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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

**SITUATION IN UGANDA
IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN***

Public

**Decision on the ‘Prosecution Request for Disclosure of Material Underlying the
Defence Psychiatric Expert Report’**

To be notified, in accordance with Regulation 31 of the Regulations of the Court, to:

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Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court ('Court') in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64(2) and 64(3)(c) of the Rome Statute ('Statute') and Rules 78, 79 and 84 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on the "Prosecution Request for Disclosure of Material Underlying the Defence Psychiatric Expert Report"'.

I. Background

1. On 7 June 2016, the Single Judge directed the Defence to notify the Chamber and the participants of any intention to raise a ground for excluding criminal responsibility pursuant to Article 31 of the Statute, and to disclose the names of the witnesses and any other evidence upon which it intends to rely to establish the defence(s).¹
2. On 9 August 2016, in compliance with the Single Judge's order, the Defence filed a notification stating that it was pursuing a defence under Article 31(1)(a) of the Statute and had contracted experts to examine Mr Ongwen to determine if he suffered from a mental disease or defect that destroyed his capacity to appreciate the unlawfulness or nature of his conduct, or capacity to control his conduct to conform to the requirements of the law.² The Defence subsequently provided the names of the four expert witnesses it was considering in support of its defence under Article 31(1)(a) of the Statute.³ Among these expert witnesses are the two experts in the fields of psychiatry and psychology retained by the Defence who have been referred to in public filings as D26-41 and D26-42 ('Defence Experts').

¹ Decision on 'Prosecution request to order the Defence to comply with rule 79', ICC-02/04-01/15-460.

² Defence Notification Pursuant to Rule 79(2) of the Rules of Procedure and Evidence, ICC-02/04-01/15-518.

³ Annex A to Defence Updates to ICC-02/04-01/15-517 and ICC-02/04-01/15-518, 25 August 2016, ICC-02/04-01/15-528-Conf-AnxA.

3. On 5 December 2016, the Chamber received the 'Defence Request for a Stay of Proceedings and Examinations Pursuant to Rule 135 of the Rules of Procedure and Evidence',⁴ whereby the Defence, *inter alia*, stated that the Defence Experts 'have determined that [...] Mr Ongwen was not aware of the wrongfulness of any actions during his time in the bush'.⁵ The Defence emphasised that the Defence Experts 'did not rely solely on their interviews with Mr Ongwen', but that, '[i]n pursuit of a proper medical diagnosis', they also interviewed four persons known to Mr Ongwen and 'reviewed psychiatric and psychological reports generated by the ICC-DC medical officers'.⁶
4. On 6 December 2016, the Defence provided to the Chamber the 'Psychiatric report' by the Defence Experts⁷ ('Report'),⁸ which was disclosed to the other participants the day after.
5. On 16 January 2017, the Office of the Prosecutor ('Prosecution'), after attempting to resolve the matter with the Defence on an *inter partes* basis,⁹ filed a request seeking that the Chamber order the Defence to disclose the material underlying the Report ('Request').¹⁰ In the Request the Prosecution seeks an order for the disclosure by the Defence of: (i) the medical records from the ICC Detention Centre that were consulted by the Defence Experts and are referred to in the Report ('Clinical Notes') and (ii) the notes of the Defence Experts taken during their interviews of four associates of Mr Ongwen ('Handwritten Notes').¹¹ The Prosecution argues that this measure is needed to ensure the disclosure of all

⁴ Defence Request for a Stay of Proceedings and Examinations Pursuant to Rule 135 of the Rules of Procedure and Evidence, ICC-02/04-01/15-620-Conf, also publicly available in redacted form (ICC-02/04-01/15-620-Red).

⁵ ICC-02/04-01/15-620-Red, para. 78.

⁶ ICC-02/04-01/15-620-Red, para. 59.

⁷ UGA-D26-0015-0004.

⁸ Email from the Defence to the Chamber, 6 December 2016 at 17.27.

⁹ See ICC-02/04-01/15-653-Conf-AnxA.

¹⁰ Prosecution Request for Disclosure of Material Underlying the Defence Psychiatric Expert Report, ICC-02/04-01/15-653-Conf.

¹¹ Request, ICC-02/04-01/15-653-Conf, para. 1.

information necessary for the determination of the truth¹² and is consistent with the Chamber's decision that, in relation to Article 31 defences, the Defence has an obligation to make disclosures sufficient to enable the Prosecution to adequately prepare and respond.¹³ The Prosecution indeed submits that '[it] cannot properly evaluate the Defence Expert Report and prepare its response without access to the sources underlying it'.¹⁴

6. On 27 January 2017, the Defence filed its response seeking that the Request be denied ('Response').¹⁵
7. On the same day, the legal representatives of the participating victims submitted a joint filing supporting the Request and seeking that the concerned material also be disclosed to them as it is essential in understanding and weighing the Report, assessing the claims made by the Defence and properly expressing the views and concerns of the participating victims on the matter.¹⁶
8. As the Request concerns two different categories of material underlying the Report, the Single Judge will address them separately below, together with the specific submissions made by the participants.

II. Request for disclosure of the Clinical Notes

9. The Prosecution requests disclosure of the Clinical Notes that were consulted by the Defence Experts as they have been referred to in the Report and characterised by the Defence as 'confirm[ing]' the Experts' findings.¹⁷ The

¹² Request, ICC-02/04-01/15-653-Conf, para. 2.

¹³ Request, para. 3, with reference to Decision on 'Prosecution request to order the Defence to comply with rule 79', 7 June 2016, ICC-02/04-01/15-460.

¹⁴ Request, ICC-02/04-01/15-653-Conf, para. 3.

¹⁵ Defence Response to Prosecution Request for the Disclosure of Medical Records, ICC-02/04-01-15-679-Conf.

¹⁶ Joint Response to the "Prosecution Request for the Disclosure of Material Underlying the Defence Psychiatric Expert Report", ICC-02/04-01/15-671-Conf.

¹⁷ Request, ICC-02/04-01/15-653-Conf-AnxA, para. 4, with reference to Defence Request for a Stay of the Proceedings and Examinations Pursuant to Rule 135 of the Rules of Procedure and Evidence, 5 December 2016, ICC-02/04-01/15-620-Red, para. 59.

Prosecution submits that ‘having raised the issue of Mr Ongwen’s mental health, and Mr Ongwen having waived medical confidentiality with regard to the instructed Defence Experts, the Defence cannot now selectively invoke that confidentiality to avoid disclosing the Clinical Notes to the Chamber or the Prosecution’.¹⁸

10. The Defence argues that this request should be denied ‘until such time that an official Article 31(1) submission has been proffered’,¹⁹ as the notification made by the Defence pursuant to Rule 79(1)(b) of the Rules ‘was an indication of the possible intent, not a submission of a defence pursuant to Article 31(1)(a)’.²⁰ In addition, the Defence refers to Regulation 156 of the Regulations of the Registry which, in its view, ‘grants the detainees at the ICC-DC complete control over their medical records when not incapacitated or a danger to the person or persons at the ICC-DC’.²¹ Finally, the Defence states that its Experts did not actually rely on the Clinical Notes for the Report.²²
11. At the outset, the Single Judge clarifies that disclosure of the Clinical Notes is not barred by Regulation 156 of the Regulations of the Registry. In this regard, the Single Judge finds it sufficient to recall, as recently observed, that the Chamber’s exercise of statutory obligations and prerogatives under the Statute and the Rules – including the responsibility to ensure the fair and expeditious conduct of the proceedings under Article 64(2) of the Statute – can in no way be obstructed or limited by the Regulations of the Registry, including Regulation 156.²³ In addition, on the general issue of whether the Clinical Notes may be protected by

¹⁸ Request, ICC-02/04-01/15-653-Conf, para. 4.

¹⁹ Response, ICC-02/04-01/15-679-Conf, para. 2.

²⁰ Response, ICC-02/04-01/15-679-Conf, para. 29.

²¹ Response, ICC-02/04-01/15-679-Conf, para. 31.

²² Response, ICC-02/04-01/15-679-Conf, para.35. See also paras 30 and 34.

²³ Decision on Defence Request for Non-Disclosure or Redactions to Report of Chamber Appointed Expert, 3 February 2017, ICC-02/04-01/15-691-Conf, para. 19. See also Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Order to provide Appointed Expert with access to Mr Gbagbo's medical record, 20 October 2015, ICC-02/11-01/15-302, para. 16.

any ‘medical privilege’, the Single Judge notes that Mr Ongwen voluntarily consented to the disclosure of the Clinical Notes to the Defence and the Defence Experts. Mr Ongwen has been aware since the pre-trial stage of the case and throughout the present proceedings that any interaction between him and the Defence Experts was not covered by any privilege.²⁴ Indeed, the Defence Experts have been involved in the present case with a view to determining the viability of the ground for excluding criminal responsibility under Article 31(1)(a) of the Statute and producing a report to be potentially used by the Defence in the proceedings. In this context, Mr Ongwen’s voluntary choice to share the Clinical Notes with the Defence Experts (and his Defence) for the purposes of developing a defence under Article 31(1)(a) of the Statute in the present proceedings excludes any reasonable expectation of privacy on his part with respect to the information contained in this material.

12. However, the fact that an order for disclosure of the Clinical Notes is not precluded by the legal instruments of the Court does not automatically entail that such disclosure must indeed be ordered. The Single Judge thus turns to the question whether disclosure of the Clinical Notes is warranted. In this regard, the Single Judge agrees with the international criminal jurisprudence to the effect that ‘sources used 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.²⁵

²⁴ This has been made clear to the Defence since the pre-trial stage of the case (see *e.g.* email sent on behalf of the Single Judge of the Pre-Trial Chamber to the Defence and the Registry on 1 February 2016 at 16.24) and reiterated by this Chamber (*e.g.* Decision on issues related to the restriction of communications of Dominic Ongwen, 30 May 2016, ICC-02/04-01/15-450-Conf; email on behalf of Trial Chamber IX dated 14 September 2016 at 14.25).

²⁵ ICTY, Trial Chamber, *Prosecutor v. Galić*, Decision on the expert witness statements submitted by the Defence, IT-98-29-T, 27 January 2003, p. 6. See also *e.g.* ICTY, *Prosecutor v. Gotovina*, Decision on disclosure of expert materials, IT-06-90-T, 27 August 2009, para. 10 (‘[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

13. As recalled above, in its Response the Defence emphasises that the Defence Experts did not actually rely upon the Clinical Notes for their Report and that, therefore, their disclosure is not necessary.²⁶ The Single Judge is not persuaded by this argument. It is undisputed that the Defence Experts did consult the Clinical Notes. The Report describes the Clinical Notes as a source of ‘collateral information about Mr Ongwen’s clinical situation’ and states that the Clinical Notes contain information that is ‘to a large extent similar to’ and in ‘agreement’ with the Defence Experts’ own information.²⁷ The Defence itself also stated 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’.²⁸ The Single Judge agrees with the Prosecution in this regard that ‘for the purpose of disclosure, there is no meaningful difference between an expert “using” a source and “relying upon” that source’.²⁹ The Single Judge also recalls that the Defence has previously characterised the information contained, *inter alia*, in the Clinical Notes as ‘necessary to inform [the] Defence experts for the Article 31 defences’ and that their disclosure to the Defence Experts was required ‘to inform their assessment’.³⁰

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’); ICTY, *Prosecutor v. Dragomir Milošević*, Decision on admission of expert report of Robert Donia, IT-98-29/1-T, 15 February 2007, para. 8; ICTY, *Prosecutor v. Radovan Karadžić*, Decision on Prosecution motion to exclude the expert report of Kosta Čavoški, IT-98-S/18-T, 5 April 2013, para. 22; STL, *Prosecutor v. Ayyash*, Decision on Sabra’s seventh motion for disclosure – experts, STL-11-01/PT/PTJ, 24 May 2013, para. 6.

²⁶ Response, ICC-02/04-01/15-679-Conf, paras 30 and 35.

²⁷ Report, UGA-D26-0015-0004 at 0005.

²⁸ Defence Request for a Stay of the Proceedings and Examinations Pursuant to Rule 135 of the Rules of Procedure and Evidence, 5 December 2016, ICC-02/04-01/15-620-Red, para. 59.

²⁹ Request, ICC-02/04-01/15-653-Conf, para. 23.

³⁰ Defence for Request for Assistance from Trial Chamber IX Regarding the Defences under Article 31 and Access to Documentation Necessary for the Defence of Mr Ongwen, 23 September 2016, ICC-02/04-01/15-540-Conf-Exp (a redacted confidential *ex parte* is also available to the Prosecution, ICC-02/04-01/15-540-Conf-Exp-Red), paras 33 and 46.

14. At this point, the Single Judge turns to the Defence argument that the request for disclosure of the Clinical Notes should be denied ‘until such time that an official Article 31(1) submission has been proffered’.³¹
15. In this respect, the Single Judge recalls that in August 2016, the Defence indicated that it was pursuing a defence under Article 31(1)(a) of the Statute and had contracted for this purpose the Defence Experts.³² In its filing of 9 August 2016, the Defence also clarified that ‘should the possibility of such a defence not arise, the Defence shall inform the Chamber, Prosecution and Legal Representatives of Victims as such’.³³ Later, in its filing of 5 December 2016, the Defence stated that the Defence Experts had determined that Dominic Ongwen ‘was not aware of the wrongfulness of any actions during his time in the bush’.³⁴
16. In the absence of any contrary information from the Defence, the assumption therefore remains that the Defence intends to raise the ground for excluding criminal responsibility under Article 31(1)(a) of the Statute. The Single Judge notes that, contrary to the Defence argument, its disclosure obligations in respect of an Article 31 defence are not contingent on an ‘official Article 31(1) submission’, which is not formally required by the legal instruments of the Court, nor can such disclosure be deferred pending the Defence formally raising a ground for excluding criminal responsibility. This is particularly the case given

³¹ Response, ICC-02/04-01/15-679-Conf, para. 2. This argument is repeated by the Defence, with some variations, throughout the entire Response. See *e.g.* para. 29 (‘the Clinical Notes, at this time, are protected by medical privilege [...] Until such time that the Defence filed an official Article 31(1)(a) submission, the Prosecution is barred from disclosure’), para. 32 (‘[t]he Defence has not filed official submissions pursuant to Article 31(1)(a) of the Rome Statute’), para. 34 (‘Mr Ongwen, so long as an official Article 31(1)(a) submission has not been filed, has a reasonable expectation of privacy to the Clinical Notes’) and para. 36 (‘[i]f detainees must wonder if their meetings with medical professionals might be disclosed if their Defence team is required to give notice about a possible affirmative defence before a final judgment is made about an affirmative defence, the entire ICC suffers’).

³² Defence Notification Pursuant to Rule 79(2) of the Rules of Procedure and Evidence, 9 August 2016, ICC-02/04-01/15-518; Defence Updates to ICC-02/04-01/15-517 and ICC-02/04-01/15-518, 25 August 2016, ICC-02/04-01/15-528 and its confidential annex.

³³ Defence Notification Pursuant to Rule 79(2) of the Rules of Procedure and Evidence, ICC-02/04-01/15-518, para. 5.

³⁴ Defence Request for a Stay of the Proceedings and Examinations Pursuant to Rule 135 of the Rules of Procedure and Evidence, 5 December 2016, ICC-02/04-01/15-620-Red, para. 78.

that, as already observed, the ground for excluding criminal responsibility under Article 31(1)(a) of the Statute ‘could generally be advanced on the basis of information solely within the Defence’s control’.³⁵

17. As recalled, the Defence, pursuant to Rule 79 of the Rules, was already directed, *inter alia*, to provide any evidence upon which it relies upon to establish any ground excluding criminal responsibility before the commencement of the trial.³⁶ Having now received the Report, which was explicitly commissioned for the purpose of determining the viability of the ground excluding criminal responsibility under Article 31(1)(a) of the Statute and then voluntarily placed on the record by the Defence, the Single Judge sees no reason why the disclosure of the Clinical Notes which were consulted by the Defence Experts as part of their mandate should be postponed. In this regard, the Single Judge recalls his previous observation that Rule 79 of the Rules ‘require[s] the Defence to provide disclosures which enable the Prosecution to adequately prepare and to respond’ to any affirmative defence.³⁷
18. In light of these considerations, and noting Rule 79(4) of the Rules, the Single Judge concludes that the fair and expeditious conduct of the proceedings requires the Defence to disclose the Clinical Notes forthwith in order for the other participants to adequately assess and respond to the Report by the Defence Experts.

³⁵ Decision on ‘Prosecution request to order the Defence to comply with rule 79’, 7 June 2016, ICC-02/04-01/15-460, para. 15.

³⁶ Decision on ‘Prosecution request to order the Defence to comply with rule 79’, 7 June 2016, ICC-02/04-01/15-460.

³⁷ Decision on ‘Prosecution request to order the Defence to comply with rule 79’, 7 June 2016, ICC-02/04-01/15-460, para. 18.

III. Request for disclosure of the Handwritten Notes

19. The Report relies on information obtained from the Defence Experts' interviews of four witnesses – conducted between April and September 2016 – that are referred to in the Report as 'collateral sources'.³⁸ The Report however does not indicate the identity of these four witnesses nor does it specify which one of them provided any particular piece of information,³⁹ including when verbatim quotations are reported.⁴⁰
20. Upon receipt of the Report, the Prosecution requested the Defence, on an *inter partes* basis, to disclose the identity of the four witnesses and the reports of their interviews with the Defence Experts.⁴¹ The Defence provided the names of the four witnesses and indicated that the Defence Experts had not recorded the meetings nor had they taken any statement from the witnesses.⁴² Rather, in the Defence's words, '[a]ll that is left from the Experts interviews are their handwritten notes'.⁴³
21. The Prosecution requests disclosure of these Handwritten Notes as they 'appear to be the only record that may reflect on the issue of what exactly each of these four witnesses said to the Defence Experts'.⁴⁴ Indeed, according to the Prosecution, '[w]ithout access to these notes, the Prosecution cannot properly test for witness bias and any related impact on the reliability and probative value of the Defence Expert Report'.⁴⁵ The Defence states that it has no objection to supplying the Prosecution with 'a key which states which statement are

³⁸ See Report, UGA-D26-0015-0004 at 0005, 0020-0023.

³⁹ See e.g. Report, UGA-D26-0015-0004 at 0010 ('Witnesses described Dominic Ongwen as diligent, fearless, but kind, likeable and being a good administrator').

⁴⁰ See e.g. See e.g. Report, UGA-D26-0015-0004 at 0010 ('Witnesses reported that "Mr Dominic Ongwen liked to counsel those in trouble and he was not a vicious person toward his colleagues"').

⁴¹ Annex A to the Request, ICC-02/04-01/15-653-Conf-AnxA, p. 2.

⁴² Annex A to the Request, ICC-02/04-01/15-653-Conf-AnxA, p. 3.

⁴³ Annex A to the Request, ICC-02/04-01/15-653-Conf-AnxA, p. 3.

⁴⁴ Request, ICC-02/04-01/15-653-Conf, para. 5.

⁴⁵ Request, ICC-02/04-01/15-653-Conf, para. 5.

attributed to which interview',⁴⁶ and that therefore there is no actual need to disclose the Handwritten Notes.⁴⁷

22. The Single Judge is of the view that the disclosure of the names of the witnesses relied upon by the Defence Experts and of a 'key' identifying which statement in the Report was made by each witness is sufficient for the Chamber and the other participants to properly assess the sources of the Report. This conclusion is reinforced by the Defence assurance that the Handwritten Notes were actually reproduced in the Report.⁴⁸ Provided that the Defence submits this 'key' to the Chamber and the other participants without delay, it is therefore unnecessary to order the Defence to disclose any additional materials in its possession with respect to the interviews of the four witnesses.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the request for disclosure of the Clinical Notes and **DIRECTS** the Defence to proceed to the immediate disclosure of the Clinical Notes to the other participants; and


REJECTS the request for disclosure of the Handwritten Notes.

⁴⁶ Response, ICC-02/04-01/15-679-Conf, para. 39.

⁴⁷ Response, ICC-02/04-01/15-679-Conf, para. 40.

⁴⁸ Response, ICC-02/04-01/15-679-Conf, para. 40.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt
Single Judge

Dated 21 February 2017

At The Hague, The Netherlands