

**Cour
Pénale
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**International
Criminal
Court**

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Date: 10 August 2020

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***

Public

Public Redacted Version of “Defence Request for Assistance from Trial Chamber IX Regarding the Defences under Article 31 and Access to Documentation Necessary for the Defence of Mr Ongwen”, filed 23 September 2016

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
Colin Black

Counsel for the Defence

Krispus Ayena Odongo
Chief Charles Achaleke Taku

Legal Representatives of the Victims

Joseph Manoba
Francisco Cox

Common Legal Representative for Victims

Paolina Massidda

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Paolina Massidda

The Office of Public Counsel for the Defence

Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Patrick Craig
Harry Tjonk

Victims Participation and Reparations Section Other

I. INTRODUCTION

1. The Defence hereby requests Trial Chamber IX ('Trial Chamber') to order the transmission of medical reports, incident reports, and other documentation related to Mr Ongwen's behaviour or health ('Requested Information') be made available to the Defence. This assistance concerns matters relating both to the litigation concerning the defences pursuant to Article 31 and access to information generally necessary for Mr Ongwen's to have an effective defence.
2. The Regulations of the Registry specify many instances where documentation about a detainee's health, detainment, and behaviour is created, thus in addition to the more general request, and not to limit it in any way, the Defence thus also requests:
 - a. Any reports where the Medical Officer has raised concerns that the "mental health of a detained person has been or will be adversely affected by any condition of or treatment in detention" pursuant to Regulation 155(1) RoR or the subsequent Chief Custody officer reports to the Presidency or Chamber pursuant to Regulation 155(3) RoR;
 - b. The daily log events relevant to this request and required to be made pursuant to Regulation 187(2) RoR;
 - c. [REDACTED];
 - d. Any log entries concerning the use of force against Mr Ongwen pursuant to Regulation 204(6) RoR; and
 - e. Any log entries pursuant to Regulation 212 (2) and any Medical Officer evaluations pursuant to Regulations 212(3) and (5) RoR.

3. The Defence also requests a copy of the guidelines created pursuant to Regulation 162*bis* (2).
4. The Defence seizes the Trial Chamber now because throughout the summer and early fall, the Detention Centre ('ICC-DC') has delayed the answering of queries and requests from the Defence connected to matters touching upon the medical care of Mr Ongwen. This has undermined the capacity of the Defence to receive proper information as regards to the defences under Article 31 and to prepare for an effective defence. Given the present trend and alleged legal barriers raised by the ICC-DC, with the present schedule of opening statements on 6 December 2016, at the present moment, there is a real danger that the Defence will be unable to fulfil its obligations¹ to Mr Ongwen due to reasons beyond its control and for which it now seeks the assistance of the Trial Chamber.

II. CONFIDENTIALITY

5. Pursuant to Regulation 23*bis* of the Regulations of the Court ('RoC') and Regulation 24 of the Regulations of the Registry ('RoR'), this request is submitted confidential *ex parte* as it refers to detention incidents, the collection of evidence, and matters relating to the Accused, which are not disclosable at this time. A confidential redacted version shall be filed in due course.

¹ See Article 9(3) of Code of Professional Conduct for counsel: "Where a client's ability to make decisions concerning representation is impaired because of mental disability or for any other reason, counsel shall inform the Registrar and the relevant Chamber. Counsel shall also take the steps necessary to ensure proper legal representation of the client according to the Statute and the Rules of Procedure and Evidence."; *see also* Article 9(2): "In his or her relations with the client, counsel shall take into account the client's personal circumstances and specific needs, in particular where counsel is representing victims of torture or of physical, psychological or sexual violence, or children, the elderly or the disabled."

III. PROCEDURAL HISTORY AND BACKGROUND

6. The present request is informed by two separate, yet inter-related narratives and issues. The first concerns the access of two psychiatric experts to meet with Mr Ongwen to provide the Defence with expert opinions in relation to whether and how to proceed as regards the defence pursuant to Article 31(1)(a). The second concerns the on-going lack of access by Mr Ongwen's Defence to medical reports and incidents that have occurred in the ICC-DC.
7. For clarity, the Defence presents these two separate narratives by theme, rather than strict chronology as the issues progressed in parallel.

a) Defence experts concerning Article 31(1)(a)

8. In response to a Defence request on 1 February 2016 with regards to the possibility of using defences, on 1 February 2016, the Pre-Trial Chamber authorised defence expert Dr Akena to (a) bring a recording device with him on condition that it not be used to circumvent Mr Ongwen's restrictions on communication and (b) to work without monitoring. The Pre-Trial Single Judge emphasised that:

Judge Tarfusser also accepts that Dr Akena's visits with Dominic Ongwen are conducted without monitoring. Just for the sake of clarity, Judge Tarfusser wishes to point out that this measure of confidentiality, which is granted to the Defence in the interest of its work, is unrelated to doctor patient privilege. Dr Akena is not Dominic Ongwen's doctor (the latter receives all required medical care through the ICC Detention Unit, including access to a doctor under the guarantee of doctor patient privilege). Indeed, the purpose of these visits is quite the opposite: to generate evidence that could eventually be disclosed to the parties and the Court and used in the proceedings.²

² Email, subject line: 'RE: Request for Audio Recorder in the ICC-DC', sent 1 February 2016 at 16h24, see Annex A.

9. Following a Prosecution request,³ on 7 June 2016, the Single Judge of the Trial Chamber issued a decision concerning Rule 79 of the Rules wherein he, *inter alia*, directed 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 2016.⁴

10. As part of its compliance with this order, the Defence sought to have Dr Akena visit Mr Ongwen between the 19 and 26 June 2016.⁵ The ICC-DC initially refused to have Dr Akena visit Mr Ongwen confidentially and the Defence was forced to seek the assistance of the Trial Chamber, which was provided on 15 June 2016. The Trial Chamber indicated to the ICC-DC that

[a]s set out in paragraph 8 of decision ICC-02/04-01/15-450-Conf-Exp ('Decision on issues related to the restriction of communications of Dominic Ongwen'), and unless otherwise indicated, the conditions for visits with Dr Akena that were set by the Pre-Trial Chamber Single Judge continue to apply.⁶

11. As part of the scheduling request to the ICC-DC, the Defence passed on the request on 14 June 2016 that Dr Akena meet three of the individuals who treated and interacted with Mr Ongwen.⁷ On 24 June 2016, after indicating that the ICC-DC medical officer and psychologist refused to meet with the Dr Akena, it was communicated that:

[REDACTED].⁸

³ ICC-02/04-01/15-435.

⁴ ICC-02/04-01/15-460, page 7.

⁵ Email, subject line: 'Visitation Requests for Next Week', sent 14 June 2016 at 9h51, *see* Annex B.

⁶ Email, subject line: 'RE: Request for Confidential Visitation to Mr Ongwen', sent 15 June 2016 at 12h32, *see* Annex C.

⁷ Email, subject line: 'Visitation Requests for Next Week', sent 14 June 2016 at 9h51, *see* Annex B.

⁸ Email, subject line: 'RE: Any official news on the Defence's request', sent 24 June 2016 at 12h18, *see* Annex I.

The Defence responded⁹ indicating that the visits followed Mr Ongwen's request, that the expert needed to speak with the medical professionals to have a more fully informed position, [REDACTED].

12. On 3 August 2016,¹⁰ the Defence made a request for the extension of the Article 31 notification deadline, citing in part delays¹¹ due to the Registrar not providing funding and securing the appointment of a second expert. In that filing, the Defence did not mention the difficulties that the Defence was experiencing with regards to having Dr Akena enter the ICC-DC as the Trial Chamber was aware of the issue, had re-iterated an issued order, and the Defence considered that these issues had been provisionally resolved.
13. Being "appreciative of the logistical challenges and difficulties",¹² the Single Judge refused this request on 4 August 2016.
14. Having secured a visa for its second expert, the Defence wrote to the Trial Chamber on 9 September 2016¹³ to ensure that the two experts would be able to visit Mr Ongwen so as to complete their Article 31(1)(a) work.
15. On 14 September 2016, the Defence wrote to the ICC-DC to schedule the visits by the two experts.¹⁴ Despite the re-iteration of the Trial Chamber's decision on 15 June 2016, once again, the ICC-DC raised the issue of Trial Chamber authorisation and, once again, the Defence was forced to seek the Trial Chamber's order ensuring the visits of the experts,¹⁵ which it gave that day, re-iterating its 15 June 2016 decision as regards Dr Akena again.¹⁶

⁹ Email, subject line: 'RE: Any official news on the Defence's request', sent 24 June 2016 at 13h56, *see* Annex J.

¹⁰ ICC-02/04-01/15-513-Conf.

¹¹ ICC-02/04-01/15-513-Conf, paras 8-9.

¹² ICC-02/04-01/15-515, para. 6.

¹³ Email, subject line: 'Visitation to Dominic by Experts', sent 9 September 2016 at 15h29, *see* Annex L.

¹⁴ Email, subject line: 'Visitation to Dominic by Experts', sent 14 September 2016 at 11h32, *see* Annex M.

¹⁵ Email, subject line: 'RE: Request related to Dr. Ovuga', sent 14 September 2016 at 13h35, *see* Annex N.

¹⁶ Email, subject line: 'RE: Request related to Dr. Ovuga', sent 14 September 2016 at 14h25, *see* Annex O.

16. [REDACTED].¹⁷

17. [REDACTED].¹⁸ [REDACTED].

18. The Defence promptly responded¹⁹ to the ICC-DC, copying the Trial Chamber, indicating that (a) the decision by the ICC-DC would impact upon an order of the Trial Chamber, (b) that the delays would impact upon the Defence budget, (c) and that the Defence re-iterated its request for “the medical report on this and prior incidents” should be made available to the Defence and Trial Chamber due to their importance to an effective defence and the impact upon the trial-schedule and issues. Given the restriction of time’s impact upon the ability of the Defence to prepare an effective defence, the Defence also sought clarification as to whether [REDACTED].

19. [REDACTED].²⁰

b) Access to medical records

20. As previously stated, to more completely inform their report to the Defence regarding the Article 31(1)(a) defence, on 14 June 2016 the ICC-DC was asked²¹ to facilitate meetings between the Defence expert Dr Akena and Mr Ongwen’s ICC-DC medical staff and [REDACTED].

21. In response to the resistance that was already becoming apparent, on 20 June 2016, the Defence provided²² the ICC-DC with a PDF copy of a signed medical waiver from Mr Ongwen. This waiver signed by Mr Ongwen authorised disclosure to Dr Akena of “any and all records” related to Medical Professionals who examined Mr Ongwen since 6 January 2015. Also

¹⁷ [REDACTED].

¹⁸ Email, subject line: ‘RE: Polite Requests of the ICC-DC’, sent 16 September 2016 at 16h32, see Annex R, p. 2.

¹⁹ Email, subject line: ‘[REDACTED]’, sent 16 September 2016 at 17h25, see Annex R, p. 1.

²⁰ [REDACTED].

²¹ Email, subject line: ‘Visitation Requests for Next Week’, sent 14 June 2016 at 9h51, see Annex B.

²² Email, subject line: ‘RE: Visitation Requests for Next Week’, sent 20 June 2016 at 16h46, see Annex D. For the waiver see Annex E.

authorised was discussion between Dr Akena and “any and all medical professionals that have examined” Mr Ongwen since 6 January 2015. That same day, the ICC-DC responded stating that “[l]egal Advice is being sought on some of the issues regarding the request”.²³

22. On 21 June 2016, the Defence followed up upon this email²⁴ and reminded the ICC-DC staff that the request to which the waiver related was connected to the Defence’s 9 August 2016 Article 31 notification deadline and that Dr Akena was not going to be available again before that deadline.
23. On 22 June 2016, the Defence wrote to the Trial Chamber seeking its assistance, explaining that the Defence had sought out “the records of the detention centre doctors and psychologists who have treated Mr Ongwen so that our medical expert can examine them”²⁵ and that the ICC-DC was raising legal issues that were preventing Dr Akena – who was present only for a week – from doing his job. The Trial Chamber forwarded this email to the ICC-DC and shortly thereafter, the ICC-DC appeared to cooperate.
24. The Defence was able to put Dr Akena and [REDACTED] (Mr Ongwen’s ICC-DC doctor) in contact on 24 June 2016, requesting that their exchanges be kept between themselves.²⁶ [REDACTED] refused any cooperation and none of the information or materials in regards to the Defence earlier requests of 15, 20, and 22 June were made available.
25. [REDACTED].

²³ Email, subject line: ‘RE: Visitation Requests for Next Week’, sent 20 June 2016 at 17h54, *see* Annex F.

²⁴ Email, subject line: ‘Answers for Meetings with Medical Professionals’, sent 21 June 2016 15h01, *see* Annex G, p. 1.

²⁵ Email, subject line: ‘RE: Update on Issues Facing the Defence (D26) Pursuant to Order 460’, sent 22 June 2016 at 13h45, *see* Annex H.

²⁶ Email, subject line: ‘Introduction from Defence Team of Dominic Ongwen’, sent 24 June 2016 at 14h20, *see* Annex K.

26. [REDACTED]. It was clarified that these were needed “for our records for the purpose of case preparation.”²⁷

27. The ICC-DC responded stating that:

The DC staff is constantly in touch with the Medical Service and we are finding the best procedure to follow in the best interest of Mr Ongwen. In this regard I would like to kindly remind you the strict confidentiality of Mr Ongwen’s medical record pursuant to regulation 156 of the RoR.²⁸

28. [REDACTED],²⁹ [REDACTED]³⁰ [REDACTED].

29. On 19 September 2016, [REDACTED].³¹ At the time of filing, the Registry has yet to provide a response following this commitment, even though the Defence knows that the Director of Division of Judicial Services and his staff have been constantly requesting answers from the ICC-DC.³²

IV. APPLICABLE LAW

30. Pursuant to Article 64(2), the Trial Chamber is charged with conducting the trial “with full respect for the rights of the accused”. As part of its broad powers to do this, Article 64(6)(e) provides that the Trial Chamber may “[p]rovide for the protection of the accused” and also “[r]ule on any other relevant matters” pursuant to Article 64(6)(f). The Trial Chamber may also order the production of documents pursuant to Article 64(6)(b).

31. Pursuant to Article 67(1)(b), the Accused is afforded the right to have “adequate time and facilities for the preparation of the defence”. This right is connected to that under Article 67(1)(d) whereby the Accused has the right “to

²⁷ Email, subject line: ‘Polite Requests of the ICC-DC’, sent 15 September 2016 at 11h54, *see* Annex P.

²⁸ Email, subject line: ‘RE: Polite Requests of the ICC-DC’, sent 15 September 2016 at 18h42, *see* Annex Q.

²⁹ *See* para. 18 above.

³⁰ Email, subject line: ‘[REDACTED]’, sent 16 September 2016 at 19h49, *see* Annex S.

³¹ Email, subject line: ‘[REDACTED]’, sent 19 September 2016 at 18h37, *see* Annex T.

³² Discussions from the 21 September 2016 meeting between Mr Marc Dubuisson and representatives from the Defence.

conduct the defence in person or through legal assistance of the accused's choosing".

32. Pursuant to Regulation 92(3) RoC, the Trial Chamber may order the disclosure of the detention record.

V. SUBMISSIONS

33. As stated, the Defence requires access to the Requested Information. Given the fast approaching start of trial, the alleged legal issues within the ICC-DC delaying timely action, and the prospect of further domestic Dutch legal issues outside of the ICC-DC, the Defence seeks the Chamber's assistance to cut the legal and administrative Gordian Knot and make this information available. The information is necessary to inform Defence experts for the Article 31 defences, to be appraised of any information that is pertinent to the upcoming trial proceedings, and to prepare for an effective defence more generally.

a) There exists a pattern of delay and alleged legal obstruction by the Detention Centre

34. The background outlined above³³ illustrates a pattern whereby the ICC-DC has delayed, blocked, and failed to respond to the time-constrained availability of the Defence experts and the deadlines imposed upon the Defence with regards to the Article 31 defences. Three examples of several illustrate this pattern.
35. Firstly, despite being reminded of the Trial Chamber's order of 15 June 2016, the ICC-DC continually seemed to doubt the substance of it. Similarly, when the Defence sought to put Dr Akena in touch with medical professionals during his limited stay – of which the ICC-DC was aware, the ICC-DC took 10 days to properly respond and only when it became apparent that the Trial

³³ See 'a) Defence experts concerning Article 31(1)(a)' at paras 8 to 19 above.

Chamber was aware of the issue and emailed the ICC-DC.³⁴ In that case, ultimately, the ICC-DC's assistance was still only limited as only one of three professionals was it seems willing to be put in touch.

36. Secondly, most recently, and exemplifying the pattern, [REDACTED]³⁵ [REDACTED].

37. Finally, the Defence provided a signed waiver given by Mr Ongwen, but the ICC-DC appears to consider this insufficient for release of its own medical records and incident reports and it has not clearly explained how it fails to fulfil the requirements under Dutch law a full 94 days since the waiver was first provided has elapsed.³⁶ The Defence lacks the resources to navigate the Dutch legal system concerning doctor-patient confidentiality so that his Defence can establish how to access Mr Ongwen's medical records. Such complexity is moreover compounded by the administrative layer of the ICC as an intermediary between the Defence and Mr Ongwen's Dutch doctor.

b) The records are necessary to prepare an effective defence and safe-guard Mr Ongwen

38. Even more perplexing than the delays, the ICC-DC appears to be attempting to protect Mr Ongwen from the experts, one of whom Mr Ongwen has explicitly asked to meet (Dr Akena) and for whom he has given a waiver to access his information. On the basis of observations by staff, the ICC-DC has virtually chastised the Defence for bringing its expert³⁷ and for a time its doctor has ordered that they not visit Mr Ongwen.³⁸

39. Under these circumstances, the Defence can only ask itself what is happening at the ICC-DC and what is the ICC-DC keeping from the Defence.

³⁴ See paras 10-11 above.

³⁵ See paras 17-19 above.

³⁶ See paras 20-29 above.

³⁷ See para.11 above.

³⁸ See para. 17 above.

40. It would not be unreasonable to conclude that the ICC-DC thinks that Mr Ongwen is not capable of standing trial. Indeed, if Mr Ongwen is not capable of withstanding more than an hour and half of discussion – some-time of which involves pleasantries – with individuals whom he trusts, or discussion with a psychologist, it is difficult to see how the ICC-DC thinks that Mr Ongwen will be capable of sitting through four and half hours of sometimes harrowing testimony five days a week typically in six weeks blocks at time.
41. If there are signs that Mr Ongwen is not mentally competent, or periodically not mentally competent, it is clearly essential that his Defence knows this so that it can proceed accordingly. It is obviously not in the interests of justice to push a mentally unstable individual through a multi-year trial, yet the actions of the ICC-DC seem to indicate that it is leaning towards this assessment of his behaviour.
42. Less drastic, but nonetheless important, if the ICC-DC has observed particular causes of distress for Mr Ongwen, his Defence needs to know this so that it can proactively anticipate possible problems at trial or otherwise.³⁹ While the Defence cannot apply to have Mr Ongwen as a victim under the courts rules, it is relatively clear that Mr Ongwen is a victim of crimes outside the temporal jurisdiction of the court which would otherwise fall under its subject matter jurisdiction.
43. Recent events illustrate the necessity of the Defence having this information. [REDACTED], the ICC-DC recommended that his Defence not visit him for too long. This is clearly antithetical to him being able to provide instructions, to comprehend the unfolding case against him, and his Defence being able to prepare for trial.

³⁹ The Defence notes that during the 21 September 2016 meeting with Mr Marc Dubuisson, Mr Dubuisson requested further information about the issues described in the ICC-DC's email dated 24 June 2016 at 12h12, but he stated that the ICC-DC failed to give a response to his inquiry.

44. In short, if there is a larger pattern that is presently unknown to it, the Defence **must** be aware of the pattern as it will impact heavily upon proceedings.

c) The Defence needs access to Mr Ongwen's medical records and incident reports to prepare any Article 31 defences

45. As part of its role to advise and guide Mr Ongwen through a criminal trial, the Defence has an obligation to make an assessment of whether legally Mr Ongwen can avail himself of the complete defence pursuant to Article 31(1)(a). Though obvious, it is worth stressing that the Article 31 defences are *complete* defences. If they are established, the impact upon the case against Mr Ongwen is profound. Having as complete information as possible is thus extremely significant and important as the denial of an applicable defence through the lack of relevant information would amount to a miscarriage of justice.

46. This legal assessment cannot be competently undertaken without the input of psychiatric and/or psychological experts. This input in turn requires that the experts can (a) access Mr Ongwen to speak with him confidentially and (b) be provided recent medical information to inform their assessment.

47. Mr Ongwen has a right to have adequate time and facilities for the preparation of the defence pursuant to Article 67(1)(b). He also has a right to conduct his defence through legal assistance of his choosing pursuant to Article 67(1)(e). Mr Ongwen's Defence had been unable to access necessary expertise required to prepare any Article 31 defences through the provision of information to its experts. This has interfered with both rights as his Defence can neither properly prepare informed defences absent certain information nor can offer informed legal assistance.

48. The Defence thus requests the provision of this information so that it can properly prepare for trial and provide legal assistance to Mr Ongwen.

VI. RELIEF

49. For the reasons above, the Defence respectfully requests Trial Chamber IX to order that:

- a. The materials described in paragraph 2 above be made available to the Defence; and
- b. That the Requested Information described in paragraph 1 be made available to the Defence.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 10th day of August, 2020

At Kampala, Uganda