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

Date: 4 August 2016

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

Public

**Decision on Defence Notification on a Later Filing Date for Potential Article 31(1)
Submissions**

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

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Detention Section

**Victims Participation and Reparations
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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'), having regard to Articles 64 (2) and 67(1) of the Rome Statute ('Statute'), Rules 79 of the Rules of Procedure and Evidence ('Rules') and Regulation 37(2) of the Regulations of the Court ('Regulations'), issues the following 'Decision on Defence Notification on a Later Filing Date for Potential Article 31(1) Submissions'.

1. On 7 June 2016, the Single Judge issued a decision on an Office of the Prosecutor ('Prosecution') request¹ concerning Rule 79 of the Rules.² Therein he, *intern alia*, directed the defence of Mr Ongwen ('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 ['9 August Deadline']'.³
2. On 3 August 2016, the Defence filed a motion on its intended Article 31 submissions ('Article 31 Notification').⁴ Therein, it informs the Chamber that 'it will not be in a position to submit a potential Article 31(1)(a) submission until early October 2016'⁵ due to a number of logistical issues. It further requests to lift all page restrictions for its anticipated Article 31(1)(a) submission ('Request').⁶
3. As a preliminary matter, the Chamber notes that the classification of the Article 31 Notification is 'confidential, *ex parte*', Defence only. The Defence did not provide any confidential-redacted version to the parties and participants and

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 Decision on 'Prosecution's request to order the Defence to comply with rule 79', ICC-02/04-01/15-460.

³ Decision on 'Prosecution's request to order the Defence to comply with rule 79', ICC-02/04-01/15-460, page 7.

⁴ Defence Notification of a Later Filing Date for any Potential Article 31(1)(a) Submission and Request Pursuant to Regulation 37(2) of the Regulations of the Court, ICC-02/04-01/15-513-Conf-Exp, available only to the Defence.

⁵ Defence Notification, ICC-02/04-01/15-513-Conf-Exp, paras 5-15.

⁶ Defence Notification, ICC-02/04-01/15-513-Conf-Exp, paras 16-20.

proposes to reclassify the motion as ‘confidential’ once it decided to proffer a defence under Article 31 of the Statute.⁷

4. The Single Judge is not convinced by this proposition. None of the points raised by the Defence in justification of the classification level⁸ explains why a confidential-redacted version could not have been prepared. The Article 31 Notification impacts a decision of the Single Judge (in respect of the 9 August Deadline) and the parties and participants have a legitimate right to know if this deadline is affected and must be in a position to react to the submissions made by the Defence. As stated above, no reasons were provided to justify why a confidential-redacted version could not be filed. The Single Judge further notes that it is not fully apparent from the submissions which possible medical issues justify the withholding of the filing from the other parties and participants, since the subject matter deals with logistical and scheduling matters and not with medical details. Accordingly, the Chamber directs the Defence to file either a request for reclassification or a confidential-redacted version of its Article 31 Notification forthwith.
5. Further, with regard to the timing of the Article 31 Notification, the Single Judge notes that it was filed 6 days before the expiration of the deadline. From the submissions made by the Defence it is apparent that it was in a position to know the impact of the logistical arrangements on the ability to meet the 9 August Deadline for an extended period of time. The late moment of the filing – together with the fact that no confidential-redacted version was prepared – effectively prevents the Single Judge to receive potential submissions from the other parties and participants before reacting to the motion. The Single Judge expects that similar situations are avoided in the future.

⁷ Defence Notification, ICC-02/04-01/15-513-Conf-Exp, para. 4.

⁸ Defence Notification, ICC-02/04-01/15-513-Conf-Exp, paras 3-4.

6. As to the reasons on the substance presented by the Defence, the Single Judge is appreciative of the logistical challenges and difficulties and the impact they can have on the Defence ability to fully comply with the 9 August Deadline. Nevertheless, the submissions contained in the Article 31 Notification suggest that the Defence is already now in a position to indicate whether it has the intention to raise a ground for excluding criminal responsibility pursuant to Article 31 of the Statute or not. This becomes particularly clear in light of a request for extension of page limits for potential submissions. It may not be possible to provide the names of all the witnesses and other evidence upon which it relies for such defence, but this does not mean that the Defence is free to ignore the 9 August Deadline completely. The Chamber still expects the Defence to comply with the 9 August Deadline to the best of its abilities, in particular indicating its general intention whether it plans to raise a defence pursuant to Article 31 of the Statute.
7. In respect of the Request, the Single Judge is of the view that it is premature at this point in time. As stated by the Defence, its preparations for Article 31 submissions are not entirely finalized. Once the Defence knows how much pages it needs, it can submit an appropriate request. Accordingly, the Request is rejected.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

DIRECTS the Defence to either request reclassification or file a confidential-redacted version of its Article 31 Notification forthwith;

DIRECTS the Defence to comply with the 9 August Deadline in accordance with paragraph 6 above; and

REJECTS the Request.

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



Judge Bertram Schmitt
Single Judge

Dated 4 August 2016

At The Hague, The Netherlands