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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

Confidential

**Prosecution's Response to the Defence's Request for Authorisation to Apply
Redactions to UGA-D26-0015-1219 (Third Defence Expert Report)**

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 Defence's request ("Request")¹ for authorisation to apply redactions to item UGA-D26-0015-1219 ("Third Report") should be denied.

2. The Defence argues that certain findings and opinions of the mental health experts who will testify in support of their case, D-0041 and D-0042 ("Defence Experts"), are so personal and sensitive that the opposing party cannot be allowed to see them.

3. In fact, all of the information at issue has already been shared not only with the Trial Chamber, but more importantly with the Defence Experts, who are not the Accused's treating physicians but rather witnesses in this case. Moreover, the Third Report is inextricably linked to the first two reports of the Defence Experts. It expands upon their assessment of the Accused's current mental health status, an issue which the Defence has placed at the heart of its Article 31(1)(a) claim. All Parties and Participants must have access to the full content of the Third Report in order to be in a position to meaningfully test the Defence Experts' reliability, methodology, and conclusions.

Confidentiality

4. The Prosecution files this response confidentially pursuant to regulation 23*bis* of the Regulations of the Court, because it responds to a confidential filing and makes references to confidential information. A public redacted version ("PRV") will be filed as soon as a PRV of the Request becomes available.

¹ ICC-02/04-01/15-1485-Conf-Red ("Request").

Background

5. On 7 December 2016, the Defence disclosed the first report of the Defence Experts.² The report included a specific section entitled “present mental state.”³

6. In a letter dated 13 April 2018, the Defence instructed the Defence Experts to “re-evaluate Mr Ongwen.”⁴ As the Single Judge has noted, the terms of reference included in this letter specifically linked the current state of health of the accused to the testimony of the Defence Experts.⁵

7. On 4 June 2018, the Defence filed its final lists of witnesses and evidence.⁶ D-0041 and D-0042 were included on the list of witnesses,⁷ and the first report of the Defence Experts was included on the list of evidence.⁸ The Defence also notified the Chamber that it had requested the Defence Experts to “further examine” Mr Ongwen and requested authorisation from the Chamber to provide an “updated” report from the Defence Experts, given that “the nature of this evidence is crucial” and “of potentially dispositive importance.”⁹

8. On 29 June 2018, the Defence disclosed the second report of the Defence Experts.¹⁰ The second report “contains a section concerning the accused’s state of mind during the proceedings and numerous sections on his current state of health.”¹¹ The Defence Experts indicated that “[t]his report has been prepared for

² UGA-D26-0015-0004.

³ UGA-D26-0015-0004 at 0013-0014.

⁴ UGA-D26-0015-1035 at 1036-1037.

⁵ ICC-02/04-01/15-1475, paras. 14-16.

⁶ ICC-02/04-01/15-1272-Conf-AnxA; ICC-02/04-01/15-1272-Conf-AnxB.

⁷ ICC-02/04-01/15-1272-Conf-AnxA, p. 2.

⁸ ICC-02/04-01/15-1272-Conf-AnxB, p. 4, row 76.

⁹ ICC-02/04-01/15-1272-Conf-Red, paras. 19-20.

¹⁰ UGA-D26-0015-0948.

¹¹ ICC-02/04-01/15-1475, paras. 15 (citing UGA-D26-0015-0948, from 0961 to 0970).

consideration alongside our first report” and that they had “included information from the first report into [the second] report for comparison where appropriate.”¹²

9. On 2 July 2018, the Defence filed summaries of the expected witness testimony of D-0041 and D-0042.¹³ These summaries stated that D-0041 and D-0042 would discuss, *inter alia*, their “mental examination of Mr Ongwen.”¹⁴ It further specified that the Defence Experts would discuss how particular issues detected in their “examinations” of Mr Ongwen led them to determine that he suffers from dissociative disorders and dissociative amnesia.¹⁵

10. On 4 July 2018, the Defence requested leave to add the second report of the Defence Experts to its list of evidence, noting that it “is highly relevant and probative in proving the Defence’s Article 31(1)(a) affirmative defence.”¹⁶

11. On 24 July 2018, the Chamber approved the Defence’s request for leave to add the second report to the Defence’s list of evidence.¹⁷

12. On 28 January 2019, the Defence sent an *ex parte* email to the Chamber, attaching the Third Report¹⁸ and stating that it should consider this report as a “supplement to previously filed reports from these Defence Experts.”¹⁹ The Defence have since characterised this use of the word “supplement” as a “semantic mistake”,²⁰ but the authors of the report itself gave it the title “Supplemental Report of 25 January 2019”, which makes it clear that there was no such mistake.

¹² UGA-D26-0015-0948 at 0949.

¹³ ICC-02/04-01/15-1296-Conf-AnxA, pp. 2-5.

¹⁴ ICC-02/04-01/15-1296-Conf-AnxA, p. 2, para. 6 (D-0041) and p. 5, para. 6 (D-0042).

¹⁵ ICC-02/04-01/15-1296-Conf-AnxA, p. 2, para. 7(a) (D-0041) and p. 5, para. 7(a) (D-0042).

¹⁶ ICC-02/04-01/15-1299-Red, para. 14.

¹⁷ ICC-02/04-01/15-1314, para. 10.

¹⁸ ICC-02/04-01/15-1462-Conf-AnxA.

¹⁹ ICC-02/04-01/15-1462-Conf-AnxA.

²⁰ ICC-02/04-01/15-1478-Red, para. 22.

13. On 6 March 2019, the Chamber ordered the Defence to disclose the Third Report within 10 days.²¹

14. On 18 March 2019, the Prosecution was notified of the Request and its Confidential Annex A, containing the Third Report. Both items contained extensive redactions.²²

The Request Should Be Rejected Because the Parties and Participants Must Have Access to the Totality of the Third Report In Order to Meaningfully Question the Defence Experts

15. As the Defence acknowledges,²³ the Single Judge found that the Third Report “must be disclosed in order to allow the other parties to meaningfully question the Expert Witnesses.”²⁴ The Defence nevertheless suggests that it may decide which information is relevant to such questioning and withhold any information that purportedly “falls outside of that basis.”²⁵ However, as the Prosecution has previously argued,²⁶ the Defence, having selected the Defence Experts as testifying expert witnesses, cannot now pick and choose which information relating to their examinations of Mr Ongwen to share with the Parties and Participants. Those conducting the questioning referred to by the Chamber must have access to all the information in order to decide what questions to ask.

16. As it stands, the Defence has proposed redactions to the Report, including redactions to almost the entirety of the “background” section, over half of the

²¹ ICC-02/04-01/15-1475, para. 19.

²² See, e.g., Request, para. 12 (“The first paragraph of the Report contains [REDACTED]. The Defence submits that the matters contained in this paragraph implicate [REDACTED]. Therefore, disclosure of this material to the Prosecution and LRVs will violate [REDACTED]. Given that the information contained in the paragraph is not relevant to the proceedings or necessary for meaningful questioning of D-0041 and D-0042, the need to conduct a fair and expeditious trial does not outweigh the social and legal value of [REDACTED].”).

²³ Request, para. 11.

²⁴ ICC-02/04-01/15-1475, para. 19.

²⁵ Request, para. 11.

²⁶ ICC-02/04-01/15-1446-Red, para. 9.

“history” section, and substantial portions of the sections entitled “findings of mental status assessment” and “summary of clinical findings.”²⁷ The Prosecution submits that all of the information included in the Third Report is relevant and necessary for the Prosecution’s preparation, since any statements that the Defence Experts deemed worthy of inclusion in the Third Report will reflect on the quality of their methodology and reasoning.

17. Within the constraints of the existing redactions, it is already clear that the Defence Experts made statements in the Third Report that warrant further inquiry, including the assertion that “Mr. Ongwen is seriously ill with active psychotic mental illness.”²⁸ Two of the Prosecution mental health experts have come to a diametrically opposite conclusion.²⁹ This is one of the principal issues in the case. The Prosecution must have the opportunity to fully assess the reasoning employed to substantiate such assertions, and it is impossible to do so without access to the complete report. At present, for example, the Prosecution cannot tell if the statement about Mr Ongwen’s purported “active psychotic mental illness” is supported by any other information in the Third Report besides what is presently available to the Parties and Participants.

18. The Defence’s arguments for redaction in relation to the specific sections of the Third Report are themselves heavily redacted in the version of the Request

²⁷ See ICC-02/04-01/15-1485-Conf-AnxA, pp. 1-4.

²⁸ ICC-02/04-01/15-1485-Conf-AnxA, p. 4.

²⁹ P-0446, UGA-OTP-0280-0786 at 0811, paras. 103-104 (“Based on a review of all the material I have been provided with, I do not consider that there is evidence to show that Mr Ongwen is currently, or has at any time, suffered from Posttraumatic Stress Disorder, Depressive Disorder (although he has ‘mild’ transient depressive symptoms during his incarceration), Dissociative Disorder or any other significant mental illness or disorder. I therefore do not agree with the conclusions reached by [D-0041 and D-0042], with regard to Mr Ongwen’s mental state, either currently or at the time of the alleged offences.”); P-0447, UGA-OTP-0280-0674 at 0700-0701 (finding, “[a]fter a careful consideration of all available materials”, that “there is no sufficient evidence to justify the diagnosis of a particular mental disorder” and “it is dubious that one of the suggested diagnoses by [D-0041 and D-0042] to classify Mr. Ongwen’s current mental health status is applicable”).

available to the Parties and Participants.³⁰ However, the Prosecution below attempts to respond to the specific points raised, to the extent possible.

19. First, the Defence argues that certain information should be redacted because it is “not relevant to the proceedings or necessary for meaningful questioning of D-0041 and D-0042.”³¹ This is a remarkable assertion, given that the Defence Experts themselves chose to include the information in their report, which necessarily implies that they considered it relevant. Furthermore, as noted above, the Defence is not the arbiter of what is relevant or necessary for the Prosecution’s questioning of the Defence Experts. In any case, even if the passages proposed for redaction were somehow not directly relevant to the proceedings, they would be contextually relevant given that the Defence Experts considered them important enough to include in the Third Report. Indeed, if the Defence Experts cannot reliably determine what information is important to their own analyses and opinions, that fact is likely to impact upon the Trial Chamber’s assessment of their credibility and reliability as expert witnesses.

20. Along the same lines, the circumstances also suggest that the Defence itself considers the Third Report, at least as a whole, to be closely related to these proceedings. As the Chamber has noted, the Defence itself clearly considers the Third Report to be “inextricably linked” with D-0041 and D-0042’s second report.³²

21. The Defence have indicated that the Defence Experts will testify about their mental state examination of Mr Ongwen.³³ It is unrealistic to think that the Defence Experts could exclude their most recent observations of Mr Ongwen when testifying about their assessment of Mr Ongwen’s mental state. If Mr Ongwen’s present mental

³⁰ See Request, para. 12-18.

³¹ Request, paras. 12; *see also id.*, paras. 19, 23.

³² ICC-02/04-01/15-1475, para. 18.

³³ ICC-02/04-01/15-1296-Conf-AnxA, p. 2, para. 6 (D-0041) and p. 5, para. 6 (D-0042).

state is relevant at all to the Article 31(1)(a) issue, then all of the Defence Experts' observations are relevant. To exclude certain matters contained in the report from the scope of the Defence Experts' testimony would be artificial and inconsistent with their duty to give an objective account of the matters. It would also be contrary to the Chamber's duty to establish the truth.

22. Second, contrary to the Defence submission, the Chamber's assessment of proposed redactions to the rule 135 report of Professor de Jong was not a "similar situation" to this one.³⁴ Professor de Jong was tasked by the Chamber with providing independent therapeutic recommendations to help the ICC Detention Centre address any mental condition or disorder affecting Mr Ongwen.³⁵ In that situation, when considering the disclosure of "highly personal information" mentioned in Professor de Jong's report, the Chamber was concerned to "avoid unfairly treating Mr Ongwen for his cooperation with the examining psychiatrist."³⁶ Here, the situation is entirely different because the examining experts are not Court-appointed doctors or Mr Ongwen's treating physicians; rather, they are witnesses whom the Defence is calling to persuade the Chamber that Mr Ongwen should not bear criminal responsibility for his actions. Given the particular status of the Defence Experts, and their importance to the Defence's Article 31(1)(a) claim, the Prosecution must be in a position to assess the totality of their submissions, including in relation to Mr Ongwen's present mental health status.

23. Third, to the extent that the Third Report contains information that the Chamber previously allowed to be redacted from other documents in other contexts,³⁷ that is not a valid basis for allowing such information to be redacted in the present context. The Defence made a considered decision to ask its testifying experts

³⁴ Request, para. 14.

³⁵ ICC-02/04-01/15-691-Conf, para. 1.

³⁶ ICC-02/04-01/15-691-Conf, para. 7.

³⁷ See Request, paras. 18, 20-22, 25-29.

to provide a new report, despite the following factors: (a) having no guarantee of medical privilege in relation to the most recent examination,³⁸ (b) having been clearly informed in the past that no privilege applied to Mr Ongwen's interactions with the Defence Experts,³⁹ and (c) having been informed that the Trial Chamber did not consider the Defence Experts to be appropriate rule 135 experts, given that they had been "nominated" as witnesses by the Defence and "had already produced material, by order and account of the Defence, into the proceedings."⁴⁰ If the Defence was intent on protecting the secrecy of certain information at all costs, it should not have invited the Defence Experts to conduct an additional examination and prepare a supplemental report, or sent that report to the Trial Chamber.

24. The Defence similarly argues that some information redacted from the Third Report is too "sensitive and personal" to be shared with the Prosecution and LRVs.⁴¹ This argument is no longer available to them. By making the choice to invite the Defence Experts to examine the Accused on multiple occasions, the Defence has necessitated the disclosure of this information. An expert witness cannot testify regarding his or her opinions formed on the basis of information which has not been shared with those who have a right to question that expert in the proceedings.

25. As noted above, the question of the scope of medical confidentiality in relation to Mr Ongwen's treating physicians or any rule 135 expert appointed to make therapeutic recommendations is entirely different to the question presented here. Accordingly, the Chamber's decision to apply a balancing test in those situations cannot be assumed to apply equally in the present situation. In any event, even if such a test were appropriate here, the balance would weigh in favour of disclosure of the information, given that the information provided by the Defence

³⁸ See ICC-02/04-01/15-1475, para. 2.

³⁹ ICC-02/04-01/15-709, para. 11.

⁴⁰ ICC-02/04-01/15-1412-Red, paras. 10-11.

⁴¹ Request, paras. 24, 29.

Experts relates to critical contested issues, such as the Accused's fitness to stand trial and the Defence's article 31(1)(a) claim, and must be subject to scrutiny and informed questioning by the Prosecution and Legal Representatives of the Victims.

26. Fourth, even though redactions have sometimes been allowed in other, distinguishable, situations, the Chamber also has emphasised that such redactions could be lifted later if the Defence makes any submissions that take "undue advantage of the fact that portions of [the item at issue] are redacted."⁴² The Prosecution submits that such a situation has arisen here. Specifically, the Defence first attempted to use the Third Report to advocate for its preferred outcome, on an *ex parte* basis,⁴³ but now seeks to shield the Third Report from being fully disclosed to the Parties and Participants, largely on the basis that it contains information that had been redacted in other contexts.⁴⁴

27. Fifth, the Defence's argument that a particular comment by Mr Ongwen in paragraph 7 of the Third Report should be redacted as it "has no relevance to the proceedings"⁴⁵ is unfounded. Any comment that was considered important enough to warrant a mention by the Defence Experts under the heading of "findings of mental status assessment"⁴⁶ is relevant to these proceedings. Furthermore, given that the Defence itself asserts that the Defence Experts have taken Mr Ongwen's comment "out of context",⁴⁷ that portion of the Third Report may be particularly important to the Prosecution's exploration of the Defence Experts' credibility and reliability during questioning at trial.

⁴² ICC-02/04-01/15-691-Conf, para. 36.

⁴³ See ICC-02/04-01/15-1462-Conf-AnxA (communicating to the Trial Chamber a so-called "Supplementary Report of 25 January 2019" and indicating that the Chamber should "consider this report as a supplement to previously filed reports from these Defence Experts").

⁴⁴ See Request, paras. 14, 18, 21-22, 25-29.

⁴⁵ Request, para. 23.

⁴⁶ See ICC-02/04-01/15-1485-Conf-AnxA, p. 2 (UGA-OTP-0015-1219 at 1221).

⁴⁷ Request, para. 23.

Conclusion

12. For the reasons set out above, the Request should be rejected.



Fatou Bensouda, Prosecutor

Dated this 25th day of March 2019
At The Hague, the Netherlands