

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-02/04-01/15

Date: 16 March 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 Requests Following Prosecution's Notice of Filing of an  
Item Received in Response to an RFA**

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

**The Office of the Prosecutor**

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**Legal Representatives of Applicants**

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**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

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

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Detention Section**

**Victims Participation and Reparations  
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**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 Articles 54(1)(b), 64(2) and 67(1) of the Rome Statute (‘Statute’), Rule 10 of the Rules of Procedure and Evidence (‘Rules’) and Regulation 23 *bis* of the Regulations of the Court, issues the following ‘Decision on Defence Requests Following Prosecution’s Notice of Filing of an Item Received in Response to an RFA’.

### **I. Procedural history**

1. On 16 January 2018, the defence for Mr Ongwen (‘Defence’) filed a submission requesting that the Chamber order the Office of the Prosecutor (‘Prosecution’) to disclose, amongst other items, certain requests for assistance (‘RFAs’) related to the reported death of Vincent Otti.<sup>1</sup> The Defence had become aware of one specific RFA on this matter (RFA/UG/0024, or ‘RFA 24’), but the Prosecution confirmed repeatedly that it never received a final response to it from the Ugandan authorities.<sup>2</sup>
2. On 1 February 2018, the Single Judge rejected this Defence request (‘February Disclosure Decision’).<sup>3</sup> The Single Judge decided that RFAs related to the reported death of Vincent Otti are not material to the preparation of the defence.<sup>4</sup>

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<sup>1</sup> Public Redacted Version of “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).

<sup>2</sup> ICC-02/04-01/15-1137-Conf, paras 10, 21-24; Prosecution’s Response to Defence Request for Leave to Appeal Decision ICC-02/04-01/15-1161, 12 February 2018, ICC-02/04-01/15-1177, para. 3 (citations removed: ‘[t]he Prosecution again emphasises that it has received no response to the RFA at issue, and thus it has received no evidence, about the circumstances of Otti’s death or other matters, in response. Therefore, the Prosecution is not withholding any evidence’); 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), 18 January 2018, ICC-02/04-01/15-1142, para. 4.

<sup>3</sup> Decision on Defence Request for Disclosure of Certain Requests for Assistance and Related Items, ICC-02/04-01/15-1161. Leave to appeal this decision was rejected. Decision on Request for Leave to Appeal the Decision on Defence Request for Disclosure of Certain RFAs and Related Items, 14 February 2018, ICC-02/04-01/15-1179.

<sup>4</sup> February Disclosure Decision, ICC-02/04-01/15-1161, paras 7-10.

3. On 23 February 2018, the Prosecution filed a notification ('Prosecution Notification') indicating its discovery that, contrary to its previous submissions, it *had* received substantive information in response to RFA 24.<sup>5</sup> This information – a report from a UPDF officer and a sound recording on which part of the report was based ('UPDF Report' and 'Sound Recording', respectively) – was missed in previous disclosure reviews because it was contained in a secure electronic binder to which only certain members of the Prosecution had access.<sup>6</sup>
4. The Prosecution apologised for its error and announced that it: (i) has provided a redacted version of the UPDF Report to the Defence, despite considering that this information is not material to its preparation, in an 'effort to provide transparency and an explanation for its erroneous statements [...]'; (ii) confirms that its trial team 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; and (iii) 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.<sup>7</sup>
5. On 5 March 2018, the Defence requested a variety of disclosure related relief following the Prosecution Notification ('Request').<sup>8</sup> The Defence requests that the Chamber: (i) order disclosure of the Sound Recording, the identity of the informant redacted in the UPDF report and RFA 24; (ii) order the Prosecution to 'disclose all the available information about other UPDF informants that assisted

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<sup>5</sup> 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, ICC-02/04-01/15-1189-Red (with annex).

<sup>6</sup> Prosecution Notification, ICC-02/04-01/15-1189-Red, para. 6.

<sup>7</sup> Prosecution Notification, ICC-02/04-01/15-1189-Red, paras 9-10 (the UPDF Report can be found at ICC-02/04-01/15-1189-Conf-Exp-AnxA).

<sup>8</sup> Defence Response and Disclosure Request, in light of the "Prosecution's Notice of Filing of an Item Received in Response to an RFA", ICC-02/04-01/15-1197-Conf.

the Prosecution with [the] collection of evidence used against Mr Ongwen'; and (iii) certain further remedial measures.<sup>9</sup>

6. On 6 March 2018, the Prosecution announced that it would not file a submission following the Request and emphasised that its error was inadvertent.<sup>10</sup>

## **II. Analysis and conclusions**

7. The Single Judge will address each item of the Defence's relief sought in turn.

### **A. Provision of the Sound Recording, the identity of the informant redacted in the UPDF report and RFA 24**

8. The Single Judge considers that the statutory scheme requires the Prosecution to engage in effective information and evidence management.<sup>11</sup> This includes the Prosecution taking appropriate measures to allow for a complete review of its evidence database for disclosure purposes. The Prosecution fell short of these obligations in the present instance, and this failure led to erroneous statements before this Chamber regarding what information was in its possession. The Prosecution assures the Defence and Chamber that it was always acting in good faith, and the Single Judge considers that nothing suggests this was done deliberately or that this failure is indicative of a more widespread problem. But the Single Judge agrees with the Defence to the extent that providing it with the affected information it identifies would best ensure the fair and expeditious conduct of the proceedings.

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<sup>9</sup> Request, ICC-02/04-01/15-1197-Conf, paras 3, 53 (consolidated and renumbered from original list).

<sup>10</sup> Email from the Prosecution, 6 March 2018, at 12:01 ('The Prosecution does not intend to seek leave to reply to the Defence's filing # 1197 of yesterday. However, the Prosecution wishes to make absolutely clear that it rejects the Defence's assertion that the Prosecution's failure to review the two items at issue sooner "was deliberate" (filing # 1197, para. 21). That is incorrect. As explained in filing # 1189, the Prosecution's failure to review those items sooner was inadvertent. The error was rectified as soon as the existence of the items was discovered, the matter was promptly brought to the attention of the Chamber and the Defence, and the Prosecution has taken and is taking steps to ensure that similar errors are not repeated.')

<sup>11</sup> Article 54(1)(b) of the Statute; Rule 10 of the Rules; February Disclosure Decision, ICC-02/04-01/15-1161, para. 14. *See also* Regulations 23 and 55 of the Regulations of the Office of the Prosecutor.

9. On this basis, and irrespective of whether these three items sought by the Defence fall under the Prosecution's disclosure obligations,<sup>12</sup> the Single Judge considers it appropriate for the Prosecution to provide the Sound Recording and RFA 24.<sup>13</sup> As regards the identity of the informant in the UPDF Report, this must also be provided to the Defence forthwith unless, within 5 days of notification of the present decision, the Prosecution files a substantiated request for non-disclosure.
10. To this extent, this part of the Defence request is granted.

**B. All available information about other UPDF informants that assisted the Prosecution with the collection of evidence used against Mr Ongwen.**

11. As regards this part of the Defence request,<sup>14</sup> the Single Judge considers this to be a new category of information not referenced in previous disclosure requests. There is no indication that any *inter partes* conversations have taken place on the disclosability of this information, as is required before seeking a disclosure order from this Chamber.<sup>15</sup> The Single Judge dismisses this request as premature.

**C. Further remedial measures**

12. The Defence requests the Chamber to: (i) reprimand the Prosecution for its alleged deficient internal review procedure; (ii) order the Prosecution to conduct a complete review of its evidence database; (iii) order the Prosecution to certify

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<sup>12</sup> *In this regard, see Appeals Chamber, The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, ICC-01/05-01/13-2275-Red, A-A5, paras 638-43.

<sup>13</sup> Redactions, to the extent they are consistent with the present decision, may be applied to these materials in accordance with the applicable procedure. Decision on issues related to disclosure and exceptions thereto, 23 April 2015, ICC-02/04-01/15-224, *applied at trial by virtue of* Order Scheduling First Status Conference and Other Matters, 4 May 2016, ICC-02/04-01/15-432, para. 4.

<sup>14</sup> Request, ICC-02/04-01/15-1197-Conf, paras 48-50.

<sup>15</sup> Decision on Disclosure Issues Arising Out of First Status Conference, 7 June 2016, ICC-02/04-01/15-457, para. 5.

before this Chamber that it has conducted this review and (iv) grant the Defence, if it considers it necessary, 'the right to recall some of the Prosecution witnesses for further cross-examination based on the (re)discovered materials'.<sup>16</sup> The Defence also requests the Chamber to make a finding that 'the late or delayed, and incomplete disclosure caused prejudice to Mr Ongwen, which is a fair trial violation under Article 67 of the Statute'.<sup>17</sup>

13. The Single Judge has already determined that the Prosecution failed to act in full conformity with its information and evidence management obligations, and does not consider any further reprimand to be warranted. The Prosecution has already committed itself to conduct a full re-review of its evidence database, rendering any order for it to do so superfluous. The Single Judge is also satisfied that the steps taken by the Prosecution to avoid this situation repeating make it unnecessary to order any sort of certification at this time.
14. The Single Judge also will not grant the Defence an abstract right to recall witnesses. Recalling witnesses is an exceptional measure, and, as has been stated previously, for any such request to succeed the Defence must be able to substantiate that a significant new line of questioning has arisen.<sup>18</sup> Noting the speculative nature of the relief sought, it follows from the Defence's argumentation that the redacted UPDF Report already provided does not trigger the need to recall specific witnesses. Once the Defence is in a position to make the requisite showing, it may file a request accordingly.
15. Noting this possibility to recall witnesses and the fact that all affected information identified by the Defence has been provided to it by virtue of the

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<sup>16</sup> Request, ICC-02/04-01/15-1197-Conf, paras 3, 51, 53.

<sup>17</sup> Request, ICC-02/04-01/15-1197-Conf, paras 19-28, 52.

<sup>18</sup> Public Redacted Version of Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, 6 March 2018, ICC-02/04-01/15-1199-Red, para. 25.

present decision,<sup>19</sup> the Single Judge considers that any prejudice caused by the Prosecution's information management failure has been fully addressed. Under the circumstances, the Single Judge does not consider that the Defence has suffered undue prejudice amounting to a violation of the accused's right to a fair trial.

16. The Single Judge therefore rejects these parts of the relief sought by the Defence.

**FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY**

**GRANTS** the Request in respect of the Sound Recording and RFA 24;

**GRANTS** the Request in respect of the identity of the UPDF informant, subject to paragraph 9 above;

**REJECTS** the remainder of the Request; and

**ORDERS** the Defence to file a public redacted version of its Request (ICC-02/04-01/15-1197-Conf), or request reclassification thereof, within 10 days of notification of the present decision.

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

  
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**Judge Bertram Schmitt, Single Judge**

Dated 16 March 2018

At The Hague, The Netherlands

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<sup>19</sup> See paragraph 9 above.