

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: **ICC-02/04-01/15**

Date: **6 February 2019**

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

Defence Response to the Prosecution's Request for Disclosure

Source: Defence for Dominic Ongwen

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

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I. SUBMISSIONS

1. The Defence for Dominic Ongwen ('Defence') requests that the Trial Chamber IX ('Trial Chamber') dismiss the 'Prosecution's Request for Disclosure of Material Provided to D-0133'¹ for the following reasons.
2. *First*, the Prosecution bases its Request primarily on the disclosure obligations under the statutory scheme and requests the Trial Chamber to exercise its powers under Articles 64(2), 64(3)(c), 69(3), and 69(4) of the Rome Statute ('Statute') and Rules 79(2), 79(4), and 84 of the Rules of Procedure and Evidence ('Rules').²
3. When determining if such an order should be given, the Defence respectfully submits that the Trial Chamber should also take into account that the disclosure obligations between the Prosecution and the Defence differ significantly,³ that the Defence disclosure obligations are regulated by Rule 78 of the Rules,⁴ and that "[t]he starting point of consideration of this issue [of ordering the defence to disclose evidence] is that the fundamental rights of the accused not to incriminate himself or herself and to remain silent must not be undermined by any obligations imposed on the defence."⁵
4. *Second*, in support of its Request, the Prosecution mainly refers to Single Judge Schmitt's 'Decision on the 'Prosecution Request for Disclosure of Material Underlying the Defence

¹ Prosecutor v. *Dominic Ongwen*, Prosecution, *Prosecution's Request for Disclosure of Material Provided to D-0133*, ICC-02/04-01/15-1428, 31 January 2019 ('Request'). The Defence also takes note of the CLRV's response in support of the Request that categorically re-litigates the Prosecution's submissions.

² Request, para. 2.

³ Prosecutor v. *Bemba et al.*, Single Judge, *Directions on Defence Presentation of Evidence*, ICC-01/05-01/13-1450, para. 2 (ii): "The disclosure obligations of the Defence and Prosecution differ significantly because of the particular role of the two parties have at trial. This said, the Defence must permit the Prosecution to inspect any books, documents, photographs and other tangible objects in their possession or control, which are intended for use by the Defence as evidence for purposes at trial."

⁴ Prosecutor v. *Bemba et al.*, Single Judge, *Decision on Prosecution Request to Order the Disclosure of Material in Possession of the Defence*, ICC-01/05-01/13-1820, para. 6: "From the wording of Rule 78 of the Rules, it is clear that only an item which the defence 'intends to use' falls under its disclosure obligations. The scope of the Rule 78 of the Rules is accordingly limited to the defence's choice of evidence. This narrow interpretation of the defence's disclosure obligations is in accordance with the required protection of the rights of the defence."

⁵ Prosecutor v. *Bemba et al.*, Single Judge, *Decision on Prosecution Request to Order the Disclosure of Material in Possession of the Defence*, ICC-01/05-01/13-1820, para. 6; *see also*, Prosecutor v. *Lubanga*, Trial Chamber I, *Decision on disclosure by the defence*, ICC-01/04-01/06-1235-Corr-Anx1, 20 March 2008, para. 12.

Psychiatric Expert Report’’.⁶ Upon closer analysis, it appears that such jurisprudence undermines rather than supports the Prosecution’s position.

5. The Prosecution cites Single Judge Schmitt’s ruling “that ‘sources in support of any expert witness statement must be clearly indicated and easily accessible to the other party upon request’ as this is necessary for the proper evaluation of the expert evidence and the ability to test or challenge the probative value of such evidence”⁷ and that “for the purpose of disclosure, there is no meaningful difference between an expert ‘using’ a sources and ‘relying upon’ that source.”⁸
6. The Prosecution’s Request is premised on the abovementioned ruling. It is plain, however, that Single Judge Schmitt in Decision 709 also takes into consideration the fact that the Defence experts “did consult the Clinical notes” and that “[t]he Report describes the Clinical Notes as a source of ‘collateral information about Mr Ongwen’s clinical situation’” and that “the Experts reviewed the Clinical Notes which – while not ‘relied upon’ as they ‘do not contain anything new or unknown’ – did however ‘confirm the Experts’ findings’.”⁹ These are the justifiable reasons why Single Judge Schmitt ordered the disclosure of the Clinical Notes.
7. However, such justifiable reasons are not present in the matter at hand. The Defence reiterates that it is not in the position to speculate whether or not material merely provided to D-0133 by the Defence was ever consulted, reviewed, relied upon, or used in support of her/his report.¹⁰
8. The Defence should not be urged by the Prosecution to concede on behalf of D-0133 what materials formed her/his expert opinion. D-0133 indicates and makes accessible to the Prosecution (and participants) materials that were relied upon or used in support of her/his expert report.¹¹ Beyond these items, it is not known to the Defence what material, if any, was, consulted, reviewed, relied upon, or used by D-0133.¹²
9. Thus, Decision 709 does not support the Prosecution’s current contention that the Defence is obliged to disclose all materials selected and provided to D-0133 to aid in the preparation of

⁶ Prosecutor v. *Dominic Ongwen*, Single Judge, *Decision on the ‘Prosecution Request for Disclosure of Material Underlying the Defence Psychiatric Expert Report’*, ICC-02/04-01/15-709, 21 February 2017 (‘Decision 709’).

⁷ Decision 709, para. 12; *see also*, Request, para. 11.

⁸ Decision 709, para. 13; *see also*, Request, para. 11.

⁹ Decision 709, para. 13.

¹⁰ Request, Confidential Annex A, p. 1.

¹¹ *See*, UGA-D26-0015-1022, footnotes 1-9.

¹² Request, Confidential Annex A, p. 1.

her/his expert report, irrespective of whether or not D-0133 ‘used’ or ‘relied upon’ said material in her/his report.¹³

10. It is the Defence position that the present disclosure issue differs legally and factually from the disclosure issue dealt with in Decision 709 and that such matters should be adjudicated on a case-by-case basis. The Prosecution is therefore in error to suggest that Decision 709¹⁴ supports the application it now makes.
11. *Third*, the Prosecution claims that if the material selected and provided by the Defence to D-0133 is not disclosed, then the Prosecution will have to conduct the examination “in the dark” and that it will seriously affect the Prosecution’s and the Chamber’s ability to test or challenge the basis and/or methodology on which D-0133 reaches her/his conclusions, and would therefore affect the assessment of the probative value of her/his expert report.¹⁵
12. The Defence avers that the Prosecution’s submissions are untenable and far-fetched. The Prosecution will not have to conduct D-0133’s examination “in the dark” because the Defence provided the Prosecution (and participants) with D-0133’s terms of reference,¹⁶ expert report,¹⁷ and curriculum vitae.¹⁸ In addition, as discussed above,¹⁹ D-0133 indicated the sources relied upon or used in the report, and also clarified her/his methodology on **page 2** of the report.
13. In sum, the Request lacks a justifiable legal basis and fails to give due consideration for Rule 78 disclosure limits and Mr Ongwen’s fundamental rights, which must not be undermined by any obligations imposed on the Defence.²⁰ For these reasons, it is respectfully submitted that it would be erroneous as a matter of law to order the Defence to disclose material that the Prosecution is not entitled to.

II. RELIEF SOUGHT

14. For the reasons stated above, the Defence requests that the Trial Chamber:

¹³ Request, para. 12; *see also*, CLRV Response, para. 6.

¹⁴ The Defence position also applies to Prosecution’s reference to jurisprudence of other international criminal tribunals, *see* Request, para. 10, footnote 11.

¹⁵ Request, paras 14-16.

¹⁶ UGA-D26-0015-1032.

¹⁷ UGA-D26-0015-1022.

¹⁸ UGA-D26-0015-1154.

¹⁹ *See above*, para. 8.

²⁰ *See above*, para. 3, footnotes 3, 4, and 5.

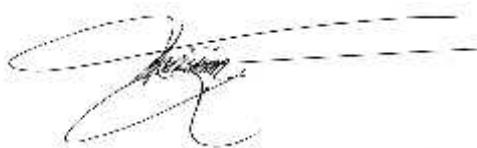
DISMISS the Request.

15. Or, if the Trial Chamber grants the Request, the Defence requests that the Trial Chamber, as a guarantor of the right to a fair and impartial trial:²¹

ORDER the Prosecution, CLRV, and LRV to disclose all material selected by the parties and provided to experts P-0422, P-0414, P-0446, P-0447, P-0445, PCV-0001, PCV-0002, PCV-0003, and V-0001, irrespective of whether or not the material was used or relied upon.

16. The Defence reserves its right under Article 67(1)(e) of the Statute to recall the Prosecution, CLRV, and LRV experts to examine them under the same conditions in respect of the newly disclosed materials, if any.

Respectfully submitted,



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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 6th day of February, 2019

At Kampala, Uganda

²¹ Article 64(2) of the Statute: The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused [...]; Article 67's *Chapeau*: In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, **in full equality**. (bold added).