failed to establish that RFAs related to the death of Vincent Otti are material to the preparation of the defence”.² On 14 February 2018, the Single Judge rejected the Defence’s request for leave to appeal his 1 February 2018 decision, emphasising that the requested material was

¹ ICC-02/04-01/15-1137.

² ICC-02/04-01/15-1161, para. 7; *see also id.* paras. 7-10.

“marginal” and that Vincent Otti’s death was “not of consequence in this case, for the reasons set out in the Impugned Decision”.³

5. In its response to the Defence’s initial request, the Prosecution stated that it “has never received a final response from the Ugandan authorities” and collected “no information whatsoever” in response to RFA [REDACTED], although it noted a communication received on 30 November 2007 in which the Ugandan authorities offered to provide further information to the Prosecution once their investigation of Otti’s death was concluded.⁴ In its response to the Defence request for leave to appeal, the Prosecution again stated that it had “received no response to the RFA at issue [other than the 30 November 2007 communication], and thus it has received no evidence, about the circumstances of Otti’s death or other matters, in response”.⁵
6. The Prosecution realised last week that it did in fact receive two related items from the Ugandan authorities in response to RFA [REDACTED], on 23 November 2007. For reasons set out in the following paragraphs, those two items had been placed in a secure electronic binder within the Prosecution’s evidence database to which only some members of the prosecution team had access. The only reference to RFA [REDACTED] in relation to these items was made on the accompanying Pre-registration Form (PRF). Unfortunately, although that PRF was itself registered in the OTP evidence database, the system’s optical character recognition (OCR) software did not recognise the handwritten reference to “[REDACTED]”, and thus searches for information related to that RFA did not identify the relevant PRF (which would, in turn, have led to the two underlying items). Furthermore, it appears that the receipt of the 23 November 2007 information was not communicated to the Prosecution’s judicial cooperation unit, or at least was not logged in the Prosecution’s RFA database. As a consequence of

³ ICC-02/04-01/15-1179, para. 12

⁴ ICC-02/04-01/15-1142, para. 4 & n.2.

⁵ ICC-02/04-01/15-1177, para. 3.

these various combined errors, at the time of drafting filings ICC-02/04-01/15-1142 and ICC-02/04-01/15-1177, the prosecution trial team was unaware that the 23 November 2007 items existed. Only last week, on 14 February 2018, as part of a supplementary disclosure review described below in paragraph 9(c), did the Prosecution locate the items and realise its mistake.

7. The newly (re)discovered items are a report from a UPDF officer and a sound recording on which part of the report is based. They contain the following information: [REDACTED]⁶ [REDACTED].⁷
8. The two items were provided to the OTP on 23 November 2007. They were treated at the time as highly sensitive, due to their content. [REDACTED] Hence the segregation of the items in a secure electronic binder within the OTP evidence database. [REDACTED]
9. However justified the cautious treatment of these items may have been at the time of their collection, the Prosecution recognises that it has fallen short in two ways: first in failing to identify and review these items until last week, and second in making representations to the Chamber which it believed to be accurate but were not. To ensure that this situation is not repeated, the Prosecution has taken and is taking the following steps:
 - a. Immediately upon learning of the existence of the items received on 23 November 2007, the Prosecution reviewed them for possible disclosure to the Defence. The Prosecution determined that the information contained in the items is not material to the preparation of the defence, or otherwise disclosable under the Statute and Rules, including in light of the Single Judge's recent decisions, because it relates only to the death of Otti and not to any charged conduct in this case or any

⁶ See [REDACTED].

⁷ Annex A, [REDACTED].

conduct by Mr Ongwen, and because it contains no actual information regarding the circumstances of Otti's death which might even potentially impact the reliability of any prosecution witness's account of that event.⁸ Nevertheless, the Prosecution today provides the annexed document to the Trial Chamber and to the Defence in an effort to provide transparency and an explanation for its erroneous statements in filings ICC-02/04-01/15-1142 and ICC-02/04-01/15-1177;

- b. The Prosecution has confirmed that its trial team now has full access to all items in the evidence database for the Uganda situation (*i.e.*, there are no other segregated electronic binders), and has reviewed all items therein for possible disclosure;
- c. Out of an abundance of caution and particularly in light of the recent assertions made by the Defence about the potential relevance of the circumstances of Otti's death to a proposed defence of duress, the Prosecution is currently undertaking an additional (re)review of its evidence database to ensure that it has disclosed to the Defence all information that may be material to the preparation of Mr Ongwen's defence, including any information potentially affecting the credibility of a prosecution witness's account of Otti's death.⁹ Any disclosable information will be communicated to the Defence as soon as possible.

Conclusion

10. In summary and conclusion, the Prosecution has discovered information that it received in response to RFA [REDACTED]. Although that information is not disclosable under rule 77 or any other provision of the Statute and Rules, the Prosecution today provides it to the Trial Chamber and Defence to rectify

⁸ See ICC-02/04-01/15-1161, para. 8.

⁹ See ICC-02/04-01/15-1161, para. 8.

statements in its prior filings that, while made in good faith, were inaccurate. The Prosecution apologises for its error and assures the Trial Chamber and the Defence that it has taken and is taking steps to avoid such errors in the future.



Fatou Bensouda

Prosecutor

Dated 23rd day of February 2018
At The Hague, The Netherlands