

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-02/04-01/15
Date: **14 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
With Public Annex A**

**Public Redacted version of the Prosecution's Request for Disclosure of the Third
Report by Defence Experts, 13 February 2019, ICC-02/04-01/15-1446-Conf**

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 the Trial Chamber to order the Defence to disclose the recent report (“Third Report”) of the Defence Expert Witnesses D-0041 and D-0042 (“Defence Experts”). The Third Report was prepared by the Defence Experts on the basis of recent meetings with Mr Ongwen and relates to his mental health.¹

2. The Defence Experts are expected to testify towards the end of the Defence’s case.² Their first two reports focus on Mr Ongwen’s past and current mental health as a central issue affecting their methods, observations and recommendations and the purported medical basis for the grounds raised by the Defence under article 31(1)(a) of the Rome Statute.³ The Prosecution and the Chamber must be in a position to be able to fully test the Defence Experts’ reliability, methodology and conclusions. Disclosure of the Third Report will enable the Prosecution to examine the Defence Experts on all these matters on an informed basis. The fact that the Defence may not wish to rely upon any matters contained within the Third Report is irrelevant. Ultimately, the disclosure of the Third Report will ensure that the Chamber and the Parties have all the required information to establish the truth.

3. The Prosecution makes this request pursuant to articles 64(2), 64(3) and 69(3) of the Rome Statute and rules 78, 79(1)(b) and (4), 84 and 140(2)(b) of the Rules of Procedure and Evidence.

¹ [REDACTED].

² Currently scheduled as witnesses number [REDACTED] in Defence List of Witnesses (Defence’s email of 7 February 2019 at 17:08).

³ UGA-D26-0015-0004 and UGA-D26-0015-0948.

Confidentiality

4. This Request and its Annex A are classified as “Confidential” as they refer to filings and material of the same designation. The Prosecution will file a public redacted version of the Request.

Background

5. The first report of the Defence Experts, UGA-D26-0015-0004, was disclosed on 7 December 2016. The second, UGA-D26-0015-0948, was disclosed on 29 June 2018.

6. On 30 January 2019, the Prosecution learned of the existence of the Third Report. It was referenced in an email [REDACTED]; the relevant passage provided as follows: “[REDACTED].”⁴

7. On 7 February 2019, the Prosecution requested a copy of the Third Report from the Defence. The Defence refused its disclosure arguing that “it does not intend to use this report as evidence for the purposes at trial at this point. Therefore, it does not fall under the Defence disclosure obligations pursuant to Rule 78 of the Rules of Procedure [and] Evidence.”⁵

8. Having exhausted *inter partes* consultations, the Prosecution seizes the Trial Chamber for relief.⁶

⁴ [REDACTED].

⁵ See Annex A.

⁶ ICC-02/04-01/15-T-25-ENG, p. 3, ln. 22-25: “First, the parties and participants are expected to cooperate with each other in this case wherever possible; for example, when requesting disclosure, the Chamber expects the parties to first engage *inter partes* consultations before seizing the Chamber for relief.”

Submissions

9. The Defence Experts have made Mr Ongwen's past and current mental health a central issue in their anticipated testimonies in support of the article 31(1)(a) ground raised by the Defence.⁷ Consequently, the Defence cannot now pick and choose which information relating to the Defence Experts' examinations of Mr Ongwen to share with the Prosecution and the Chamber.

10. One of the fundamental principles guiding expert-witness-related disclosure is that an expert witness is expected to give his or her testimony "in full transparency of the established or assumed facts that he or she relies upon, and of the methods used when applying his or her knowledge, experience, or skills to form his or her expert opinion."⁸ The Chamber has previously ruled that "sources used in support of any expert witness statement must be clearly indicated and easily accessible to 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."⁹ Non-disclosure of the Third Report will result in a lack of the required transparency, seriously affecting the Parties' and the Chamber's ability to test or challenge the basis and/or the methodology on which the Defence Experts reached their conclusions.

11. The Defence's assertion that "it does not intend to use this report as evidence for the purposes at trial" is beside the point. The Defence has already chosen to rely

⁷ UGA-D26-0015-0004 and UGA-D26-0015-0948.

⁸ See, e.g., ICTY, *Prosecutor v. Gotovina*, Case No. IT-06-90-T, Decision on Disclosure of Expert Materials, 27 August 2009 ("Gotovina Decision"), para. 10; STL, *Prosecutor v. Ayyash*, Case No. STL-11-01/PT/PTJ, Decision on Sabra's Seventh Motion for Disclosure — Experts, 24 May 2013 ("Ayyash Decision"), para. 6; ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision on the Expert Witness Statements Submitted by the Defence, 27 January 2003 (*Galić Decision*), p. 3.

⁹ ICC-02/04-01/15-1443, para. 7; ICC-02/04-01/15-709, para. 12. The Chamber incorporated the following reference in its reasoning: "[t]he sources and methodology used in support of any proposed expert opinion must be clearly indicated and accessible. If such transparency is lacking, this will seriously affect the parties' and the Chamber's possibility to test or challenge the factual basis and the methodology on which the expert witness reached his or her conclusions, and thereby affect their possibility to assess the probative value of the proposed expert report." – see footnote 25 to ICC-02/04-01/15-709, para. 12.

on the observations of the Defence Experts pertaining to Mr Ongwen's mental health, including in the context of article 31(1)(a). The question therefore is simply whether the Defence must provide full disclosure of all of the reports where the Defence Experts make such observations, or whether it can be permitted to pick and choose.

12. Disclosure is also necessary to allow an informed and efficient examination of the Defence Experts. As held by this Trial Chamber "the Prosecution has a justifiable interest in exploring [an issue] on an informed basis," ruling against the Defence's contention that no prior disclosure was necessary given the possibility of exploring the topic during the testimony.¹⁰ Disclosure of the Third Report will expedite and streamline the examination of the Defence Experts. It will enable the Prosecution to prepare and consider the relevant issues related to all of their reports and any other relevant material beforehand and adjust its questioning and overall examination of both of the Defence Witnesses accordingly.¹¹

13. The Prosecution notes that no issue of privilege protects the Report since the Chamber has long made clear to Mr Ongwen that "any interaction between him and the Defence Experts was not covered by any privilege."¹² The Prosecution further notes that the Defence has previously conceded that [REDACTED].¹³ The Third Report clearly falls within that description.¹⁴

¹⁰ ICC-02/04-01/15-1388, paras. 13 and 14; ICC-02/04-01/15-1443, para. 8.

¹¹ ICC-02/04-01/15-1443, paras. 9-10.

¹² See ICC-02/04-01/15-709, para. 11.

¹³ ICC-02/04-01/15-658-Conf, para. 30; see also ICC-02/04-01/15-691-Conf, para. 21.

¹⁴ See ICC-02/04-01/15-1415-Conf-Red, para. 25: "Should the Defence Experts interview, which is being conducted simultaneous with this pleading, state that Mr Ongwen is not fit to stand trial, the remainder of the proceedings will be irreparably tainted."

Conclusion

14. For the reasons set out above, the Prosecution requests the Trial Chamber to order the Defence to disclose the Third Report of the Defence Experts.



Fatou Bensouda, Prosecutor

Dated this 14th February 2019
At The Hague, the Netherlands