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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

**Prosecution Response to Defence Request for Leave to Appeal Decision Ordering
Disclosure of Material Underlying the Defence Psychiatric Expert Report (ICC-
02/04-01/15-709)**

Source: Office of the Prosecutor

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The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart
Mr Benjamin Gumpert

Counsel for the Defence

Mr Krispus Ayena Odongo
Mr Charles Achaleke Taku

Legal Representatives of Victims

Mr Joseph Akwenyu Manoba
Mr Francisco Cox
Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda
Ms Caroline Walter
Mr Orchlon Narantsetseg

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Others Section

Introduction

1. The Defence request for leave to appeal¹ the Trial Chamber's decision² ordering disclosure of material ("Clinical Notes") underlying the report of the Defence's psychiatric experts³ should be rejected.

2. The issue proposed for certification ("Issue") does not meet the standard for an appealable issue because it is founded on a faulty premise and reflects no more than a disagreement with the outcome of the Impugned Decision. In essence, the Defence argues that the Chamber erred in finding that the Accused retains no "reasonable expectation of privacy" in relation to his ICC Detention Centre medical records, since the obligation to disclose those records is contingent upon the Defence's "official submission" of an article 31(1)(a) defence. However, the Defence's concept of "official submission" of its article 31(1)(a) defence is unsupported by the Statute or Rules and has no legal force.

3. Rather, the Defence's attempt to prevent or delay the disclosure of the Clinical Notes contravenes its express obligations under rule 79. The Chamber directed the Defence to make rule 79 notification of any affirmative defences and provide related disclosure by 9 August 2016. On that date, the Defence gave notification of an article 31(1)(a) defence, a defence which it continues to pursue, and its disclosure obligations under rule 79 are ongoing. The Defence cannot now withhold material cited in the Defence Expert Report, which it commissioned and voluntarily produced in support of a request for stay of proceedings, by claiming that it has yet to make a final decision about proffering an article 31(1)(a) defence.

¹ Defence Request for Leave to Appeal Decision ICC-02/04-01/15-709, ICC-02/04-01/15-712, 27 February 2017 ("Request").

² Decision on the 'Prosecution Request for Disclosure of Material Underlying the Defence Psychiatric Expert Report', ICC-02/04-01/15-709, 21 February 2017 ("Impugned Decision").

³ UGA-D26-0015-0004 ("Defence Expert Report").

4. Furthermore, the Issue, to the extent that it alleges that the Chamber failed to duly consider rule 73(2), does not arise from the Impugned Decision, but from earlier determinations. The Defence did not challenge the Chamber's earlier determination that the Accused's interactions with the Defence Experts were not covered by privilege. It is too late now to raise the issue of privilege and re-litigate the Defence's dissatisfaction.
5. Moreover, the Defence fails to establish that the Issue will have a significant impact on the fair and expeditious conduct of the proceedings. The Defence does not allege any impact on the outcome of the trial. Nor does the Defence show that immediate resolution of the Issue by the Appeals Chamber will materially advance the proceedings. On the contrary, as the Chamber recognised, the fundamental purpose of advance notification and disclosure of affirmative defences is to lessen the possibility of delays that would negatively affect the fair and expeditious conduct of the trial.

Submissions

i. Applicable law

6. A party seeking leave to appeal must identify specific "issues" which were dealt with in the relevant decision and constitute the appealable issue.⁴ An "issue" for the purpose of article 82(1)(d) is "an identifiable and discrete subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion."⁵ Such subject or topic must be "essential for

⁴ Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, ICC-02/04-01/15-529, 2 September 2016 ("2 September 2016 Leave to Appeal Decision"), paras. 4, 6.

⁵ ICC-01/04-168 OA3 ("DRC Appeal Decision"), para. 9; *see also* 2 September 2016 Leave to Appeal Decision, para. 6.

the determination of matters arising in the judicial cause under examination”⁶ and genuinely arise from the impugned decision.⁷

ii. The Request should be rejected because it fails to identify an appealable “issue”

7. The Issue—as articulated by the Defence—reflects a mere disagreement with the Impugned Decision, or rule 79 itself. It does not constitute an appealable issue within the meaning of the Statute. In the Impugned Decision, the Chamber held that the Defence’s “disclosure obligations in respect of an Article 31 defence are not contingent on an ‘official Article 31(1) submission’, which is not formally required by the legal instruments of the Court, nor can such disclosure be deferred pending the Defence formally raising a ground for excluding criminal responsibility.”⁸ In so concluding, the Chamber referenced its prior ruling of 7 June 2016, which required the Defence—pursuant to rule 79 of the Rules—to provide “any evidence upon which it relies to establish any ground excluding criminal responsibility before the commencement of the trial.”⁹
8. The Request fails to explain why resolution of the purported issue is “essential for the determination of matters arising in the judicial cause under examination.”¹⁰ Rather, the Defence merely insists—without any substantiation—that the Chamber is wrong to order disclosure of the requested material, as it maintains that its disclosure obligations are not triggered until it makes an “official” article 31(1)(a) submission.¹¹ In particular, the Defence does not explain

⁶ Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006 (“DRC Appeal Decision”), para. 9; *see also* 2 September 2016 Leave to Appeal Decision, para. 5.

⁷ *See e.g. Prosecutor v. Bemba et al.*, Decision on Defence Requests for Leave to Appeal Decision ICC-01/05-01/13-1188, ICC-01/05-01/13-1278, para. 9.

⁸ Impugned Decision, para. 16.

⁹ Impugned Decision, para. 17 (citing Decision on ‘Prosecution request to order the Defence to comply with rule 79’, ICC-02/04-01/15-460, 7 June 2016, para. 15).

¹⁰ *See supra*, para. 4.

¹¹ Request, para. 9 (referring to the Defence argument that the Accused “maintain[s] a reasonable expectation of privacy over his clinical notes until an Article 31(1)(a) affirmative defence is proffered”); *see also id.*, paras. 10-11, 13.

why the Chamber should have ignored the plain wording of rule 79(1)(b), which states in terms that the provision of notification under this sub-rule—without more—triggers the obligation to disclose the evidence relied upon for this purpose. This type of generalised argumentation does not suffice to articulate an appealable issue.¹²

9. Furthermore, as mentioned above, the Defence gave notice of its pursuit of an article 31(1)(a) defence almost 7 months ago,¹³ in compliance with the Chamber’s ruling requiring the Defence to raise any affirmative defences and make related disclosures.¹⁴ The Chamber’s ruling had obvious effect on the types of materials over which the Accused could maintain a reasonable expectation of privacy, including materials voluntarily provided for the development of an article 31(1)(a) defence, such as the Clinical Notes. If the Defence took issue with the terms of the Chamber’s 7 June 2016 ruling, it should have sought leave to appeal it within the required time period. It did not do so, and it is too late now.¹⁵
10. In this regard, it is relevant to note that in its submissions prior to the Rule 79 Decision, the Defence did not contest the proposition that rule 79 triggered notification and disclosure obligations on the Defence prior to the commencement of the trial.¹⁶ Rather, the Defence merely argued that the deadline for those obligations should be set closer to the commencement of the trial.¹⁷
11. Moreover, the Defence is incorrect in asserting that an issue genuinely arises from the Impugned Decision about whether the Chamber failed to give due

¹² See Decision on Defence Request for Leave to Appeal the Decision on Article 56 Evidence, ICC-02/04-01/15-535, 9 September 2016, para. 10 (“9 September 2016 Leave to Appeal Decision”) (rejecting an issue proposed for interlocutory appeal where it was “insufficiently substantiated to qualify as an appealable issue”).

¹³ Defence Notification Pursuant to Rule 79(2) of the Rules of Procedure and Evidence, ICC-02/04-01/15-518, 9 August 2016 (“Defence Notification”), para. 2.

¹⁴ Decision on ‘Prosecution Request to order the Defence to comply with rule 79’, ICC-02/04-01/15-460, 7 June 2016 (“Rule 79 Decision”), paras. 8, 17.

¹⁵ See 9 September 2016 Leave to Appeal Decision, para. 16 (rejecting an application for leave to appeal an issue where that issue had first arisen in a prior decision that had gone unchallenged by the Defence).

¹⁶ See Rule 79 Decision, para. 8 (citing Defence response to Prosecution’s request to order the Defence to comply with Rule 79, ICC-02/04-01/15-448-Red2, 27 May 2016, paras. 31-32).

¹⁷ See Rule 79 Decision, para. 6 (citing ICC-02/04-01/15-448-Red2, paras. 29-32).

consideration to Mr Ongwen's expectation of privacy. The Request ignores the Chamber's finding that Mr Ongwen's "voluntary choice to share the Clinical Notes with the Defence Experts (and his Defence) for the purposes of developing a defence under article 31(1)(a) of the Statute in the present proceedings excludes any reasonable expectation of privacy on his part with respect to the information contained in this material."¹⁸

12. Furthermore, the Issue, to the extent that it alleges that the Chamber failed to duly consider rule 73(2), does not arise from the Impugned Decision, but from earlier determinations. The Chamber refers to emails sent to the Defence on this issue.¹⁹ In addition, in a May 2016 ruling, the Chamber reiterated that the Accused's interaction with Dr Akena Dickens (one of the Defence psychiatric experts) was not covered by any privilege under rule 73.²⁰ As far as the Prosecution is aware, the Defence did not challenge the Chamber's earlier determination that the Accused's interactions with the Defence Experts were not covered by privilege. It is too late now to raise the issue of privilege and re-litigate the Defence's dissatisfaction.

13. For the reasons detailed above, the Request has failed to identify an appealable "issue" and can be dismissed without further consideration.

iii. The remaining article 82(1)(d) criteria are not met

14. Even assuming, *arguendo*, that the Defence has identified an appealable issue, the Request should be rejected since it fails to meet the other criteria for leave to appeal, as detailed below. Of note, the Defence does not allege any impact on the outcome of the trial.

¹⁸ Impugned Decision, para. 11.

¹⁹ Impugned Decision, para. 11, fn. 24.

²⁰ Decision on issues related to the restriction of communications of Dominic Ongwen, ICC-02/04-01/15-450-Conf, 30 May 2016, para. 8.

- a. The Issue does not significantly affect the fairness and expeditious conduct of the proceedings

15. The Defence's claim that the Issue significantly affects the fairness and expeditious conduct of the proceedings²¹ is unfounded. On the contrary, as the Chamber previously recognised, the very purpose of requiring advance notification of affirmative defences, along with related disclosure, is to promote the fairness and expeditious conduct of the trial.²² Specifically, the Chamber observed that advance notification "allows the Prosecution to adequately respond to the Defence and prepare its case for trial and lessens the possibility of delays that would negatively affect the fair and expeditious conduct of the trial."²³

16. Here, the Defence has been under an ongoing obligation to make disclosures in relation to any article 31 defences since 9 August 2016.²⁴ Since that time, the Defence has continued to make the Accused's mental health a prominent issue in this case.²⁵ It has instructed psychiatric experts and sought to rely on their report when requesting a stay of the proceedings on the basis of the Accused's mental health.²⁶

17. As the Chamber recognised in the Impugned Decision, the fair and expeditious conduct of the proceedings requires that the participants have access to the materials used in the Defence Expert Report, including the Clinical Notes, in order to adequately assess and respond to it.²⁷ The Defence itself has recognised the importance of the Clinical Notes to a legal assessment of the Accused's article 31(1)(a) defence.²⁸ There is nothing unprecedented about ordering disclosure of

²¹ Request, paras. 12-15.

²² Rule 79 Decision, paras. 8-9 (citing rules 79(2) and 80(1) of the Rules).

²³ Rule 79 Decision, para. 9.

²⁴ Rule 79 Decision, paras. 18, 20.

²⁵ Defence Notification, para. 2.

²⁶ See Impugned Decision, paras. 2-3 (citing the relevant Defence filings).

²⁷ Impugned Decision, paras. 12, 18.

²⁸ Confidential Redacted Version of "Defence Request for Assistance from Trial Chamber IX Regarding the Defences Under Article 31 and Access to Information Necessary for the Defence of Mr Ongwen", ICC-02/04-

such material; indeed, Trial Chamber I applied similar logic in the *Gbagbo* case, granting the Prosecution's request for disclosure of the Accused's ICC Detention Centre medical records to the Court-appointed expert, despite the objections of the Accused, where the Accused's health had become an issue in the case.²⁹

18. That the Defence may have encountered some delay in gaining access to the Clinical Notes,³⁰ a point elaborated upon in some detail in the Request, is irrelevant. That delay should not be used to impose a restriction on the Prosecution's access to the Clinical Notes.³¹ Similarly irrelevant is the Defence's speculative assertion that, if it ultimately decides not to file an article 31(1)(a) defence, Court and party resources would have been wasted reviewing and translating the Clinical Notes.³²

19. Contrary to the Request, it is the Defence's reluctance to comply with its disclosure obligations, and not the Issue, which undermines the expeditiousness of the proceedings. Notably, despite having a psychiatric expert report in its possession since at least early December 2016, the Defence provides no timeline for its "final" decision about whether to proffer an article 31(1)(a) affirmative defence and offers few specifics about what further analysis is left to be done and how long it will take.³³ The Defence cannot avoid its disclosure obligations

01/15-540-Conf-Exp-Red, 27 September 2016, paras. 45-46 (acknowledging that a legal assessment of the grounds for an article 31(1)(a) defence cannot be "competently undertaken" without the input of psychiatric and/or psychological experts who can review "recent medical information" to inform their assessment).

²⁹ See *Prosecutor v. Gbagbo*, Order to Provide Appointed Expert with access to Mr Gbagbo's medical record, ICC-0/11-01/15-302, 20 October 2015, para. 17; see also Impugned Decision, para. 11.

³⁰ Request, para. 14.

³¹ In any event, in regard to the contention that the Defence Experts were forced to conduct their work without the benefit of the Clinical Notes (Request, para. 14), the Prosecution notes that the Clinical Notes were available at least one month before the Report was finalised--see ICC-02/04-0115-630-Conf, paras. 38-39 (acknowledging receipt of the Accused's medical files from the ICC Detention Centre on 1-2 November 2016)—and sufficiently in time to be incorporated into the Report's analysis before its disclosure to the Chamber on 6 December 2016. See Impugned Decision para. 4; Defence Expert Report at 0005.

³² See Request, para. 15.

³³ See Request, paras. 10-11.

indefinitely by purporting not to have made a final decision about whether to make an “official article 31(1)(a) submission.”³⁴

20. For the above reasons, the Request fails to establish that the Issue would significantly affect the fairness and expeditious conduct of the proceedings or the outcome of the trial.

b. Immediate resolution by the Appeals Chamber would not materially advance the proceedings

21. The Defence’s submissions also fail to establish the last criterion of the article 82(1)(d) test. The Defence argues that the Appeals Chamber’s intervention would materially advance the proceedings because the Issue is “novel” and “deals with [the disclosure of] psychiatric and psychological medical files.”³⁵ The Appeals Chamber is not an advisory body, and does not lend “clarity” on hypothetical issues.³⁶

22. Furthermore, the Issue—as articulated by the Defence—does not turn on the purported special status of the documents sought for disclosure. Indeed, while the Defence’s statement of the Issue includes a reference to rule 73(2) and the Accused’s reasonable expectation of privacy in relation to his medical files, the Defence does not dispute that “certain material, including specific clinical notes, would be disclosable material if the Defence proffers an article 31(1)(a) affirmative defence.”³⁷ In other words, rather than disputing the extension of its disclosure obligations to medical files, the Defence disputes only the *timing* of

³⁴ See e.g. Defence Response to Prosecution Request for the Disclosure of Medical Records, ICC-02/04-01/15-679-Conf, 27 January 2017, para. 2.

³⁵ Request, para. 17.

³⁶ See *Prosecutor v. Bemba*, Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo” ICC-01/05-01/08-532, 18 September 2009, para. 12; *Prosecutor v. Lubanga*, Decision on the Appeals Chamber upon the Registrar’s Requests of 5 April 2007, ICC-01/04-01/06-873 OA8, 27 April 2007, para. 6.

³⁷ Request, para. 10.

disclosure. This challenge fails since the Defence has already made notification under rule 79, which is all that is required to trigger disclosure obligations. The Chamber has clear authority to order immediate disclosure of documents like the Clinical Notes under articles 64(3)(c) and 6(d) of the Statute and rules 80 and 84 of the Rules. Overall, the Defence's arguments reflect nothing more than a disagreement with the Chamber's decision to exercise its authority and do not establish that immediate resolution of the Issue would materially advance the proceedings.

Conclusion

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



Fatou Bensouda, Prosecutor

Dated this 3rd day of March 2017
At The Hague, The Netherlands