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**International
Criminal
Court**



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

Date: **03 March 2017**

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 Document

Joint Response to the “Defence Request for Leave to Appeal Decision ICC-02/04-01/15-709”

**Source: Office of Public Counsel for Victims
Legal Representative of Victims**

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

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I. INTRODUCTION

1. Counsel¹ representing victims participating at trial submit that the “Defence Request for Leave to Appeal Decision ICC-02/04-01/15-709” (the “Request”)² fails to identify any appealable issue. Therefore, on this ground alone, the Request should be dismissed in its entirety.

2. Assuming *arguendo* that the Trial Chamber (the “Chamber”) considers that the purported issue raised in the Defence's Request properly constitutes an appealable issue, Counsel contend that the remaining requirements of article 82(1)(d) of the Rome Statute (the “Statute”) are not fulfilled and thus the Request should be rejected.

II. PROCEDURAL BACKGROUND

3. On 16 January 2017, the Prosecution filed an Application requesting the Chamber to order the Defence to disclose the material underlying the “Psychiatric Experts Report” (the “Prosecution’s Application”).³

4. On 27 January 2017, Counsel filed their joint response, supporting the Prosecution’s Application.⁴

¹ See the “Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, p. 19; the “Decision on issues concerning victims’ participation” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; the “Second decision on contested victims’ applications for participation and legal representation of victims” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-384, 24 December 2015, pp. 20-22, “Decision concerning 300 Victim Applications and the Deadline for Submitting Further Applications”, (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-543, 26 September 2016, para. 8 and p. 5, and the “Decision Concerning 610 Victim Applications (Registry Report ICC-02/04-01/15-544) and 1183 Victim Applications (Registry Report ICC-02/04-01/15-556)” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-586, 04 November 2016, p. 8, paras. 9, 15 and 16.

² See the “Defence Request for Leave to Appeal Decision ICC-02/04-01/15-709”, No. ICC-02/04-01/15-712, 27 February 2017 (the “Request”).

³ See the “Prosecution Request for Disclosure of Material Underlying the Defence Psychiatric Expert Report”, No. ICC-02/04-01/15-653-Conf, 16 January 2017 (the “Prosecution’s Application”), para. 1.

5. On 27 January 2017, the Defence filed its response to the Prosecution's Application, opposing the disclosure of the material in question (the "Defence's Initial Submissions").⁵

6. On 21 February 2017, the Chamber issued the "Decision on the 'Prosecution Request for Disclosure of Material Underlying the Defence Psychiatric Expert Report", partially granting the Prosecution's Application (the "Impugned Decision").⁶

7. On 27 February 2017, the Defence filed its Request seeking leave to appeal the Impugned Decision.⁷

III. SUBMISSIONS

A. Legal standard for interlocutory appeals

8. Article 82(l)(d) of the Rome Statute (the "Statute") sets out the criteria for granting a request for leave to appeal:

- a) The decision shall involve an issue that would significantly affect:
 - i. the fair and expeditious conduct of proceedings; or
 - ii. the outcome of the trial; and
- b) For which, in the opinion of relevant Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

⁴ See the "Joint Response to the 'Prosecution Request for the Disclosure of Material Underlying the Defence Psychiatric Expert Report'", No. ICC-02/04-01/15-671-Conf, 27 January 2017.

⁵ See the "Defence Response to Prosecution Request for the Disclosure of Medical Records", No. ICC-02/04-01-15-679-Conf, 27 January 2017 (the "Defence's Initial Submissions").

⁶ See the "Decision on the 'Prosecution Request for Disclosure of Material Underlying the Defence Psychiatric Expert Report'" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-709, 21 February 2017 (the "Impugned Decision").

⁷ See the Request, *supra* note 2.

9. For the purposes of the first prong of this test, the Appeals Chamber defined an “issue” as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.⁸ Moreover, the Appeals Chamber ruled that “the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue”.⁹

10. Consequently, it must first be determined whether the purported “issue” in the Request is an “appealable issue” within the meaning of article 82(1)(d) of the Statute as interpreted by the jurisprudence of the Court. Indeed, “while an application for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, it must still identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error. Only in this case can the Chamber assess whether the issue, provided it was wrongly decided, may have implications on the fairness and expeditiousness of the proceedings or outcome of the trial”.¹⁰

B. The Request fails to identify an “appealable issue” and does not meet all the criteria for granting an interlocutory appeal

11. The purported “issue” as framed by the Defence in its Request is:

“[whether the 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’).”¹¹

⁸ See the “Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, para. 9.

⁹ *Idem*, para. 20.

¹⁰ See the “Decision on three applications for leave to appeal” (Pre-Trial Chamber I), No. ICC-02/11-01/11-307, 21 October 2015, par. 70.

¹¹ See the Request, *supra* note 2, para. 2.

12. Counsel submit that this issue does not arise from the Impugned Decision. Indeed, the Defence simply reiterates its arguments already considered and rejected by the Chamber in the Impugned Decision. According to the established jurisprudence, a request for leave to appeal repeating arguments already considered in a previous decision amounts to a mere disagreement with the relevant rulings¹² and the fact that the Defence is not satisfied with the dismissal of its submissions does not establish an appealable issue.

13. In particular, the “issue” as framed by the Defence is constituted of two components. Firstly, in reverse order, the question of “[whether] *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*”¹³ is simply a reproduction of the same arguments contained in the Defence’s Initial Submissions¹⁴ which had already been comprehensibly addressed in the Impugned Decision. Indeed, the Chamber recalled that the Defence consistently indicated, in several filings, its intention to pursue a defence under article 31(1)(a) of the Statute since August 2016 and thus held that “[i]n the absence of any contrary information from the Defence, the assumption therefore remains that the Defence intends to raise the ground for excluding criminal responsibility under Article 31(1)(a) of the Statute.”¹⁵ The Chamber further held that, “contrary to the Defence argument, its disclosure obligations in respect of an Article 31 defence are not contingent on an ‘official Article 31(1) submission’ [...], nor can such disclosure be deferred pending the Defence formally raising a ground for excluding criminal responsibility”.¹⁶

¹² See the “Decision on the ‘Request for Leave to Appeal against the ‘Decision on the Request for an order for the commencement of the pre-confirmation phase by the Defence of Saif Al-Islam Gaddafi’” (Pre-Trial Chamber I), No. ICC-01/11-01/11-490, 1 December 2013, para. 31 and the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’” (Trial Chamber I), No. ICC-02/11-01/15-117, 2 July 2015, para. 22.

¹³ See the Request, *supra* note 2, paras. 2, 9-13.

¹⁴ See the Defence’s Initial Submissions, *supra* note 5, paras. 29 and 34.

¹⁵ See the Impugned Decision, *supra* note 6, para. 15-16.

¹⁶ *Idem.*, para. 16.

14. Secondly, the question of giving “[...] *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*”¹⁷ merely repeats the arguments made in the Defence’s Initial Submissions¹⁸ which had also been addressed in the Impugned Decision. In particular, the Chamber found that “[...] *on the general issue of whether the Clinical Notes may be protected by any ‘medical privilege’ [...] Mr Ongwen voluntarily consented to the disclosure of the Clinical Notes to the Defence and the Defence Experts. Mr Ongwen has been aware since the pre-trial stage of the case and throughout the present proceedings that any interaction between him and the Defence Experts was not covered by any privilege. [...] 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.*”¹⁹

15. Therefore, the Request simply rehearses the Defence’s arguments already properly considered and dismissed by the Chamber in the Impugned Decision. As recalled *supra*²⁰, a request for leave to appeal repeating arguments already considered in an impugned decision amounts to a mere disagreement. Indeed, as held by the Appeals Chamber, mere “*disagreement*” or “*conflict of opinion*” do not constitute an “*appealable issue*” within the meaning of article 82(1)(d) of the Statute.²¹

16. Consequently, Counsel submit that the “*issue*” as framed by the Defence fails to establish a proper appealable issue. Therefore, on this ground alone, the Request should be dismissed in its entirety.

¹⁷ See the Request, *supra* note 2, paras. 2 and 14.

¹⁸ See the Defence’s Initial Submissions, *supra* note 5, paras. 33-34, and footnote 23.

¹⁹ See the Impugned Decision, *supra* note 6, para. 11.

²⁰ See paras. 9 and 12.

²¹ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 8, para. 9.

17. Should the Chamber consider that the issue raised in the Request properly constitutes an appealable issue, Counsel contend that the remaining requirements of article 82(1)(d) of the Statute are not fulfilled.

18. Indeed, the “*issue*” for which the Defence seeks leave to appeal would not significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial. The Defence argues in this regard that the issue significantly affects the expeditiousness of the proceedings because if the Defence finally determines not to file an article 31(1)(a) defence, the Chamber, parties and participants shall have prepared for an argument, ultimately not presented and the clinical notes must be translated in order to be disclosed, requiring significant Court resources and time.²²

19. Counsel respectfully submit that these arguments are grossly unsubstantiated and amount to no more than speculation. As held by the Appeals Chamber, not every issue may constitute the subject of an appeal since “*it must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’*”.²³ In this regard, the Defence simply fails to explain how exactly the issue significantly affects in a material way the fair and expeditious conduct of the proceedings or the outcome of the trial.

20. Moreover, an immediate resolution by the Appeals Chamber of the issue identified in the Request would not materially advance the proceedings. In this regard, the Defence argues that “[an] *immediate decision by the Appeals Chamber on the Issue will materially advance the proceeding and is in the interest of justice.*”²⁴ It should be stressed at the outset that “*the interest of justice*” is not a legal requirement contained in article 82(1)(d) of the Statute. Therefore, the arguments related to the notion of “*the interest of justice*” should not be considered.

²² See the Request, *supra* note 2, para. 15.

²³ See the “Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 8, para. 10.

²⁴ See the Request, *supra* note 2, para. 16.

21. The Defence further “[requests clarity on the purported issue which] *is a novel issue, something not dealt with before by the Appeals Chamber.*”²⁵ While the clarity on the issue may be of interest to the Defence, *“the mere fact that an issue is of general interest or that, given its overall importance, could be raised in, or affect, future pre-trial or trial proceedings before the Court is not sufficient to warrant the granting of leave to appeal.”*²⁶ This reflects the narrow parameters of interlocutory appeals under the Statute, excluding any possibility to lodge appeals on matters such as general importance to proceedings, unlike other international criminal tribunals.²⁷

22. The Defence also argues that “[the resolution of the purported issue is pressing] *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.*”²⁸ Counsel respectfully submit that these arguments are, yet again, nothing more than mere speculation.

23. *Arguendo*, even if the Request is granted, the resolution of the issue would not materially advance the proceedings, in other words it would not “*move [the proceedings] forward; by ensuring that the proceedings follow the right course*”²⁹ since the Appeals Chamber will have been asked to engage in a purely academic exercise, having no impact on the real progress of this trial. Consequently, Counsel submit that the Request should be rejected due to its failure to meet all of the requirements of article 82(1)(d) of the Statute.

²⁵ *Idem.*, para. 17.

²⁶ See the “Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58” (Pre-Trial Chamber II), No. ICC-02/04-01/05-20-US-Exp, 19 August 2005 (unsealed pursuant to Decision No. ICC-02/04-01/05-52 dated 13 October 2005), para. 21.

²⁷ *Idem.*, para. 16.

²⁸ See the Request, *supra* note 2, para. 17.

²⁹ See the “Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 8, para. 15.

FOR THE FOREGOING REASONS, Counsel respectfully request the Chamber to dismiss the Request.

Three handwritten signatures in black ink are displayed side-by-side. The first signature on the left is 'Paolina Massidda', the middle one is 'Francisco Cox', and the one on the right is 'Joseph Manoba Akwenyu'.

Paolina Massidda

Francisco Cox

Joseph Manoba Akwenyu

Dated this 03rd day of March, 2017

At The Hague (The Netherlands), Kampala (Uganda) and Santiago (Chile)