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Pénale
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**International
Criminal
Court**

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Date: 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

**Decision on Defence Request for Leave to Appeal the 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 Article 82(1)(d) of the Rome Statute ('Statute'), Rule 132 *bis* of the Rules of Procedure and Evidence ('Rules') and Regulation 23 *bis* of the Regulations of the Court, issues the following 'Decision on Defence Request for Leave to Appeal the Decision in Response to an Article 72(4) Intervention'.

1. On 1 June 2018, in response to an assertion of national security interests by the government of the Republic of Uganda ('GoU'), the Single Judge modified prior rulings ordering the provision of an informant's identity ('Article 72 Decision').¹ This had previously been ordered not because the informant's identity was deemed material to the preparation of the defence, but as a remedy to an information and evidence management failure by the Office of the Prosecutor ('Prosecution').² Prior to the filing from the GoU leading to the Article 72 Decision, the Single Judge had concluded that no basis for restricting the provision of the informant's identity had been substantiated.³
2. On 8 June 2018, the defence for Mr Ongwen ('Defence') sought leave to appeal the Article 72 Decision with respect to three issues ('Request').⁴
3. On 13 June 2018, the Prosecution responded that the Request should be rejected in full ('Response').⁵

¹ Decision in Response to an Article 72(4) Intervention, ICC-02/04-01/15-1267-Corr (corrigendum filed 6 June 2018).

² Decision on Defence Requests Following Prosecution's Notice of Filing of an Item Received in Response to an RFA, 16 March 2018, ICC-02/04-01/15-1207, paras 8-9.

³ Decision on Prosecution Request under Paragraph 9 of Decision 1207, 20 April 2018, ICC-02/04-01/15-1234, para. 8.

⁴ Defence Request for Leave to Appeal "Decision in Response to an Article 72(4) Intervention", ICC-02/04-01/15-1279-Conf.

⁵ Prosecution's Response to "Defence Request for Leave to Appeal Decision in Response to an Article 72(4) Intervention" (ICC-02/04-01/15-1279-Conf), ICC-02/04-01/15-1285-Conf (notified 14 June 2018).

4. Preliminarily, it appears that the Defence seeks for the full Chamber to rule on the Request.⁶ Following the general practice decided by the Chamber, the Single Judge will rule on the Request because it seeks leave to appeal a Single Judge decision.
5. The Single Judge recalls the interpretation of Article 82(1)(d) of the Statute as set out in detail previously.⁷

A. First Issue

6. The Defence's first proposed issue is: '[w]hether 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'.⁸
7. The Single Judge does not understand the Defence to be asserting that Chambers cannot reconsider prior decisions at all,⁹ but rather that the ruling ordering the Prosecution to provide the informant's identity cannot be modified within the framework of Article 72(5) of the Statute.
8. On this understanding, the Defence's issue is not essential for the determination of the Article 72 Decision. The Article 72 Decision was premised on two findings, both falling under the standard disclosure framework: (i) the informant's identity is not material to the preparation of the defence under Rule 77 of the Rules¹⁰ and, even if such materiality were to be assumed, (ii) restrictions for

⁶ Request, ICC-02/04-01/15-1279-Conf, para. 5 ('the Defence respectfully requests that the decision on Uganda's Article 72 intervention be taken by a full Chamber').

⁷ Decision on Defence Request for Leave to Appeal the Trial Chamber's Oral Decision on the Exclusion of Certain Parts of the CLRV Expert Report, 1 June 2018, ICC-02/04-01/15-1268, para. 8; Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, paras 4-8.

⁸ Request, ICC-02/04-01/15-1279-Conf, paras 14-31.

⁹ The Defence has sought such relief in the past. Decision on Defence Request for Reconsideration of or Leave to Appeal the Directions on Closing Briefs and Closing Statements, 11 May 2018, ICC-02/04-01/15-1259; Decision on Defence Request for Reconsideration of Decision ICC-02/04-01/15-1147 and Objections to Victim Participation, 26 January 2018, ICC-02/04-01/15-1152.

¹⁰ Article 72 Decision, ICC-02/04-01/15-1267-Corr, paras 20-24.

disclosure exist under Rule 81(4) of the Rules.¹¹ These findings were then used to conclude that taking note of the Prosecution's proposed stipulation in favour of the Defence – rather than disclosing the informant's identity – would be the more appropriate remedy for the Prosecution's original information and evidence management failure.¹² Article 72(5)(a) of the Statute was not the exclusive (or even primary) legal basis underlying the Article 72 Decision.

9. Article 72(5)(a) was referenced once in the Article 72 Decision because the resolution of the GoU's Article 72 intervention was to modify the ruling prompting it.¹³ Even if the Defence successfully argued in an interlocutory appeal that Article 72(5)(a) was referenced out of place, this is not essential to the Article 72 Decision because the Single Judge's findings on non-disclosure would be unaffected.

B. Second Issue

10. The Defence's second proposed issue is: '[t]he Interpretation of Rule 77 and Article 67(2) is an issue that arises out of the Article 72 Decision'.¹⁴ This issue has two sub-parts, namely: (a) '[w]hether the Single Judge has applied a standard of "relevance" that departs from the jurisprudence' and (b) '[w]hether the Single Judge can draw inferences regarding relevance without inspecting the material itself'.¹⁵
11. The Defence's first sub-issue proceeds on a premise that the Chamber knew the identity of the informant and that this person is a witness in these proceedings.¹⁶ The Single Judge clarifies that he has not been provided with the informant's identity, and no information in the record suggests this person is a witness in

¹¹ Article 72 Decision, ICC-02/04-01/15-1267-Corr, paras 25-26.

¹² Article 72 Decision, ICC-02/04-01/15-1267-Corr, paras 27-29.

¹³ Article 72 Decision, ICC-02/04-01/15-1267-Corr, para. 28.

¹⁴ Request, ICC-02/04-01/15-1279-Conf, para. 31.

¹⁵ Request, ICC-02/04-01/15-1279-Conf, paras 32-62.

¹⁶ Request, ICC-02/04-01/15-1279-Conf, paras 34-44.

this case.¹⁷ This sub-issue as presented by the Defence does not arise from the Article 72 Decision.

12. As to the Defence's second sub-issue, the Single Judge considers that this issue does not affect the fair and expeditious conduct of the proceedings or the outcome of the trial, as required under Article 82(1)(d) of the Statute. The informant was used by the GoU to facilitate communication with Joseph Kony to confirm the death of Vincent Otti in 2007. Vincent Otti's death occurs two years after the time period charged in the case and nothing suggests that Mr Ongwen had any role in it.¹⁸ The Defence wanted this informant's identity primarily to assist in establishing a duress defence,¹⁹ but the available information points to the informant only knowing facts relevant to duress which are effectively conceded in the Prosecution's proposed stipulation.²⁰ There is no information suggesting that the informant knows anything else of relevance to this case, and the Prosecution - who is ethically obligated to say otherwise and does know the informant's identity - asserts this clearly and consistently.²¹
13. The Article 72 Decision could be issued without the informant's identity because the Defence was insisting upon manifestly unimportant information. It must be noted in this regard that Joseph Kony's implicit threats of lethal violence over his subordinates - including the specific detail that it was Joseph Kony who caused the death of Vincent Otti - are already conceded by the Prosecution in this trial.²²

¹⁷ Paragraph 18 of the Article 72 Decision, ICC-02/04-01/15-1267-Corr, incorrectly states the status of the informant as a 'witness'. Following the present decision, this will be corrected by way of a corrigendum.

¹⁸ *As stated previously in* Decision on Defence Request for Disclosure of Certain Requests for Assistance and Related Items, 1 February 2018, ICC-02/04-01/15-1161, para. 9.

¹⁹ Public Redacted Version of "Defence Response to the Letter from the Ugandan Government", filed on 7 May 2018, 9 May 2018, ICC-02/04-01/15-1255-Red, para. 42, *cited in* Article 72 Decision, ICC-02/04-01/15-1267-Corr, para. 21.

²⁰ *See* Article 72 Decision, ICC-02/04-01/15-1267-Corr, para. 23.

²¹ Response, ICC-02/04-01/15-1285-Conf, para. 8; Prosecution's Submission regarding an Intervention under Article 72(4) of the Statute, 7 May 2018, ICC-02/04-01/15-1256, paras 19-23, 28-35.

²² *See* Article 72 Decision, ICC-02/04-01/15-1267-Corr, paras 14, 23.

14. The Single Judge fails to see how non-disclosure in these circumstances could have any impact on the fairness and expeditiousness of the proceedings or the outcome of the trial. Though not strictly relevant to the leave to appeal criteria, the Single Judge cannot help but note that the Defence also prominently references Appeals Chamber jurisprudence to the effect that Chambers do not always have to possess the disputed information prior to making a disclosure ruling.²³

C. Third Issue

15. The Defence's third proposed issue is: '[w]hether 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'.²⁴

16. The Single Judge also considers this issue to not be essential to the determination of the Article 72 Decision. As indicated in paragraph 8 above, the Article 72 Decision is a disclosure ruling prompted on grounds that providing information previously ordered as a remedy for a Prosecution mistake would, in the opinion of the GoU, create a national security issue.²⁵ In the course of making this disclosure ruling, the Single Judge concluded that the identity of the informant was not material to the preparation of the defence under Rule 77 of the Rules.

²³ Request, ICC-02/04-01/15-1279-Conf, para. 49, *citing* 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 OA 4 (emphasis as added by the Defence, noting the word 'may' in particular: '[t]he 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').

²⁴ Request, ICC-02/04-01/15-1279-Conf, paras 63-77.

²⁵ The terms of the original remedy showed awareness that something like a national security issue might affect what had been ordered. ICC-02/04-01/15-1207, para. 9 (emphasis added: '[a]s 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 non-disclosure*').

The Single Judge reasoned that concluding otherwise would expand the Prosecution's disclosure obligations to an unreasonable degree, emphasising further that the Prosecution's proposed stipulation meant that no defence need be prepared towards establishing Joseph Kony's implicit threats of lethal violence over his subordinates.²⁶

17. As stated in the Article 72 Decision: '[o]n 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'.²⁷ So, even if the Defence were to prevail in an interlocutory appeal on its interpretation of Article 72 of the Statute, the Single Judge's ruling would again be unaffected.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request;

ORDERS the Registry to reclassify the Response (ICC-02/04-01/15-1285-Conf) as 'public'; and

ORDERS the Defence to file a public redacted version of the Request, or request its reclassification, within 10 days of notification of the present decision.

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



Judge Bertram Schmitt, Single Judge

Dated 26 June 2018

At The Hague, The Netherlands

²⁶ Article 72 Decision, ICC-02/04-01/15-1267-Corr, para. 23.

²⁷ Article 72 Decision, ICC-02/04-01/15-1267-Corr, para. 24.