

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **01 June 2018**

Date of corrected version: **26 June 2018**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

**Public
Corrected version of
Decision in Response to an Article 72(4) Intervention**

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

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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 67 and 72 of the Rome Statute ('Statute') and Rules 77 and 81 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision in Response to an Article 72(4) Intervention'.

I. Procedural history and submissions

A. Procedural history prior to Article 72 intervention

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.¹ Specifically, the Defence requested one RFA from April 2004 'RFA/UG/0024' ('RFA 24').²
2. On 18 January 2018, the Prosecution indicated in its response that it did not receive any communications from the government of Uganda in response to RFA 24.³ The Chamber rejected the Defence's request in respect of RFA 24 on grounds that it was not material to the preparation of the defence.⁴
3. On 22 February 2018, the Prosecution filed a notification rectifying its previous position and clarifying that, despite its prior assertions, it was in possession of

¹ Defence Request for a Rule 77 Disclosure Order Concerning the Requests for Assistance and Other Related Items, ICC-02/04-01/15-1137-Conf. A public redacted version was filed on the same day, ICC-02/04-01/15-1137-Red.

² ICC-02/04-01/15-1137-Red, para. 21-24.

³ 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), ICC-02/04-01/15-1142, para. 4 with confidential annex A, ICC-02/04-01/15-1142-Conf-AnxA. The Prosecution repeated this assertion in 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. 6.

⁴ Decision on Defence Request for Disclosure of Certain Requests for Assistance and Related Items, 1 February 2018, ICC-02/04-01/15-1161.

items received in response to RFA 24 ('Prosecution Notification').⁵ The Prosecution explained that, due to an internal oversight, it had previously not been able to identify two items which were transmitted by the government of Uganda in response to RFA 24 on 23 November 2007.⁶ The items are a report from a UPDF officer ('UPDF Report') based on information provided by an informant ('Informant') and a sound recording on which part of the report is based ('Sound Recording').⁷

4. The Prosecution concluded that in its view, the information contained in the two items is not material for the preparation of the defence or otherwise disclosable,⁸ but, in response to its mistake, provided the Defence with a redacted version of the UPDF Report as an annex to the Prosecution Notification.⁹
5. On 5 March 2018, the Defence filed a request in reaction to the Prosecution Notification, seeking *inter alia*, the disclosure of the Sound Recording, the disclosure the identity of the Informant and a finding that the late or delayed disclosure constitutes a fair trial violation under Article 67 of the Statute ('Defence Request').¹⁰
6. On 16 March 2018, the Single Judge ruled on the Defence Request, ordering, *inter alia*, that RFA 24 and the Sound Recording be disclosed while rejecting the request to find a violation of the accused's fair trial rights ('16 March Decision').¹¹ The Single Judge explained that this was done as a remedy to the Prosecution

⁵ Prosecution's Notice of Filing of an Item Received in Response to an RFA, ICC-02/04-01/15-1189-Conf-Exp, with a confidential *ex parte* annex, ICC-02/04-01/15-1189-Conf-Exp-AnxA. A public redacted version was filed on 23 February 2018, ICC-02/04-01/15-1189-Red.

⁶ ICC-02/04-01/15-1189-Red, para. 6.

⁷ ICC-02/04-01/15-1189-Red, para. 7.

⁸ ICC-02/04-01/15-1189-Red, para. 9 a.

⁹ ICC-02/04-01/15-1189-Conf-Exp-AnxA.

¹⁰ 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. A public redacted version was filed on 16 March 2018, ICC-02/04-01/15-1197-Red.

¹¹ Decision on Defence Requests Following Prosecution's Notice of Filing of an Item Received in Response to an RFA, ICC-02/04-01/15-1207.

failing to fulfil its duties regarding effective information and evidence management,¹² irrespective of the question of whether the information fell under the Prosecution's disclosure obligations.¹³ As to the identity of the Informant, the Single Judge ordered that it should also be disclosed, unless a substantiated request for non-disclosure is filed by the Prosecution.¹⁴

7. On 5 April 2018, the Prosecution filed such a request for non-disclosure ('Request for Non-disclosure').¹⁵ It explained that it already provided RFA 24 and a transcription of the Sound Recording, in which the identity of the Informant is redacted, to the Defence on 26 March 2018.¹⁶ In relation to the identity of the Informant, it submitted that the government of Uganda was concerned regarding the Informant's safety should the identity be revealed. Accordingly, it requested that the identity of the Informant be withheld from the Defence, pursuant to Rule 81(4) of the Rules, and that the redactions in the transcription of the Sound Recording and UPDF Report be maintained.¹⁷ In its response, the Defence submitted that the Request for Non-disclosure should be rejected.¹⁸
8. On 20 April 2018, the Single Judge rejected the Request for Non-disclosure ('Decision on Non-disclosure').¹⁹ Therein, he stated that the request was not justified under the second limb of Rule 81(4) of the Rules, since the Single Judge

¹² 16 March Decision, ICC-02/04-01/15-1207, para. 8.

¹³ 16 March Decision, ICC-02/04-01/15-1207, para. 9.

¹⁴ 16 March Decision, ICC-02/04-01/15-1207, para. 9.

¹⁵ Request under Paragraph 9 of Decision ICC-02/04-01/15-1207, ICC-02/04-01/15-1217, with confidential annex A, ICC-02/04-01/15-1217-Conf-AnxA.

¹⁶ ICC-02/04-01/15-1217, para. 4, the items were provided via e-mail on 26 March 2018.

¹⁷ ICC-02/04-01/15-1217, paras 8-12.

¹⁸ Defence Response to the Prosecution's Request to Withhold the Identity of the UPDF Informant, 16 April 2018, ICC-02/04-01/15-1229-Conf-Exp. A corrected version was filed on 24 April 2018, ICC-02/04-01/15-1229-Corr-Conf-Exp. A corrected public redacted version was filed on 24 April 2018, ICC-02/04-01/15-1229-Corr-Red.

¹⁹ Decision on Prosecution Request under Paragraph 9 of Decision 1207, ICC-02/04-01/15-1234.

wasn't persuaded of the existence of an objectively justifiable risk to the Informant's safety.²⁰

B. Article 72 intervention

9. On 24 April 2018, the Registry transmitted a communication by the attorney general of the Republic of Uganda ('Ugandan Intervention').²¹ Therein, the Ugandan authorities object to the disclosure of the Informant's identity and intervene pursuant to Article 72(4) of the Statute.²² The identity of the Informant, according to the Ugandan authorities, had been revealed to the Prosecution in the expectation that it would not be further divulged. They argue that, since the Informant was guaranteed anonymity, it would compromise the efficient conduct of law enforcement should the identity be revealed subsequently to, *inter alia*, a former LRA member. This might have a deterrent effect on persons willing to provide information in the future to the Ugandan authorities.²³
10. On 7 May 2018,²⁴ the Defence filed its response to the Ugandan Intervention ('Defence Response').²⁵ It requests that it should be rejected, submitting that the Ugandan authorities had a prior occasion to raise their objection,²⁶ that the Article 72(4) intervention is without merit²⁷ and disclosure does not pose a national security threat.²⁸

²⁰ Decision on Non-disclosure, ICC-02/04-01/15-1234, para. 8.

²¹ Transmission of a Letter dated 24 April 2018 from the Attorney General of Uganda, ICC-02/04-01/15-1240, with annex A, containing the communication, ICC-02/04-01/15-1240-AnxA.

²² Ugandan Intervention, ICC-02/04-01/15-1240-Anx, para. 6.

²³ Ugandan Intervention, ICC-02/04-01/15-1240-Anx, paras 3-5.

²⁴ For purposes of the parties' responses to the Uganda Intervention, the parties were specifically invited to make submissions on any inferences to be made under Article 72(7). Email communication from the Chamber on 25 April 2018 at 11:17. As correctly pointed out by the Prosecution, the relevant inferences provision for purposes of the present litigation is Article 72(7)(b)(ii), and not Article 72(7)(a)(iii).

²⁵ Defence Response to the Letter from the Ugandan Government, ICC-02/04-01/15-1255-Conf. A public redacted version was filed on 9 May 2018, ICC-02/04-01/15-1255-Red.

²⁶ Defence Response, ICC-02/04-01/15-1255-Red, para. 20.

²⁷ Defence Response, ICC-02/04-01/15-1255-Red, paras 24 – 33.

²⁸ Defence Response, ICC-02/04-01/15-1255-Red, paras 34 – 40.

11. The Defence further submits that the Informant's identity is relevant and necessary to the Defence, since the UPDF Report and Sound Recording may be relied upon as evidence during the presentation of the Defence case and are important for its defence of duress.²⁹
12. Regarding any adverse inferences which could be drawn in the course of the Article 72 proceedings, the Defence submits a list of inferences while clearly stating that it reserves its right to make submissions on further inferences.³⁰
13. On the same day, the Prosecution also provided its Response to the Ugandan Intervention,³¹ submitting that the matter should be resolved cooperatively under the measures of Article 72(5) of the Statute.³²
14. Further, the Prosecution engages itself to treat unilaterally as proven 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 their conversation that Joseph Kony was accepting his responsibility for the death of Vincent Otti.³³ ('Proposed Stipulation').

15. In its view, this would render a disclosure request for the Informant's identity moot, since this stipulation 'would effectively achieve the same forensic purpose by providing the information in a different form'.³⁴

²⁹ Defence Response, ICC-02/04-01/15-1255-Red, paras 41 – 44.

³⁰ Defence Response, ICC-02/04-01/15-1255-Red, paras 52 – 55.

³¹ Prosecution's Submission regarding an Intervention under Article 72(4) of the Statute, ICC-02/04-01/15-1256.

³² Prosecution Response, ICC-02/04-01/15-1256, paras 9 – 14.

³³ Prosecution Response, ICC-02/04-01/15-1256, para. 31.

³⁴ Prosecution Response, ICC-02/04-01/15-1256, para. 18.

II. Analysis

16. As a first step, the Single Judge finds it important to clearly set out the procedural background in which the Ugandan Intervention has been provided, since this determines the manner in which the intervention will be resolved.
17. The Ugandan government exercised its right to intervene under Article 72(4) of the Statute. Contrary to the Defence,³⁵ the wording of Article 72(1) to (5) of the Statute clearly specifies that the prerogative to determine whether the disclosure of certain information or documents would prejudice the national security interests lies only with the intervening state.³⁶ Ultimately, it is only the state itself that has all the necessary information to decide whether the disclosure of certain material affects its national security. However, it may not always be possible to fully explain or justify this assessment, since such justification might itself reveal information sensitive to the security interests of the state.³⁷ The Chamber's role, for purposes of Article 72(5) of the Statute, is not to evaluate the accuracy of the asserted national security prejudice, but rather to decide the most appropriate way to proceed in response to it.
18. This assertion is also different from the previous communication in which the Ugandan authorities only raised concerns regarding the person's safety.³⁸ While the Single Judge notes that it would have been preferable for the Ugandan authorities to communicate all their concerns as early as possible and at the same time, the Ugandan Intervention does not concern the Informant's security and safety but the national security interests of Uganda. The Single Judge considers that the information provided in the Uganda Intervention constitutes new facts which justify a revised assessment.

³⁵ Defence Response, ICC-02/04-01/15-1255-Red, paras 34 – 40.

³⁶ 'in the opinion of a State' is mentioned or a similar wording is used four times in Articles 72(1), (2), (4) and (5) when referencing national security interests.

³⁷ See Article 72(6) of the Statute.

³⁸ ICC-02/04-01/15-1217-Conf-AnxA.

19. When an Article 72 intervention arises, pursuant to Article 72(5) of the Statute, the Single Judge has to determine whether the matter can be resolved by cooperative means.
20. One of the steps provided for in Article 72(5) is the determination of the relevance of the information that is to be disclosed.³⁹ The 16 March Decision, which initially ordered the disclosure of the Sound Recording and the Informant's identity, did not make such determination. Rather, the Single Judge held that disclosure was ordered as a remedy for the Prosecution's failure to properly engage in effective information and evidence management⁴⁰ and stressed that this was done 'irrespective of whether these three items sought by the Defence fall under the Prosecution's disclosure obligation'.⁴¹
21. The Single Judge notes that the Defence argues that the Informant's identity is material to preparation of the Defence and potentially exculpatory, since it relates to the defence of duress.⁴² As stated by the Appeals Chamber, the right to disclosure is not unlimited⁴³ and it is incumbent on the Defence to show that, even under a broad interpretation, the 'material to the preparation of the defence' standard of the items or information in question is met.⁴⁴
22. Nothing in UPDF Report⁴⁵ — or in the transcription of the Sound Recording on which the report is partly based — suggest that the Informant has any more specific information relevant to the defence of duress for Mr Ongwen. This is

³⁹ Article 72(5)(b) of the Statute.

⁴⁰ 16 March Decision, ICC-02/04-01/15-1207, para. 8.

⁴¹ 16 March Decision, ICC-02/04-01/15-1207, para. 9.

⁴² Defence Response, ICC-02/04-01/15-1255-Red, para. 42.

⁴³ Appeals Chamber, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor", 28 August 2013, ICC-02/05-03/09-501, para. 39.

⁴⁴ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01/04-01/06-1433, para. 78.

⁴⁵ ICC-02/04-01/15-1189-Conf-Exp-AnxA.

also supported by the inferences the Defence proposes to draw from the report and the Sound Recording,⁴⁶ most of which concern the Informant's personal role and capabilities (without any relation to the accused or the charges) or are of an entirely speculative nature.

23. The mere fact that the Informant had at some point in time after the charged period contact with Joseph Kony and possesses information about the LRA does not meet the low, *prima facie*, threshold of Rule 77 of the Rules. Finding otherwise would mean that any information relating to the LRA at any point in time, irrespective of any connection to the charges or the accused, would fall under Rule 77.⁴⁷ This would expand the Prosecution's disclosure obligations to an unreasonable degree. Further, no defence need be prepared towards establishing Joseph Kony's implicit threats of lethal violence over his subordinates. This fact, including the specific detail that it was Joseph Kony who caused the death of Vincent Otti, is conceded by the Prosecution through its Proposed Stipulation.⁴⁸
24. Accordingly, the Single Judge finds that the Informant's identity is not material to the preparation of the Defence. On this understanding, the question of whether any restrictions on disclosure apply by virtue of Article 72 of the Statute and Rule 81(4) of the Rules does not even arise.
25. However, even if it were assumed that the identity would fall under the disclosure obligations of the Prosecution, the intervention by the Ugandan authorities constitutes a factor to be considered under Rule 81(4) of the Rules.

⁴⁶ Defence Response, ICC-02/04-01/15-1255-Red, para. 54.

⁴⁷ See *similarly*, Decision on Defence Request for Disclosure of Certain Requests for Assistance and Related Items, ICC-02/04-01/15-1161, para. 9.

⁴⁸ See, *paragraph 14 above*. Although the Proposed Stipulation is better understood as a concession than an agreed fact, it is noted that agreed facts under Rule 69 of the Rules have been understood as a substitute for disclosure of items material to the preparation of the defence. Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Defence Request for Disclosure of Information Relating to the Mungiki, 25 August 2014, ICC-01/09-01/11-1465, paras 18-19.

26. Under the first limb of Rule 81(4) of the Rules, the Chamber is required to take necessary steps to ensure the confidentiality of information in accordance with, *inter alia*, Article 72 of the Statute. Considering the nature of the information sought (as discussed above), the Single Judge considers that the national security prejudice raised in the intervention by the Ugandan authorities justifies a restriction on disclosure of the Informant's identity under Rule 81(4) of the Rules.
27. The Single Judge is also conscious of his pronouncement in the 16 March Decision that the disclosure of the Informant's identity, amongst others, 'would best ensure the fair and expeditious conduct of the proceedings'.⁴⁹ However, as regards the identity of the Informant, this finding was explicitly conditioned at the time on the possibility that a request for restriction on disclosure could be substantiated.⁵⁰ The Chamber considers that the Article 72(4) intervention by the Ugandan authorities constitutes just such a substantiated request.⁵¹ The Single Judge does not consider that any undue prejudice is caused to the Defence by such a ruling in view of the information at issue, noting the Proposed Stipulation and that the other information related to the Informant (namely RFA 24 and the transcription of the Sound Recording) has already been provided to the Defence.
28. Considering the above, under Article 72(5)(a) of the Statute, the Single Judge hereby modifies the obligation of the Prosecution to disclose the Informant's identity and the lifting of all corresponding redactions in the UPDF report, arising from the 16 March Decision and the Decision on Non-disclosure. The Informant's identity does not have to be disclosed and the redactions can be maintained.

⁴⁹ 16 March Decision, ICC-02/04-01/15-1207, para. 8.

⁵⁰ 16 March Decision, ICC-02/04-01/15-1207, para. 9.

⁵¹ The Single Judge notes that paragraph 9 of the 16 March Decision calls on the Prosecution to file such a substantiated request. However, the intervention by the Ugandan authorities is done with the same intention and falls therefore in the category of submission the Chamber wished to receive.

29. As to the question of whether the Defence has now been amply and sufficiently remedied by the Prosecution's original failure to fulfil its information and evidence management obligations,⁵² the Single Judge considers that the Proposed Stipulation — along with the other items already disclosed — fully and adequately addresses this failure and ensures the fair and expeditious conduct of the proceedings.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

MODIFIES the 16 March Decision and the Decision on Non-disclosure with regard to the obligation of the Prosecution to disclose the Informant's identity and the lifting of all corresponding redactions in the UPDF Report, nullifying these obligations; and

TAKES NOTE of the Proposed Stipulation, as cited in paragraph 14 of this decision.

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



Judge Bertram Schmitt, Single Judge

Dated 01 June 2018

At The Hague, The Netherlands

⁵² 16 March Decision, ICC-02/04-01/15-1207, para. 8.