

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 3 August 2016

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

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

Confidential *ex parte* Defence and Trial Chamber IX only

**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**

Source: Defence for Dominic Ongwen

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

The Office of the Prosecutor

Counsel for the Defence

Krispus Ayena Odongo

Chief Charles Achaleke Taku

Legal Representatives of the Victims

Common Legal Representatives of the Victims

Unrepresented Victims

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

Amicus Curiae

REGISTRY

Registrar

Herman Von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby notifies Trial Chamber IX ('Chamber') that any potential Article 31(1)(a) submission shall not be ready for notification until early October 2016.
2. Additionally, the Defence respectfully requests the Chamber to grant the Defence an unlimited amount of pages for any potential Article 31(1)(a) submission.

II. CONFIDENTIALITY LEVEL

3. Pursuant to Regulation 23bis(1) of the Regulations of the Court, the Defence files this request as confidential *ex parte* Defence and Chamber only. The Defence files the request as such because it deals with information not disclosable to the parties and participants at this time and that it deals with possible medical issues affecting Mr Ongwen.
4. Should Mr Ongwen and the Defence choose to proffer an affirmative defence pursuant to Article 31(1)(a) of the Rome Statute, the Defence would request that this filing be reclassified as confidential the day after any submission pursuant to Article 31(1)(a), and the Defence would prepare a public redacted version of this request proximate to the date of its submission.

III. SUBMISSIONS

Notification of an Early October 2016 Submission Date

5. The Defence hereby notifies the Chamber that it will not be in a position to submit a potential Article 31(1)(a) submission until early October 2016.
6. Rule 79(2) requires the Defence to notify the Prosecution and Chamber "sufficiently in advance to enable the Prosecutor to prepare adequately and to respond."

Respectfully, Rule 79(3) prevents the Chamber from disallowing the Defence from raising defences and presenting evidence described in Rule 79(1).

7. The Defence understands and has attempted to respect the requested deadline of 9 August 2016 to present defences pursuant to Article 31 and Rule 79. For the reasons outlined below, the Defence is not in a position to finalise any potential Article 31(1)(a) submissions by 9 August 2016.
8. After the confirmation of the charges against Mr Ongwen, the Defence did not receive final confirmation of additional funds to aid its investigations and hire additional team member until late July 2016. The Defence filed for additional funds, specifically noting the need to employ expert witnesses, on 11 April 2016.¹ The Defence received a tentative answer on 20 May 2016, being asked to further elaborate on the investigation aspect of the request (which included funds for experts).² A revised request was sent on 30 May 2016.³ It was not until 8 July 2016 that the Defence received confirmation of additional resources for its investigations.⁴ Knowing that the work needed to be completed, the Defence added Dr Ovuga to its team on 11 July 2016, which was approved on 14 July 2016 with retroactivity of 1 July 2016. Due to the Registrar's delay in approving additional funds, the Defence was unable to prepare any potential Article 31(1)(a) defence within the Chamber's advisory deadline of 9 August 2016.
9. Professor Emilio Ovuga and Dr Akena Dickens (collectively the 'Experts') are both admitted to the list of experts at the International Criminal Court and are registered as Defence members.⁵ The Experts, both being educators, do not have flexible

¹ Email "Defence Request for Additional Funds Pursuant to Reg 83(3) of the Regulations of the Court" from Defence to CSS on 11 April 2016 at 21h11 CET.

² Email "Emailing: 2016-05-20 Decision on additional resources.pdf" from CSS to the Defence on 20 May 2016 at 18h25 CET.

³ Email "Clean List" from Defence to Pieter Vanaverbeke and Esteban Peralta Losilla on 30 May 2016 at 17h50 CET.

⁴ Email "Decision on the renewed request for additional resources - D26 Ongwen Defence" from CSS to the Defence on 8 July 2016 at 18h12 CET.

⁵ The Experts registration as Team members is for finance purposes.

schedules. As an example, Dr Akena currently has a teaching engagement in South Africa.⁶ It has been difficult for the Defence to schedule collateral interviews to aid the psychiatric forensic evaluation between the Experts and witnesses, especially considering the Experts' schedules and witness safety. The Defence and Experts are currently collaborating on an interview schedule for August and early September 2016, and should be able to finish the collateral interviews by mid-September 2016.

10. The Experts will also seriously consider environmental facts, as well as the collateral interviews a number of crucial witnesses who were either present or lived under the same structural and environmental conditions with Mr Ongwen from when he was abducted. The experts expect to undertake this task on or about 20 August 2016.
11. Additionally, Professor Ovuga has requested and is yet to meet Mr Ongwen. As the Experts are not allowed to speak with Mr Ongwen confidentially *via* telephone communication, the only mode for Professor Ovuga to meet with Mr Ongwen is in-person at the ICC Detention Centre. Whilst Dr Akena has travelled to The Hague twice and held a few sessions with Mr Ongwen, Professor Ovuga and Dr Akena have jointly determined that joint sessions with Mr Ongwen is necessary. This venture was not possible until just recently as the Defence waited for nearly three (3) months to receive news about its increased funding for its investigations.
12. The Defence bases these statements on the preliminary examinations of Mr Ongwen by Dr Akena. After discussions during the beginning of July 2016 between the Experts, these collateral interviews and a few joint sessions are deemed necessary and vital to diagnose Mr Ongwen's condition(s) for the purpose of any potential Article 31(1)(a) defence.

⁶ Dr Akena has been teaching a class in South Africa from approximately 1 July 2016 and it continues through to the end of August 2016.

13. The Defence began the process of securing a three (3) month visa for Dr Ovuga three (3) weeks ago, which was started after his appointment. A trip for them to The Hague is tentatively scheduled for 5-12 September 2016. The Experts and the Defence deem it necessary for the Experts to visit Mr Ongwen jointly before finalising the potential report.
14. The Defence avers that this does not prejudice the preparation of the Prosecution's case. As His Honour, Judge Bertram Schmitt, wrote, "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."⁷ Likewise, the Prosecution will not need extra time to collect evidence on the potential defence as the Defence shall be supplying evidence. With such a defence, Rule 135 of the Rules of Procedure and Evidence vests the investigatory power within the purview of the Chamber. The Chamber may accept the expert report and submissions as truth or may appoint expert(s) from the approved list maintained by the Registrar.
15. For the reasons stated above, the Defence respectfully notifies the Chamber that any potential submission pursuant to Article 31(1)(a) will not be filed with the Chamber until early October 2016.

Request for a Page Extension

16. Regulation 37(2) of the Regulations of the Court grants the power to the Chamber to extend the page limit of a submission at the request of a participant in exceptional circumstances.

⁷ ICC-02/04-01/15-460, para. 15.

17. The Defence requests that the Chamber lift all page restrictions for its potential Article 31(1)(a) submission.
18. The Defence notes that there is very little in the realm of modern international case law which deals with mental disease or defect at the time of the alleged commission of the crime.⁸ Given the novelty of the issue, the Defence's potential interpretive submissions based upon Article 21(1)(b), 21(1)(c) and 21(3) shall be almost entirely based on interpretive sources subsidiary to the Rome Statute, such as international treaties, customary international law, laws and decisions of national legal systems of the world and recognised human rights law. The Defence deems this necessary to guide the Chamber on its interpretation of Article 31(1)(a).
19. Furthermore, the Defence notes that the expert report on Mr Ongwen's mental state at the times alleged by the Prosecution shall be rather long, and will be counted in the page limit of the submission as it will not comport to Regulation 36(2)(b) of the Regulations of the Court. Said report shall also contain analysis of testimonies from persons other than Mr Ongwen, as it is the reasoned opinion of the Experts that supplementary questioning of persons known to Mr Ongwen at the alleged times in question are required to make an accurate assessment.
20. The Defence respectfully requests the Chamber, pursuant to Regulation 37(2) of the Regulations of the Court, to lift the page restriction for the Defence's potential Article 31(1)(a) submission.

IV. RELIEF

21. For the above reasons, the Defence respectfully requests the Chamber to lift the page restriction for submissions pursuant to Regulation 37(2) of the Regulations of

⁸ See Celebici case, Judgement [sic], Appeals Chamber, 20 February 2001, Case No. IT-96-21-A, para. 587, available at: <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>. The Appeals Chamber distinguished Article 31(1)(a) of the Rome Statute from Rule 67(A)(ii) of the ICTY.

the Court and notifies the Chamber that any potential submission pursuant to Article 31(1)(a) of the Rome Statute cannot be ready until early October 2016.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 3rd day of August, 2016

At Gulu, Uganda