

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/04-01/15
Date: 14 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 Request for Leave to Appeal the Decision on Defence Request for
Disclosure of Certain RFAs and Related Items**

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

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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 Article 82(1)(d) of the Rome Statute, issues the following 'Decision on Request for Leave to Appeal the Decision on Defence Request for Disclosure of Certain RFAs and Related Items'.

I. Procedural history and relief sought

1. On 16 January 2018, the defence for Mr Ongwen ('Defence') filed a submission ('Initial Request') requesting that the Chamber order the Office of the Prosecutor ('Prosecution') to disclose various items, specifically: (i) certain requests for assistance ('RFAs') related to the reported death of Vincent Otti; (ii) an April 2004 RFA which was in the Prosecution's custody, but is now missing; and (iii) communications associated with RFAs, such as responses to RFAs, official letters and/or emails.¹
2. On 1 February 2018, the Single Judge rejected the Initial Request ('Impugned Decision').²
3. On 7 February 2018, the Defence sought leave to appeal the Impugned Decision in respect of five issues ('Request').³
4. On 12 February 2018, the Prosecution responded, opposing the Request in full.⁴

¹ Public Redacted Version of "Defence Request for a Rule 77 Disclosure Order Concerning the Requests for Assistance and Other Related Items", filed on 16 January 2018, ICC-02/04-01/15-1137-Red (with three annexes; the confidential was version notified on the same day).

² Decision on Defence Request for Disclosure of Certain Requests for Assistance and Related Items, ICC-02/04-01/15-1161.

³ Defence Request for Leave to Appeal the "Decision on Defence Request for Disclosure of Certain Requests for Assistance and Related Items", ICC-02/04-01/15-1174-Conf (a redacted version was notified on 8 February 2018).

⁴ Prosecution's Response to Defence Request for Leave to Appeal Decision ICC-02/04-01/15-1161, ICC-02/04-01/15-1177.

II. Submissions, analysis and conclusions

5. The Single Judge recalls the interpretation of Article 82(1)(d) of the Statute as set out in detail previously.⁵
6. Before turning to the Request, the Single Judge recalls that the Impugned Decision concluded that the Defence had failed to establish the *prima facie* materiality of RFAs related to confirming the death of Vincent Otti.⁶ In doing so, the Single Judge rejected the two arguments advanced, namely that the materials sought are required to prepare an informed and effective challenge: (i) to the reliability of the impugned evidence; and (ii) to the veracity of witness testimonies.⁷ However, the Defence repeatedly supports its request for leave to appeal with the argument that the undisclosed RFAs are material to its duress defence.⁸ Although the Single Judge has been generally aware of the Defence's potential duress defence for some time,⁹ it must be noted that this is a new disclosure argument not advanced in the Initial Request.
7. The Single Judge considers that parties cannot use leave to appeal applications as an opportunity to complement past arguments. To entertain such arguments after an adverse ruling challenges the basic principles of judicial finality¹⁰ and calls into question whether the new arguments genuinely reflect the moving party's original position. The Defence had a *prima facie* burden to substantiate an order for disclosure, and the Impugned Decision decided that the Defence failed to discharge this burden in its Initial Request. Advancing a new argument

⁵ Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, paras 4-8. *See also* Decision on the Defence Request for Leave to Appeal the Decision on the Confirmation of Charges, 29 April 2016, ICC-02/04-01/15-428, paras 5-9.

⁶ Impugned Decision, ICC-02/04-01/15-1161, paras 5-10.

⁷ Impugned Decision, ICC-02/04-01/15-1161, para. 5. The Initial Request does not make reference to any affirmative defences, and the word 'duress' does not even appear.

⁸ Request, ICC-02/04-01/15-1174-Red, paras 22, 42, 44.

⁹ Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules of Procedure and Evidence, 9 August 2016, ICC-02/04-01/15-517 (with annex).

¹⁰ For the high standard required for reconsidering a judicial decision, *see* Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance, 15 June 2016, ICC-02/04-01/15-468, para. 4.

justifying disclosure at this point misrepresents the record leading up to the Impugned Decision, and the Single Judge expects all relevant arguments to be advanced when first requesting relief from the Chamber.

A. First, fourth and fifth issues

8. The Defence's first proposed issue is: '[w]hether the Impugned Decision meets the standard articulated in the *Lubanga* Case that a) the expression "material to the preparation of the defence has to be interpreted broadly"; and b) that Rule 77 of the RPE encompasses "all objects that are relevant for the preparation of the defence"'.¹¹
9. The Defence's fourth proposed issue is: '[w]hether the Impugned Decision violates the Single Judge's Disclosure Decision regarding the disclosure of RFAs, considering that – in the [Confirmation] Decision – Mr Ongwen is charged under Article 25(3)(a) of the Statute as an indirect co-perpetrator, and Vincent Otti is identified as one of the co-perpetrators'.¹²
10. The Defence's fifth proposed issue is: '[w]hether the Impugned Decision, especially in relation to Vincent Otti's alleged execution from 2007 was consistent with previous Trial Chamber's rulings in respect to evidence outside the temporal jurisdiction of the confirmed charges'.¹³
11. The Single Judge considers that these issues do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. All three issues allege some sort of inconsistency between the Impugned Decision and

¹¹ Request, ICC-02/04-01/15-1174-Red, paras 20-23, 43-49, 50(a).

¹² Request, ICC-02/04-01/15-1174-Red, paras 35-38, 43-49, 50(d).

¹³ Request, ICC-02/04-01/15-1174-Red, paras 39-42, 43-49, 50(e).

prior jurisprudence. The Impugned Decision referenced all this jurisprudence to some degree and considered its conclusions to be consistent with it.¹⁴

12. When deciding whether the leave to appeal criteria are met, the marginal nature of the materials sought must be emphasised. The only materials at issue in the Impugned Decision which the Prosecution actually possessed or controlled – and thus could disclose – are RFAs related to confirming Vincent Otti’s death. This event is not of consequence in this case, for reasons set out in the Impugned Decision.¹⁵ Although RFAs are disclosable in certain contexts, it must be acknowledged that RFAs are only Prosecution correspondence asking for evidence – the subsequent evidence acquired is not at issue in the Impugned Decision. At least in the contexts of RFAs leading to any incriminating or potentially exculpatory evidence in this case, the Single Judge already determined such RFAs to be material to the preparation of the defence.¹⁶
13. The only RFAs not disclosed as a result of the Impugned Decision are those related to an inconsequential event *and* which bear no relationship to any incriminating or potentially exonerating evidence. The Single Judge fails to see what impact such undisclosed documents could have on the fair and expeditious conduct of the proceedings or the outcome of the trial. The relief sought is rejected in respect of these issues.

B. Second issue

14. The Defence’s second proposed issue is: ‘[w]hether the Impugned Decision’s position that material requested for challenging the reliability of impugned evidence in respect to, *inter alia*, [certain Prosecution witnesses], is unnecessary

¹⁴ Impugned Decision, ICC-02/04-01/15-1161, paras 3, 7, 16.

¹⁵ Impugned Decision, ICC-02/04-01/15-1161, para. 9.

¹⁶ *See* Impugned Decision, ICC-02/04-01/15-1161, para. 8 (only in reference to witness credibility, but with the finding premised on Article 67(2) of the Statute); Decision on Disclosure Issues Arising Out of First Status Conference, 7 June 2016, ICC-02/04-01/15-457, para. 14.

to challenge the reliability of their evidence is consistent with a) the provisions of Article 67(2) of the Statute in respect to the Prosecution's disclosure obligations of material "which may affect the credibility of prosecution evidence"; and b) the provisions of Article 67(1)(e) of the Statute, which entitles an accused to raise defences'.¹⁷

15. The Single Judge does not consider this issue to arise from the Impugned Decision. The Impugned Decision did not conclude that the materials sought were 'unnecessary' for purposes of challenging Prosecution witness credibility, but rather that nothing indicated that there were any such materials. Had the materials sought affected Prosecution witness credibility, the Impugned Decision clearly stated they would need to be disclosed.¹⁸ As the arguments in the Initial Request did not concern affirmative defences, any consideration of Article 67(1)(e) of the Statute also did not arise in the Impugned Decision. The relief sought is rejected in respect of this issue.

C. Third issue

16. The Defence's third proposed issue is: '[w]hether the Impugned Decision's position that the missing RFA is "obviously regrettable" is a sufficient response to implement the principle that where there is a human rights violation, there has to be a remedy'.¹⁹
17. The Single Judge considers that this issue also does not arise from the Impugned Decision. The Impugned Decision never concluded the missing RFA led to a 'human rights violation'. The only human rights mentioned in the Request are

¹⁷ Request, ICC-02/04-01/15-1174-Red, paras 24-29, 43-49, 50(b).

¹⁸ Impugned Decision, ICC-02/04-01/15-1161, para. 8 ('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').

¹⁹ Request, ICC-02/04-01/15-1174-Red, paras 30-34, 43-49, 50(c).

the 'rights enumerated under [a] fair trial in Article 67 of the Statute',²⁰ but Article 67(2) of the Statute only extends to 'evidence in the Prosecution's possession or control'²¹ and the Impugned Decision specifically held that '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'.²² As no fair trial violation was found in the Impugned Decision, the issue of whether this violation was sufficiently remedied does not arise. The relief sought is rejected in respect of this issue.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request.

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



Judge Bertram Schmitt, Single Judge

Dated 14 February 2018

At The Hague, The Netherlands

²⁰ Request, ICC-02/04-01/15-1174-Red, para. 33.

²¹ See Impugned Decision, ICC-02/04-01/15-1161, para. 13 (with reference to identical language contained in Rule 77 of the Rules of Procedure and Evidence: '[t]he Single Judge cannot order the Prosecution to disclose materials it does not have').

²² Impugned Decision, ICC-02/04-01/15-1161, para. 14.