

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 28 June 2017

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

Public

**Decision on Prosecution Request in Relation to its Mental Health Experts
Examining the Accused**

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

The Office of the Prosecutor

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Counsel for the Defence

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Legal Representatives of Victims

Joseph Akwenyu Manoba
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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 31(1)(a), 64 and 69 of the Rome Statute ('Statute') and Rules 63(2), 84, 113 and 135 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Prosecution Request in Relation to its Mental Health Experts Examining the Accused'.

1. On 16 December 2016, the Chamber appointed an expert ('Chamber appointed expert') and ordered that a psychiatric examination of Mr Ongwen be conducted with a view to: (i) making a diagnosis as to any mental condition or disorder that Dominic Ongwen may suffer at the present time; and (ii) providing specific recommendations on any necessary measure/treatment that may be required to address any such condition or disorder at the detention centre.¹ The expert wrote a report following this examination ('Chamber Expert Report'),² and the Chamber ordered that it be disclosed to the participants with certain redactions on grounds that it is 'essential for the other participants in this trial to know how Mr Ongwen's health conditions may impact the trial going forward'.³
2. On 7 June 2017, the Prosecution filed a submission indicating that its three retained mental health experts wished to examine the accused and that Mr

¹ Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen, 16 December 2016, ICC-02/04-01/15-637-Red, page 18 (confidential version notified same day).

² Annex II to the Registry's Transmission of Expert's Report concerning Mr Ongwen's Psychiatric Examination pursuant to Decision ICC-02/04-01/15-691-Conf, 8 February 2017, ICC-02/04-01/15-702-Conf-AnxII. The Chamber Expert Report itself was first transmitted to the Chamber without redactions on 18 January 2017. Annex B to the Defence Request for Non-Disclosure of the Expert Report, or in the Alternative, Submission of Proposed Redactions to the Expert Report Authored by Chamber Expert Professor Doctor de Jong, ICC-02/04-01/15-658-Conf-Exp-AnxB.

³ 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. 4.

Ongwen objects to this examination ('Request').⁴ The Prosecution requests the Chamber to inform Mr Ongwen that:

- i. the Chamber considers that it would be in the best position to determine his criminal responsibility under Article 31(1)(a) of the Statute 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.⁵
3. On 19 June 2017, the Prosecution sent the Chamber certain email correspondence related to the Request. This correspondence, to which the other parties and participants were copied, conveys one further request to the Chamber.⁶ This further request is to permit the Prosecution to communicate with the Chamber appointed expert in an effort to secure the 'hand written records made in the course of [the] examination of Mr Ongwen' and 'raw scores of the psychological measures' referred to in the Chamber Expert Report.⁷
4. Later that day, the defence for Mr Ongwen ('Defence') responded to the Request, seeking that it be rejected in full ('Response').⁸

⁴ Prosecution request under articles 64, 69 and rule 84 in respect of medical examination of the Accused by mental health experts instructed by the Prosecution, ICC-02/04-01/15-860-Red (with two annexes; confidential version of filing notified same day).

⁵ Request, ICC-02/04-01/15-860-Red, para. 27.

⁶ Email from the Prosecution to the Chamber and other participants, 19 June 2017 at 12:09.

⁷ The Prosecution's email notes other matters communicated by its experts. However, it is understood that the rest of the email contains no further requests for the Chamber, but merely conveys information communicated by its experts and makes suggestions or invitations for the defence for Mr Ongwen to meet with the experts or provide materials.

⁸ Defence Response to the Prosecution Application to Conduct a Medical Examination on Mr Ongwen (ICC-02/04-01/15-860-Conf), ICC-02/04-01/15-883-Red (redacted version notified 21 June 2017).

5. As for the relief sought in the Request, it is noted at the outset that the Single Judge cannot compel the accused to participate in a psychiatric examination and the Prosecution does not request such a course in its relief sought. The evidence foreshadowed in the Request is to be understood as being collected only in possible response to a mental disease or defect defence for acts and conduct during the charged time period from 1 July 2002 to 31 December 2005.
6. The Single Judge notes that Rule 63(2) of the Rules permits broad discretion as to how evidence is considered, allowing Chambers to ‘freely assess all evidence submitted in order to determine its relevance or admissibility [...]’. But the Single Judge also recalls the general approach to considering evidence adopted in the ‘Initial Directions on the Conduct of the Proceedings’. As a general rule, the Chamber in this case will not consider the relevance, probative value, or potentially prejudicial effects of any evidence until deliberating its judgment pursuant to Article 74(2) of the Statute.⁹
7. The Single Judge considers that nothing in the Prosecution’s submissions justify making an exception to this general rule. The Chamber will not give abstract guidance on what kind of evidence would or would not be probative in relation to a potential mental disease or defect defence.¹⁰ The Chamber will also not give advance considerations as to how it might consider Defence evidence if the Prosecution’s experts are not given an opportunity to interview the accused. Whether or how the Chamber will take into account Mr Ongwen’s refusal to be interviewed will be decided in the course of deliberating its judgment.
8. As for the additional Prosecution request to secure materials underlying the Chamber Expert Report, the Single Judge is also unconvinced that disclosure of

⁹ Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497, paras 24-26.

¹⁰ The Defence has given notice that it may raise such a defence, but has not made a final decision to present this defence or lead evidence supporting it. Response, ICC-02/04-01/15-883-Conf, para. 2, referring to Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules of Procedure and Evidence, 9 August 2016, ICC-02/04-01/15-518.

these materials is warranted. The Chamber Expert Report was not ordered to prove or disprove a mental disease or defect defence. Rather, this report was ordered to ensure Mr Ongwen's ongoing health during the trial proceedings, and Mr Ongwen spoke freely with the Chamber's expert on this understanding.

9. The Prosecution has access to a redacted version of the Chamber Expert Report, and may share this with its experts no differently than any other information in the case record which it can access and considers necessary to share. However, the Single Judge considers that disclosing the materials underlying the report to the Prosecution's experts gives the Chamber Expert Report an adversarial dimension which goes beyond its original purpose. Noting Rule 84 of the Rules, the Single Judge does not consider that disclosing this information 'facilitates the fair and expeditious conduct of the proceedings', and will not order or otherwise arrange for disclosure of these materials.
10. Although the Prosecution's requests are rejected, the Single Judge emphasises that any affirmative defence will be considered with scrutiny. The present ruling is also without prejudice to the Chamber later appointing experts to verify the viability of any grounds for excluding criminal responsibility.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the relief sought in the Request and the further request for disclosure of materials underlying the Chamber Expert Report.

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



Judge Bertram Schmitt, Single Judge

Dated 28 June 2017

At The Hague, The Netherlands