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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

Public

Decision on 'Prosecution's request to order the Defence to comply with rule 79'

To be notified, in accordance with Regulation 31 of the Regulations of the Court, to:

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Other

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court ('Court'), issues the following 'Decision on "Prosecution's request to order the Defence to comply with rule 79"', having regard to Articles 64 (2), (3)(c) and 67(1) of the Rome Statute ('Statute') and Rules 79 and 80 of the Rules of Procedure and Evidence ('Rules').

1. On 16 May 2016, the Office of the Prosecutor ('Prosecution') filed the 'Prosecution's request to order the Defence to comply with rule 79' ('Request'),¹ in which it requests that the Chamber order the defence for Dominic Ongwen ('Defence') to comply with Rule 79 of the Rules by: (i) '[c]larifying whether the Defence intends to rely on article 31(1)(a) or any other defence under article 31' ('First Request'); (ii) '[p]roviding the Prosecution with the names of witnesses and any other evidence it relies in support of defences advanced under article 31' ('Second Request'); (iii) '[p]roviding the Prosecution with the particulars of the acts and conduct in respect of which defences under article 31 are advanced' ('Third Request'); and (iv) providing 'the Prosecution with any other evidence upon which it intends to rely, including but not limited to any expert reports' ('Fourth Request').² The Prosecution also requests that the Chamber inform the Defence of its authority to draw adverse inferences from a failure to comply with Rule 79 of the Rules in a timely fashion ('Fifth Request').³
2. In support of its Third Request, the Prosecution argues that Article 31 of the Statute requires the Defence to 'indicate which of the charged acts and conduct it is that the accused concedes would otherwise amount to crimes with which he is

¹ Prosecution's request to order the Defence to comply with Rule 79, 16 May 2016, ICC-02/04-01/15-435, with confidential Annexes A and B.

² Request, ICC-02/04-01/15-435, paras 3 and 38.

³ Request, ICC-02/04-01/15-435, paras 4 and 39.

charged and to specify, in respect of each of these crimes, the evidence which gives rise to a ground for excluding his criminal responsibility'.⁴

3. On 27 May 2016,⁵ the Common Legal Representative of 592 victims filed a response to the Request,⁶ in which it entreats the Chamber to order the Defence to comply with Rule 79 of the Rules and inform the Defence of the Chamber's authority to draw adverse inferences for a failure to comply.⁷
4. On 27 May 2016, the Defence filed its Response to the Request,⁸ in which it asks the Chamber to dismiss the Request.⁹ The Defence submits that the Chamber does not need to intervene in this matter at this time.¹⁰
5. Specifically, the Defence argues that the Prosecution's assumptions about the Defence case, based on the Defence's statements during the confirmation phase of the case, do not mandate disclosure under Rule 79 of the Rules.¹¹ It argues that it does not have sufficient information at the present time to make a determination for an affirmative defence under Article 31(1) of the Statute.¹² The Defence submits that there is a distinction between the requirement of disclosure in advance of trial under Rule 80 of the Rules and timing of disclosure under Rule 79 of the Rules.¹³

⁴ Request, ICC-02/04-01/15-435, paras 20-21.

⁵ On 17 May 2016, the Chamber shortened the response deadline for filing responses and ordered the participants to file their responses to the Request by 27 May 2016. Email from Chamber, sent on 17 May 2016 at 10.16.

⁶ Common Legal Representative's response to the 'Prosecution's request to order the Defence to comply with rule 79', 27 May 2016, ICC-02/04-01/15-447.

⁷ ICC-02/04-01/15-447, paras 1 and 22.

⁸ Defence response to Prosecution's request to order the Defence to comply with Rule 79, 27 May 2016, ICC-02/04-01/15-448-Red2, with confidential Annex A (confidential *ex parte* and confidential redacted versions of the main filing were notified the same day).

⁹ ICC-02/04-01/15-448-Red2, para. 50.

¹⁰ ICC-02/04-01/15-448-Red2, paras 47-49.

¹¹ ICC-02/04-01/15-448-Red2, paras 21-22.

¹² ICC-02/04-01/15-448-Red2, paras 3, 23-25, 28 and 33.

¹³ ICC-02/04-01/15-448-Red2, para. 27.

6. Further, the Defence states that should it form the intent and determination to use any affirmative defence under Article 31(1) of the Rules, it will notify the Prosecution as soon as practicable.¹⁴ However, it submits that at the present time, the Request is premature and urges the Chamber to follow Trial Chambers I and VII in setting a disclosure deadline closer to the start of the trial.¹⁵ The Defence submits that requiring disclosure under Article 31(1) of the Statute at the present time would violate Mr Ongwen's right to remain silent.¹⁶
7. The Defence argues that the Prosecution conflates Article 31 of the Statute with Article 65's provision on an admission of guilt,¹⁷ and that the Prosecution, in its Third Request, seeks 'to infringe Mr Ongwen's absolute right to remain silent' and 'threaten[s] to taint the very essence of the proceedings'.¹⁸

First and Second Requests

8. At the outset, the Single Judge notes that according to Rule 79(2) of the Rules, the Defence's notification of a ground for excluding criminal responsibility under Article 31(1) of the Rome Statute 'shall be given sufficiently in advance to enable the Prosecutor to prepare adequately and to respond'. With respect to a ground for excluding criminal responsibility under Article 31(3) of the Rome Statute, Rule 80(1) of the Rules requires notification 'sufficiently in advance of the commencement of trial to enable the Prosecutor to prepare adequately'. The Single Judge considers that notification that is 'sufficiently in advance to enable the Prosecutor to prepare adequately and to respond' implies notification prior to

¹⁴ ICC-02/04-01/15-448-Red2, paras 32, 34 and 48.

¹⁵ ICC-02/04-01/15-448-Red2, paras 29-32. Trial Chamber I ordered the defence to notify the Prosecution of its intent to raise the existence of an alibi or grounds for excluding criminal responsibility three weeks in advance of trial. *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on disclosure by the Defence, 11 May 2008, ICC-01/04-01/06-1235-Corr-Anx1, para. 41(b). Trial Chamber VII issued its order that the Defence provide notification of its intent to raise the existence of an alibi or grounds for excluding criminal responsibility 27 days in advance of the trial. *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Trial Chamber VII, Directions on the conduct of the proceedings, 2 September 2015, ICC-01/05-01/13-1209, para. 8.

¹⁶ ICC-02/04-01/15-448-Red2, paras 34-36.

¹⁷ ICC-02/04-01/15-448-Red2, para. 41.

¹⁸ ICC-02/04-01/15-448-Red2, para. 40-46.

the commencement of trial.¹⁹ Indeed, the Single Judge notes that both Trial Chambers I and VII, which the Defence cites positively in relation to its submissions as to the appropriate timing of disclosure under Rule 79 of the Rules, mandated disclosure in advance of the trial.²⁰ Thus, the Defence is to provide notification of its intention to assert grounds for excluding criminal responsibility under either Article 31(1) or (3) of the Statute prior to the commencement of trial.

9. Such 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.
10. As to the timing of the disclosure, the Single Judge notes the Defence contention that requiring disclosure under Article 31(1) of the Statute at the present time would violate Mr Ongwen's right to remain silent.²¹ The Single Judge notes that, while the accused's right to remain silent and not to incriminate himself is inviolable, the Statute's framework also imposes certain obligations on the Defence in order to ensure a fair and expeditious trial. Rules 79 and 80 of the Rules are two such obligations and do not infringe the rights of the accused, even if disclosure occurs substantially in advance of the trial. Certainly, there is a link between the timing of the Defence's disclosure, on one hand, and the extent to which the Prosecution has fulfilled its own disclosure obligations, on the other. However, as a general rule, the Single Judge concurs with Trial Chamber II's conclusion that defence counsels have a 'responsibility to notify their intention, if any, to raise a defence to the Prosecution and the Chamber as soon as a

¹⁹ See ICC-01/05-01/13-1209, para. 8; and ICC-01/04-01/06-1235-Corr-Anx1, para. 29(b).

²⁰ See ICC-02/04-01/15-448-Red2, paras 31-32.

²¹ ICC-02/04-01/15-448-Red2, paras 34-36.

determination to rely on such ground has been made'.²² This is without prejudice to whether a defence may nevertheless be advanced at a later date, as set out in Rule 79(3) of the Rules.

11. The Single Judge notes the Defence's suggestion that while it is currently contemplating advancing grounds for excluding criminal responsibility, it has yet to make a *determination* to use such grounds at trial.²³ The Defence argues that '[w]ithout full disclosure, or at least a majority of it', Defence Counsel cannot 'reasonably be expected to make a determination on whether or not to rely upon an Article 31(1) defence at trial'.²⁴ The Defence also states that the material disclosed thus far contains 'only 270 pages, *i.e.* 0.339% of pages disclosed, of potentially exculpatory evidence'.²⁵

12. The Single Judge recalls the Prosecution's previous submission²⁶ that:

[it] is currently in possession of approximately 49,000 pages of material, which remain to be reviewed for disclosure to the Defence. Approximately 4,500 further pages are likely to be generated from sound recorded interviews with potential witnesses which are still awaiting transcription. Supplementary investigations continue and are scheduled to cease on 30 June 2016, save where important existing lines of inquiry require a small amount of further time to be completed. These inquiries will continue to create further items for review and potential disclosure....To date, [the Prosecution] **has disclosed to the Defence 7,718 items amounting to 79,611 pages.**

13. In setting 6 September 2016 as the deadline for the Prosecution's disclosure of any incriminating material it intends to rely on at trial (along with its final lists of witnesses and evidence), the Chamber relied on the above information and noted

²² *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Decision on the 'Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)', 14 September 2010, ICC-01/04-01/07-2388, para. 46.

²³ ICC-02/04-01/15-448-Red2, paras 23-24 and 29.

²⁴ ICC-02/04-01/15-448-Red2, para. 28.

²⁵ ICC-02/04-01/15-448-Red2, para. 33 and footnote 17.

²⁶ Prosecution submissions in accordance with the scheduling order of 4 May 2016, 18 May 2016, ICC-02/04-01/15-438, paras 5-6 (emphasis added).

that 'most of the material falling under the Prosecution's disclosure obligations appear to have been disclosed'.²⁷

14. Despite its statement concerning the dearth of exculpatory material in the disclosed materials, the Defence does not advance a substantiated argument that the Prosecution has failed to comply with its obligation under Article 67(2) of the Statute. The fact remains that the Prosecution has already disclosed to the Defence the majority of the evidence required to be disclosed.
15. The Single Judge observes that the 'Decision on the confirmation of charges against Dominic Ongwen' sets out the charges against Mr Ongwen.²⁸ Also, the Single Judge considers that, at the present stage of proceedings, the Defence has already gained a substantial understanding of the Prosecution case through the confirmation proceedings (including, in particular, the Prosecution's 257 page pre-confirmation brief²⁹) and the disclosure of materials received from the Prosecution. Despite the outstanding materials to be disclosed by the Prosecution, the information currently available to the Defence is sufficient to allow it to determine whether it intends to raise the existence of grounds for excluding criminal responsibility. Indeed, the Single Judge notes that several of the potential grounds for excluding criminal responsibility, *e.g.* on the ground of mental disease or defect under Article 31(1)(a) of the Statute, could generally be advanced on the basis of information solely within the Defence's control.

²⁷ Decision setting the commencement of the trial, 30 May 2016, ICC-02/04-01/15-449, para. 6.

²⁸ Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, ICC-02/04-01/15-422-Conf, pages 71-104.

²⁹ Pre-confirmation brief, 21 December 2015, ICC-02/04-01/15-375-Conf-AnxC.

16. Further, the Defence will receive a list of provisional witnesses from the Prosecution on 7 June 2016, and summaries of the anticipated testimony on a rolling weekly basis starting 7 June 2016 and concluding on 9 August 2016.³⁰
17. In light of the above, and without prejudice to Rule 79(3) of the Rules, the Single Judge grants the First and Second Requests and directs the Defence to notify whether it intends to rely on any defence pursuant to Article 31 of the Statute and, if so, to provide the Chamber and the participants with the information required under, as appropriate, Rules 79(1) and 80(1) of the Rules, including names of the witnesses and any other evidence upon which it relies upon to establish the defence(s). The Single Judge observes that a proper notification should also set out, in general terms, an indication of which of the charged crimes would, in the Defence submission, be covered by the alleged ground for excluding criminal responsibility.
18. Noting that part of the purpose of Rule 79 and 80 notifications is to enable the Prosecution to respond to any affirmative defences, the Single Judge considers that the deadline to provide this information should be set sufficiently in advance of the Prosecution's 6 September deadline to provide its final lists of witnesses and evidence. A deadline for the Defence to provide this information is accordingly set for 9 August 2016.

Third Request

19. As noted above, the Court's statutory framework carefully protects the accused's rights while ensuring the fairness and expeditiousness of the trial. Thus, Rules 79 and 80 of the Rules require the Defence to provide disclosures which enable the Prosecution to adequately prepare and to respond but do not require the Defence to fully articulate its case before the completion of the Prosecution's case. The

³⁰ Decision on the Prosecution request for variation of the time limit to provide its provisional list of witnesses and summaries of their anticipated testimony, 6 June 2016, ICC-02/04-01/15-453, para. 2.

Prosecution's request that the Defence be compelled to provide it 'with the particulars of the acts and conduct in respect of which defences under Article 31 are advanced' – in so far as such may be interpreted to extend beyond an indication of which of the charged crimes would be covered by a defence under Article 31 of the Statute – appears to edge towards the latter. The Prosecution's Third Request is denied.

Fourth Request

20. As to the Prosecution's request that the Defence provide it 'with any other evidence upon which it intends to rely, including but not limited to any expert reports', in so far as the request regards the disclosures of material related to the assertion of grounds under Article 31 of the Statute, the Single Judge, in the present decision, grants the request for disclosure of evidence upon which Mr Ongwen intends to rely to establish grounds for excluding criminal responsibility.

21. However, in so far as the request relates to the Defence's disclosure obligations under Rule 78 of the Rules, the Single Judge considers such a request to be premature at this stage in the proceedings. At a later stage, the Chamber will provide a timeline for Defence disclosure of the evidence upon which it intends to rely at trial. In light of the above, the Single Judge dismisses the Fourth Request.

Fifth Request

22. With regard to the Prosecution's submission that the Chamber informs the Defence of its authority to draw adverse inferences from a failure to comply with Rule 79 in a timely fashion,³¹ the Single Judge does not consider such a statement

³¹ Request, ICC-02/04-01/15-435, paras 4 and 39.

necessary at the present time. Accordingly, the Single Judge rejects the Fifth Request.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Prosecution's First and Second Request;

DIRECTS the Defence to notify the Chamber and the participants of any intention to raise a ground for excluding criminal responsibility pursuant to Article 31 of the Statute and provide the names of the witnesses and any other evidence upon which it relies upon to establish the defence(s) by 9 August 2016; and

REJECTS the remainder of the relief sought.

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



Judge Bertram Schmitt
Single Judge

Dated 7 June 2016

At The Hague, The Netherlands