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

Date: 10 March 2017

**TRIAL CHAMBER IX**

**Before: Judge Bertram Schmitt, Single Judge**

**SITUATION IN UGANDA**

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

**Public**

**Decision on the Defence Request for Leave to Appeal the Decision Ordering the Disclosure of Medical Records pertaining to Dominic Ongwen**

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

**The Office of the Prosecutor**

Fatou Bensouda  
James Stewart  
Benjamin Gumpert

**Counsel for the Defence**

Krispus Ayena Odongo

**Legal Representatives of the Victims**

Joseph Akwenyu Manoba and Francisco  
Cox  
Paolina Massidda

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States Representatives**

**Other  
Appeals Chamber**

**REGISTRY**

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**Registrar**

Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**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') in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 82(1)(d) of the Rome Statute ('Statute'), issues the following 'Decision on the Defence Request for Leave to Appeal the Decision Ordering the Disclosure of Medical Records pertaining to Dominic Ongwen'.

1. On 21 February 2017, the Single Judge issued the 'Decision on the "Prosecution Request for Disclosure of Material Underlying the Defence Psychiatric Expert Report"' ('Decision').<sup>1</sup> In this decision, the Single Judge, *inter alia*, ordered the Defence to immediately disclose to the other participants the medical records of Dominic Ongwen from the ICC Detention Centre that were consulted by two experts retained by the Defence and referred to in the 'Psychiatric report' commissioned by the Defence ('Clinical Notes').
2. On 27 February 2017, the Defence requested leave to appeal the Decision on the 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[ly] proffered ('Issue').<sup>2</sup>
3. On 3 March 2017, the Office of the Prosecutor and, in a joint filing, the two teams of legal representatives of the participating victims filed their responses to the Request, arguing that it should be rejected as it fails to satisfy the requirements of Article 82(1)(d) of the Statute.<sup>3</sup>

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<sup>1</sup> ICC-02/04-01/15-709.

<sup>2</sup> Defence Request for Leave to Appeal Decision, ICC-02/04-01/15-712 ('Request').

<sup>3</sup> 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), ICC-02/04-01/15-736; Joint Response to the 'Defence Request for Leave to Appeal Decision ICC-02/04-01/15-709', ICC-02/04-01/15-735.

4. The Single Judge recalls the interpretation of Article 82(1)(d) of the Statute as set out in previous decisions in the present case.<sup>4</sup>
5. As evident from the Request, the issue on which the Defence requests leave to appeal the Decision does not concern, in and of itself, whether the Clinical Notes shall be disclosed, but rather the timing for such disclosure.<sup>5</sup> The Defence indeed wishes to appeal the Decision on the issue of whether its disclosure obligations as described in the Decision only arise after ‘an Article 31(1)(a) affirmative defence is official[ly] proffered’.
6. The Single Judge considers that, within these terms, the issue identified by the Defence can be said to arise out of the Decision, in that the Decision does indeed conclude, in light of a number of considerations, that ‘the fair and expeditious conduct of the proceedings requires the Defence to disclose the Clinical Notes forthwith’<sup>6</sup> on the grounds, *inter alia*, that:

Having now received the Report, which was explicitly commissioned for the purpose of determining the viability of the ground excluding criminal responsibility under Article 31(1)(a) of the Statute and then voluntarily placed on the record by the Defence, the Single Judge sees no reason why the disclosure of the Clinical Notes which were consulted by the Defence Experts as part of their mandate should be postponed.<sup>7</sup>

7. The Single Judge is, however, not satisfied that the issue identified by the Defence is one that may significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. It is recalled in this regard that, in assessing whether these alternative requirements under Article 82(1)(d) of the Statute are met, the Chamber ‘must ponder the implications of a given issue

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<sup>4</sup> See, for example, Decision on the Defence request for leave to appeal the decision on the confirmation of charges, 29 April 2016, ICC-02/04-01/15-428, paras 5-9; Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, paras 4-8.

<sup>5</sup> In this respect, the Defence explicitly states ‘[t]he 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’ (Request, ICC-02/04-01/15-712, para. 10).

<sup>6</sup> Decision, ICC-02/04-01/15-709, para. 18.

<sup>7</sup> Decision, ICC-02/04-01/15-709, para. 17.

being wrongly decided' on the fairness and expeditiousness of the proceedings or the outcome of the trial, performing an 'exercise [that] involves a forecast of the consequences of such an occurrence'.<sup>8</sup>

8. In this particular case, the Single Judge considers that even if the Defence were correct in its argument that disclosure of the Clinical Notes should not have been ordered 'until such time that an Article 31(1)(a) affirmative defence is official[ly] proffered', their immediate disclosure to the other participants cannot be said to have significant repercussions on the fair and expeditious conduct of the proceedings. The Defence elected to make Dominic Ongwen's mental health a live issue in this trial – including by relying on the psychiatric report of its own experts in an attempt to obtain, *inter alia*, a stay of the proceedings. The Single Judge does not see how the present proceedings would be significantly tainted from disclosure of the Clinical Notes consulted by the Defence experts even before a final determination by the Defence is made on whether to raise a ground excluding criminal responsibility under Article 31(1)(a) of the Statute.
9. Should the Defence eventually confirm its intention to raise a ground for excluding criminal responsibility under Article 31(1)(a) of the Statute (as it still appears to be the case according to the Request<sup>9</sup>) the result of the Decision would be to avoid possible delays at trial in that the relevant material will have already been disclosed to the other participants for their preparation. Should the Defence instead ultimately withdraw its intention to raise the ground for excluding criminal responsibility under Article 31(1)(a) of the Statute, the disclosure of the concerned material could, at most, be considered unnecessary, but under no circumstance, even in this assumed scenario, would such

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<sup>8</sup> Appeals Chamber, *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, ICC-01/04-168, paras 10 and 13.

<sup>9</sup> In the Request, the Defence states, with respect to the ground for excluding criminal responsibility under Article 31(1)(a), that '[a]s it stands, the Defence still intends to submit such an argument, but it waits for a final test on Mr Ongwen' (Request, ICC-02/04-01/15-712, para. 10).

disclosure have significant repercussions on the fair and expeditious conduct of the proceedings warranting correction through an interlocutory appeal. The mere assertion by the Defence that '[u]ntil 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 [could] be unnecessary'<sup>10</sup> manifestly falls short of demonstrating that the issue proposed for appeal would actually affect in a significant manner the fair and expeditious conduct of the proceedings. The same can be said with respect to the Defence additional argument that that the fair and expeditious conduct of the proceedings would be significantly impacted if the Defence ultimately decides not to advance an Article 31(1)(a) defence because the Court's resources and the other participants' time would have been wasted reviewing and translating the Clinical Notes.<sup>11</sup>

10. The Single Judge is also not persuaded that the issue as defined by the Defence holds the potential to significantly affect the outcome of the trial. It is noteworthy in this regard that, in the Request, the Defence does not allege that the issue proposed for appeal satisfies this alternative requirement under Article 82(1)(d) of the Statute.

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<sup>10</sup> Request, ICC-02/04-01/15-712, para 13.

<sup>11</sup> Request, ICC-02/04-01/15-712, para. 15.

**FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY**

**REJECTS** the Request.

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

A handwritten signature in black ink, appearing to read 'BS', is written above a solid horizontal line.

**Judge Bertram Schmitt**  
**Single Judge**

Dated 10 March 2017

At The Hague, The Netherlands