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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

With Confidential Annexes A and B

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"

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. On 9 August 2016, the Defence notified the Chamber, Prosecution and Legal Representatives for Victims of its “intent to produce an article 31(1)(a) affirmative defence by early October 2016”.¹

2. On 6 December 2016, the Defence provided to the Chamber an undated “[REDACTED]” written by two [REDACTED], [REDACTED] (‘Defence Report’).² The Defence Report was “based on a series of interviews...held with Mr Dominic Ongwen at the Detention Centre of the International Criminal Court”³ and later registered in Ringtail and disclosed to the Prosecution and other participants.

3. In the Defence Report, [REDACTED] offered several [REDACTED] conclusions regarding the Accused’s [REDACTED], including that [REDACTED]”⁴ However, they also went further and made findings, *inter alia*: that “[i]n [their] considered opinion, Mr Dominic Ongwen is [REDACTED].”⁵

4. On 8 February 2017, the Registry, in accordance with a decision of the Chamber,⁶ transmitted a redacted version of a report written by Professor Joop de Jong, following his [REDACTED] examination of Dominic Ongwen as previously ordered⁷ by the Chamber (‘Chamber’s Report’).⁸

¹ ICC-02/04-01/15-518.

² ICC-02/04-01/15-637-Conf, para. 4.

³ UGA-D26-0015-0004.

⁴ UGA-D26-0015-0004 at 0017.

⁵ UGA-D26-0015-0004 at 0015 and 0016.

⁶ ICC-02/04-01/15-691-Conf.

⁷ ICC-02/04-01/15-637-Conf.

⁸ ICC-02/04-01/15-702-Conf-AnxII.

5. In the Chamber's Report, Professor De Jong, came to similar [REDACTED] conclusions regarding [REDACTED] as those expressed in the Defence Report (page 6). However, he also found (page 4) that [REDACTED] and that it is likely that Dominic Ongwen had (page 26) a [REDACTED].

6. Following the disclosure⁹ by the Defence of the records and other written material on which [REDACTED] relied, the Prosecution has now instructed three experts in the field of [REDACTED] to consider and report on the issues raised in this case by article 31(1)(a), the Defence Report and the Chamber's Report. They are: [REDACTED] ('Prosecution Experts'). Their *curricula vitae* can be found at Annex A to this filing.

7. There is an abundance of written and electronic material which will enable the Prosecution Experts to make an assessment of Dominic Ongwen's [REDACTED] at the relevant times, and of the issues to which article 31(1)(a) gives rise. However all three Prosecution Experts have indicated that they would wish to examine Dominic Ongwen face to face (as was done in the preparation of the Defence Report and the Chamber's Report). The Prosecution Experts have not suggested that the absence of such examinations would, in itself, prevent their providing reports, or invalidate their conclusions, but it would necessarily render them less complete.

8. The Prosecution has informed the Defence, both at a face to face meeting and by email that the Prosecution Experts wish to examine the Accused. The Defence has stated (and confirmed as recently as 12 May 2017) that the possibility of an examination by experts instructed by the Prosecution has been discussed with Dominic Ongwen and that, despite his willingness to be

⁹ ICC-02/04-01/15-776-Conf-AnxA, ICC-02/04-01/15-806-Conf-AnxA and ICC-02/04-01/15-818-Conf-AnxA.

examined by experts appointed by his own Defence team and by the Chamber, he “will not see Prosecution experts”. A more formal letter, at Annex B to this filing, remains unanswered.

9. An accused person should not be permitted to wield procedural rights as both a shield and a sword. To allow Dominic Ongwen to choose which experts may conduct their assessment with the benefit of a clinical interview, and to deny that evidentiary resource to experts engaged by the Prosecution, would unfairly weight the scales in favor of the Defence and put the fairness of the proceedings at risk. Perhaps more importantly, Dominic Ongwen’s lack of cooperation may result in the Chamber being deprived of valuable input—from highly qualified experts engaged by the Prosecution but instructed to act independently—that might assist the Chamber in discharging its mandate to establish the truth. The Chamber should prevent, in as much as it is able, this selective exercise of his rights by Dominic Ongwen.

10. The Prosecution submits that the Chamber should inform Dominic Ongwen that if he fails so to co-operate the Chamber may decline to take into consideration, or may place reduced weight upon any evidence advanced by or through expert witnesses upon whom the Defence seek to rely, and may draw such adverse inferences as it considers to be fair and appropriate.

Confidentiality

11. This document is filed confidentially, because it contains summaries of [REDACTED] reports resulting from examinations of Dominic Ongwen. A public redacted version is filed simultaneously. The Annexes to this submission are Confidential Annexes A and B.

The Law¹⁰

12. Articles 64(2) and 64(8)(b)(ii) require the Trial Chamber to ensure that the trial is fair and empower it to give directions (including directions concerning the submission of evidence) to this end.

13. Articles 64(6) and 69(3) and rule 84 permit the Trial Chamber a broad discretion in requesting the submission and ordering the production of evidence that it considers necessary for the determination of the truth and in ruling on any other relevant matters which arise during the course of the trial.

14. Rule 135(1) permits the Chamber to order a [REDACTED] examination of the Accused.

¹⁰ The full text of the articles of the Rome Statute and the Rules of Procedure and Evidence on which the Prosecution relies are readily available. They are not set out herein.

Submissions

Fairness

15. If Dominic Ongwen does not co-operate with examinations by the Prosecution Experts this may affect the fairness of the trial. One party, the Defence, will have been able to rely upon a significant evidential resource when seeking to persuade the Chamber of the correctness of its submissions which will have been denied to the other party, the Prosecution.

16. In short, the Prosecution submits that Dominic Ongwen cannot 'have it both ways'. He has chosen to speak, at length, to the [REDACTED] who compiled the Defence Report and the Chamber's Report. The Prosecution observes that approximately nine (out of 20) pages of the Defence Report are taken up with recording assertions made by the Accused and his accounts of events, and his state of mind, both during the charged period, and more recently.

17. Dominic Ongwen cannot reasonably expect to have these assertions and accounts, and the expert conclusions based upon them, taken into consideration by the Chamber if, at the same time, he is manipulating the system of evidence gathering, by refusing to provide the Prosecution Experts with equal access to relevant information which he himself has put at issue. The Prosecution submits that for the Chamber to require, or otherwise encourage, Dominic Ongwen to co-operate with examinations by the Prosecution Experts would not constitute an infraction of his right under article 67(1)(g) "...to remain silent, without such silence being a consideration in the determination of guilt or innocence" or be otherwise unfair.

18. Dominic Ongwen has not remained silent. He has spoken at length, and the Defence relies upon what he has said to support the affirmative defence which they intend to put forward. In this respect the Prosecution submits that the situation is analogous to that where an Accused person gives testimony, answering questions from his own advocate, and then refuses to answer the questions asked by the Prosecution.

19. The ruling of the Trial Chamber in the *Katanga and Ngudjolo* case is instructive in this regard. The Chamber ruled that: "...[O]nce an Accused voluntarily testifies under oath, he waives his right to remain silent and must answer all relevant questions, even if the answers are incriminating.... Moreover, if they decline to answer a permissible question, the Chamber may draw any adverse inferences as appropriate."¹¹

20. While the Prosecution does not contend that the Accused's willingness to submit to [REDACTED] examinations should have any effect upon his obligation to answer questions if he chooses to testify at trial, the Prosecution does submit that, by choosing to co-operate with the experts who compiled the Defence Report, Dominic Ongwen has, in effect, waived his right to refuse to co-operate on equal terms with the Prosecution Experts.

The Truth

21. The establishment of the truth is hampered if the production of the required evidence at any trial is not complete. If Dominic Ongwen persists in his refusal to co-operate with the Prosecution Experts the evidence at this trial will be incomplete, and the Chamber will be deprived of a significant evidential tool

¹¹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the request of the Defence for Mathieu Ngudjolo to obtain assurances with respect to self-incrimination for the accused, ICC-01/04-01/07-3153, 13 September 2011, paras. 7 and 8.

in seeking to determine the truth of any contention by the Defence that he is not responsible for any of the charged crimes by reason of mental incapacity.

22. The Prosecution Experts are [REDACTED] of high reputation and long experience. They have been engaged on the basis that they will provide objective reports. Specifically they have been instructed by the Senior Trial Lawyer with conduct of the case in these terms: "Your role as an expert witness will be to provide the judges with an objective, independent assessment of Mr Ongwen. I wish to make it clear that such expert evidence is regarded as evidence given under a duty to the Court and to justice, rather than to any party in the proceedings."

23. Further, the Prosecution observes that the Accused's refusal to submit to examination is apparently based solely on the (perceived) party affiliation of the Prosecution Experts. Although it is conventional shorthand to refer to 'Prosecution Experts' or 'Defence Witnesses', the jurisprudence is clear that "...witnesses do not "belong" to parties or participants; "...witnesses "are the property neither of the Prosecution nor of the Defence and [...] should therefore not be considered as witnesses of either party, but as witnesses of the Court" [...]."¹² In seeking to distinguish between the various expert witnesses as concerns the Accused's willingness to co-operate, the Defence is failing to observe this important principle.

24. In these circumstances, there can be no reasonable apprehension on the part of the Defence that the Prosecution Experts will adopt a partisan approach to their work. They will reach conclusions solely based on the material available

¹² *Prosecutor v. Bemba*, Decision on the "Prosecution Motion on Procedure for Contacting Defence Witnesses and to Compel Disclosure", ICC-01/05-01/08-2293, 4 September 2012, para. 23. See also *Prosecutor v. Lubanga*, Decision on the defence request for a witness to give evidence via video-link ICC-01/04-01/06-2285-Red, 9 February 2010, paras. 3, 16.

to them and their expertise. Their reports will be disclosed to the Defence (and available to the Chamber) whether or not the Prosecution seeks to rely upon them in evidence.

Remedies

25. Despite the provisions of rule 135, the Prosecution acknowledges that an accused person's co-operation with a [REDACTED] examination is not a matter which is readily amenable to compulsion. While a [REDACTED] examination can, in theory, be carried out under conditions of restraint, the verbal input from an accused person necessary to a thorough [REDACTED] examination cannot realistically be compelled. The Prosecution does not ask the Chamber to make any such order, under rule 135 or otherwise.

26. However, even if the Accused cannot or should not be ordered to co-operate in an examination by the Prosecution Experts, that does not mean that no consequences may properly flow from his refusal. In order to protect the fairness of the trial, and to give best effect to the truth-seeking function of the trial process, it is submitted that the Trial Chamber should clearly inform the Accused of at least the following two potential consequences:

- First, that the Chamber, in their deliberations prior to their decision under article 74, may consider that assertions made by Dominic Ongwen to [REDACTED], and the expert conclusions based upon them, should not be relied upon by the Chamber, or should be given less weight, in the light of his refusal to co-operate with examination by the Prosecution Experts.

- Second, that, if the Chamber does take these assertions and expert conclusions into account, it may also draw adverse inferences arising from Dominic Ongwen's refusal to co-operate with the Prosecution Experts.

Relief Requested

27. For the foregoing reasons, the Prosecution respectfully requests the Chamber to inform Dominic Ongwen that:

- i) the Chamber considers that it would be in the best position to determine his criminal responsibility under article 31(1)(a) after receiving reports from experts, by whomever retained or appointed, who have had full and equal access to all relevant information, including an in-person examination of the Accused in which he co-operates fully and forthrightly;
- ii) if he fails so to co-operate the Chamber may decline to take into consideration, or may place reduced weight upon any evidence advanced by or through expert witnesses upon whom the Defence seek to rely; and

- iii) if he fails so to co-operate the Chamber may draw such adverse inferences as it considers to be fair and appropriate.



Fatou Bensouda, Prosecutor

Dated this 7th day of June 2017
At The Hague, The Netherlands