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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

**Public Redacted Version of ‘Defence Request for Leave to Appeal
“Decision in Response to an Article 72(4) Intervention”’**

Source: Defence for Dominic Ongwen

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Rome Statute ('Statute'), the Defence for Dominic Ongwen ('Defence') seeks leave to appeal Judge Bertram Schmitt's ('Single Judge') "Decision in Response to an Article 72(4) Intervention" ('Article 72 Decision').¹
2. The Defence avers that the Single Judge's decision to modify prior disclosure rulings² and nullify the Prosecution's obligations to disclose the UPDF informant's identity is erroneous as a matter of law and fact. As a result, Mr Ongwen suffers prejudice.
3. It is the Defence position that the outcome of Article 72 Decision effectively undermines the intended purpose and application of statutory provisions discussed below. Further, the Article 72 Decision compromises the integrity of the *Ongwen* case proceedings.
4. The three requirements for granting an interlocutory appeal pursuant to Article 82(1)(d) of the Statute are satisfied in respect to three issues hereinafter identified: i) the issues for which appellate resolution is sought arise out of Article 72 Decision and are essential for the correct determination of Article 72 Decision; ii) the issues significantly affect the fair and expeditious conduct of the proceedings against Mr Ongwen, or the outcome of the *Ongwen* trial; and iii) an immediate resolution of the issues by the Appeals Chamber may materially advance the proceedings by removing doubts regarding the correctness of the decision and ensuring the proceedings follow the right course.
5. Trial Chamber IX ('Trial Chamber') has the power to exercise "any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11."³ Rule 7 and Rule 132*bis* of the Rules of Procedure and Evidence ('RPE') enable the Single Judge to take decisions on behalf of the Chamber. At the request of a party under Rule 7(3) or Rule 132*bis*(3) of the RPE, the Trial Chamber may decide that the functions of the Single Judge be exercised by the full Chamber. Given the inherent gravity of matters arising under Article 72 procedure,⁴ the Defence respectfully requests that the decision on Uganda's Article 72 intervention be taken by a full Chamber.

¹ ICC-02/04-01/15-1267-Corr.

² ICC-02/04-01/15-1207 *and* ICC-02/04-01/15-1234.

³ Article 64(4)(a) of the Statute.

⁴ ICC-02/04-01/15-1256: ("[T]he Prosecution is conscious of both of the inherent gravity of matters arising under the article 72 procedure, and the relative novelty of such proceeding.").

II. CONFIDENTIALITY

6. Pursuant to Regulation 23*bis* (2) of the Regulations of the Court ('RoC'), the Defence files this request confidentially, because it discusses confidential items.

III. APPLICABLE LAW

7. Pursuant to Article 82(1)(d) of the Statute, either party may appeal a decision that involves an issue that would "significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings." The purpose of such a procedure is to "pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial."⁵ The Chamber is vested with the power to certify the existence of an appealable issue.⁶ However, when determining whether leave to appeal should be granted, the Chamber must not justify or defend the correctness of its decision, but instead determine whether the issue presented significantly affects the fairness of the proceedings.⁷
8. According to Rule 155(1) of the Rules of Procedure and Evidence ('RPE'), a party shall "make a written application [for leave to appeal] to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal." The application for leave to appeal "shall state the name and number of the case or situation and shall specify the legal and/or factual reasons in support thereof."⁸ This application must also "specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue."⁹
9. The Appeals Chamber has ruled that only an 'issue' may form the subject-matter of an appealable decision, which it defined as "an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion."¹⁰ Further, an issue is "a subject the resolution of which is essential for the determination of the matters arising in the judicial cause under examination" and may be "legal or factual or a mixed one."¹¹ The issue must be one apt to "significantly affect" the fair and

⁵ ICC-01/04-168, para. 19.

⁶ ICC-01/04-168, para. 20.

⁷ See e.g. ICC-01/09-02/11-253, para. 28.

⁸ Regulation 65(1) of the Regulations of the Court ('RoC')

⁹ Rule 155(1) of the RPE.

¹⁰ ICC-01/04-168, para. 9.

¹¹ ICC-01/04-168, para. 9.

expeditious conduct of the proceedings or the outcome of the trial.¹² In other words, the issue “must be one likely to have repercussions on either of these two elements of justice.”¹³

10. The Appeals Chamber has defined the term “fair” as being associated with the norms of a fair trial and corresponding human rights, as per Articles 64(2) and Article 67(1) of the Statute.¹⁴ In particular, the Appeals Chamber noted that the “expeditious conduct of the proceedings in one form or another constitutes an attribute to a fair trial.”¹⁵ The term “proceedings” extends to proceedings prior and subsequent to the current proceedings.¹⁶
11. When determining whether a request for leave to appeal should be granted, the Trial Chamber must not justify or defend the correctness of its decision, but instead focus on determining whether the issue presented significantly affects the fairness of the proceedings.¹⁷ Mr Ongwen has the right to a reasoned statement¹⁸ and “reasoned statement of the Trial Chamber’s findings on the evidence and conclusions” must be provided.¹⁹ A reasoned statement includes a “holistic evaluation and weighing of all the evidence taken together in relation to the fact at issue.”²⁰
12. The Appeals Chamber also held an issue will be appealable “where the possibility of error in an interlocutory or intermediate decision may have a bearing” on the outcome of the trial.²¹ The Chamber, when deciding on a request for leave to appeal, “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case”, thereby forecasting the consequences of such an occurrence.²²
13. Regarding the third aspect of a request for leave to appeal (the immediate resolution by the Appeals Chamber), the Appeals Chamber held this criterion will be satisfied if the relevant Chamber rules that an authoritative determination on the appeal would “move forward” the proceedings and remove “doubts about the correctness of the decision or [map] a course of action along the right lines.”²³ The issue at stake must also be “such that its immediate

¹² ICC-01/04-168, para. 10.

¹³ ICC-01/04-168, para. 10.

¹⁴ ICC-01/04-168, para. 11.

¹⁵ ICC-01/04-168, para. 11.

¹⁶ ICC-01/04-168, para. 12.

¹⁷ *See e.g.* ICC-02/09-02/11-253, para. 28.

¹⁸ ICC-01/05-01/13-2275-Red, para. 1540.

¹⁹ Article 74(5) of the Statute.

²⁰ ICC-01/04-01/06-3121-Red, para. 22.

²¹ ICC-01/04-168, para. 13.

²² ICC-01/04-168, para. 13.

²³ ICC-01/04-168, paras 14-15.

resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or the outcome of the trial.”²⁴ By resolving the issue, the Appeals Chamber ensures “that the proceedings follow the right course.”²⁵

IV. SUBMISSIONS

14. The Defence seeks leave to appeal the following issues arising from Article 72 Decision:

Issue 1: Whether the Single Judge’s modification of his prior rulings on the basis of Article 72(5)(a) of the Statute is erroneous as a matter of law

Issue 1 is an appealable issue that arises from Article 72 Decision

15. This issue arises from Article 72 Decision. In particular, the Single Judge held that

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.²⁶

16. Article 72(5)(a) of the Statute stipulates that

If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:

(a) Modification or clarification of **the request**; (Bold added).

17. As a matter of law, the Defence rejects the premise that the Single Judge is authorised to modify the obligation of the Prosecution to disclose the UPDF informant’s identity, arising from his prior orders,²⁷ under Article 72(5)(a) of the Statute. Article 72(5)(a) of the Statute

²⁴ ICC-01/06-168, para. 14.

²⁵ ICC-01/04-168, para. 15.

²⁶ Article 72 Decision, para. 28.

²⁷ ICC-02/04-01/15-1207, para. 9: (“[T]he Single Judge considers it appropriate for the Prosecution to provide the Sound Recording and RFA 24. As regards the identity of the informant in the UPDF Report, this must also be provided to the Defence forthwith unless, within 5 days of notification of the present decision, the Prosecution files a substantiated request for nondisclosure.”); and ICC-02/04-01/15-1234: (“The Prosecution is therefore ordered to disclose the identity of the UPDF informant to the Defence, subject only to ensuring that

strictly²⁸ allows for “modification or clarification of the request”, *i.e.* a request for assistance, a request for cooperation, or a request for information.²⁹ It, however, does not allow for a modification of an order. Once the Single Judge has ruled that the Prosecution is obliged to disclose the UPDF informant’s identity, the Single Judge is no longer at liberty to modify disclosure obligations arising from his prior rulings, especially not by using Article 72(5)(a) of the Statute. Therefore, the Single Judge’s modification of his prior rulings on the issue of Prosecution’s obligation to disclose the UPDF informant’s identity amounts to an error of law.

18. Any potential contention³⁰ that the Single Judge may change the explicit meaning of a statutory provision – modification or clarification of **the request** –³¹ because the cooperative measures in the *chapeau* of Article 72(5) of the Statute are not exhaustively defined is incorrect. The non-exhaustive nature of cooperative measures under the Article 72(5) *chapeau* allows the concerned parties to propose unforeseen cooperative measures. Article 72(5) *chapeau*, however, does not allow the Single Judge to change the meaning and purpose of a strictly construed provision from “modification or clarification of **the request**”,³² to ‘modification or clarification of the orders’.³³ This is an error of law. (Bold added).
19. Article 72(5)(a) of the Statute applies to a situation where a request for disclosure of information³⁴ is pending before a State. At that point, the information sought is under the control of the State and (non)disclosure of this information is at the State’s discretion. In such a situation, the State may invoke Article 72 of the Statute and assert that the disclosure of requested information would prejudice its national security interests. Then, acting in

any appropriate measures still deemed necessary are taken to protect the safety of the person prior to disclosure.”).

²⁸ ICC-02/04-01/15-1256, fn. 12: (“[t]he Prosecution notes that, in its own terms, article 72(5)(a) strictly refers to modification or clarification of a “request”.)

²⁹ Triffterer/Ambos, *The Rome Statute of the International Criminal Court, A Commentary*, Third Edition, 2015, p. 1797: (“Several of the steps outlined appear to assume the scenario where the material in dispute is **in the exclusive hands of the State concerned** and its assistance has been sought pursuant to a request for cooperation under Part 9. Thus, subparagraph (a) refers to modification or clarification ‘**of the request**’.”). (Bold added).

³⁰ ICC-02/04-01/15-1256, fn. 12: (“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 72(5)(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).”)

³¹ Article 72(5)(a) of the Statute. (Bold added).

³² Article 72(5)(a) of the Statute.

³³ Article 72 Decision, p. 12: (“**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.”).

³⁴ *E.g.*, a request for assistance, a request for information, or a request for cooperation.

conjunction with the involved parties, it may seek modification or clarification of **the request** for disclosure of information.³⁵ However, this is not the present situation.

20. As previously argued by the Defence,³⁶ the Ugandan Government made a conscious decision to disclose the UPDF informant's identity to the Prosecution on 23 November 2007.³⁷ Thus, this information has been within this Court's evidentiary database for more than ten years.
21. The request for assistance (RFA 24)³⁸ was transmitted by the Prosecution to the Ugandan Government on 8 November 2007 and the Ugandan Government responded on 23 and 30 November 2007.³⁹ If the Ugandan Government considered that the information sought may cause prejudice to its national security interests, it should have raised Article 72(5)(a) of the Statute after receiving the Prosecution's RFA 24 in 2007. Then, the Prosecution's RFA 24 could have been modified under Article 72(5)(a) of the Statute. However, the Ugandan Government did not raise Article 72(5) of the Statute.
22. The Ugandan Government's response provided the Prosecution with, *inter alia*, the UPDF informant's identity. This made the UPDF informant's identity information within the control of the organs of this Court. The Single Judge ordered the Prosecution to disclose the UPDF informant's identity to the Defence.⁴⁰
23. Contrary to the Prosecution,⁴¹ there is no provision in Article 72 of the Statute that makes Article 72(5)(a) of the Statute applicable to information which is already under the control of

³⁵ Triffterer/Ambos, *The Rome Statute of the International Criminal Court, A Commentary, Third Edition*, 2015, p. 1797: ("Several of the steps outlined appear to assume the scenario where the material in dispute is in the exclusive hands of the State concerned and its assistance has been sought pursuant to a request for cooperation under Part 9. Thus, subparagraph (a) refers to modification or clarification '**of the request**'.") and p. 1799: ("Under this heading, the State concerned may propose that **the request** is modified or clarified to avoid or minimise the impact on its national security interests. This might be by limiting the scope of **the request**, by requesting greater specificity as to the location or identification of particular sought items, or by inviting the moving party to identify in greater detail the purpose of **the request** or the essential facts underlying it, corresponding to the general requirements for cooperation requests set out in article 96."); William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute, Second Edition*, 2016, p. 1122: ("The provision seems to impose an obligation, an unusual situation given that it applies not only to States Parties, but to all States. But perhaps to the extent that non-party States might be entitled to the benefit of protection from disclosure under article 72(4), there is a quid pro quo of cooperation with the Court. If they do not cooperate, they lose their entitlement to protection. Several means of cooperation are proposed, including modification or clarification of **the request**.") (Bold added).

³⁶ ICC-02/04-01/15-1255-Red, paras 28, 31, 32, and 55.

³⁷ ICC-02/04-01/15-1255-Red, para. 6; ICC-02/04-01/15-1189-Red, para. 6.

³⁸ UGA-D26-0017-0049.

³⁹ ICC-02/04-01/15-1255-Red, paras 5-7; ICC-02/04-01/15-1142, fn. 2.

⁴⁰ ICC-02/04-01/15-1207 and ICC-02/04-01/15-1234.

⁴¹ ICC-02/04-01/15-1256, fn. 12.

the organs of this Court,⁴² and thus empowers the Single Judge to modify the Prosecution's obligation to disclose the UPDF informant's identity to the Defence, as ordered by the Single Judge in his prior rulings.⁴³ Such conduct exceeds the Single Judge's functions and powers.

24. Furthermore, no legal basis for such an approach exists in Article 64 of the Statute⁴⁴ or in the relevant principles of treaty interpretation. Additionally, it is the Defence position that the Single Judge's approach is erroneous, *ultra vires*, and violates his obligation to "ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused."⁴⁵
25. Therefore, the Defence submits that this amounts to an error of law that prejudices Mr Ongwen, and demands immediate scrutiny and resolution by the Appeals Chamber.

Issue 1 affects the fair and expeditious conduct of the proceedings against Mr Ongwen, or, the outcome of the Ongwen trial

26. The Defence is of the view that appealable Issue 1 significantly affects the fair and expeditious conduct of the proceedings against Mr Ongwen and the outcome of the *Ongwen* trial. The prejudice of withholding the UPDF informant's identity from the Defence is founded in the Single Judge's erroneous use and application of Article 72(5)(a) of the Statute. This is especially so given that the Single Judge erroneously, and acting *ultra vires*, modified his prior orders on the Prosecution's obligation to disclose the identity of the UPDF informant, on the ground that disclosure "would best ensure the fair and expeditious conduct of the proceedings."⁴⁶
27. In other words, on 16 March 2018, the Single Judge considered that **the disclosure** of the UPDF informant's identity "best ensure[s] the fair and expeditious conduct of the proceedings"⁴⁷ against Mr Ongwen. However, on 1 June 2018, the Single Judge considered that **the non-disclosure** of the UPDF informant's identity – an adverse ruling – "ensures the fair and expeditious conduct of the proceedings."⁴⁸ Thus, the prejudice of withholding the UPDF

⁴² See Article 72 Decision, para. 17: ("[T]he wording of Article 72(1) and (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."); See *above*, fn. 35.

⁴³ ICC-02/04-01/15-1207 and ICC-02/04-01/15-1234.

⁴⁴ Rule 81(4) of the RPE does not authorise the Single Judge or the Trial Chamber to modify prior rulings either.

⁴⁵ Article 64(2) of the Statute; Rule 84 of the RPE.

⁴⁶ Article 72 Decision, para. 27; ICC-02/04-01/15-1207, para. 8.

⁴⁷ ICC-02/04-01/15-1207, para. 8.

⁴⁸ Article 72 Decision, para. 29. (Bold added).

informant's identity from the Defence is founded in the Single Judge's erroneous use and application of Article 72(5)(a) of the Statute.

28. Based on the Single Judge's prior rulings, the Defence is entitled to the UPDF informant's identity.⁴⁹ The Single Judge's erroneous modification of his prior rulings under Article 72(5)(a) of the Statute prejudices Mr Ongwen and violates his right to access and scrutinise the UPDF informant's identity,⁵⁰ with the associated items. Thus, the erroneous modification of the prior orders significantly affect the fair and expeditious conduct of these proceedings.
29. Given that the appealable issue deals with a controversial situation where the Single Judge acted *ultra vires* and erroneously modified his two prior rulings on the issue of the Prosecution's obligation to disclose the UPDF informant's identity,⁵¹ the integrity and the outcome of the *Ongwen* case proceedings is at stake and may be seriously damaged if the issue is not immediately resolved and corrected by the Appeals Chamber.

An immediate resolution of Issue 1 may materially advance the Ongwen case proceedings

30. As held by the Appeals Chamber, the purpose of interlocutory appeal is “[to remove] doubts about the correctness of a decision or [to map] a course of actions along the rights lines”, which “provides a safety net for the integrity of the proceedings”.⁵² In the present case, there is no such safety net since Article 72 Decision contains a legal error that hinders the disclosure of the UPDF informant's identity to which the Defence is rightfully entitled.⁵³
31. This legal error ought to be immediately resolved by the Appeals Chamber. Immediate resolution will allow the Defence the opportunity to access and scrutinise the information sought and properly prepare for the presentation of its defence commencing 18 September 2018.⁵⁴ In sum, the Defence avers that an immediate and urgent resolution by the Appeals Chamber will materially advance the proceedings against Mr Ongwen.

Issue 2: The Interpretation of Rule 77 and Article 67(2) is an issue that arises out of the Article 72 Decision

⁴⁹ ICC-02/04-01/15-1207, para. 9; ICC-02/04-01/15-1234.

⁵⁰ Article 67(1)(b) of the Statute Article 67(2) of the Statute.

⁵¹ ICC-02/04-01/15-1207 and ICC-02/04-01/15-1234.

⁵² ICC-01/04-168, para. 15.

⁵³ ICC-02/04-01/15-1207, para. 9; ICC-02/04-01/15-1234.

⁵⁴ ICC-02/04-01/15-1275, p. 4.

32. Two related sub-issues arise in relation to the Single Judge’s finding in paragraph 23 of the Article 72 Decision that the identity of the UPDF informant is not relevant pursuant to Rule 77 of the RPE.⁵⁵ These issues are:
- a. Whether the Single Judge has applied a standard of ‘relevance’ that is consistent with the jurisprudence; and
 - b. Whether the Single Judge can draw inferences as relevance without inspecting the material itself and whether discretion should have been exercised to inspect the material.
33. These two issues arise from the two different possible responses to the unanswered question of whether the Single Judge knows the identity of the UPDF informant.
1. *Sub-Issue 2 (a): Whether the Single Judge has applied a standard of ‘relevance’ that departs from the jurisprudence*
34. If the Single Judge knows the identity of the UPDF informant, then the interpretation of ‘relevance’ arises from Article 72 Decision. In paragraph 18, the Single Judge found that the Ugandan Government’s national security claim was “different from the previous communications in which the Ugandan authorities only raised concerns regarding the **witness’s** safety”.⁵⁶
35. The Defence is unaware of information upon which the Single Judge could, with certainty, conclude that the UPDF informant is a witness in this case. There is no indication of an *ex parte* filing or transcript since this litigation began whereby the Single Judge could have reviewed or discussed this item.
36. Such terms of art are not used lightly, yet this sentence from the Single Judge appears to indicate that the UPDF informant is a witness – presumably in this case. This interpretation is further strengthened by the materials that are part of the present litigation. The letter from the Ugandan Government to the Prosecution states, [REDACTED]

⁵⁵ Article 72 Decision, para. 23.

⁵⁶ Article 72 Decision, para. 18. (Bold added).

41. Denying that such information is relevant to Defence preparation is a clear departure from the understood scope of Rule 77 disclosure obligations articulated by the Appeals Chamber in the *Lubanga* case and referred to in the Article 72 Decision⁵⁹ as a “low, *prima facie*, standard.”⁶⁰
42. The Defence recalls that in articulating that standard, the Appeals Chamber was addressing an appeal that concerned, *inter alia*, “that the prosecution [was] not under an obligation to ‘serve material that relate[d] [to] the *general use* of child soldiers’ [in the Democratic Republic of the Congo]”⁶¹ because it did not constitute exculpatory material and therefore did not contravene Rule 77. That proposition was rejected and the information was made available.⁶² At face value, general information is hardly more important than information about a witness in the case.
43. If the Single Judge knows the identity of the UPDF informant, then the issue also arises out of Article 72 Decision because it is a departure from the Trial Chamber’s own decision. The Trial Chamber has accepted that where there is a direct link to incriminating or exonerating evidence, then the evidence is material pursuant to Rule 77 of the RPE. In rejecting a prior related Defence request, it has stated

Although the Defence need not establish a direct link to incriminating or exonerating evidence when substantiating Rule 77 materiality, the Defence argument that this information is required to effectively ‘challenge the reliability of the impugned evidence’ appears to be untenable.⁶³

44. In sum, if the Single Judge knows the identity of the UPDF informant as a witness, then the Single Judge’s narrow construction of the Prosecution’s disclosure obligations merits appellate consideration.

2. *Sub-Issue 2(b): Whether the Single Judge can draw inferences regarding relevance without inspecting the material itself*

45. It is also the Defence position that Sub-Issue 2(b) is an appealable issue that arises from Article 72 Decision. If it is the case that the Single Judge does not know the identity of the UPDF informant, then it follows that when the Single Judge finds “the Informant’s identify is not

⁵⁹ Article 72 Decision, para. 21, footnotes 43 and 44.

⁶⁰ Article 72 Decision, para. 23.

⁶¹ ICC-01/04-01/06-1433 OA11, para. 10 (emphasis added).

⁶² ICC-01/04-01/06-1433 OA11, para. 85.

⁶³ ICC-02/04-01/15-1161, para. 7.

material to the preparation of the Defence”⁶⁴ the Single Judge is also drawing inferences or speculating from the material available whether the individual’s identity is material to the Defence, exculpatory, or neither.

46. For clarity of the present argument, while both are relevant to Sub-Issue 2(b), a distinction must be drawn between the inferences that are drawn as described under Article 72(7)(b)(ii) of the Statute and inferences, drawn in the absence of the informant’s name, regarding the relevance of material for the purposes of Defence disclosure.
47. The degree to which Article 67(2) of the Statute and Rule 77 of the RPE permit the Single Judge to make inferences, absent actual knowledge, when deciding whether information should be disclosed to the Defence, is an appealable issue arising out of Article 72 Decision.
48. Article 67(2) of the Statute requires that “[i]n case of doubt as to the application of this paragraph, the Court shall decide [whether evidence in the Prosecutor's possession or control tends to show the innocence of the accused, or to mitigate the guilt of the accused]” and should be disclosed.
49. With respect to the application of Rule 77 of the RPE, the same Appeal Judgement⁶⁵ paragraph that the Single Judge cites⁶⁶ as authority for the proposition that “the right to disclosure is not unlimited”⁶⁷ also states that

The Chamber *may need to be provided with further information* by the Prosecutor about the documents being sought, either in the form of lists of the documents *or the documents themselves* [...] in order to be *placed in the best position to take an informed decision* with regard to whether the documents in respect of which disclosure was requested are material to the preparation of the defence.⁶⁸

50. Article 72(5) of the Statute appears to permit the Trial Chamber to seek cooperation from the concerned State and discuss the issues. If the Single Judge drew his conclusions without knowing the identity of the UPDF informant, then review of the decision is even more essential

⁶⁴ Article 72 Decision, para. 24.

⁶⁵ ICC-02/05-03/09-501 OA4.

⁶⁶ Article 72 Decision, para. 21, footnote 43.

⁶⁷ ICC-02/05-03/09-501 OA4, para. 39.

⁶⁸ ICC-02/05-03/09-501 OA4, para. 39 (‘emphasis added’).

because the concerns raised by the Ugandan Government only pertain to Mr Ongwen having access to the information.⁶⁹ The logic of the State’s concern did not apply to the Trial Chamber.

51. Briefly summarised, all the legal sources – rules and jurisprudence – encourage or mandate the Trial Chamber to review the item itself before deciding its relevance to Defence preparation. Instead, the Trial Chamber appears to have accepted at face value the Prosecution’s assessment that the name is not relevant.
52. Having accepted the unilateral stipulation requested only by the Prosecution, the Single Judge reasoned thus

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. This would expand the Prosecution’s disclosure obligations to an unreasonable degree.⁷⁰

53. Yet, the Prosecution has disclosed, pursuant to its Rule 77 obligations, many items⁷¹ as ‘relevant’ that date from after the charged period. Some concern information that dates from the charged period, but several do not. An example of the latter type of ‘relevant’ item is UGA-OTP-0238-0045, which dates from 1 March 2015 and is a list of “voice service providers” from Uganda. The Prosecution considered this item relevant to Defence preparations. Is it a consistent assessment of relevance that someone extremely close to Joseph Kony – with a

⁶⁹ UGA-D26-0017-0042, at UGA-D26-0017-0044, para. 5.

⁷⁰ Article 72 Decision, para. 23.

⁷¹ A total of 76 items having a main date following the charged period have been disclosed as “relevant” pursuant to Rule 77. These are: DAR-OTP-0184-0079, UGA-OTP-0191-0244, UGA-OTP-0192-0286, UGA-OTP-0192-0821, UGA-OTP-0192-0823, UGA-OTP-0208-0504, UGA-OTP-0219-0083, UGA-OTP-0219-0838, UGA-OTP-0220-0381, UGA-OTP-0220-0457, UGA-OTP-0220-0504, UGA-OTP-0220-0536, UGA-OTP-0220-0552, UGA-OTP-0221-0679, UGA-OTP-0221-0698, UGA-OTP-0222-0118, UGA-OTP-0222-0143, UGA-OTP-0222-0302, UGA-OTP-0222-0304, UGA-OTP-0226-0223, UGA-OTP-0227-0118, UGA-OTP-0227-0583, UGA-OTP-0231-0696, UGA-OTP-0231-0710, UGA-OTP-0231-0761, UGA-OTP-0231-0873, UGA-OTP-0231-0876, UGA-OTP-0231-0881, UGA-OTP-0233-1303, UGA-OTP-0233-1340, UGA-OTP-0233-1341, UGA-OTP-0233-1342, UGA-OTP-0233-1343, UGA-OTP-0233-1344, UGA-OTP-0233-1346, UGA-OTP-0233-1456, UGA-OTP-0236-0022, UGA-OTP-0236-0506, UGA-OTP-0237-0006, UGA-OTP-0238-0045, UGA-OTP-0239-0002, UGA-OTP-0241-0104, UGA-OTP-0246-0096, UGA-OTP-0248-0624, UGA-OTP-0248-0641-R01, UGA-OTP-0248-1070, UGA-OTP-0248-1735, UGA-OTP-0248-1743, UGA-OTP-0248-1788, UGA-OTP-0249-1772, UGA-OTP-0249-1799, UGA-OTP-0249-1826, UGA-OTP-0249-1908, UGA-OTP-0251-0883, UGA-OTP-0251-0887, UGA-OTP-0251-0895, UGA-OTP-0251-0896, UGA-OTP-0251-0900, UGA-OTP-0251-0902, UGA-OTP-0251-0908, UGA-OTP-0253-0753, UGA-OTP-0253-0797, UGA-OTP-0253-0841, UGA-OTP-0253-0857, UGA-OTP-0253-0885, UGA-OTP-0253-0886, UGA-OTP-0253-0945, UGA-OTP-0253-0977, UGA-OTP-0253-0978, UGA-OTP-0253-0979, UGA-OTP-0253-0981, UGA-OTP-0254-0007, UGA-OTP-0254-0008, UGA-OTP-0254-0018, UGA-OTP-0254-0019, and UGA-OTP-0254-0045. These documents date from 1 January 2006 to 26 January 2016.

direct knowledge about the implicit threat of lethal violence which Joseph Kony held over his subordinates if he considered that they had disobeyed or disrespected him⁷² – is less *prima facie* relevant? It is not.

54. Drawing a conclusion that the name is irrelevant without seeing the name also appears to be inconsistent with the principle or reasoning underlying the evidence submission regime in this trial. The Trial Chamber previously explained that the purpose of the regime of submitting evidence and delaying assessment of standard evidentiary criteria was that “the Chamber is able to assess more accurately the relevance and probative value of a given item of evidence after having received all of the evidence being presented at trial”.⁷³
55. If relevance of known information cannot be assessed until all material is available, how can the relevance of unknown information be so categorically and confidently assessed and rejected? Whether this is permitted by the court’s rules is an issue that should be assessed by the Appeals Chamber.

Issue 2 (a) and (b) affects the fair and expeditious conduct of the proceedings against Mr Ongwen, or, the outcome of the Ongwen trial

56. If the Single Judge knows the identity, then the erroneous modification of the Prosecution’s disclosure obligations jeopardises the fairness of the *Ongwen* case proceedings. An erroneous application of a legal standard with respect to material related to a witness in this case can profoundly prejudice the Defence preparation, and thus violate Mr Ongwen’s rights under Articles 67(1)(b) and (e) of the Statute. Also, an erroneous legal interpretation by the Single Judge will lead to lengthier proceedings and harm the expeditiousness of proceedings and will lead to additional litigation.
57. If the Single Judge found, on the basis of inferences about the identity of the informant, that the material is irrelevant, then the drawing of inferences in relation to assessing relevance is an appealable issue. This has two separate impacts upon fairness, expeditiousness and the outcome of the trial. These impacts include (1) the assessment of whether or not to disclose, and (2) the inferences to draw in light of the lack of disclosure pursuant to Article 72(7)(b)(ii) of the Statute.

⁷² Article 72 Decision, para. 14.

⁷³ ICC-02/04-01/15-497, para. 25.

58. With respect to the decision not to disclose, if the Single Judge did not have the information, then it appears that the Single Judge has delegated the assessment of relevance to one of the parties in an adversarial trial. This is an uninformed decision that leads to prejudice against Mr Ongwen by denying his right to access and analyse the UPDF informant's identity, as previously ordered by the Single Judge.⁷⁴ Therefore, this is an error of law and/or fact that violates Mr Ongwen's fair trial rights, and thus warrants the Appeals Chamber's resolution.
59. In relation to the inferences that a Trial Chamber can draw pursuant to Article 72(7)(b)(ii) of the Statute, the acceptance of the Prosecution's unilateral stipulation, in combination with acceptance of the Prosecution's claim that the item is not relevant, denied Mr Ongwen the benefit of reasonable inferences that could be drawn from concrete facts contained within the transcript.⁷⁵ The way in which this mode of reasoning impacted upon the Single Judge is apparent where the Defence inferences are dismissed as speculative and Single Judge states

Nothing in UPDF Report — 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.⁷⁶

60. Yet, even ignoring the inferences based on concrete facts in the transcript⁷⁷ that were rejected by the Single Judge, just for example, [REDACTED]
[REDACTED].⁷⁸

An immediate resolution of Issue 2 may materially advance the Ongwen case proceedings

61. Determinations of relevance and accompanying assessment of the reasonableness of inferences drawn are appealable legal issues. This is because the application of this standard can profoundly impact both the fairness of proceedings and the outcome of the trial. It is the same in the *Ongwen* trial. Sub-Issues 2(a) and (b) significantly affect the fairness of the *Ongwen* proceedings, will impact the expeditiousness of the proceedings, and may determine the outcome of the *Ongwen* trial given the centrality of the affirmative defences to this case.
62. Whether or not the Single Judge knows the identity of the UPDF informant, issues of importance arise from Article 72 Decision. If the issue is not addressed on appeal, the problems

⁷⁴ ICC-02/04-01/15-1207 and ICC-02/04-01/15-1234.

⁷⁵ UGA-D26-0017-0052.

⁷⁶ Article 72 Decision, para. 22.

⁷⁷ UGA-D26-0017-0052.

⁷⁸ [REDACTED].

associated with this UPDF informant and LRA collaborator are likely re-appear in the proceedings. The Appeals Chamber's resolution of this issue will therefore materially advance the proceedings.

Issue 3: Whether the Single Judge's decision to proceed under Article 72(5) of the Statute, without any evaluation of the accuracy of the asserted national security prejudice, is erroneous as a matter of law and fact

Issue 3 is an appealable issue that arises from Article 72 Decision

63. This issue also arises from Article 72 Decision. In particular, the Single Judge held

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.⁷⁹

64. The Defence submits that the Single Judge's decision to find the most appropriate way to proceed in response to the Ugandan Government's intervention under Article 72 of the Statute, without evaluating the accuracy of the asserted national security prejudice, is erroneous as a matter of law and fact and violates Mr Ongwen's fair trial rights.

65. It is implicit that if the Single Judge decides to proceed under Article 72(5) of the Statute, to find the most appropriate way to proceed in response to the asserted national security prejudice, the Single Judge must be persuaded that the national security prejudice is accurate or reasonable. However, in the Article 72 Decision, the Single Judge does not provide any finding on the national security prejudice to Uganda or validate the accuracy of the Ugandan Government's assertions regarding the potential prejudice.

66. In other words, the Single Judge's finding that it is not the Trial Chamber's role "to evaluate the accuracy of the asserted national security prejudice"⁸⁰ could also indicate that regardless of the accuracy or reasonableness of the national security prejudice alleged by a State, the Trial Chamber will proceed to resolve the matter under Article 72 of Statute, e.g. prejudicially hindering the disclosure of the UPDF informant's identity to which Mr Ongwen is rightfully entitled. This approach violates the Single Judge's obligation to "ensure that a trial is fair and

⁷⁹ Article 72 Decision, para. 17.

⁸⁰ Article 72 Decision, para. 17.

expeditious and is conducted with full respect for the rights of the accused,”⁸¹ and thus violates Mr Ongwen’s fair trial rights.

67. The Single Judge’s ruling on this matter sets a concerning standard that provides the ICC State Parties with a *carte blanche* discretion in preventing the disclosure of information sought, or ordered to be disclosed,⁸² on the basis of any national security interests alleged.⁸³ The dangers of such an approach, in respect of the principles of equality of arms and fair trial rights, are evident in a number of the European Court of Human Rights cases.⁸⁴
68. The danger inherent to an overly broad construction of the term ‘national security’, without ruling on its accuracy, was also addressed by the Appeals Chamber in the *Blaškić* case

[T]o grant States a blanket right to withhold, for security purposes, documents necessary for trial might jeopardise the very function of the International Tribunal, and “defeat its essential object and purpose”. The International Tribunal was established for the prosecution of persons responsible for war crimes, crimes against humanity and genocide; these are crimes related to armed conflict and military operations. It is,

⁸¹ Article 64(2) of the Statute; Triffterer/Ambos, *The Rome Statute of the International Criminal Court, A Commentary, Third Edition*, 2015, p. 1789: (“Framing the parameters that were to guide the negotiations of article 72, the ICTY Appeals Chamber [in the *Blaškić* case] emphasised that rather than allowing States a unilateral right to withhold documents because of national security concerns, the solution lay in an approach that **enabled the Tribunal to adopt practical methods and procedures to scrutinise the validity of a State’s national security claim**, while mindful of legitimate State concerns.”) (Bold added); *see also* Prosecutor v. *Milan Milutinović et al*, Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54bis, IT-05-87-PT, 17 November 2005, para. 31.

⁸² ICC-02/04-01/15-1207, para. 9: (“[T]he Single Judge considers it appropriate for the Prosecution to provide the Sound Recording and RFA 24. As regards the identity of the informant in the UPDF Report, this must also be provided to the Defence forthwith unless, within 5 days of notification of the present decision, the Prosecution files a substantiated request for nondisclosure.”); and ICC-02/04-01/15-1234: (“The Prosecution is therefore ordered to disclose the identity of the UPDF informant to the Defence, subject only to ensuring that any appropriate measures still deemed necessary are taken to protect the safety of the person prior to disclosure.”).

⁸³ Triffterer/Ambos, *The Rome Statute of the International Criminal Court, A Commentary, Third Edition*, 2015, p. 1788: (“Nonetheless, if the Court were to follow the practice of some States when using this term it could lead to the absurd result that disclosure of information concerning almost any matter involving an armed conflict or military activity would be considered prejudicial to national security and, therefore, protected from disclosure.”).

⁸⁴ *Rowe and Davis v. United Kingdom*, N 28901/95, European Court of Human Rights, Judgment, 16 February 2000, para. 61: (“The entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused (see, for example, the *Doorson v. the Netherlands* judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 470, § 70). In some cases it may be necessary to withhold certain evidence from the defence as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are **strictly necessary** are permissible under Article 6 §1 (see the *Van Mechelen and Others v. the Netherlands* judgment of 23 April 1997, *Reports* 1997-III, p. 712, §58). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a **limitation on its rights must be sufficiently counterbalanced** by the procedures followed by the judicial authorities (see the *Doorson* judgment cited above, p. 471, §72, and the *Van Mechelen and Others* judgment cited above, p. 712, §54). (Bold added), available at: <http://hudoc.echr.coe.int/eng?i=001-58496>.

therefore, evident that military documents or other evidentiary material connected with military operations may be of crucial importance, either for the Prosecutor or the defence, to prove or disprove the alleged culpability of an indictee, particularly when command responsibility is involved. [...] To admit that a State holding such documents may unilaterally assert national security claims and refuse to surrender those documents could lead to the stultification of international criminal proceedings: those documents might prove crucial for deciding whether the accused is innocent or guilty. The very *raison d'être* of the International Tribunal would then be undermined.⁸⁵

69. Irrespective of the Single Judge's erroneous decision to proceed under Article 72(5) of the Statute, the Defence reiterates that no prejudice to national security of Uganda exists.⁸⁶ No argument was presented as to how the disclosure of the UPDF informant's identity to the Defence and Mr Ongwen – as opposed to the public – would prejudice the national security of Uganda.
70. Mr Ongwen is not only a former LRA member, as alleged by the Ugandan Government,⁸⁷ but he is also an individual who stands accused of 70 crimes and seven modes of liability in front of this Court. Mr Ongwen is being held in the custody of this Court and is subject to, *inter alia*, the secured communication protocol applied by the Registry of this Court. Mr Ongwen is actively monitored and it is impossible for him to divulge any confidential information to the public.⁸⁸ Any finding against this fact is presumptuous and prejudicial against Mr Ongwen's right to a fair and expeditious trial.⁸⁹ This amounts to an error of law and fact.
71. The impossibility to create any national security prejudice by disclosing the UPDF informant's identity to the Defence and Mr Ongwen is further highlighted by the Single Judge's finding that
- [O]ther individuals with a similar background have provided testimony in the present case following disclosure of their identities to the Defence. The Defence is well aware of its professional obligations in relation to the handling of confidential information.⁹⁰
72. In light of the above, the Defence notes that the Single Judge's erroneous decision to proceed without justifying the accuracy of the alleged national security prejudice violates Mr Ongwen's internationally recognized fair trial rights under Articles 21 and 67 of the Statute, thus immediate resolution by the Appeals Chamber is warranted.

⁸⁵ Prosecutor v. *Tihomir Blaškić*, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II on 18 July 1997, ICTY Appeals Chamber, 29 Oct. 1997, para. 65.

⁸⁶ ICC-02/04-01/15-1255-Red, paras 34-40.

⁸⁷ Article 72 Decision, para. 9; see also ICC-02/04-01/15-1240-Anx, paras 3-5.

⁸⁸ ICC-02/04-01/15-1255-Red, para. 38.

⁸⁹ Article 64(2) of the Statute.

⁹⁰ ICC-02/04-01/15-1234, para. 8.

Issue 3 affects the fair and expeditious conduct of the proceedings against Mr Ongwen, or, the outcome of the Ongwen trial

73. It is the Defence position that this appealable issue also significantly affects the fair and expeditious conduct of the proceedings against Mr Ongwen, or the outcome of the *Ongwen* trial. In particular, the prejudice of withholding the UPDF informant's identity from the Defence emanates from the Single Judge's erroneous decision to proceed under Article 72(5) of the Statute without justifying the accuracy of the national security prejudice alleged.
74. The Defence is entitled to the UPDF informant's identity.⁹¹ Therefore, the erroneous decision to proceed under Article 72(5) of the Statute, without justifying the accuracy of the national security prejudice, prejudices Mr Ongwen and thus significantly affects the fair and expeditious conduct of the proceedings against Mr Ongwen.
75. The integrity and the outcome of the Ongwen trial may be compromised as well if the Single Judge's erroneous decision is not immediately resolved and corrected by the Appeals Chamber.

An immediate resolution of Issue 3 may materially advance the Ongwen case proceedings

76. The Single Judge's decision to find the most appropriate way to proceed under Article 72(5) of the Statute, without evaluating the accuracy of the alleged national security prejudice, contains a legal and factual error. These errors prevent the disclosure of the UPDF informant's identity to which the Defence is rightfully entitled. This legal and factual error must be immediately resolved by the Appeals Chamber, so that the Defence can access and scrutinise the information sought and properly prepare for the presentation of its defence commencing 18 September 2018.⁹²
77. In sum, the Trial Chamber has an obligation to conduct a fair trial as well as to reach a verdict in Mr Ongwen's case.⁹³ As Richard J. Goldstone noted "Whether there are convictions or whether there are acquittals will not be the yardstick. The measure is going to be the fairness of

⁹¹ ICC-02/04-01/15-1207, para. 9; ICC-02/04-01/15-1234.

⁹² ICC-02/04-01/15-1275, p. 4.

⁹³ Article 64 of the Statute.

the proceedings.”⁹⁴ It is the Defence position that the proceedings against Mr Ongwen are unfair, prejudicial and in violation of Mr Ongwen’s rights under Article 67 of the Statute.

V. RELIEF SOUGHT

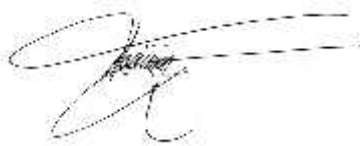
78. For the reasons stated above, the Defence respectfully requests that leave is granted by the Trial Chamber to appeal the following issues:

Issue 1: Whether the Single Judge’s modification of his prior rulings on the basis of Article 72(5)(a) of the Statute is erroneous as a matter of law;

Issue 2: (a) Whether the Single Judge has applied a standard of ‘relevance’ that is consistent with the jurisprudence and/or (b) Whether the Single Judge can draw inferences regarding relevance without inspecting the material itself; and

Issue 3: Whether the Single Judge’s decision to proceed under Article 72(5) of the Statute without any evaluation of the accuracy of the asserted national security prejudice is erroneous as a matter of law and fact.

Respectfully submitted,



.....
 Hon. Krispus Ayena Odongo
 On behalf of Dominic Ongwen

Dated this 28th day of June, 2018

At Lira, Uganda

⁹⁴ Richard J. Goldstone, Address before the Supreme Court of the United States, 1996 CEELI Leadership Award Dinner (Oct. 2, 1996): (“There is no question that history will judge the Tribunals for the former Yugoslavia and Rwanda on the fairness or unfairness of their proceedings. Whether there are convictions or whether there are acquittals will not be the yardstick. The measure is going to be the fairness of the proceedings.”).