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**International
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Date: **13 June 2018**

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

Confidential

**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)**

Source: The Office of the Prosecutor

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

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Introduction

1. The Defence Request for Leave to Appeal¹ ("Request") the "Decision in Response to an Article 72(4) Intervention"² ("Decision") should be denied. None of the three issues identified by the Defence arises from the Decision, and none satisfies the other article 82(1)(d) criteria.

Confidentiality

2. This response is filed confidentially pursuant to regulation 23bis of the Regulations of the Court because the Defence Request was filed confidentially. As soon as the Defence files a public redacted version of the Request, this response should be reclassified as public.

Submissions

*The first issue is not an appealable issue arising from the Decision
and does not satisfy the article 82(1)(d) criteria*

3. The Defence frames its first issue for interlocutory appeal as "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".³

4. First, the Defence's general challenge to the correctness of the Single Judge's finding is not a concrete "subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination."⁴ It is

¹ ICC-02/04-01/15-1279-Conf ("Request").

² ICC-02/04-01/15-1267-Corr ("Decision").

³ Request, para. 14.

⁴ ICC-01/04-168 OA3, para. 9; ICC-02/04-01/05-367, para. 22; ICC-02/05-02/09-267, p. 6; ICC-01/04-01/06-2463, para. 8; ICC-01/09-02/11-27, para. 7.

therefore not an issue within the meaning of article 82(1)(d) of the Statute, and the Defence's first ground should be dismissed on that basis alone.

5. Second, this issue does not arise from the Decision because it is based upon a fundamental misunderstanding of the Decision. The Defence suggests, in effect, that the Single Judge was powerless to reconsider and modify his previous order, because the Prosecution was under a disclosure obligation to reveal the confidential informant's identity. That is inaccurate.

6. At no point has the Prosecution or the Trial Chamber determined that the informant's identity is relevant to the preparation of the defence in this case. To the contrary, the Prosecution's position from the beginning has been that the UPDF report and related information are *not* relevant to the preparation of the Defence and *not* subject to rule 77 (or any other provision imposing a disclosure obligation upon the Prosecution).⁵ The Single Judge reached the same conclusion specifically regarding the informant's identity, after thorough analysis, in the Decision.⁶ As noted by the Single Judge, and contrary to the insinuation of the Defence, his prior decisions regarding the UPDF report and associated items did not characterise them as subject to the rule 77 or other disclosure provisions.⁷ Because the confidential informant's identity has never been subject to a disclosure obligation under the Statute or Rules, the Defence's arguments regarding the scope of possible restrictions on disclosure pursuant to article 72 are irrelevant.

7. Equally important, there is no support for the Defence's suggestion that a Trial Chamber, or a Single Judge acting on behalf of a Trial Chamber, cannot modify a prior order on the basis of newly available information. As held by the Single Judge previously in this case, reconsideration of a prior ruling may be appropriate where

⁵ ICC-02/04-01/15-1189-Conf-Ex, para. 9(a).

⁶ Decision, paras. 23-24.

⁷ Decision, para. 20 (citing ICC-02/04-01/15-1207, para. 9).

necessary to prevent an injustice, and new facts and arguments may be relevant to such assessments.⁸ The Decision expressly held that the information provided by the Ugandan authorities “constitutes new facts which justify a revised assessment”.⁹ The Defence’s challenge is thus no more than a disagreement with the outcome of the Decision, and does not constitute an appropriate issue for interlocutory appeal.¹⁰

8. Third, and in any event, even if the first issue identified by the Defence did arise from the Decision, it does not significantly affect the fair and expeditious conduct of these proceedings or the outcome of the trial, nor would an immediate resolution by the Appeals Chamber materially advance the proceedings.¹¹ As discussed in the Prosecution’s prior filings¹² and found by the Single Judge in the Decision,¹³ any alleged relevance of the confidential informant’s identity to these proceedings or to the preparation of a defence is so attenuated and speculative that it does not meet even the low standard of rule 77. The Defence has identified no concrete way in which knowing the confidential informant’s name would advance its investigation or these proceedings, particularly given that the Defence has already received the UPDF report and recording (with only the informant’s name redacted) and the Prosecution’s unilateral stipulation in relation thereto.

9. For these reasons, leave to appeal the first issue identified in the Request should be denied.

⁸ ICC-02/04-01/15-468, para. 4.

⁹ Decision, para. 18

¹⁰ ICC-01/04-168 OA3, 13 July 2006, para. 9 (“Only an ‘issue’ may form the subject matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”).

¹¹ Article 82(1)(d) criteria are cumulative: a failure to fulfil any one of the criteria is fatal to any application for leave to appeal. ICC-01/05-01/08-3273, para. 8.

¹² *E.g.*, ICC-02/04-01/15-1256, paras. 19-23, 28-35.

¹³ Decision, paras. 21-24.

*The second issue does not arise from the Decision
and does not satisfy the article 82(1)(d) criteria*

10. The second issue identified by the Defence is predicated on a misinterpretation of the Decision and therefore does not arise from it.

11. The Defence challenges the Single Judge's interpretation of rule 77 and article 67(2), specifically whether he applied an appropriate standard of relevance, and whether he appropriately drew inferences without knowing the informant's name.¹⁴ Both of these alleged sub-issues are predicated on the Defence's inaccurate suggestion that the confidential informant might be a prosecution witness in this case, and therefore neither sub-issue can be reasonably construed as arising from the Decision.

12. The Defence recognises that the Single Judge cited the correct legal standards in his Decision.¹⁵ However, in its first sub-issue, the Defence argues that if the Single Judge knew the confidential informant was a witness, then "denying that such information is relevant to Defence preparation is a clear departure from the understood scope of Rule 77".¹⁶

13. In filing # 1217, the Prosecution clearly stated:

The Prosecution has never had contact with the informant. The Prosecution has no information (beyond that set out in Confidential Annex A) as to the informant's current situation. *The informant is not a victim or a witness in the current proceedings.*¹⁷

¹⁴ Request, para. 32.

¹⁵ Request, para. 41.

¹⁶ Request, para. 41 (emphasis added).

¹⁷ ICC-02/04-01/15-1217, para. 7 (emphasis added).

14. Because the confidential informant is not a prosecution witness, and because the Single Judge was well informed of that fact, the Defence's first sub-issue must fail.

15. The Defence next argues, in the second sub-issue, that the mere theoretical possibility that the confidential informant *might* be a witness required the Single Judge to inspect the unredacted UDPF report. Even if the Single Judge had not been expressly informed in filing # 1217 that the informant was not a witness, the case law is clear that the determination of whether information is subject to the Prosecution's disclosure obligations is, in the first instance, for the Prosecution, and Chambers will intervene only where there are "good reasons for doubting" that the Prosecution has complied with its obligations.¹⁸ Here the Defence has offered nothing but speculation that the confidential informant might have been a witness, and there was no basis or need for the Single Judge to look further into the matter.

16. Because both sub-issues of the Defence's second identified issue for appeal are patently contradicted by the record, leave to appeal the second issue should be denied. Furthermore, for the same reasons explained above in relation to the first issue, there is no indication that an interlocutory appeal of the second issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor that an immediate decision from the Appeals Chamber would materially advance the proceedings. The Request in relation to the second issue should be denied for that reason as well.

¹⁸ ICC-02/04-01/15-907, para. 18 ("As a general rule, it is for the Prosecution to determine whether a document is disclosable under Rule 77 of the Rules."); ICC-02/11-01/11-351-Red, para. 17 (Chambers will intervene in Prosecution's disclosure determinations only when there are good reasons for doubting that the duty has been properly fulfilled).

*The third issue does not arise from the Decision
and does not satisfy the article 82(1)(d) criteria*

17. Third, the Defence challenges the Single Judge's conclusion that it is the prerogative of an intervening State, rather than the Chamber, to determine whether the disclosure of certain information prejudices national security interests.¹⁹ The Defence posits that the Single Judge's allegedly erroneous approach led to the nondisclosure of information to which the Defence is entitled.²⁰ This issue too is based on a mischaracterisation of the Decision and does not arise from it.

18. As discussed above, the identity of the UPDF confidential informant is not relevant to the preparation of the defence in this case, nor otherwise disclosable under the Statute or Rules of this Court. Consequently, the Defence is not "entitled" to it. It follows that the Decision did not curtail any disclosure right of the Accused on the basis of article 72. Indeed, the Decision itself expressly held that the issue of applying "any restrictions on disclosure [...] by virtue of Article 72 of the Statute and Rule 81(4) of the Rules does not even arise".²¹

19. Because the Decision was based on the Single Judge's determination that the requested information is not disclosable, rather than on a restriction under article 72, the Defence's third issue for appeal not only does not arise from the Decision but also fails the other requirements of article 82(1)(d). A favourable decision from the Appeals Chamber on the identified issue would not lead to disclosure of the confidential informant's identity, and thus cannot materially advance the proceedings. Nor, for the reasons set out above, does the nondisclosure of this information significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

¹⁹ Request, from para. 63.

²⁰ Request, para. 74.

²¹ Decision, para. 24 (emphasis added).

Conclusion

20. For the reasons set out above, the Defence Request should be rejected.



Fatou Bensouda, Prosecutor

Dated this 13th day of June 2018

At The Hague, The Netherlands