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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

**Prosecution's Request to Add Material Provided to its Mental Health Experts to its
List of Evidence**

Source: The Office of the Prosecutor

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

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Introduction

1. The Prosecution requests leave (“Request”) to add to its List of Evidence material provided to its mental health experts (“Prosecution Experts”).¹ The Prosecution intends to request submission of these items *via* the email submission procedure after the testimony of its first mental health expert, P-0445.

2. The Request should be granted since (i) it will enable the Chamber to make a more comprehensive assessment of the material reviewed by the Prosecution-instructed mental health experts; and (ii) it does not prejudice the Defence, which is on notice of the items’ relevance to the Prosecution’s case, including because most (33 out of 39 items) were disclosed by the Defence itself.

Background

3. On 7 December 2016, the Defence disclosed a psychiatric report by two experts in psychiatry (“Defence Experts”) related to Mr Ongwen’s mental state (“Defence Expert Report”).²

4. On 21 February 2017, the Chamber granted the Prosecution’s request that it order the Defence to disclose certain materials underlying the Defence Expert Report, including the medical records from the ICC Detention Centre consulted by the Defence Experts.³ The Defence completed disclosure of these records in May 2017.

¹ See *infra*, para. 14 and its footnotes (listing the ERNs for the relevant items).

² UGA-D26-0015-0004 (“Defence Expert Report”).

³ ICC-02/04-01/15-709, para. 18.

5. On 13 April 2017, the Prosecution instructed the Prosecution Experts and provided them with relevant material, including the available medical records from the ICC Detention Centre. After 13 April 2017, the Prosecution provided the Prosecution Experts with additional material that had subsequently become available, including 18 medical records from the ICC Detention Centre that had been disclosed by the Defence after 13 April 2017; a video, transcript and translations relating to the words and behaviour of Mr Ongwen in the courtroom on 2 March 2017;⁴ a transcript and translation of an audio recording already on the List of Evidence,⁵ which was commented on by P-0142 during the course of his testimony;⁶ and a film featuring footage of Mr Ongwen that had been made available to the Prosecution on a short-term basis by the filmmaker.⁷ To the Prosecution's understanding, the Defence has had the opportunity to view the film, in addition to having received unedited footage of certain portions of the film directly from the filmmaker.

6. On 3 October 2017, the Prosecution disclosed the Prosecution Expert Reports to the Defence.⁸ On 24 October 2017, the Prosecution provided a complete list of the material provided to the Prosecution Experts⁹ and requested that the three expert reports, along with the newly registered open source items cited in P-0445's report,

⁴ In relation to the events in the courtroom on 2 March 2017, the material obtained includes video footage showing Mr Ongwen (UGA-OTP-0277-1169) and transcripts and translations reflecting his words in this period of time (UGA-OTP-0278-0003 and UGA-OTP-0278-0006).

⁵ UGA-OTP-0053-0062 (sound recording); UGA-OTP-0274-6941 (transcript and translation of the sound recording).

⁶ ICC-02/04-01/15-T-71-CONF-ENG ET, 5 May 2017, p. 44, ln. 15 – p. 57, ln. 14.

⁷ As the version of the film shown to the Prosecution Experts (which had English subtitles) is still not available for commercial purchase, the Prosecution is currently liaising with the filmmaker to see if a version can be made available to the Chamber. If the Prosecution is successful, it will promptly register and disclose the film and update its List of Evidence with the relevant ERN.

⁸ ICC-02/04-01/15-1014.

⁹ ICC-02/04-01/15-1024, para. 11, fn. 14; ICC-02/04-01/15-1024-Conf-AnxC.

be added to the List of Evidence.¹⁰ That request was granted by the Chamber on 16 November 2017.¹¹

7. On 25 January 2018, the Prosecution sent an email notifying the Chamber, Parties, and participants that it had provided a chart of supplemental material¹² to the Prosecution Experts. This chart was produced by the Prosecution after the Chamber's instructions in decision 1073, in an effort to put the Prosecution Experts in the best position to assist the Chamber in assessing "salient issues arising out of all the evidence heard to date."¹³ The Prosecution plans to use this chart with the Prosecution Experts during their upcoming testimony.

Applicable Law

8. Addition to the Prosecution's list of witnesses or evidence requires leave of the Chamber.¹⁴ In assessing any such request, the Chamber "must determine *in 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."¹⁵

Submissions

Granting the Request is in the Interests of Justice

9. Granting the Request is in the interests of justice because it will enable the Chamber to make a more comprehensive assessment of the material underlying the

¹⁰ ICC-02/04-01/15-1024.

¹¹ ICC-02/04-01/15-1073.

¹² UGA-OTP-0283-1386, sent to the Chamber and Parties *via* e-mail on 25 January 2018, at 20:14.

¹³ ICC-02/04-01/15-1073, para. 14.

¹⁴ ICC-02/04-01/15-449, para. 8; ICC-02/04-01/15-600, para. 14.

¹⁵ ICC-02/04-01/15-619, para. 10.

Prosecution Expert Reports. All but one item proposed for addition to the List of Evidence were reviewed by the Prosecution Experts while preparing their Expert Reports. Of particular note, the Prosecution Experts referred frequently to the ICC Detention Centre medical records in their Expert Reports,¹⁶ which makes sense given their inability to conduct their own clinical examination of Mr Ongwen. They will likely refer to those records again in their upcoming testimony.

10. The other item¹⁷ is a recent document created in response to the Chamber's decision 1073 of 16 November 2017. The Prosecution plans to use it as a basis for much of its supplemental examination of the Prosecution Experts. Allowing these items to be added to the List of Evidence makes practical sense and will enable the Prosecution to request their submission through the email submission procedure.

11. Having these items on the record will ensure the completeness and coherency of the trial record. It will also facilitate the Chamber's assessment of the relevant matters, including which factors may have influenced the Prosecution Experts' opinions.

The Defence is Not Prejudiced by the Addition of these Items

12. The Defence will not be prejudiced by the addition of the items to the List of Evidence. The Defence is on notice of the relevance of these items to the Prosecution's case. All of the items (except the recently-disclosed chart of testimonial evidence extracts) were included in the Prosecution's list of materials that it had

¹⁶ See, e.g., P-0445, UGA-OTP-0280-0732 at 0741, 0745, 0762, 0768; P-0446, UGA-OTP-0280-0786 at 0790-0795; P-0447, UGA-OTP-0280-0674 at 0676, 0694-0696, 0711, 0717. Other material sought for addition to the List of Evidence was also relied upon in the reports (in addition to being part of the set of material provided for the experts' review). See, e.g., P-0445, UGA-OTP-0280-0732 at 0741 (referencing the transcript UGA-OTP-0274-6941, which is the proposed item for addition listed in para. 14(f) of this filing).

¹⁷ UGA-OTP-0283-1386.

provided to the Prosecution Experts.¹⁸ Furthermore, the bulk of the items—the medical records from the ICC Detention Centre—were disclosed by the Defence itself after substantial litigation over their relevance to the Prosecution.¹⁹

13. Specifically, of the 39 items requested for addition, 33 were disclosed by the Defence. Of the 6 remaining items, 2 are audio-video recordings (one being courtroom footage in which Defence Counsel were present, the other being an open-source documentary featuring an interview with Mr Ongwen); associated courtroom transcripts totaling 7 pages; a transcript and translation of an audio that is already on the List of Evidence, totaling 12 pages; and the abovementioned chart of courtroom testimony totaling 22 pages. In this context, no prejudice results from adding these items to the List of Evidence, and their admission will assist the Chamber in its truth-finding function and ensure the completeness of the trial record.²⁰

Relief Requested

14. The Prosecution respectfully requests leave to add items related to the upcoming testimony of its mental health experts to its List of Evidence. The items are listed below:

- a. A chart of courtroom testimony;²¹
- b. A documentary film showing Mr Ongwen speaking;²²
- c. English translations of medical records from the ICC Detention Centre, disclosed by the Defence;²³

¹⁸ ICC-02/04-01/15-1024, para. 11, fn. 14; ICC-02/04-01/15-1024-Conf-AnxC.

¹⁹ ICC-02/04-01/15-709; ICC-02/04-01/15-744.

²⁰ See also ICC-02/04-01/15-1073, para. 13.

²¹ UGA-OTP-0283-1386.

²² The ERN for this item is currently pending. See *supra*, fn. 7.

- d. The key to the identities of the collateral interviewees mentioned in the Defence Expert Report, also disclosed by the Defence;²⁴
- e. Documentation of Mr Ongwen's words and behaviour in the courtroom on the morning of 2 March 2017;²⁵ and
- f. A transcript and translation of an audio recording where the recording is already on the List of Evidence.²⁶



Fatou Bensouda , Prosecutor

Dated this 6th day of March 2018
At The Hague, The Netherlands

²³ Translations of the following items disclosed before 13 April 2017: UGA-D26-0015-0035, UGA-D26-0015-0037, UGA-D26-0015-0038; UGA-D26-0015-0098, UGA-D26-0015-0100, UGA-D26-0015-0102, UGA-D26-0015-0104, UGA-D26-0015-0106, UGA-D26-0015-0109, UGA-D26-0015-0110, UGA-D26-0015-0112, UGA-D26-0015-0113, UGA-D26-0015-0115. Translations of the following items disclosed on 20 April 2017: UGA-D26-0015-0135; UGA-D26-0015-0136; UGA-D26-0015-0138; UGA-D26-0015-0139; UGA-D26-0015-0140; 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. UGA-D26-0015-0154 is a medical file dated 9 February 2016, disclosed by the Defence in May 2017. UGA-D26-0015-0163 is the English translation of the Dutch portion of that medical file.

²⁴ UGA-D26-0015-0081.

²⁵ UGA-OTP-0277-1169 (video footage showing Mr Ongwen); UGA-OTP-0278-0003 (ACH-ENG) and UGA-OTP-0278-0006 (ENG) (transcripts and translations reflecting Mr Ongwen's words in this period of time).

²⁶ UGA-OTP-0274-6941 (commented on by P-0142 during his testimony at ICC-02/04-01/15-T-71-CONF-ENG ET, 5 May 2017, p. 44, ln. 15 – p. 57, ln. 14 and relating to the sound recording UGA-OTP-0053-0062).