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Date: **7 November 2017**

**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  
with Confidential Annexes A-C**

**Public Redacted Version of "Prosecution's Request to Add Three Experts and Related Evidence to its Witness and Evidence Lists and Request For All Mental Health Experts to be Heard in One 'Joint' Session", 24 October 2017, ICC-02/04-01/15-1024-Conf**

**Source:** The Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the Regulations of the Court  
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## Introduction

1. The Prosecution requests leave to add three mental health experts, P-0445, P-0446, and P-0447 (“Prosecution Experts”), to its Witness List and eleven related items to its List of Evidence (“Request for Additions”). The proposed additional items of evidence are the experts’ reports (“Expert Reports”) detailing their forensic assessment of Dominic Ongwen’s mental health at the time relevant to the charges,<sup>1</sup> along with eight of the items cited in P-0445’s report<sup>2</sup> (together, “Expert Material”). The Request for Additions is in the interests of justice because (i) the Expert Material is highly relevant and probative in responding to the Defence’s article 31(1)(a) affirmative defence and (ii) granting the Request for Additions would not prejudice the Defence.
2. The Prosecution further requests the Chamber’s guidance regarding the presentation of the Prosecution’s additional evidence in response to the Defence’s article 31(1)(a) defence. The Prosecution submits that the best procedure, taking into account the specific circumstances of this case, is for the Chamber to hear all expert evidence on mental health issues, whoever the calling party may be, in a “joint session” set apart for this topic alone (“Request for Joint Session”). Hearing the evidence of all experts contiguously in a joint session will allow for a deep engagement with the medical issues and the opportunity for the various experts to respond spontaneously to each other’s testimony, thereby promoting the efficiency of the proceedings, the coherency of the evidence elicited, and the establishment of the truth. The Prosecution proposes that this Joint Session take place at the end of the Prosecution case, or, alternatively, at an appropriate point during the Defence case.

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<sup>1</sup> UGA-OTP-0280-0732 (“Expert Report of P-0445”); UGA-OTP-0280-0786 (“Expert Report of P-0446”); UGA-OTP-0280-0674 (“Expert Report of P-0447”).

<sup>2</sup> UGA-OTP-0279-0039, UGA-OTP-0279-0045, UGA-OTP-0279-0047, UGA-OTP-0279-0059, UGA-OTP-0279-0065, UGA-OTP-0279-0089, UGA-OTP-0279-0093, UGA-OTP-0279-0107.

3. Alternatively, in lieu of a Joint Session that occurs as part of the Parties' presentation of evidence, the Prosecution requests that the Chamber consider calling all mental health experts (including P-0445, P-0446, P-0047, D26-0041 and D26-0042) as Chamber's witnesses in a joint session, pursuant to its powers to call all evidence considered necessary for the determination of the truth. If the Chamber is not inclined to order a Joint Session, the Prosecution requests leave to call the Prosecution Experts after the close of the Defence case to ensure that the Prosecution can examine them in light of the actual Defence case, as presented in court.

### **Background**

4. On 30 May 2016, the Chamber set a deadline of 6 September 2016 for the Prosecution to submit its final list of witnesses and evidence.<sup>3</sup>
5. On 7 June 2016, the Single Judge directed the Defence to disclose the names of the witnesses and any other evidence upon which it intends to rely to argue that the Accused's criminal responsibility for any crimes should be excluded under article 31 by 9 August 2016.<sup>4</sup> The Single Judge required the Defence to "set out, in general terms, an indication of which of the charged crimes would, in the Defence submission, be covered by the alleged ground for excluding criminal responsibility."<sup>5</sup>
6. On 9 August 2016, the Defence filed a notification that it would be relying on grounds under article 31(1)(a) (mental incapacity), indicating that it would make a more formal submission by October 2016.<sup>6</sup>

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<sup>3</sup> ICC-02/04-01/15-449.

<sup>4</sup> ICC-02/04-01/15-460, para. 20, p. 11.

<sup>5</sup> ICC-02/04-01/15-460, para. 17.

<sup>6</sup> ICC-02/04-01/15-518.

7. On 25 August 2016, the Defence filed an update to its 9 August 2016 notification,<sup>7</sup> annexing a “provisional list of expert witnesses,” including two experts in psychiatry—D26-0041 and D26-0042 (“Defence Experts”).<sup>8</sup>
8. On 5 December 2016, the Defence filed a request to stay the proceedings pending a psychiatric and/or psychological examination of Dominic Ongwen to assess his fitness to stand trial; the request referenced a report from the Defence Experts.<sup>9</sup> On 7 December 2016, the Defence disclosed a psychiatric report by the Defence Experts (“Defence Expert Report”).<sup>10</sup>
9. On 16 December 2016, the Chamber appointed its own expert (“Chamber appointed expert”) to examine Dominic Ongwen’s mental health, “in order to ensure [his] ongoing health during the trial proceedings.”<sup>11</sup> On 8 February 2017, the Prosecution received access to a redacted version of the Chamber appointed expert’s report (“Chamber Expert Report”).<sup>12</sup>
10. On 21 February 2017, the Chamber ordered the Defence to disclose certain materials underlying the Defence Expert Report, including, *inter alia*, the medical records from the ICC Detention Centre that were consulted by the Defence Experts.<sup>13</sup>
11. In April 2017, the Prosecution instructed the Prosecution Experts and provided them with relevant material, including the available psychiatric assessments, medical records from the ICC Detention Centre, and video, audio, and written recordings of Dominic Ongwen.<sup>14</sup> The Prosecution Experts requested to examine

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<sup>7</sup> ICC-02/04-01/15-528.

<sup>8</sup> ICC-02/04-01/15-528-Conf-AnxA.

<sup>9</sup> ICC-02/04-01/15-620-Conf, para. 42.

<sup>10</sup> UGA-D26-0015-0004 (“Defence Expert Report”).

<sup>11</sup> See ICC-02/04-01/15-902, paras. 1, 8.

<sup>12</sup> ICC-02/04-01/15-702-Conf-AnxII.

<sup>13</sup> ICC-02/04-01-15-709, para. 18.

<sup>14</sup> See, e.g., UGA-OTP-0280-0732 at 0757-0768 (itemised list of material provided to the Experts). In addition to this material, the Prosecution also provided the Clinical Notes disclosed by the Defence on 20 April 2017, namely the following: Translated versions of Clinical Notes disclosed by the Defence on 20 April 2017 (UGA-D26-0015-0135; UGA-D26-0015-0136; UGA-D26-0015-0138; UGA-D26-0015-0139; UGA-D26-0015-0140;

Mr Ongwen, but the Defence responded that the Accused was not willing to be examined by experts appointed by the Prosecution.<sup>15</sup>

12. On 2 October 2017, the Prosecution provided courtesy copies of the Expert Reports by email to the Defence Counsel and requested confirmation of whether the Defence plans to call the Defence Experts in support of its article 31(1)(a) defence.<sup>16</sup>

13. On 3 October 2017, the Prosecution formally disclosed the Expert Material to the Defence.<sup>17</sup>

14. On 16 October 2017, the Defence confirmed that it intends to call the Defence Experts as witnesses.<sup>18</sup> The Defence rejected the Prosecution's invitation for all mental health experts to testify contiguously at the end of the Prosecution case.<sup>19</sup>

### Confidentiality

15. This request is classified as "Confidential", as it refers to filings and material of the same designation. The Prosecution will file a public redacted version.

### Applicable Law

16. Addition to the Prosecution's list of witnesses or evidence requires leave of the Chamber.<sup>20</sup> In assessing any such request, the Chamber "must determine *in*

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UGA-D26-0015-0141; UGA-D26-0015-0142; UGA-D26-0015-0143; UGA-D26-0015-0144; UGA-D26-0015-0145; UGA-D26-0015-0146; UGA-D26-0015-0147; UGA-D26-0015-0148; UGA-D26-0015-0149; UGA-D26-0015-0150; UGA-D26-0015-0151; UGA-D26-0015-0152); Original versions of Clinical Notes disclosed by the Defence on 20 April 2016 (UGA-D26-0015-0117; UGA-D26-0015-0118; UGA-D26-0015-0120; UGA-D26-0015-0121; UGA-D26-0015-0122; UGA-D26-0015-0123; UGA-D26-0015-0124; UGA-D26-0015-0125; UGA-D26-0015-0126; UGA-D26-0015-0127; UGA-D26-0015-0128; UGA-D26-0015-0129; UGA-D26-0015-0130; UGA-D26-0015-0131; UGA-D26-0015-0132; UGA-D26-0015-0133; UGA-D26-0015-0134). For the complete list of material provided to the Prosecution Experts, please see Confidential Annex C.

<sup>15</sup> See ICC-02/04-01/15-860-Conf, para. 8.

<sup>16</sup> See Confidential Annex A, Email of Prosecution to Defence, dated 2 October 2017.

<sup>17</sup> ICC-02/04-01/15-1014; *see supra*, fns. 1-2 (listing the relevant ERNs).

<sup>18</sup> See Confidential Annex A, Email of Defence to Prosecution, dated 16 October 2017.

<sup>19</sup> *Id.*

<sup>20</sup> ICC-02/04-01/15-449, para. 8; ICC-02/04-01/15-600, para. 14.

*concreto* whether reliance on the part of the Prosecution on items of evidence additional to those included in the original list of evidence causes an undue prejudice to the procedural rights of the Defence.”<sup>21</sup>

17. Pursuant to rule 79, the Defence is required to give fair notice of affirmative defences, including the grounds for excluding criminal responsibility under article 31(1), and the Chamber is authorised to grant adjournments if necessary to enable the Prosecutor to prepare adequately and to respond. The Chamber has already recognised the need to provide adequate time and information for the Prosecution to prepare its response to article 31(1)(a) issues, after due notice from the Defence.<sup>22</sup>

18. Various provisions in the Court’s legal framework, including article 64 of the Statute, rules 84 and 140 of the Rules, and regulation 43 of the Regulations of the Court, empower the Trial Chamber to ensure the trial is fair and expeditious and to give directions to this end, including in relation to the mode and order of witness appearance. In *Bemba*, Trial Chamber III held that the Court’s legal framework provides “a wide range of mechanisms” for the Chamber to make orders regarding the Parties’ (including the Defence’s) presentation of evidence as part of its obligation to ensure the fairness and expeditiousness of the proceedings;<sup>23</sup> the Chamber ultimately altered the proposed order of appearance of the Defence’s witnesses so that the Defence case would commence with the testimony of the Defence’s expert witnesses.<sup>24</sup> In so ordering, the Chamber noted that the Parties’ discretion to determine the manner in which they will present their cases is not “unlimited” and is subject to “judicial oversight from the

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<sup>21</sup> ICC-02/04-01/15-619, para. 10.

<sup>22</sup> *See, e.g.*, ICC-02/04-01/15-460, paras. 8-10, 18; ICC-02/04-01/15-709, paras. 17-18.

<sup>23</sup> *See* ICC-01/05-01/08-2221, paras. 14-15. For other examples of the application of these powers in relation to determining the order of appearance of witnesses, see ICC-01/04-01/07-2775; ICC-01/04-02/06-661.

<sup>24</sup> ICC-01/05-01/08-2225, paras. 16, 23(d).

Chamber” and adjustment by the Chamber where “there is a compelling reason to do so.”<sup>25</sup>

### **Submissions**

*The Request for Additions is Justified Because It Concerns Relevant and Probative Evidence and Does Not Prejudice the Defence.*

#### The Evidence of the Prosecution Experts is Relevant and Probative.

19. The evidence of the Prosecution Experts is relevant to the charges because it addresses an issue affirmatively raised by the Defence—whether grounds for excluding criminal responsibility under article 31(1)(a) apply in this case. Each expert has prepared a report containing a detailed forensic assessment of Dominic Ongwen’s mental health, with reference to the specific elements of article 31(1)(a).
20. The Expert Reports are of significant probative value, including because of (i) the background of the authors; (ii) the *prima facie* reliability of the assessment process; and (iii) the concurrence between the experts on fundamental issues. First, the Expert Reports were prepared by highly qualified, experienced mental health experts, two psychiatrists<sup>26</sup> and one clinical psychologist,<sup>27</sup> all of whom have university appointments in their field and experience in conducting forensic assessments for use in criminal proceedings.<sup>28</sup>
21. Second, the reports were prepared on the basis of the Prosecution Experts’ review of relevant, accessible material, including, *inter alia*, the Defence Expert Report, the Chamber Expert Report, medical records available from the ICC Detention Centre, and other video, audio, and written recordings of Dominic

<sup>25</sup> See *id.*, para. 6 (citing ICC-01/05-01/08-1904-Conf, paras. 24-25).

<sup>26</sup> P-0445 and P-0446.

<sup>27</sup> P-0447.

<sup>28</sup> For P-0445, see UGA-OTP-0280-0732 at 0769-0783; for P-0446, see UGA-OTP-0280-0786 at 0790, 0830-0838; for P-0447, see UGA-OTP-0280-0674 at 0677, 0719-0729.



Ongwen's own words and behaviour in circumstances relevant to this case.<sup>29</sup> The Prosecution Experts were instructed (i) to provide an "objective, independent assessment of Mr Ongwen" and (ii) that their evidence would be "regarded as evidence given under a duty to the Court and to justice, rather than to any party in the proceedings."<sup>30</sup> The Prosecution Experts have provided details in relation to their overall methodology, and have cited the literature and sources on which they rely.

22. Third, the Prosecution Experts concurred in their principal findings. Specifically, they all determined that whether or not Dominic Ongwen suffered from a mental disease or defect at the time relevant to the charges, there is insufficient psychiatric evidence on record to conclude that any such mental disease or defect destroyed his capacity to appreciate the unlawfulness or nature of his conduct, or his capacity to control his conduct to conform to the requirements of law.<sup>31</sup> P-0446 and P-0447 further considered that there is "no evidence" or "no sufficient evidence" that Mr Ongwen suffered from any particular mental disease or disorder at the time relevant to the charges.<sup>32</sup>

23. In addition to seeking to add the Prosecution Experts to the Prosecution's List of Witnesses, the Prosecution seeks leave to add the Expert Material to its List of Evidence. The Expert Material consists of eleven items: (i) the Expert Reports;<sup>33</sup>

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<sup>29</sup> See *supra*, para. 11, fn. 14.

<sup>30</sup> See, e.g., Expert Report of P-0445 at 0758.

<sup>31</sup> See Expert Report of P-0445 at 0756 (finding "no evidence from the materials provided that [REDACTED] are directly linked to the crimes he allegedly committed"); Expert Report of P-0446 at 0815 (finding "no evidence of mental illness or disorder that would have removed or seriously compromised the mental elements of Mr Ongwen's actions" during the relevant time period and "no psychiatric reason, related to current or past mental illness or disorder" to suggest that Mr Ongwen was incapable of appreciating the nature or unlawfulness of his conduct or of controlling his conduct to conform to the requirements of the law); Expert Report of P-0447 at 0700-0701 (finding a high probability that Mr Ongwen maintained an intact level of functioning, sufficient volitional control and sufficient insight into the wrongfulness of his actions during the relevant time period).

<sup>32</sup> See Expert Report of P-0446 at 0815 (identifying "no evidence of mental illness or disorder that would have removed or seriously compromised the mental element of Mr Ongwen's actions during the period covered by this legal action"); Expert Report of P-0447 at 0700-0701 (finding "no sufficient evidence to justify the diagnosis of a particular mental disorder").

<sup>33</sup> See *supra*, fn. 1.

and (2) eight items that were referenced in P-0445's report in the form of a link to a location on the internet.<sup>34</sup> The latter eight items have been registered and disclosed, with the same classification as P-0445's report, in order to ensure their ongoing availability to the Parties and participants. For the reasons outlined above, the Expert Material is relevant, reliable, and probative.

The Defence is Not Prejudiced by the Request for Additions.

24. Neither the content nor the timing of the Request for Additions prejudices the Defence. With respect to the content, the issue of Mr Ongwen's mental health was raised by the Defence. It was clearly foreseeable that the Prosecution would react to the Defence's disclosure of an expert report by instructing its own experts and seeking to rely on their evidence. This was specifically referred to by the Prosecution in its filing of 13 January 2017.<sup>35</sup>
25. With respect to its timing, the Prosecution could not have included these witnesses or items of evidence on its lists in advance of the 6 September 2016 disclosure deadline because the Defence had only recently notified the Prosecution of its article 31(1)(a) defence and had not yet provided enough information to allow the Prosecution to develop any sort of meaningful response. It was only once information contained in the Defence Expert Report was disclosed in December 2016 that the Prosecution could instruct its own experts.
26. Since then, the Prosecution has advanced its preparations by (i) identifying an appropriate panel of mental health experts; (b) seeking access to the material underlying the Defence psychiatric expert report, including the Clinical Notes;<sup>36</sup> (c) instructing the Prosecution Experts; (d) requesting that Mr Ongwen be encouraged to agree to a clinical interview with the Prosecution Experts, as

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<sup>34</sup> See *supra*, fn. 2.

<sup>35</sup> ICC-02/04-01/15-653, para. 24.

<sup>36</sup> ICC-02/04-01/15-653-Conf.

requested by those experts;<sup>37</sup> and (e) collecting, registering and disclosing the Expert Reports and related material. As a result, the Prosecution is in a position to seek leave to rely on this evidence well in advance of the close of its case, ensuring that the Defence will have ample time to prepare to examine the witnesses.

27. Furthermore, while the Defence has not yet started its case, the Request is not premature.<sup>38</sup> It is appropriate for the Prosecution to give advance notice of witnesses and evidence in relation to issues that it may reasonably anticipate the Defence to raise.

28. The Prosecution further notes that while the Rome Statute is silent on the matter, it is a well-established principle in international and domestic criminal jurisdictions that an accused is presumed to be a person of sound mind,<sup>39</sup> and any claim or conclusion to the contrary must be supported by concrete evidence.<sup>40</sup> Such a presumption does not constitute a reversal of the burden of proof or otherwise contravene an accused's fair trial rights.<sup>41</sup> Accordingly, the Prosecution

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<sup>37</sup> ICC-02/04-01/15-860-Red.

<sup>38</sup> The Prosecution addresses this point given the prior suggestion of the Defence, albeit in a different context, that certain article 31(1)(a)-related requests by the Prosecution were premature prior to the Defence's "formal application" or presentation of the evidence in relation to article 31(1)(a). *See* ICC-02/04-01/15-883-Red, paras. 2, 18.

<sup>39</sup> *See, e.g.,* ICTY, *Prosecutor v. Delalić*, Case No. IT-96-21-T, 16 Nov. 1998 ("*Delalić* Trial Judgment"), para. 1157 (stating that "[i]n every criminal act there is a presumption of sanity of the person alleged to have committed the offence. Thus, every person charged with an offence is presumed to be of sound mind and to have been of sound mind at any relevant time until the contrary is proven" and citing domestic law); *see also id.*, paras. 599, 1158, 1163; *Delalić* Appeal Judgment, para. 582 (referring to the presumption of sanity); *M'Naghten's Case* (1843) 10 Cl & F 200, p. 210; Michael Bohlander, *PRINCIPLES OF GERMAN CRIMINAL LAW* (2009), p. 131; Kevin Jon Heller and Markus Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press 2011), p. 224; Canadian Criminal Code Part XXI, 16(3).

<sup>40</sup> *See, e.g.,* *Delalić* Appeal Judgment, paras. 593-594 (noting that "[a]n expert opinion is relevant only if the facts upon which it is based are true" and finding no error in the Trial Chamber's decision to reject the conclusions contained in certain psychiatric reports because the facts were all self-reported by the Accused, and the Chamber did not find those self-reported facts to be consistent or reliable); *Delalić* Trial Judgment, paras. 602-603, 1172.

<sup>41</sup> *See* ICTR, *Prosecutor v. Baglishema*, Case No. ICTR-95-1A-T, Separate Opinion of Judge Asoka de Z. Gunawardana, 7 June 2001, paras. 5-12 (explaining how an accused may be required to adduce sufficient evidence to put certain matters in issue, to make the matters "fit for consideration by court," without that requirement constituting a reversal of the burden of proof); ICTY, *Prosecutor v. Hadzihasanovic*, Case No. IT-01-47-T, *Judgement*, 15 March 2006, paras. 229-230 (distinguishing the concept of an evidential burden—i.e., the requirement to present sufficient material in support of a particular plea to justify its consideration—with the

notes that its proposal to call the Prosecution Experts at the end of its case, as part of a Joint Session, does not import any acceptance that the Prosecution is required to prove sanity. Rather, in the interest of efficiency and fairness, the Prosecution is merely notifying the Defence and Chamber of the evidence of the Prosecution Experts and making a proposal as to the most efficient way of presenting that evidence.

29. The Prosecution reserves the right to seek to submit additional evidence after the presentation of the Defence case, depending on the actual Defence case as presented. In this regard, the Prosecution notes that (i) the Defence has recently disclosed the identity of a new article 31(1)(a) defence witness<sup>42</sup> and indicated that it may soon disclose additional witnesses in support of that defence;<sup>43</sup> and (ii) the Defence has not provided, as it previously alluded to, any “formal submission” of an article 31(1)(a) defence.<sup>44</sup> Relatedly, as discussed below, if the Chamber does not accept the Prosecution’s proposal for mental health expert evidence to be heard in a Joint Session, the Prosecution seeks leave to call the Prosecution Experts after the presentation of the Defence case.<sup>45</sup>

*The Request for a Joint Session Should Be Granted Because It Will Serve the Interests of Justice by Promoting the Efficiency of the Proceedings, Clarity of the Evidence Elicited, and the Establishment of the Truth.*

30. The Rules are silent as to the procedure to be followed when the Defence intends to call evidence in support of an article 31(1) affirmative defence and the Prosecution wishes to call its own evidence in response. The Chamber’s initial directions on the conduct of proceedings do not address specifically the modalities in relation to the presentation of evidence in support of affirmative

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persuasive burden, i.e., the burden of proof); *Delalić* Trial Judgment, paras. 1160, 1172; Knoop, G.J., *Defenses in Contemporary International Criminal Law* (2d ed.) (Martinus Nijhoff 2007), p. 142.

<sup>42</sup> Confidential Annex B, Email from Defence to Prosecution, dated 6 September 2017.

<sup>43</sup> ICC-02/04-01/15-T-101-CONF-ENG, p. 45, Ins. 3-10.

<sup>44</sup> See ICC-02/04-01/15-518, paras. 4, 6; ICC-02/04-01/15-883-Red, para. 2.

<sup>45</sup> See *infra*, paras. 41, 43(e).

defences, and any evidence submitted in response.<sup>46</sup> In this filing, therefore, the Prosecution requests (a) that the Chamber issue directions regarding the presentation of the Prosecution's additional evidence in respond to the Defence's article 31(1)(a) defence and (b) makes its own submissions as to the best procedure, taking into account the specific circumstances of this case.

31. In particular, the Prosecution invites the Chamber to direct that the Defence Experts and Prosecution Experts all give evidence in each other's presence in the course of a single trial session ("Joint Session"). The proposed Joint Session will enable all of the experts (currently three Prosecution and two Defence) to be present (whether in person or by video link) when each other are giving evidence.<sup>47</sup>

Holding a Joint Session Would Promote the Clarity and Coherence of the Evidence Elicited.

32. A joint session for article 31(1)(a) expert evidence would promote the clarity and coherence of the evidence elicited, thereby contributing to the establishment of the truth. Specifically, having one focused session on this topic will allow for a deeper and more sustained engagement with the relevant medical issues, including any new points that may arise during the experts' oral testimony. It will also provide an opportunity for the experts to follow the testimonies of their counterparts and react to each other, including by potentially providing supplementary testimony at the end of the joint session, when the issues remain fresh in the minds of all. In this regard, the Prosecution proposes that, towards the end of the joint session, the Prosecution and Defence prepare a schedule of agreed and disputed issues as between the experts. The Chamber could then decide—on a point by point basis—whether or not it would be assisted by supplementary testimony in response to questions from the bench.

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<sup>46</sup> ICC-02/04-01/15-497, para. 9.

<sup>47</sup> Rule 140(3) clarifies that expert witnesses may be present during the testimony of other witnesses.

33. One example of how this approach might help illuminate important concepts is the following: it can be observed that P-0447, on the one hand, and the Defence Experts on the other hand, have substantially different notions about the concept of “appetitive aggression” and its relevance to this case.<sup>48</sup> This divergence is mentioned in passing by P-0447, but the precise contours of the experts’ respective viewpoints may be difficult to elucidate without some degree of further back and forth.
34. The need for interactive engagement is heightened given the relatively sparse detail provided in the Defence Expert Report as to how the [REDACTED] purportedly resulted in the destruction of Mr Ongwen’s mental capacities at the time of the alleged crimes.

Holding a Joint Session Would Promote the Efficiency of the Proceedings.

35. In addition to promoting maximum coherency of the article 31(1)(a)-related expert evidence, hearing all the experts together would advance the efficiency of the proceedings. Without a joint session, one or both of the Parties may have good cause to seek leave to re-call their expert witnesses in rebuttal or rejoinder, and the Chamber may conclude that leave should be granted to ensure the fairness of the proceedings. The re-calling of experts would absorb additional Court resources and time. Furthermore, since all of the experts are busy professionals with commitments, including in other court proceedings, the need to re-call any of them might result in delays to the proceedings due to scheduling conflicts. The joint session proposed by the Prosecution would eliminate the risk of such inefficiencies as any rebuttal or rejoinder evidence could be elicited at the end of the session, when the experts are already present and able to react spontaneously to each other’s testimony.

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<sup>48</sup> Cf. P-0447 Expert Report at 0679-0680, 0692-0693 and Defence Expert Report, at 0015-0016.

A Specialised Procedure for Article 31(1)(a)-Related Expert Evidence is Warranted in This Case.

36. The Prosecution further submits that the technical nature of this topic justifies a special procedure. It is true that the Chamber is frequently required to grapple with ambiguities and inconsistencies in witness testimony, and does so without holding joint sessions on particular topics. However, the task of resolving contradictions and establishing the truth is considerably more complicated when the issue is one requiring medical expert input, as here, since certain points of interest may ultimately be subject to a degree of reasonable debate within the medical community. The precision and sophistication of the Chamber's ultimate assessment on this topic can only be enhanced by adopting a particularised approach to the presentation of the expert evidence, one designed to result in a full understanding of the nuances and limitations of the medical opinion on offer. Maximum clarity in relation to the article 31(1)(a)-related expert evidence is also important because (i) the issue is one of first impression at the Court (no other Chamber has addressed the potential applicability of article 31(1)(a) to an accused) and (ii) the language of the article 31(1)(a) standard is specific, and has not yet been interpreted, further justifying a careful and thorough examination of the pertinent medical issues.

37. For these reasons, the Prosecution requests that the Chamber direct that all expert evidence related to mental health issues be heard in one Joint Session.

Timing of the Joint Session

38. The Prosecution's submission is that the Joint Session should take place at the close of the Prosecution case. This would enable the Chamber to hear any subsequent evidence (particularly that which may come from Dominic Ongwen himself) in the light of the expert mental health evidence. That said, the timing of

the joint session is less important, the Prosecution submits, than the principle that the experts all be heard together.

39. If there is a Joint Session at the close of the Prosecution case, the Prosecution is willing to call P-0445, P-0446, and P-0447 as its final witnesses, with D26-0041 and D26-0042 as the first witnesses for the Defence; the reverse order would also be acceptable. However, if the Defence objects to calling its psychiatric experts at the start of its case, and the Chamber finds merit in the objection, the Prosecution requests that all experts be heard together at an appropriate point during the Defence case.

#### Alternative Grounds for the Joint Session

40. The Prosecution requests to have the experts heard in a Joint Session as part of the Parties' submission of evidence. As discussed above, the Chamber has the authority to issue directions in this regard, including in relation to the timing of the appearance of expert witnesses.<sup>49</sup> However, if the Chamber is not inclined to do so, the Prosecution requests that the Chamber consider calling all mental health experts—including the Prosecution and Defence experts—in a joint session as Chamber witnesses, whom the Chamber and both Parties could question as they see fit. The Court's legal framework—in particular article 69(3)—empowers the Chamber to call any witnesses that may assist it in establishing the truth.<sup>50</sup>

*If the Request for a Joint Session Is Rejected, Leave Should Be Granted for the Prosecution to Call the Prosecution Experts After the Close of the Defence Case.*

41. Alternatively, if the Chamber is not persuaded by the Prosecution's arguments in favor of the Joint Session, then the Prosecution seeks leave to call the Prosecution

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<sup>49</sup> See *supra*, para. 18.

<sup>50</sup> See also articles 64(6)(d), 64(6)(f), 64(8)(b); rule 140 of the Rules of Procedure and Evidence; regulation 43 of the Regulations of the Court. See generally ICC-01/05-01/08-1023, para. 5; ICC-02/11-01/15-205, para. 12.



Experts as witnesses after the close of the Defence's case, so that it may examine them in light of the totality of the Defence's affirmative defence case, as presented, and so that the Prosecution Experts may have the opportunity to address the substance of the Defence Experts' testimony, including any new points that may be raised.<sup>51</sup> Without a Joint Session, it would not be efficient for the Prosecution to call the Prosecution Experts at the end of its case since it may be necessary to recall them, depending on how the Defence case is presented. It may also be prejudicial to the Prosecution since it would be obliged to present evidence in response to a Defence case that has not yet been fully developed,<sup>52</sup> and there would be no opportunity for the Prosecution Experts to react spontaneously to the Defence Experts, as there would be in a Joint Session. It is critical for the Prosecution Experts to have the opportunity to engage with the testimony of the Defence Experts because the latter have had access to the Accused while the former have not.

42. The Prosecution further notes that it has attempted to respond to the issues that it can expect the Defence to raise, including the affirmative defence of duress, where and to the maximum extent possible. However, in relation to the Defence's article 31(1)(a) defence, in the current circumstances,<sup>53</sup> it is not possible to address the issue properly or comprehensively in the ordinary course of the Prosecution's case. Therefore, in the interest of fairness and efficiency, the Prosecution Experts' evidence should be heard either in a specialised Joint Session or, alternatively, after the close of the Defence case.

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<sup>51</sup> See ICTY, *Prosecutor v. Lukic*, Case No. IT-98-32/1-AR73.1, Decision on the Prosecution's Appeal Against the Trial Chamber's Order to Call Alibi Rebuttal Evidence During the Prosecution's Case In Chief, 16 October 2008, para. 24 (finding that the Prosecution should not be forced to present rebuttal evidence in relation to an alibi defence during its case-in-chief simply because the Defence had provided notice of that defence; the Chamber reasoned that to so require would "raise the possibility of prejudice to the Prosecution's case" and "be unadvisable in view of the interest in judicial economy," including because the Defence might decide to present its alibi evidence "in a completely different way than anticipated by the Prosecution").

<sup>52</sup> See *supra*, paras. 29, 33-34.

<sup>53</sup> *Id.*

## Relief Requested

43. The Prosecution respectfully requests:

- a. leave to add P-0445, P-0446, and P-0447 to its List of Witnesses;
- b. leave to add the expert reports of P-0445, P-0446, and P-0447,<sup>54</sup> along with eight items cited in P-0445's report,<sup>55</sup> to its List of Evidence;
- c. that the Chamber order that all expert evidence related to mental health issues (whoever the calling party may be) be heard in one joint session, ideally to begin at the close of the Prosecution case or, alternatively, at an appropriate point during the Defence case;
- d. alternatively, that the Chamber call all mental health experts—including P-0445, P-0446, P-0047, D26-0041 and D26-0042—as Chamber's witnesses in a joint session;
- e. in the further alternative, if the Chamber is not inclined to order a joint session for mental health evidence, that the Chamber grant leave for the Prosecution to call P-0445, P-0446, and P-0447 after the close of the Defence case.



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**Fatou Bensouda , Prosecutor**

Dated this 7<sup>th</sup> day of November 2017  
At The Hague, The Netherlands

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<sup>54</sup> UGA-OTP-0280-0732; UGA-OTP-0280-0786; UGA-OTP-0280-0674.

<sup>55</sup> UGA-OTP-0279-0039, UGA-OTP-0279-0045, UGA-OTP-0279-0047, UGA-OTP-0279-0059, UGA-OTP-0279-0065, UGA-OTP-0279-0089, UGA-OTP-0279-0093, UGA-OTP-0279-0107.