

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 27 February 2017

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

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

PUBLIC

Defence Request for Leave to Appeal Decision ICC-02/04-01/15-709

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, the Defence for Dominic Ongwen (‘Defence’) requests leave to appeal the “Decision on the ‘Prosecution Request for Disclosure of Material Underlying the Defence Psychiatric Expert Report’”(‘Impugned Decision’).¹

2. The Defence requests leave to appeal the following issue:

Trial Chamber IX (‘Chamber’) failed to give due consideration to Rule 73(2) of the Rules of Procedure and Evidence (RPE) when determining the privileged and confidential status of the clinical notes, and Mr Ongwen has a reasonable expectation of privacy to the clinical notes until such time that an Article 31(1)(a) affirmative defence is official proffered (‘Issue’).

II. APPLICABLE LAW

3. Pursuant to Article 82(1)(d) of 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 Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. The purpose of such procedure is to “pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.² The Pre-Trial Chamber is vested with the power to certify the existence of an appealable issue,³ however when determining whether leave to appeal should be granted, the Pre-Trial Chamber must not justify or defend the correctness of its decision, but instead determine whether the issues presented significantly affect the fairness of the proceedings.⁴

4. 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, in accordance with Regulation 65(1) of the Regulations of

¹ ICC-02/04-01/15-709.

² ICC-01/04-168, para. 19.

³ *Ibid.*, para. 20.

⁴ *See e.g.* ICC-01/09-02/11-253, para. 28.

the Court ('RoC'). It shall also specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue.⁵

5. 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".⁶ 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".⁷ The issue must be one apt to "significantly affect", that is, in a material way, either the fair and expeditious conduct of the proceedings, or the outcome of the trial.⁸ In other words, the issue "must be one likely to have repercussions on either of these two elements of justice".⁹

6. The Appeals Chamber has defined the term "fair" as being associated with the norms of a fair trial and corresponding human rights, as per Article 64(2) and 67(1) of the Statute.¹⁰ In particular, it noted that the "expeditious conduct of the proceedings in one form or another constitutes an attribute to a fair trial".¹¹ The term "proceedings" extends to proceedings prior and subsequent to the current proceedings.¹²

7. The Appeals Chamber also held that 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.¹³ The Pre-Trial 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.¹⁴

8. Regarding the second aspect of a request for leave to appeal (the immediate resolution by the Appeals Chamber), the Appeals Chamber has held that this criterion will be satisfied if

⁵ Regulation 155 (2) of the RoC.

⁶ ICC-01/04-168, para. 9.

⁷ *Ibid.*

⁸ *Ibid.*, para. 10.

⁹ *Ibid.*

¹⁰ *Ibid.*, para. 11.

¹¹ *Ibid.*

¹² *Ibid.*, para. 12.

¹³ *Ibid.*, para. 13.

¹⁴ *Ibid.*, para. 13.

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”.¹⁵ The issue at stake must also be “such that its immediate 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 mar [*sic*] the outcome of the trial”.¹⁶ The solving of the issue by the Appeals Chamber is aimed to “ensure that the proceedings follow the right course”.¹⁷

III. SUBMISSIONS

a) The Issue arises from the Impugned Decision

9. The Issue arises from the Impugned Decision. The Chamber dismissed the Defence’s argument that Mr Ongwen maintained a reasonable expectation of privacy over his clinical notes until an Article 31(1)(a) affirmative defence is proffered.¹⁸

10. The Issue is not merely disagreement in the interpretation of the laws or rules governing the Court. The Defence does not dispute that certain material, including specific clinical notes, shall be disclosable material if the Defence proffers an Article 31(1)(a) affirmative defence. As it stands, the Defence still intends to submit such an argument, but it waits for a final test on Mr Ongwen. The finality of the Article 31(1)(a) affirmative defence concludes after this test, which has been requested by D26-0041 and D26-0042 (‘Defence Experts’) to the ICC-DC medical staff.¹⁹

11. As such, until this final test has been completed and analysed by the Defence Experts, the Defence is not in a position to state conclusively whether an Article 31(1)(a) affirmative defence shall be proffered.

¹⁵ *Ibid.*, paras 14-15.

¹⁶ *Ibid.*, para. 14.

¹⁷ *Ibid.*, para. 15.

¹⁸ Impugned Decision, paras 11 and 16.

¹⁹ The Defence cannot confirm whether or not this test has been done, but it is following up with it, and if not, shall be formally requesting this test be performed at the earliest opportunity.

- b) *The Issue significantly affects the fair and expeditious conduct of the proceedings*

12. The Issue affects the fair and expeditious conduct of the proceedings.

13. As stated in the Defence's response²⁰ to the Prosecution's request,²¹ confidentiality still attaches to the clinical notes.²² The clinical notes remain part of the Defence's materials which it *might* use for its Article 31(1)(a) submission. Until such time that the Defence proffers an Article 31(1)(a) defence, it is wholly unfair to order the Defence to disclose documents which ultimately be unnecessary.

14. Furthermore, as noted by the Chamber,²³ the Defence requested an order from the Chamber against the ICC-DC to disclose the clinical notes, which the Chamber did not grant. The Defence requested these notes to better inform the Defence Experts in their examinations, which the Defence Experts did not have a chance to do because of a delay by the ICC-DC. It is unfair to Mr Ongwen that these clinical notes were withheld from his Defence Team and Defence Experts for over four (4) months, and the Defence Experts conducted their work without the clinical notes, and now the Prosecution files its request and is granted the request. The clinical notes were important to the Defence Experts, but the Defence Experts worked without the clinical notes because of lack of cooperation by the ICC-DC. As such, Mr Ongwen still has a reasonable expectation of privacy to the clinical notes, especially since the examinations of Mr Ongwen and the Defence Expert report were done without the aid of the clinical notes for its clinical diagnosis.²⁴

15. The Issue also significantly affects the expeditious of the proceedings. Assuming *arguendo*, that the Defence finally determines not to file an Article 31(1)(a) defence, the Chamber, Prosecution and Victim Representatives shall have prepared for an argument not presented. Furthermore, the clinical notes must be translated if disclosed.²⁵ This requires significant Court resources and significant amount of time.

²⁰ ICC-02/04-01/15-679-Conf.

²¹ ICC-02/04-01/15-653-Conf.

²² ICC-02/04-01/15-670-Conf, para. 34 and fn. 23.

²³ Impugned Decision, para. 13.

²⁴ ICC-02/04-01/15-697-Conf, para. 35.

²⁵ The clinical notes are in Dutch.

- c) *An immediate resolution by the Appeals Chamber will materially advance the proceedings and is in the interest of justice*

16. An immediate decision by the Appeals Chamber on the Issue will materially advance the proceeding and is in the interest of justice.

17. The Defence requests clarity on the issue. As this is a novel issue, something not dealt with before by the Appeals Chamber, the Defence argues that clarity on the Issue is required. It is more pressing in this regard as it deals with psychiatric and psychological medical files. Should the clinical notes be disclosed, and the Defence decide not to submit an official Article 31(1)(a) defence, the repercussions from this forced disclosure would taint the entire proceedings including any decision rendered by the Chamber.

18. Finally, as the Issue and the Impugned Decision deal with the disclosure of medical files, something which enjoys protection under customary international law, it is in the interest of justice that the Appeals Chamber renders a decision on the Issue.

IV. RELIEF

19. The Defence respectfully requests leave to appeal the defined Issue above.

Respectfully submitted,



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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 27th day of February, 2017

At Den Haag, Netherlands