

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 15 June 2016

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

Public

Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance

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 issues the following 'Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance', in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 21(2), 64(2) and 67(1) of the Rome Statute ('Statute') and Regulation 36(3) of the Regulations of the Court.

1. On 7 June 2016, the Single Judge rendered the following finding ('Decision') on the disclosability of the Office of the Prosecutor's ('Prosecution') requests for assistance ('RFAs'):

The Single Judge considers that the Prosecution's submissions suggest that it misconstrues its obligations in relation to RFAs. The materiality of RFAs are assessed on a case-by-case basis, and the Single Judge is not persuaded that all RFAs in the Uganda situation must be disclosed by default. However, the Prosecution's arguments understate the fact that it is imperative that the Defence be able to test the reliability of the procedure employed in collecting the evidence against them. It is also incorrect to say that RFAs are internal work product – they are Prosecution requests for information to States and other third parties, and external correspondence does not qualify under Rule 81(1) of the Rules.

The Single Judge understands 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. The Prosecution may redact these RFAs in accordance with the applicable redaction regime.¹

2. On 13 June 2016, the Prosecution requested reconsideration of the Decision ('Request').² The Prosecution alleges that this decision contains a clear error of reasoning on the basis of: (i) the inconsistency between the law stated in the Decision and the law applied in practice; (ii) the inconsistency of the Decision with prior case law; and (iii) the inconsistency of the Decision with the consultative approach to disclosure emphasised by the Single Judge and implemented by the parties.

¹ Decision on Disclosure Issues Arising Out of First Status Conference, ICC-02/04-01/15-457, paras 13-14 (citations removed).

² Request for reconsideration of the order to disclose requests for assistance (ICC-02/04-01/15-457), ICC-02/04-01/15-462 (with annex). The Request exceeds an average of 300 words per page, as required in Regulation 36(3) of the Regulations of the Court, but is nevertheless accepted on the present occasion.

3. In this particular instance, the Single Judge considers that no further submissions are necessary in order to rule upon the relief sought.
4. As conceded by the Prosecution, reconsideration is exceptional and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment.³
5. The Prosecution's arguments fail to satisfy this standard.
6. First, the Prosecution challenges whether the Single Judge, consistently with a case-by-case assessment, could declare the RFAs identified in the Decision as material to the preparation of the defence. Accepting the Prosecution's argument effectively precludes rulings on the disclosability of classes of items. Such a position unduly limits the Chamber's flexibility in ruling on disclosure of identically situated documents and, more importantly, is not a 'clear' error of reasoning.
7. Second, the reliance on allegedly contrary case law as evincing a clear error misrepresents the showing made by the Defence,⁴ the Court's applicable law⁵ and the cases cited.⁶

³ Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba et al.*, Decision on Defence Request for Reconsideration of or Leave to Appeal 'Decision on "Defence Request for Disclosure and Judicial Assistance"', 24 September 2015, ICC-01/05-01/13-1282, para. 8; Trial Chamber V-A, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits, 10 February 2015, ICC-01/09-01/11-1813, para. 19.

⁴ The defence did advance arguments – accepted in part by the Single Judge - on *prima facie* materiality, submitting that the RFAs in question are material to assist in evaluating the 'legality of the process' of evidence collection. Transcript of Hearing, 23 May 2016, ICC-02/04-01/15-T-25-ENG, page 9 lines 7-17, cited in Decision, ICC-02/04-01/15-457, para. 12.

⁵ Article 21(2) of the Statute does not require the Court to always apply the law as set out in past decisions: 'The Court *may* apply principles and rules of law as interpreted in its previous decisions' (emphasis added).

⁶ For instance, the Prosecution relies on multiple references to the Special Tribunal for Lebanon's *Ayyash et al.* case in support of its position. However, the Trial Chamber in this case actually ordered the STL Prosecution to disclose RFAs which led to *any* disclosable material, an even broader finding than the one made in the Decision challenged. Special Tribunal for Lebanon, *The Prosecutor v. Ayyash et al.*, Decision Reconsidering 'Decision on the Oneissi Defence Motion for Disclosure of Requests for Assistance', 7 November 2014, 6 March 2015, STL-11-01/T/TC F1875, paras 19-20.

8. Third, the Prosecution is correct that the Chamber expects *inter partes* disclosure discussions before seizing the Chamber, but it is hardly a clear error to rule on certain objections prior to consultations concluding when appropriate – particularly when, as here, the Prosecution’s status conference submissions on RFAs misstated its disclosure obligations.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request.

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

A handwritten signature in black ink, appearing to read 'BSchmitt', is written over a horizontal line.

Judge Bertram Schmitt, Single Judge

Dated 15 June 2016

At The Hague, The Netherlands