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**International
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Court**

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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

Public

Decision on Prosecution Requests Related to Mental Health Expert Evidence

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

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Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64(2), 66 and 67 of the Rome Statute ('Statute'), Rules 68, 79 and 140 of the Rules of Procedure and Evidence ('Rules') and Regulation 23 *bis* of the Regulations of the Court, issues the following 'Decision on Prosecution Requests Related to Mental Health Expert Evidence'.

I. Procedural History

1. On 9 August 2016, the defence for Mr Ongwen ('Defence') filed a notification that it intended to raise a mental disease or defect defence under Article 31(1)(a) of the Statute.¹ The Defence disclosed a psychiatric report from its experts in December 2016, and was subsequently ordered to disclose the medical records from the ICC Detention Centre consulted in making this report.²
2. On 24 October 2017, the Office of the Prosecutor ('Prosecution') filed a request ('Request') seeking the following relief:
 - a) leave to add three mental health experts (P-445, P-446, and P-447, collectively 'Prosecution Experts') to its List of Witnesses ('LoW');
 - b) leave to add the Prosecution Experts' reports,³ along with eight items cited in P-445's report,⁴ to its List of Evidence ('LoE');
 - 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 as Chamber witnesses in a joint session;

¹ Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules of Procedure and Evidence, ICC-02/04-01/15-518.

² See Decision on the 'Prosecution Request for Disclosure of Material Underlying the Defence Psychiatric Expert Report', 21 February 2017, ICC-02/04-01/15-709.

³ UGA-OTP-0280-0732; UGA-OTP-0280-0786; UGA-OTP-0280-0674.

⁴ 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.

- 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 its experts after the close of the Defence case.⁵
3. On 26 October 2017, the Legal Representatives of Victims informed the Chamber that they support the Request in full and would not file a response.⁶
 4. On 6 November 2017, the Defence responded to the Request, requesting that it be rejected in full ('Response').⁷

II. Submissions, Analysis and Conclusions

5. The Single Judge will first consider the Prosecution's requested additions to the LoW and LoE (items (a) and (b) of the relief sought) before turning to the series of alternative requests relating to the sequencing of mental health expert testimony (items (c), (d) and (e) of the relief sought).

A. Additions to the LoW and LoE

6. The Prosecution submits that the Prosecution Experts have prepared reports containing a detailed forensic assessment of Mr Ongwen's mental health at the time relevant to the charges.⁸
7. The Prosecution argues that the timing of its Request does not prejudice the Defence, noting that it was clearly foreseeable that the Prosecution would instruct its own experts to respond to the Defence's expert report. As this report was only disclosed after the deadline for the final Prosecution LoW and LoE, the Prosecution submits that it could not have included these experts and their

⁵ 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, ICC-02/04-01/15-1024-Conf (with three confidential annexes; a public redacted version was notified 7 November 2017).

⁶ Email from the LRVs to the Chamber and parties, 26 October 2017 at 14:03.

⁷ Defence Response to the Prosecution's Eighth Request to Add Three Experts and Related Evidence to its Witness and Evidence Lists and Request for All Mental Health Professionals to be heard in One "Joint" Session, ICC-02/04-01/15-1063-Conf (with three confidential annexes).

⁸ Request, ICC-02/04-01/15-1024-Red, paras 19-23.

evidence by this deadline. The Prosecution also mentions that it put on record as far back as January 2017 that it might instruct its own mental health experts in this case.⁹

8. The Defence responds that the requested LoW/LoE additions should be rejected on grounds that: (i) the Prosecution was not diligent in requesting this relief earlier; (ii) the additions prejudice the Defence due to the additional time and resources required to scrutinise the concerned material; and (iii) the Request violates Mr Ongwen's rights as it is an attempt to 'arm twist Mr Ongwen to testify against himself in the Prosecution case against him by pitting potential Defence witnesses with the Prosecution's retained medical practitioners'.¹⁰
9. The Single Judge recalls the applicable legal framework for considering additions to the LoW/LoE from past decisions.¹¹
10. The Single Judge also recalls that the Prosecution's final deadline for its LoW and LoE was 6 September 2016.¹² The requested additions come well after this deadline and concern a significant amount of new information.
11. However, the timing of the Request must be viewed in its full context. The requested additions concern the Prosecution's evidence responding to a prospective affirmative defence. The Defence provided essential information on this defence only after the 6 September 2016 deadline, disclosing the psychiatric report of its experts in December 2016. In January 2017 (the same month the Prosecution evidence presentation began), the Prosecution gave an indication

⁹ Request, ICC-02/04-01/15-1024-Red, paras 24-29, *citing to* Prosecution Request for the Disclosure of Material Underlying the Defence Psychiatric Expert Report, 13 January 2017, ICC-02/04-01/15-653-Conf, paras 24-25.

¹⁰ Response, ICC-02/04-01/15-1063-Conf, paras 19-26.

¹¹ Decision on Prosecution's Request to Add 14 Items to its List of Evidence, 24 August 2017, ICC-02/04-01/15-957, para. 6; Decision on the 'Prosecution's Request to Add Transcripts and Seven Additional Documents to its List of Evidence', 2 December 2016, ICC-02/04-01/15-619, para. 10; Decision on Prosecution Request to Add Items to its List of Evidence, to include a Witness on its List of Witnesses and to Submit Two Prior Recorded Testimonies under Rule 68(2)(b) and (c), 22 November 2016, ICC-02/04-01/15-600, paras 14, 22.

¹² Decision Setting the Commencement Date of the Trial, 30 May 2016, ICC-02/04-01/15-449, page 7.

that it may seek to use evidence from its own mental health experts.¹³ In February 2017, the Single Judge ordered that the Defence disclose clinical notes consulted by its experts in the course of preparing their report.¹⁴ In April 2017, the Prosecution instructed its experts and - in a June 2017 request naming them and providing their *curricula vitae* - requested they interview Mr Ongwen.¹⁵ This request was rejected,¹⁶ but this procedural history demonstrates the foreseeability of the Prosecution's intentions well before formally disclosing the reports of the Prosecution Experts on 3 October 2017.¹⁷

12. Contrary to the arguments of the Defence, the Single Judge also does not consider that permitting the addition of the Prosecution Experts and their associated documents constitutes any sort of compulsion for Mr Ongwen to testify or a reversal of the burden of proof.¹⁸ The Prosecution is entitled to present evidence disproving affirmative defences, including when they concern the mental state of the accused. Were this otherwise, then the affirmative notice requirements in Rule 79 of the Rules would have no meaning.¹⁹ The Single Judge fails to see how permitting additional Prosecution evidence can reverse the burden of proof in any way. Mr Ongwen may remain silent in the face of the evidence of the Prosecution Experts, and granting the requested additions does not change his capacity to exercise this right.

¹³ ICC-02/04-01/15-653-Conf, para. 24 (with confidential annex).

¹⁴ Decision on the 'Prosecution Request for Disclosure of Material Underlying the Defence Psychiatric Expert Report', 21 February 2017, ICC-02/04-01/15-709 (resolving request ICC-02/04-01/15-653-Conf).

¹⁵ Public Redacted Version of "Prosecution request under articles 64, 69 and rule 84 in respect of [REDACTED] examination of the Accused by [REDACTED] instructed by the Prosecution", ICC-02/04-01/15-860-Red, para. 6 (with two confidential annexes).

¹⁶ See Decision on Prosecution Request in Relation to its Mental Health Experts Examining the Accused, 28 June 2017, ICC-02/04-01/15-902 (resolving request ICC-02/04-01/15-860-Red).

¹⁷ Prosecution's Communication of the Disclosure of Evidence, ICC-02/04-01/15-1014 (with confidential annex).

¹⁸ See Articles 66(2) and 67(1)(g) and (i) of the Statute.

¹⁹ ICC-02/04-01/15-709, para. 17; Decision on 'Prosecution request to order the Defence to comply with rule 79', 7 June 2016, ICC-02/04-01/15-460, para. 18 (Rule 79 of the Rules, which requires advance notice by the defence of Article 31(1) defences, is to enable the Prosecution to both prepare and respond to any affirmative defence).

13. When viewing the Request in its full procedural context, the Single Judge considers that the Prosecution has been sufficiently diligent in requesting the additions to its LoW/LoE and that no undue prejudice to the Defence will be caused by these additions. It must also be noted that: (i) the Request concerns the core expert evidence raised in response to a mental disease or defect defence which may affect all 70 confirmed charges – making this evidence of potentially dispositive importance - and (ii) the appearance of the Prosecution Experts can be timed in such a way so as to facilitate adequate Defence preparations.²⁰ Balancing all the relevant considerations, and without prejudice to any further determinations on the Prosecution Experts' qualifications or the probative value of their conclusions, the Single Judge grants the requested additions to the LoW and LoE.
14. As for the modalities of examining these experts, the Single Judge considers it unnecessary for the Prosecution Experts to describe each and every aspect of their reports through oral testimony. The Single Judge considers that the fair and expeditious conduct of the proceedings is best served by hearing these witnesses pursuant to Rule 68(3) of the Rules,²¹ and permits the Prosecution to do so on condition of satisfying the criteria under this rule. As with all Rule 68(3) witnesses, the Prosecution may also ask supplemental questions. In this regard, the Prosecution provided certain materials from the case record when initially instructing its experts,²² but many witnesses have since testified on Mr Ongwen's acts and conduct during the charged time period. In order for the Chamber to have as complete an assessment as possible, the experts should give their opinions on the salient issues arising out of all the evidence heard to date. The parties are encouraged to put questions to the experts premised on factual

²⁰ *In this regard, see* para. 20 below.

²¹ *See* Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497, para. 33.

²² Annex C of the Request, ICC-02/04-01/15-1024-Conf-AnxC.

propositions drawn from the testimonial evidence in this case, using direct quotations as appropriate.

B. Sequencing of Mental Health Expert Testimony

15. The Prosecution invites the Chamber to direct that both parties' experts all give evidence in each other's presence in the course of a joint trial session. This would promote the 'clarity and coherence of the evidence elicited' by allowing for experts to react to each other and by having all evidence on this topic elicited at the same time.²³ The Prosecution requests this joint session take place at the close of the Prosecution's evidence, and alternatively requests that the Chamber convene the joint session with all witnesses testifying as Chamber witnesses.²⁴ In a further alternative, the Prosecution seeks leave to call the Prosecution Experts after the Defence case.²⁵
16. The Defence opposes all these requests, arguing in particular that it must hear the totality of the Prosecution and LRVs' evidence presentation before presenting any of its evidence.²⁶
17. The Single Judge recalls the relevant paragraph of the conduct of proceedings decision ('Rule 140 Decision') as to how this trial is organised:

Subject to Articles 64(6)(b) and 69(3) of the Statute, the trial will be organised into: (i) presentation of evidence by the Prosecution; (ii) any presentation of evidence by the LRVs, should leave to do so be granted, and (iii) any presentation of evidence by the Defence. The Chamber's leave must also be sought in order to present 'rebuttal'/'rejoinder' evidence or non-evidentiary 'views and concerns' of participating victims.²⁷
18. The Single Judge is not persuaded that the issue of Mr Ongwen's mental health is so extraordinary that the Prosecution Experts need to be heard in a joint

²³ Request, ICC-02/04-01/15-1024-Red, paras 30-37.

²⁴ Request, ICC-02/04-01/15-1024-Red, paras 38-40.

²⁵ Request, ICC-02/04-01/15-1024-Red, paras 41-42.

²⁶ Response, ICC-02/04-01/15-1063-Conf, paras 27-44.

²⁷ ICC-02/04-01/15-497, para. 9.

session outside the standard trial framework. The Chamber is capable of assessing the testimony of competing witnesses testifying at different points in time. Such assessments are routine over the course of a long trial, including on technical or complex matters. Further, and contrary to the Prosecution's arguments, the fact that a mental disease or defect defence has yet to be raised in a case before this Court does not mean that the assessment of facts underlying this defence is meaningfully different.²⁸

19. The Single Judge likewise does not consider it necessary for the Prosecution Experts to appear after the close of the Defence evidence presentation. Hearing witnesses after the Defence's evidence presentation should be exceptional – this is why the Rule 140 Decision requires that leave be sought in a manner not required during the initial evidence presentation. The Prosecution is clear that it believes its experts must be called, and has in fact asserted that it will seek to call them even if the Defence experts do not testify.²⁹ The Prosecution will not be permitted to call these witnesses after the Defence's evidence presentation while its own evidence presentation is ongoing, especially when it has resolved to call them irrespective of any evidence the Defence presents. It is currently the Prosecution's turn to present evidence, and the Single Judge sees no reason why it cannot call these new witnesses within its evidence presentation. Should the Prosecution consider it necessary for the Prosecution Experts to give supplementary testimony after the conclusion of the Defence evidence, a substantiated request to exceptionally recall them can be made.

20. For these reasons, the Single Judge rejects the Prosecution's requests in relation to sequencing the testimony of mental health experts in this case. The

²⁸ *Contra* Request, ICC-02/04-01/15-1024-Red, para. 36.

²⁹ Annex A of the Request, ICC-02/04-01/15-1024-Conf-AnxA, page 3 ('If the Defence no longer intends to call expert witnesses in support of an Article 31(1)(a) defence, the Prosecution will, in any event, seek to call P-0445, P-0446, and P-0447 as the last three witnesses in the presentation of its case').

Prosecution must call the Prosecution Experts at the end of its evidence presentation.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Prosecution request to add the Prosecution Experts to its LoW, noting paragraph 14 above;

GRANTS the Prosecution request to add the Prosecution Expert reports and associated items³⁰ to its LoE;

REJECTS the Prosecution requests related to the sequencing of evidence presentation;

ORDERS the Prosecution to file an updated LoE in the case record forthwith and to reflect the Prosecution Experts on its next LoW;

ORDERS the Prosecution to file anticipated testimony summaries for the Proposed Experts by 16:00 on Thursday, 14 December 2017; and

ORDERS the Defence to request reclassification or file a public redacted version of the Response within 10 days of the present decision.

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



Judge Bertram Schmitt, Single Judge

Dated 16 November 2017

At The Hague, The Netherlands

³⁰ UGA-OTP-0280-0732; UGA-OTP-0280-0786; UGA-OTP-0280-0674; 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.