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**International
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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

Public Redacted Version of “Defence Response to the Prosecution Application to Conduct a Medical Examination on Mr Ongwen (ICC-02/04-01/15-860-Conf),” filed on 19 June 2017

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**

Fatou Bensouda, Prosecutor
 James Stewart, Deputy Prosecutor
 Benjamin Gumpert, QC

Counsel for the Defence

Krispus Ayena Odongo
 Chief Charles Achaleke Taku

Legal Representatives of the Victims

Joseph Akwenyu Manoba
 Francisco Cox

Common Legal Representative for Victims

Paolina Massidda
 Jane Adong

The Office of Public Counsel for Victims

Paolina Massidda
 Caroline Walter
 Orchlon Narantsetseg

The Office of Public Counsel for the Defence

Xavier-Jean Keita

Amicus Curiae**REGISTRY****Registrar**

Herman Von Hebel

Counsel Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby responds to the Prosecution's request to conduct medical examinations on Mr Ongwen against Mr Ongwen's will ('Application').¹ The Defence respectfully requests Trial Chamber IX ('Chamber') to reject the Prosecution Application.
2. At the outset the Defence notes that the Application is improper at the present time as the procedural fairness question the Prosecution raises in paragraph 9 has not yet arisen. Though an Article 31(1)(a) notice has been provided, no formal application has been made and the evidence has yet to be led. The reports cited by the Prosecution were submitted for other purposes namely: (1) an issue of fitness to stand trial² and (2) to make all necessary arrangements to protect the health and safety of detained persons³ respectively. For this reason, the Application should be dismissed *in limine*.
3. Nevertheless, given the seriousness of the rights at stake, and without prejudice to arguments that may be raised in response to a later procedurally proper application, the Defence also submits that the Application violates:
 - (1) Mr Ongwen's right to remain silent remain silent without such silence being a consideration in the determination of guilt or innocence, pursuant to Article 67(1)(g);
 - (2) Rules 135 and 113 of the Rules of Procedure and Evidence ('RPE'); and
 - (3) Mr Ongwen's fundamental right to refuse medical procedures pursuant to Article 21(3) of the Rome Statute.
4. In addition, if Mr Ongwen is to be treated like a potential witness as the Prosecution analogises, Mr Ongwen has the right not to speak with representatives of the opposing party pursuant to ICC-02/04-01/15-339-Anx, paragraph 28.
5. As a final preliminary remark, the Defence notes that the Prosecution Application has as an unstated premise that the existence of the reports reflect some kind of

¹ ICC-02/04-01/15-860-Conf.

² ICC-02/04-01/15-620-Conf.

³ ICC-02/04-01/15-637-Conf, para. 31.

exceptional surprise that merits departing from critical fair-trial and human rights protections. It has to have been assumed that at the time Mr Ongwen was arrested, the Prosecution reviewed what was known about him and could have made an educated guess that notices of defences afforded by the Statute, including Article 31(1)(a) defences, might be provided. If this did not occur, then it is certainly not the responsibility of the Defence. In any case, the existence of these defences in the Statute mean that, in a sense, the Prosecution is always formally on notice that they may be raised. There is nothing exceptional about the defences being raised and, as just noted, the reports entered the case-record for other reasons and have yet to be used for the defences.

II. CONFIDENTIALITY

6. Pursuant to Regulation 23 *bis*(2) of the Regulations of the Court, the Defence files this response as confidential. A public redacted version shall be filed in due course.

III. BACKGROUND

7. On 4 May 2017, the Office of the Prosecutor requested through Defence Counsel to have the Prosecution retained medical professionals interview Mr Ongwen and conduct psychiatric/psychological tests on Mr Ongwen.⁴
8. On 12 May 2017, the Prosecution asked the Defence if a decision had been reached, and the Defence replied that day stating that the answer was no.⁵
9. On 18 May 2017, the Prosecution informed the Defence by way of an emailed letter that if Mr Ongwen refused the medical examinations by the Prosecution Experts, it would file a request for an order from the Chamber to force Mr Ongwen to have the examination. The letter also asked Counsel to consult Mr Ongwen about reconsidering his decision.⁶
10. On 7 June 2017, the Prosecution filed its Application.

⁴ ICC-02/04-01/15-860-Conf-AnxB, pg. 4-5.

⁵ *Ibid.*, pg. 3.

⁶ *Ibid.*, pg. 2.

IV. SUBMISSIONS

a) *The Prosecution Application violates Mr Ongwen's fundamental right to remain silent without such silence being a consideration in the determination of guilt or innocence, pursuant to Article 67(1)(g)*

11. Article 67(1)(g) of the Rome Statute guarantees an accused the right "not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence." This text reflects the international codification of the fair-trial right.⁷ The fundamentality of this right is evidenced by Article 67(1)(h) which grants an Accused the right "[t]o make an unsworn oral or written statement in his or her defence."
12. An accused's right to remain silent is also encapsulated in the Rules of Procedure and Evidence at the United Nations International Criminal Tribunals for Rwanda⁸ and the former Yugoslavia.⁹ While not explicitly guaranteed by the European Convention on Human Rights, the European Court of Human Rights considers the right to remain silent to be implicit in the guarantees which lie at the heart of a fair trial.¹⁰
13. The Defence's request for a medical examination pursuant to Article 64(8)(a)¹¹ does not amount to a waiver of this right, neither does the Defence's notification pursuant to Rule 79(1)(b) of the RPE¹² and subsequent disclosure of the Defence's Expert Medical Report and medical reports from the ICC-DC.¹³ The Prosecution's citation of

⁷ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, article 14(3)(g), "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] (g) Not to be compelled to testify against himself or to confess guilt", available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 19 June 2017]

⁸ Article 20(4)(g) of the Statute, available at: http://unictr.unmict.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf and Rule 42(A)(iii) and (B) of the ICTR Rules of Procedure and Evidence, available at: <http://unictr.unmict.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf>.

⁹ Article 21(g) of the Statute, available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf and Rule 42 (A)(iii) and (B) B of the ICTY Rules of Procedure and Evidence, available at: http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf.

¹⁰ *John Murray v United Kingdom*, Application no. 18731/91, European Court Grand Chamber, Judgment, 8 February 1996, para. 45, available at: <http://hudoc.echr.coe.int/eng?i=001-57980>. The Defence notes that the European Court of Human Rights allows judges to draw adverse inferences of the accused under limited circumstances which this Rome Statute does not allow.

¹¹ ICC-02/04-01/15-620-Conf.

¹² ICC-02/04-01/15-518.

¹³ ICC-02/04-01/15-658-Conf.

Katanga and Ngudjolo case-law¹⁴ is not an appropriate analogy and distinguishable as that decision concerned testimony *under oath*.

14. The Prosecution's suggestion that Rule 84 provides a legal basis¹⁵ for its request is inapposite. The RPE are subsidiary to the Statute,¹⁶ if they conflict with a right in the Statute, the RPE defers, not the Statutory right.
15. The Rome Statute grants Mr Ongwen the minimum guarantee of the right to remain silent. The Statutory right further restricts the Chamber from considering the use of this right in the determination of his guilt or innocence.
16. Furthermore, *in arguendo*, Mr Ongwen's decision to remain silent cannot be used against him in as an aggravating factor in sentencing if convicted. Rule 145 of the RPE contains a non-exhaustive list of aggravating factors which the Chamber may consider when determining a sentence. Rule 145(2)(b)(vi) qualifies the non-exhaustive list by stating, "[o]ther circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned above." None of the aggravating factors listed in Rule 145(2)(b)(i)-(v), or those in Article 78, are remotely connected, concerned or similar with an accused's enforcement of a guaranteed fundamental right.
17. The Prosecution request to issue Mr Ongwen warnings at this time concerning adverse inferences¹⁷ is coercive because it places pressure on Mr Ongwen to accept a procedure with the threat of potential imprisonment. With regards to drawing 'adverse inferences', the Defence notes that the Chamber is not deliberating and issuing the warning risks pre-judging the outcome when evidence has yet to be led. The deliberative process the Prosecution is inviting the Chamber to invoke in this Application, if applied, will taint the integrity of the proceedings and pre-judge a determination reserved by the Statute for the end of the trial after hearing the evidence.
18. The Defence is not required at this time to submit its list of evidence and witnesses which it will rely upon for the purpose of its case-in-chief. It still cannot be presumed

¹⁴ Application, para. 19.

¹⁵ *Ibid.*, para. 31.

¹⁶ Article 51(5): "In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail."

¹⁷ Application, para. 26.

that an affirmative Defence case will even be put forward. The Defence is only required to disclose “the names of witnesses and any other evidence upon which the accused intends to rely to establish the ground” under Article 31(1)(a).¹⁸ The Defence has disclosed its available materials in good faith pursuant to Rule 79(1)(b) and Order 709, and shall be conducting a review on 21 and 23 June 2017 with its Investigator and Resource Persons to facilitate any other materials required by the RPE and Order 709.

19. Finally, the Defence notes that this is not a new overarching issue. [REDACTED]¹⁹ [REDACTED]²⁰ [REDACTED].

20. The Defence respectfully requests the Chamber to reject the Prosecution Application because it violates Mr Ongwen’s guaranteed fundamental right to remain silent.

b) The Prosecution Application violates Rules 135 and 113 of the RPE

21. Rules 113 and 135 of the RPE outline the procedures to be used for a medical, psychiatric or psychological examination of a detained person or an accused.

22. Rule 135(1) of the RPE requires the Chamber to refer to Rule 113 of the RPE. Rule 113(1) of the RPE requires the Chamber to “consider the nature and purpose of the examination and ***whether the person consents to the examination.***”²¹

23. Both Rules 113 and 135 require that the Chamber appoint the expert.²² This process of the Chamber selecting an expert to conduct medical examinations on Mr Ongwen has been done once prior in this case.²³ The Defence highlights that the Prosecution neglected to provide the information in these two paragraphs – namely the critical issue of the court-organ which selects and appoints the experts – and it should be reminded by the Chamber of its duty to notify the Chamber of obvious negative law.

¹⁸ Rule 79(1)(b) of the RPE.

¹⁹ Email to Prosecution from Defence, 26 March 2015 at 11h40 CET, titled “Result from Meeting with Dominic Ongwen”.

²⁰ Emailed letter from Prosecution to Defence, 24 March 2016 at 15h11 CET, titled “160324 – Letter to Mr Odongo – Re: interview”.

²¹ Emphasis added.

²² See Rules 113(2) and 135(3) of the RPE.

²³ ICC-02/04-01/15-637-Conf.

24. The Defence notes, unlike the Prosecution, that the medical examinations performed on Mr Ongwen in December 2016 and January 2017, which were requested by the Chamber, did not concern Articles 31(1)(a) or 64(8)(a). The medical examinations concerned specifically:

that a psychiatric examination of Dominic Ongwen be conducted with a view to: (i) making a diagnosis as to any mental condition or disorder that Dominic Ongwen may suffer at the present time; and (ii) providing specific recommendations on any necessary measure/treatment that may be required to address any such condition or disorder at the detention centre²⁴

25. This was specifically “to make all necessary arrangements to protect the health and safety of detained persons” to fulfil the Registry’s responsibility “in accordance with Regulation 103 of the Regulations”.²⁵
26. The report from these examinations, in a redacted form, has been disclosed to the Prosecution, and it can prepare its case based upon the two (2) expert reports and medical reports disclosed by the Defence.
27. The RPE foresees issues dealing with medical issues and one’s fundamental right to remain silent. The Defence argues this is the very reason why the drafters of the RPE had the foresight to envisage complex issues associated with this conundrum. The RPE does not grant the power to the Prosecution to conduct a medical, psychiatric or psychological examination on the Accused. The RPE grants the power to conduct these examinations solely to the Chamber to protect an accused’s fundamental rights enshrined in the Rome Statute and in international human rights law. The Trial Chamber, unlike the Prosecution, is burdened with the overarching obligation to respect the rights of the Accused pursuant to Article 64(2).
28. Regardless of what the Prosecution argues concerning whether a witness is a witness of a party or the Court, the Trial chamber is not in a position to police informal discussions between an expert witness and his/her employer following any interview. Whether the expert has a professional duty of confidentiality, the only conceivable way to ensure the examination is not influenced by the Prosecution and information from it is not transmitted to the Prosecution is to forbid any contact between the

²⁴ *Ibid.*, p. 18.

²⁵ *Ibid.*, para. 31.

Prosecution and a potential expert and to prohibit contact between the Prosecution and the expert until the end of any Appeal.

29. Thus, any examination conducted by Prosecution Experts is an examination conducted by the Prosecution itself. It violates Mr Ongwen's rights to remain silent and refuse medical procedures (see below). For this reason, the RPE requires the use of Chamber appointed experts and the consideration of Mr Ongwen's consent.
30. The Defence respectfully requests the Chamber to reject the Prosecution Application because it violates Rules 135 and 113 of the RPE.
 - c) *The Prosecution Application violates Mr Ongwen's fundamental right to refuse medical procedures pursuant to Article 21(3) of the Rome Statute*
31. Article 21(3) of the Rome Statute requires the Chamber to interpret the law consistent with internationally recognised human rights law. The Defence argues that it is uncontestable that someone who is conscious and of sound mind has the legal right to refuse medical treatment, especially when said refusal does not endanger the lives of the persons around him or her.
32. The examinations which the Prosecution Experts must perform are medical examinations of the mind. Serious effort has been put forth by the Defence and the ICC-DC to ensure that Mr Ongwen's mental health is stable, and now the Prosecution demands that he undergo intrusive examinations in a short time-period during trial.²⁶
33. The Prosecution has known about the possibility of an Article 31(1)(a) defence since 9 August 2016, and should have known of the possibility of one since the day it filed for an arrest warrant in May 2005. The timing of the Application comes at an illogical moment in the proceedings and risks derailing Mr Ongwen's focus upon the present proceedings with a stressful, intrusive, and unnecessary medical examination.
34. The Defence requests the Chamber to reject the Application as it would violate Mr Ongwen fundamental right to refuse medical procedures.

²⁶ See email from Prosecution to the Chamber, Defence and Participants, 19 June 2016, 12h09 CET, titled "Prosecution mental health experts".

d) In arguendo, if the Chamber determines that Mr Ongwen waived his right to remain silent, the Prosecution Application violates paragraph 28 of ICC-02/04-01/15-339-Anx

35. The Defence rejects any assertion that Mr Ongwen has waived his guaranteed fundamental right to remain silent. This section does not purport in any way to represent whether or how Mr Ongwen intends to testify during the Defence case-in-chief.
36. Pursuant to Protocol ICC-02/04-01/15-339-Anx, paragraph 28, an interview of a potential witness by an opposing party or participant requires the consent of the witness. It does not state whether such person conducting the interview must be an attorney, investigator, or retained expert.
37. The Defence has asked Mr Ongwen if he wishes to partake in medical examinations conducted by experts retained by the Prosecution. In short, Mr Ongwen stated no. Notwithstanding the Defence position that the Protocol does not apply to Mr Ongwen, if one applies the aforementioned protocol, the Prosecution has no right to interview Mr Ongwen.
38. In such case that the Trial Chamber considers the Protocol relevant, the Defence respectfully requests the Chamber to reject the Prosecution Application as it is contrary to the procedure contained in ICC-02/04-01/15-339-Anx.

V. RELIEF

39. The Defence respectfully requests the Chamber to reject the Prosecution Application in its entirety as the Application violates the Rome Statute, Rules of Procedure and Evidence, Protocol ICC-02/04-01/15-339-Anx and fundamentally recognised human rights law.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 21st day of June, 2017
At The Hague, Netherlands