

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 3 April 2017

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 Material Related to Local
Defence Forces and Other Matters**

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Benjamin Gumpert

Counsel for the Defence

Krispus Ayena Odongo

Legal Representatives of Victims

Joseph Akwenyu Manoba and Francisco
Cox
Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**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

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

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 Articles 54(3)(e) and 67(2) of the Rome Statute ('Statute'), Rules 76, 77, 81 and 82 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 Material Related to Local Defence Forces and Other Matters'.

1. On 15 March 2017, the defence for Mr Ongwen ('Defence') requested that the Chamber order disclosure of materials falling under nine categories ('Disclosure Request').¹ The Defence later requested that the Disclosure Request be reclassified as a 'public' document.²
2. On 27 March 2017, the Office of the Prosecutor ('Prosecution') responded to the Request ('Prosecution Response').³ The Prosecution indicates that it has reviewed its materials and identified 15 undisclosed items which appear to be at least 'partially or arguably responsive' to the Request. The Prosecution indicates that these materials will be disclosed in the coming days.⁴
3. For one item, the Prosecution indicates that the United Nations ('UN') has agreed to disclosure of the item while requesting redaction to the names of certain third party organisations ('Redactions Request').⁵ The document is a nine

¹ Defence Request for a Disclosure Order Regarding Material Related to the Circumstances of Hostilities between the LRA and Ugandan Government Pursuant to Article 67(2) and Rule 77, ICC-02/04-01/15-759-Conf (with three annexes).

² Email from the Defence, 24 March 2017 at 12:50.

³ Prosecution Response to Defence Request for a Disclosure Order (ICC-02/04-01/15-759), 27 March 2017, ICC-02/04-01/15-792 (with one confidential *ex parte* annex).

⁴ Prosecution Response, ICC-02/04-01/15-792, paras 2-3. These materials were indeed included in the Prosecution's most recent disclosure notice. See Prosecution's Communication of the Disclosure of Evidence, 28 March 2017, ICC-02/04-01/15-794 (with annex).

⁵ Prosecution Response, ICC-02/04-01/15-792, para. 5.

page report (UGA-OTP-0159-0119) – redaction is sought for one word at page 0121 and two words on page 0123.⁶

4. On 29 March 2017,⁷ the Defence responded to Redactions Request, asking that it be rejected on grounds that the Prosecution failed to explain the legal basis for the redactions or why they are necessary.⁸
5. On 30 March 2017, after being granted leave to reply in relation to the Redactions Request,⁹ the Prosecution submitted that: (i) the UN provided the document on an understanding that it would not be further disclosed without the UN's consent and (ii) the redactions sought are required because disclosure would violate obligations owed by the UN to the named third parties.¹⁰
6. Given the confirmation in the Prosecution Response that all materials in the Prosecution's possession falling under the nine categories have been disclosed, the Single Judge considers the relief sought in the Disclosure Request to be moot.
7. As to the Redactions Request, the Single Judge notes the Prosecution's reply and understands that the redacted information cannot be disclosed to the Defence pursuant to Article 54(3)(e) of the Statute and Rule 81(3) of the Rules.¹¹

⁶ See Annex A to the Prosecution Response, ICC-02/04-01/15-792-Conf-Exp-AnxA.

⁷ This response deadline was shortened to this date. Email from Trial Chamber IX Communications to the parties and participants, 28 March 2017 at 09:42.

⁸ Defence Response to the Prosecution Request for Non-Standard Redactions of Item UGA-OTP-0159-0119, ICC-02/04-01/15-797.

⁹ Email from Trial Chamber IX Communications, 30 March 2017 at 09:42 ('In order to ensure the clarity of the record and to resolve this matter expeditiously, and acting pursuant to Regulations 24(5) and 34 of the Regulations of the Court, it is considered that no responses to this request for leave to reply are necessary and the request is granted. The reply must be filed by 16:00 today, 30 March 2017. In its reply, the Prosecution must specify whether document UGA-OTP-0159-0119 falls under Article 54(3)(e) of the Statute and whether the redactions are requested due to obligations of confidentiality owed by the United Nations to third parties'), *ruling on* Email from Prosecution, 30 March 2017 at 09:10.

¹⁰ Prosecution Reply to Defence Response to the Prosecution Request for Non-Standard Redactions of Item UGA-OTP-0159-0119, ICC-02/04-01/15-801 (with annex). The annex to this reply has been annexed to a previous application specifically identifying the document in question as having been obtained pursuant to Article 54(3)(e) of the Statute. *Compare* ICC-02/04-01/15-801-Conf-AnxA, page 11 *with* Annex 1 to the Prosecution's application under article 54(3)(f) to apply redactions to documents obtained under article 54(3)(e), 24 February 2016, ICC-02/04-01/15-409-Conf-Exp-Anx1, page 11.

¹¹ Article 54(3)(e) of the Statute provides that: 'The Prosecutor may: [...] [a]gree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and

Accordingly, and as noted by Pre-Trial Chamber II in this case, the issue with such documents is rather whether disclosure with redactions is compatible with the fair trial rights of Mr Ongwen.¹²

8. The Single Judge considers the requested redactions to be narrowly tailored and exclusively relating to information irrelevant in these proceedings. The Single Judge considers there to be no tension between the Prosecution's Article 54(3)(e) agreement and the rights of the defence. The Single Judge grants the requested redactions and considers no other measures to be necessary.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

DISMISSES the Disclosure Request as moot;

GRANTS the Redactions Request; and

ORDERS the Registry to reclassify the Disclosure Request (ICC-02/04-01/15-759-Conf) as 'public' and document ICC-02/04-01/15-409-Conf-Exp-Anx1 as 'confidential'.

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



Judge Bertram Schmitt, Single Judge

Dated 3 April 2017

At The Hague, The Netherlands

solely for the purpose of generating new evidence, unless the provider of the information consents'. Rule 81(3) of the Rules provides, in relevant part: 'Where steps have been taken to ensure the confidentiality of information, in accordance with articles 54, 57, 64, 72 and 93, [...] such information shall not be disclosed, except in accordance with those articles. [...]'

¹² Decision on the "Prosecution's application under article 54(3)(f) to apply redactions to documents obtained under article 54(3)(e)", 2 March 2016, ICC-02/04-01/15-410, para. 4.