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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

Prosecution's Submission regarding an Intervention under Article 72(4) of the Statute

Source: **Office of the Prosecutor**

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Introduction

1. At the invitation of the Trial Chamber,[1] the Prosecution files these submissions regarding the intervention by the Attorney General of the Republic of Uganda under article 72(4) of the Rome Statute.[2] These submissions address the matters raised in the Article 72 Intervention as a whole but, at the Trial Chamber's express direction, also consider in particular any potential application of "article 72(7)(a)(iii)".

2. In making these submissions, the Prosecution is conscious both of the inherent gravity of matters arising under the article 72 procedure, and the relative novelty of such proceedings. While underlining its respect for the decisions and orders which have been rendered in this case to date, the Prosecution considers it appropriate to address the relevant issues in some detail, with a view to identifying the most appropriate way of resolving the matter.

3. The Attorney General's concern arises from the Single Judge's order to the Prosecution to disclose a document which contains the identity of a confidential informant for the Ugandan People's Defence Forces ("UPDF").[3] Although the Prosecution had argued that this particular information did not fall within rule 77 of the Rules of Procedure and Evidence,[4] and sought to maintain its confidentiality under article 68 and rule 81(4),[5] the Single Judge held that, in principle, "non-disclosure should […] be warranted by the existence of an objectively justifiable risk to the safety of the person concerned, as a result of disclosure to the Defence specifically—and not only the public in general—and be proportionate to the rights of the accused."[6] At that time, the Single Judge was not persuaded "of the existence

[1] E-mail from Trial Chamber IX to the Parties and participants, 25 April 2018.
[2] *See* ICC-02/04-01/15-1240-Anx ("Article 72 Intervention").
[3] *See* ICC-02/04-01/15-1207 ("Disclosure Order").
[4] *See* ICC-02/04-01/15-1217 ("Prosecution Confidentiality Request"), para. 9. *But see* ICC-02/04-01/15-1234 ("Rule 81 Order"), para. 6. *See further below* paras. 19-21.
[5] Prosecution Confidentiality Request, para. 8. *See also* para. 11 (arguing that, in the event of disclosure, the measures potentially necessary to ensure the informant's safety, who is neither a victim nor a witness, would be disproportionate when it has not been clearly demonstrated that fair trial needs require disclosure).
[6] Rule 81 Order, para. 7.

of an objectively justifiable risk to the informant", and so ordered disclosure to the Defence of their identity.[7]

Submissions

4. The Prosecution recalls that article 72 of the Statute "applies in any case where the disclosure of the information or documents of a State would, *in the opinion of that State*, prejudice its national security interests."[8] The Article 72 Intervention demonstrates that Uganda is of this opinion. Furthermore, in the Prosecution's view, the Article 72 Intervention in this case is sufficiently specific and substantiated so as to effectively trigger article 72.[9] Accordingly, the Prosecution submits that it is appropriate to consider the Article 72 Intervention within the procedural framework of article 72.

5. The Prosecution shares the concerns reflected in the Article 72 Intervention, and regrets the chain of events which led to the present state of affairs. It does, however, consider that the Article 72 Intervention presents an opportunity to ensure that the interests of all Parties and participants, including not only the Ugandan authorities but also the Defence, are appropriately met. This is the object and purpose of article 72, which exists to provide a framework in which disagreements of this nature may be, if at all possible, effectively resolved for the benefit of all concerned, including the Court.

6. As the following paragraphs explain, the Prosecution agrees with the Ugandan authorities on the general public interest in maintaining the anonymity of

[7] Rule 81 Order, para. 8.
[8] Statute, art. 72(1) (emphasis added). This plain reading of article 72(1) is also supported by article 72(6) which, again, does not require the State even to give "specific reasons" for any ultimate determination that information cannot be provided or disclosed without prejudice to its national security interests, if giving such reasons itself necessarily results in prejudice to those interests.
[9] *See e.g.* ICC-01/09-02/11-340, paras. 10-11. *See also* R. Rastan, 'Article 72,' in O. Triffterer and K. Ambos, *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H.Beck/Hart/Nomos, 2016) ("Rastan"), pp. 1789-1790, mn. 16. *See further* ICTY, *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, Decision on the Accused's Application for Binding Order Pursuant to Rule 54*bis* (Federal Republic of Germany), 19 May 2010, para. 43.

confidential informants. Admittedly, this was not the primary focus of the previous litigation concerning the scope of the Disclosure Order[10]—but the Article 72 Intervention expressly seeks a determination of the "relevance and necessity" of the disclosure of the confidential informant's identity, to which these concerns are most apposite.[11] In the Prosecution's view, Uganda is not only entitled to make such a request under article 72(5)(b), but the Court should in these circumstances consider that request on its merits as part of the obligation under article 72(5) to take "all reasonable steps" to "resolve the matter through cooperative means".

7. In order to assist in this process, the Prosecution not only explains why modification of the Disclosure Order may be appropriate under article 72(5)(a) *mutatis mutandis*,[12] but also offers—in the alternative—to render the Disclosure Order moot by making an appropriate stipulation under article 72(5)(c) and rule 69, in order to provide the Defence with functionally equivalent evidence in a different form. By either of these means, the Article 72 Intervention can, and should, be resolved without recourse to the procedures in article 72(6) and (7).

8. Finally, however, should the conditions be met to trigger article 72(6) and (7), the Prosecution submits that the correct procedure to apply in the circumstances would fall under article 72(7)(b)(ii), rather than article 72(7)(a)(iii). In this scenario, the Prosecution considers that the "inference" which may be drawn "as to the existence or non-existence of a fact", "as appropriate in the circumstances", can in

[10] *See above* para. 3.
[11] Article 72 Intervention, para. 7.
[12] The Prosecution notes that, in its own terms, article 72(5)(a) strictly refers to modification or clarification of a "request". However, mindful of the express indication in the *chapeau* of article 72(5) that the required cooperative measures are not exhaustively defined—but only "*may include*" the steps in article 75(2)(a) to (d)—the Prosecution considers that modification or clarification of an order to the Prosecution to disclose information (which is made subject to a State's application under article 72) is a step that the Chamber may take, which is also consistent with the spirit of the cooperative measures foreseen in article 72(5)(a). This understanding is further supported by the unified procedural scheme under article 72(5)-(7), and especially the clear recognition in article 72(7) that this scheme applies both to information which is not under the control of the Court at the time of the article 72 application (*i.e.*, article 72(7)(a)) *and* "other" information including information which *is* under the control of the organs of the Court, including the Prosecution (*i.e.*, article 72(7)(b)). As such, the cooperative measures in article 72(5) must be amenable alike to requests for cooperation under Part 9, other relevant kinds of requests to a person, and orders directed from the Court to the Parties and participants in cases before it.

any event be no greater than the stipulation it is already prepared to make under rule 69 for the purpose of article 72(5)(c). In the Prosecution's view, therefore, this only further underlines the feasibility and desirability of resolving the Article 72 Intervention cooperatively under article 72(5).

A. The Prosecution recognises and endorses the general interest in maintaining the anonymity of confidential informants

9. The Article 72 Intervention states that the confidential informant "provided confidential information" to the Ugandan authorities "at considerable risk to himself at a time when the Lord's Resistance Army (LRA) presented a significant threat to the national security of Uganda", and that "[i]t was an implicit part of the understanding between the informant and the Uganda authorities that his identity would be kept secret."[13] It further asserts that:

> "The efficient conduct of law enforcement requires that where the state encourages its citizens to provide sensitive information about wrongdoing, and promises that such informants will be guaranteed anonymity, those promises are kept."[14]

10. For these purposes, the Ugandan authorities have expressed their view that public awareness that the identity of a confidential informant has been revealed to another Ugandan citizen and former LRA member—Mr Ongwen—would itself "act as a significant disincentive to others who may currently or in the future be prepared to provide such confidential information to the Ugandan authorities", and thus "prejudice[] the national security interests of the Republic of Uganda."[15]

11. The Prosecution concurs in and endorses the general interest in maintaining the anonymity of confidential informants, reflected in the Article 72 Intervention.

[13] Article 72 Intervention, paras. 1-2.
[14] Article 72 Intervention, para. 4.
[15] Article 72 Intervention, para. 5.

Notwithstanding the possible national security implications for Uganda, this same interest in any event also arises in various aspects of law enforcement—including, in appropriate circumstances, the Prosecution's own activities under article 54.

12. Specifically, the Statute and Rules may otherwise provide for maintaining the confidentiality of the identity of an informant, among other sensitive investigative techniques and details, by empowering the Prosecutor to enter into non-disclosure agreements under article 54(3)(e),[16] and otherwise to request relief from disclosure, in appropriate circumstances, under rule 81(2).[17] Likewise, when a witness testifies, the Court is subject to express limits in compelling testimony on matters falling under article 54(3)(e).[18]

13. The recognition at this Court of the need to maintain strong guarantees of confidentiality for certain kinds of investigative information is also common among other international tribunals and domestic jurisdictions. Indeed, as the SCSL and ICTY Appeals Chambers acknowledged, effective cooperation in the public interest may well depend on the *assurance* that some types of confidential relationships will be respected.[19] Domestic jurisdictions similarly give effect to the same interest by

[16] *See e.g.* ICC-01/05-01/13-2275-Red A A2 A3 A4 A5 ("*CAR Art. 70* AJ'), para. 388 (noting that the Prosecutor had relied *inter alia* on "information provided by an individual under the condition that his *identity* would remain confidential under article 54(3)(e) of the Statute", emphasis supplied). *See also* para. 58 (reasoning that not all material collected in the context of investigation is disclosable). *See further* ECtHR, *Kostovski v. the Netherlands*, Judgment, 20 November 1989, para. 44 (reasoning that the ECHR "does not preclude reliance, at the investigation stage of criminal proceedings, on sources such as anonymous informants" but that "the subsequent use of anonymous statements as *sufficient evidence to found a conviction*" is a different matter, emphasis added).

[17] *See* rule 81(2) (applying when "disclosure may prejudice further or ongoing investigations"). Likewise, although the matter need not be decided for the purpose of the Article 72 Intervention, the Prosecution also notes that an 'investigator-informant' privilege may additionally inhere in article 69(5) of the Statute and rule 73: *see further below e.g.* fn. 22

[18] *See* rule 82(3).

[19] *See e.g.* SCSL, *Prosecutor v. Brima et al*, SCSL-2004-16-AR73, Decision on Prosecution Appeal against Decision on Oral Application for Witness TF1-150 to Testify without Being Compelled to Answer Questions on Grounds of Confidentiality, 26 May 2006, para. 33 ("The purposes served by Rules 70(C) and 70(D) [of the SCSL Rules] will not be served merely by resort to a closed session. The Rule 70 information provider must be empowered to *guarantee* anonymity to a confidential source. This *guarantee* of non-disclosure of identity cannot depend on the chance that a future Trial Chamber might order a closed session hearing or other protective measures", emphasis added); *see also* para. 30; Concurring Opinion of Justice Robertson, para. 30. *See also* ICTY, *Prosecutor v. Slobodan Milošević*, IT-02-54-AR108*bis* & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 19 (recalling with approval

means of doctrines such as "public interest immunity" and the like,[20] or sophisticated systems which combine professional privilege and special investigative powers in various combinations.[21] Indeed, in the specific context of confidential informants, the Supreme Court of Canada even reasoned that "informer privilege is of such importance that it cannot be balanced against other interests" and, thus, "[o]nce established, neither the police nor the court possesses discretion to abridge it."[22]

14. The Prosecution thus submits that the concerns raised by the Ugandan authorities in the Article 72 Intervention are, in this case, particularly amenable to resolution by the cooperative mechanisms in article 72(5), as subsequently explained, because they reflect values and interests which are common to the Court's own practice. The Prosecution stresses that these concerns do not reflect adversely on the integrity of Defence counsel—but, correspondingly, neither can these concerns be assuaged even by their high professional standards.[23] Rather, the facts of the Article 72 Intervention simply illustrate one aspect of the much wider principle that some investigative methods—the success of which is in the public interest—depend, for their effectiveness, on the maintenance of a high degree of confidentiality, even from persons who, of themselves, might be considered to be of the utmost probity.

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the observation of an ICTY Trial Chamber that, "without such *guarantees* of confidentiality [in rule 70(B) to (E) of the ICTY rules], it is 'almost impossible to envisage this Tribunal, of which the Prosecution is an integral organ, being able to fulfil its functions", emphasis added).

[20] By example, concerning the position in England and Wales, *see e.g.* C. Tapper, *Cross and Tapper on Evidence*, 12th Ed. (Oxford: OUP, 2010), pp. 476-486, 488, 491-497, *especially* 492-496; A. Keane, *The Modern Law of Evidence*, 6th Ed. (Oxford: OUP, 2006), pp. 591-615.

[21] *See e.g.* Federal Republic of Germany, Code of Criminal Procedure (trans. B. Duffett, M. Ebinger, K. Müller-Rostin, I. Mahdi), as amended 23 April 2014, ss. 53 (right to refuse testimony on professional grounds), 54 (authorisation for judges and officials to testify), 96 (official documents), 110a-110b (undercover investigators). German law thus appears to provide for, *inter alia*: a qualified professional privilege for journalists, and other persons who professionally participate in providing "information and communication services", against testimony concerning "the author or contributor of comments and documents" and "any other informant"; special procedures for obtaining the testimony of officials and other persons in public service covered by an obligation of secrecy; privilege against judicial orders to compel submission of files or other documents belonging to authorities or public officials if their highest superior authority declares publication would be detrimental to the welfare of the Federation or a German *Land*; and the secrecy of the identities of German police officials serving as undercover investigators. *See also* M. Bohlander, *Principles of German Criminal Procedure* (Oxford: Hart, 2012), pp. 92-93, 149.

[22] Canada, *R. v. Leipert* [1997] 1 SCR 281, p. 292, para. 14. *See further e.g. Public Prosecution Service of Canada Deskbook*, Guideline of the Director Issued under Section 3(3)(c) of the Director of Public Prosecutions Act, 1 March 2014.

[23] *See* ICC-02/04-01/15-1229-Corr-Red ("Defence Submission"), para. 11.

B. There may be no resort to article 72(6) and (7) unless and until all reasonable steps have been taken to resolve the matter cooperatively under article 72(5)

15. Application of the procedures in article 72(6) and (7) is expressly conditioned on "all reasonable steps" having "been taken to resolve" any matter raised under article 72 "through *cooperative* means" (emphasis added).[24] The Prosecution understands this to mean that there may be no resort to article 72(6) and (7) unless and until all reasonable cooperative means have been exhausted or are demonstrably futile.

16. Article 72(5) emphasises this same point, and illustrates (non-exhaustively) some of the steps which may be reasonable in attempting to resolve the matter cooperatively. These include *inter alia* seeking a further "determination by the Court regarding the relevance of the information or evidence sought",[25] a "modification or clarification" of the request or order seeking the information,[26] and consideration of the possibility that the same or similar information may be obtained in a different form.[27]

17. Since the Article 72 Intervention invites the Court, in express terms, to issue a ruling on the relevance of the identity of the confidential informant to this case,[28] and this falls under article 72(5)(b), the Prosecution considers that the Court should do so. For the reasons which follow, should it rule that the identity of the confidential informant is not relevant to the case, the Prosecution considers that the Rule 81 Order should consequently be modified pursuant to article 72(5)(a).

18. Alternatively, should the Chamber rule that the identity of the confidential informant is relevant to the case, the Prosecution is prepared, by means of rule 69, to

[24] Statute, art. 72(6). *See also* K. Khan and G. Azarnia, 'Evidentiary privileges' in K. Khan et al (eds.), *Principles of Evidence in International Criminal Justice* (Oxford: OUP, 2010), p. 584.
[25] Statute, art. 72(5)(b).
[26] Statute, art. 72(5)(a). *See also above* fn. 12.
[27] Statute, art. 72(5)(c).
[28] Article 72 Intervention, paras. 7-8.

make a relevant stipulation. This may assist the Court in applying article 72(5)(c) to enable the Defence to achieve the same forensic purpose, while rendering it unnecessary to disclose the identity of the confidential informant.

B.1. The identity of the confidential informant is, at most, of very limited relevance to this case, and the Rule 81 Order should consequently be modified

19. Granting the Ugandan authorities' request under article 72(5)(b) for a further ruling on the relevance to this case of the identity of the confidential informant creates no necessary conflict with the existing orders made by the Single Judge. Notably, as explained below, no determination has yet been made that the identity of the confidential informant, *as such*, constitutes disclosable information under the Statute or the Rules. The Court may thus properly determine that the relevance of the confidential informant's identity to this case is negligible or very limited, and modify the Rule 81 Order accordingly.

20. In the Disclosure Order, the Single Judge stated expressly that disclosure was ordered "*irrespective* of whether the[] items sought by the Defence fall under the Prosecution's disclosure obligations".[29] Instead, disclosure was ordered based on the Single Judge's agreement that, in light of the Prosecution's previously acknowledged oversight regarding its internal disclosure review of this material,[30] this "would best ensure the fair and expeditious conduct of the proceedings".[31] Furthermore, this order pertained *stricto sensu* to the *report* containing the identifying information, and was not based on a particularised analysis of the significance, if any, of the identifying information itself.

21. Accordingly, no specific determination has yet been made as to whether the identity of the confidential informant, in and of itself, is disclosable under the Statute

[29] Disclosure Order, para. 9 (emphasis added). In this context, the Single Judge acknowledged appellate jurisprudence that the types of materials susceptible to disclosure under rule 77 cannot be defined in the abstract: *see e.g.* *CAR Art. 70* AJ, para. 641 (cited in Disclosure Order, para. 9, fn. 12). *See also below* para. 30.
[30] *See* Disclosure Order, paras. 3-4.
[31] Disclosure Order, para. 8.

or the Rules. The Disclosure Order had initially left open the question whether this detail would actually be disclosed, pending further submissions from the Parties.[32] The Single Judge's subsequent order then declined to rule on the Prosecution's argument that this detail did not fall under rule 77 on the basis that the order to disclose had already been made, and further consideration would only be given to "whether any […] restrictions apply."[33]

22. For these reasons, the Prosecution thus supports the Ugandan authorities' request for a ruling under article 72(5) on the "relevance" to this case of the identity of the confidential informant, including its materiality under rule 77.

23. In this context, the Prosecution not only notes the general interest in maintaining the anonymity of confidential informants (as addressed above),[34] but also the speculative nature of the Defence claim that the identity of the confidential informant as such is material to the preparation of the defence, or otherwise disclosable. To the contrary, as further noted below,[35] the identity of the confidential informant is—at most—material to assessing the credibility of the account received of the death of Vincent Otti. There is no basis even to consider *arguendo* that it is disclosable for any other reason, such as on the basis of a theoretical and unsubstantiated claim that it may assist Defence investigations on other matters.[36]

B.2. The Article 72 Intervention may itself constitute a material change of circumstances from the Rule 81 Order, warranting its modification

24. Alternatively, and in any event, even if the identity of the confidential informant is considered to be material to the preparation of the Defence in the meaning of rule 77, the Prosecution also recalls that the Single Judge was "not persuaded *in the present circumstances* of the existence of an objectively justifiable risk

[32] Disclosure Order, para. 9.
[33] Rule 81 Order, para. 6.
[34] *See above* paras. 9-14.
[35] *See below* paras. 28-35.
[36] *See further below* paras. 34-35.

to the informant", based on the "generic terms" of the concern expressed by the Ugandan government.[37]

25. However, the arguments contained in the Article 72 Intervention—notwithstanding its primary focus on national security—may nonetheless serve also to underline the specificity of the Ugandan authorities' concerns concerning the safety of the confidential informant, or at least to prompt further consultation on this matter directly with those authorities, in the spirit of article 72(5).

26. Additionally, given the duty of the Trial Chamber to "take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93",[38] the very fact of the Article 72 Intervention may warrant an alternative form of "restriction" on disclosure of the identity of the confidential informant to those considered in the Rule 81 Order.

27. For these reasons also, the Prosecution submits that the Article 72 Intervention may thus, directly or indirectly, warrant modification of the assessment in the Rule 81 Order as to whether there is any restriction under the Statute or the Rules on the disclosure of the identity of the confidential informant, and consequently its outcome.

B.3. Similar information may be provided to the Defence, consistent with article 72(5)(c), by a Prosecution stipulation in the spirit of rule 69

28. Finally, the Prosecution notes that the Defence claims that "the UPDF informant's identity […] may be relied upon as evidence during the presentation of the Defence case", and in particular that his "identity and activities are relevant to

[37] Rule 81 Order, para. 8 (emphasis added).
[38] *See* rule 81(4).

the defence of duress, and may show the innocence of Mr Ongwen, or mitigate his guilt."[39]

29. These claims are, however, highly speculative. As the Single Judge has noted, the information provided by the confidential informant relates to the "reported death of Vincent Otti".[40] Consequently, while the confidential informant may *theoretically* be in a position to provide some evidence on that matter, which may in turn *arguendo* have some marginal relevance to Mr Ongwen's claim of duress, there is no basis to suggest that the informant could—or would—provide evidence more broadly.

30. Indeed, as the Single Judge has previously noted, "Vincent Otti's reported death comes about two years after the time period charged in this case"—nor has the Defence suggested that "this event is relevant to any of the matters for which the Chamber has previously indicated it may consider evidence falling outside the charged time period", nor has it been "alleged that Mr Ongwen had any role in this event."[41]

31. In this context, the Prosecution is willing to stipulate—or in other words unilaterally treat, for the purposes of this trial, as an agreed fact in the meaning of rule 69—that:

> At a time approximately two years after the charged time period, Joseph Kony caused his deputy, Vincent Otti, to be killed. This is consistent with the implicit threat of lethal violence which Joseph Kony held over his subordinates if he considered that they had disobeyed or disrespected him. One person who spoke with Joseph Kony at about this time understood from

[39] Defence Submission, para. 17.
[40] Disclosure Order, para. 1.
[41] ICC-02/04-01/15-1161, para. 9.

their conversation that Joseph Kony was accepting his responsibility for the death of Vincent Otti.

32. In the Prosecution's view, this stipulation satisfies any realistic assessment of what the confidential informant's testimony *might* be—and, as explained below, also constitutes the realistic scope of any inference which may be drawn in the circumstances.[42] As such, for the purpose of article 72(5)(c), it constitutes similar information to the identity of the confidential informant provided from a different source or in a different form.

33. Importantly, the Prosecution notes that the particular identity of the confidential informant adds nothing which is not covered by the stipulation, which expressly includes a recognition that a person exists who could credibly testify to the material event.

34. By contrast, the further claim by the Defence that knowledge of the identity of the confidential informant may serve *additional* Defence investigations—and on matters unrelated to the death of Vincent Otti—is *not* addressed by the stipulation, nor could it be, because this claim is simply too tenuous. It is axiomatic that a rule 77 request is not intended to be a mere 'fishing expedition',[43] and that "not […] all material collected as part of […] investigations […] must be disclosed".[44] The logical implication of the Defence position—that the Prosecution should disclose all the names in its possession of any person who might know anything about the LRA, at any point, in case that would assist the Defence investigation—demonstrates that the Defence claim does not meet even the relatively low threshold of rule 77. The express

[42] *See below* paras. 45-46.
[43] *See* STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/AC/AR126.4, Public Redacted Version of 19 September 2013 Decision on Appeal by Counsel for Mr Oneissi against Pre-Trial Judge's 'Decision on Issues Related to the Inspection Room and Call Data Records', 2 October 2013, para. 22 ("Rule 110(B) [analogous to rule 77 of this Court] does not invite a fishing expedition. Accordingly, we accept (with deletion of the word 'necessarily') a recent ICC Trial Chamber clarification that 'Rule 77 […] does not […] provide for an unfettered 'right to inspection', triggered by any unsubstantiated claim of relevance made by the defence'").
[44] *CAR Article 70* AJ, para. 58. *See also e.g.* paras. 641-642.

duty on the Prosecution to investigate exonerating circumstances equally[45]—a key procedural innovation of the Statute, in international criminal law—explains why it is not only practically important but also fair to maintain the established threshold of rule 77.

35. Moreover, quite apart from the obvious limits on the *capacity* of the confidential informant to assist the Defence in the broad fashion they surmise, there are manifest obstacles to the practical realisation of these hypothetical advantages. Specifically, given the prevailing circumstances, the Defence has no prospect of being able to: locate the confidential informant, obtain their cooperation, obtain relevant information from them, and then realise these efforts as some form of evidence admissible by this Court. Nor would the immense effort involved be rewarded by any appreciable gain, even if it somehow was successful. In particular, the very fact that the confidential informant agreed to be a '*confidential* informant' suggests they are very unlikely to be willing to testify as a witness, even discounting the public policy interest against requiring them to do so in the first place.

36. Accordingly, even if the Court does not consider that it can apply article 72(5)(a) so as to *modify* the Rule 81 Order (on the basis of the negligible relevance of the identity of the confidential informant, or the significance of the Article 72 Intervention itself), the Prosecution submits that the proposed stipulation would effectively achieve the same forensic purpose by providing information in a different form, and thus meet the requirements of article 72(5)(c). This would render moot the order to disclose the identity of the confidential informant.

C. Proceeding under article 72(7) requires a further determination of "necessity"

37. For all the reasons previously described, the Prosecution therefore considers that resort to procedures under article 72(6) and (7) is not required, and that the

[45] *See* Statute, art. 54(1)(a).

Article 72 Intervention can and should be resolved cooperatively on the basis of article 72(5).

38. Nevertheless, since the Trial Chamber has, in its e-mail,[46] expressly invited submissions on the potential application of article 72(7)(a)(iii),[47] the Prosecution addresses the application of article 72(6) and (7) out of an abundance of caution.

39. In order for the Court's powers under article 72(7) to apply, two further hurdles must be met, *after* all reasonable steps have been taken to resolve the matter through cooperative means.

- First, Uganda must make a *further* determination "that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests", and "notify […] the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice".[48]

- Second, the Court must then determine that the information in question "is relevant and necessary for the establishment of the guilt or innocence of the accused".[49] Notwithstanding any extent to which the Court may already have made an initial determination of the *relevance* of the information under article 72(5)(b), as proposed in this case,[50] the requisite showing of "necessity" pursuant to article 72(7) appears to "import a higher threshold" such that "the withheld material must go to core issues at the heart of the case".[51]

40. Given the circumstances of this case and the nature of the information at stake, the Prosecution submits that the requisite showing of "necessity" under article 72(7)

[46] *See above* fn. 1.
[47] *See further below* paras. 42-43.
[48] Statute, art. 72(6).
[49] Statute, art. 72(7).
[50] *See above* paras. 17, 19-23.
[51] *See* Rastan, p. 1808, mn. 37.

cannot be made. At no point in the preceding litigation has there been any credible suggestion that the identity of the confidential informant has *any* direct impact on establishing Mr Ongwen's guilt or innocence, let alone that it is "necessary" for this purpose. This further militates in favour of a cooperative resolution under article 72(5).

D. In the last resort, if article 72(7) applies, the matter should be resolved under article 72(7)(b)(ii)

41. Finally, in the interest of completeness and for the sake of argument, the Prosecution addresses the scenario in which the conditions for the application of article 72(7) are met.

42. Notwithstanding the Trial Chamber's invitation specifically to address article 72(7)(a)(iii), the Prosecution observes that article 72(7)(a) is only applicable where:

> "disclosure of the information […] is sought pursuant to a request for cooperation under Part 9 or the circumstances described in [article 72(2), relating to a person requested to give evidence], and the State has invoked the ground for refusal referred to in article 93, paragraph 4."

43. This is not the present case, where the identity of the confidential informant is already in the possession of the Prosecution. As such, article 72(7)(a) would be inapplicable. Instead, the Article 72 Intervention would fall under article 72(7)(b) ("all other circumstances"), and the Prosecution will make the submissions requested on that basis.

44. The Prosecution observes generally that measures under article 72(7) are discretionary, as illustrated by the word "may" in the *chapeau* of the provision.

45. If indeed the Chamber were to be satisfied that information concerning the identity of the confidential informant is "necessary" to establish the guilt or innocence of Mr Ongwen, the Prosecution submits that it should proceed only on the basis of article 72(7)(b)(ii),[52] which is analogous to article 72(7)(a)(iii). In this event, the Chamber would make an appropriate inference as to the existence of certain facts in lieu of ordering disclosure. This inference could be designed to ensure that, despite the fact that disclosure of the identity of the confidential informant is not ordered, Mr Ongwen will suffer no significant disadvantage or unfairness in his trial.

46. The Prosecution submits that the specific inference which could feasibly be drawn in this case would be consistent with the terms of the stipulation it is in any event willing to offer under article 72(5)(c) and rule 69, for similar reasons.[53] The Prosecution is firmly of the view that such an inference would be appropriate in the circumstances to ensure that Mr Ongwen suffers no significant disadvantage or unfairness.

47. In any event, the Prosecution agrees with the Ugandan authorities that it would not be appropriate in these circumstances to proceed under article 72(b)(i).[54] Such a disclosure order, notwithstanding notification by a State under article 72 that this disclosure would in its opinion prejudice its national security interests, is perhaps one of the weightiest procedural decisions which can ever be taken by a chamber of this Court. It must generally be regarded as an absolute last resort. Having regard to all the present circumstances, including the nature of the information at issue and the range of procedural options, the Prosecution does not consider that such a step would fall reasonably within the Trial Chamber's discretion on this occasion.

[52] *See also* Article 72 Intervention, para. 9.
[53] *See above* paras. 28-35. The terms of the inference proposed by the Prosecution are to be found above at para. 31.
[54] *See also* Article 72 Intervention, para. 9.

E. The Article 72 Intervention may be considered by the Trial Chamber as a whole

48. The matters associated with the Article 72 Intervention have hitherto—and quite properly—been addressed by the Single Judge. However, the Prosecution notes that rule 132*bis*(3) permits "specific issues" arising before the Single Judge, exceptionally, to be addressed by the Trial Chamber as a whole.

49. Given the intrinsic gravity of matters arising under article 72—and mindful in particular of the broader implications of that provision, including but not limited to any measures taken under article 72(7)(b) which may affect the evidentiary material ultimately received by the Trial Chamber—the Prosecution respectfully submits that it may be appropriate to proceed further on the present matter on the basis of rule 132*bis*(3).

Conclusion

50. For all the reasons above, the Prosecution submits that the matters raised in the Article 72 Intervention can and should be resolved cooperatively under article 72(5) of the Statute, without recourse to procedures under article 72(6) and (7). This can be done either by modifying the order to disclose the identity of the confidential informant, based on a determination of the limited or negligible relevance of this information, or accepting the Prosecution's stipulation as proposed in these submissions. Such an approach in this case not only respects Uganda's concern regarding a matter which it considers may prejudice its national security, but also the values and interests of law enforcement agencies more generally—including this Court—in protecting the identity of confidential informants.

51. In the alternative, however, if it is considered necessary to proceed on the basis of article 72(6) and (7), and the relevant conditions are met, the Prosecution urges

that the matter is resolved on the basis of article 72(7)(b)(ii), again on the basis proposed in these submissions.

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Fatou Bensouda, Prosecutor

Dated this 7th day of May 2018

At The Hague, The Netherlands