

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 6 March 2019

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 for Disclosure of a Report produced by
Defence Experts**

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

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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 64(2) and 64(3)(c) of the Rome Statute ('Statute') and Regulation 23 *bis* of the Regulations of the Court, issues the following 'Decision on Prosecution Request for Disclosure of a Report produced by Defence Experts'.

I. Procedural history and submissions

1. On 8 January 2019, the defence for Mr Ongwen ('Defence'), in reaction to a medical incident concerning the accused which occurred on the previous day, contacted the Chamber via an *ex parte* e-mail.¹ It requested, *inter alia*, that D-41 and D-42 ('Expert Witnesses') be allowed to communicate with the accused 'with medical privilege about this recent situation', in order to make an assessment of the accused with the aim of helping the Registry in the care for the accused.
2. The Chamber informed the Defence that no permission by the Chamber is required for the Expert Witnesses to speak to the accused and that it will not prospectively assess any privilege for the requested communications.²
3. On 9 January 2019, the Defence requested, in an *ex parte* e-mail to the Chamber, a temporary stay of proceedings until its Expert Witnesses have examined the accused.³ The Chamber ordered the Defence to make a formal *inter partes* filing in order to rule on its request for a temporary stay of proceedings.⁴
4. On 11 January 2019, after having received the submissions of the parties, the Chamber adjourned the proceedings for two weeks in an e-mail, with reasons to

¹ E-mail from the Defence to Trial Chamber IX Communications on 8 January 2019, at 9:03.

² E-mail from Trial Chamber IX Communications on 8 January 2019, at 11:41.

³ E-mail from the Defence to Trial Chamber IX Communications on 9 January 2019, at 16:56.

⁴ E-mail from Trial Chamber IX Communications on 9 January 2019, at 17:45.

follow.⁵ In its decision containing the reasons it explained that the two week adjournment was granted solely for the accused to receive any necessary medical treatment and rejected an adjournment in order to enable the Expert Witnesses to examine the accused.⁶

5. On 28 January 2019, the Defence provided a report produced on 25 January 2019 ('Report') by the Expert Witnesses to the Chamber via an *ex parte* e-mail.⁷ According to the Report, its objectives were '[t]o assess Mr. Ongwen's current mental status', '[t]o determine if Mr. Ongwen is able to participate in the proceedings of his trial' and '[t]o make recommendations based on the results of mental status assessment'. It provides a short section on the accused's medical history, a description of the assessment of the accused and concludes with a summary of the clinical finding and a list of recommendations, *inter alia*, stating that the accused 'is not fit to participate in the court proceedings'.
6. On the same day, the Chamber replied to the Defence by noting that it should liaise with the Registry regarding the health and safety of the accused and advised the Defence that '[s]hould the Defence seek to use the information in this report for any future relief sought, it must file a formal request and make this report available to the other participants.'⁸
7. On 13 February 2019, the Office of the Prosecutor ('Prosecution') filed a motion for the Defence be ordered to disclose the Report prepared by the Expert Witnesses ('Request').⁹ It argues that the accused's state of health is part of the

⁵ E-mail from Trial Chamber IX Communications on 11 January 2019, at 16:41

⁶ Decision on Defence Request to Order an Adjournment and a Medical Examination, 16 January 2019, ICC-02/04-01/15-1412-Conf, paras 8-11. A public redacted version was filed on the same day, ICC-02/04-01/15-1412-Red.

⁷ E-mail from the Defence to Trial Chamber IX Communications on 28 January 2019, at 14:05.

⁸ E-mail from Trial Chamber IX Communications on 28 January 2019, at 15:31.

⁹ Prosecution's Request for Disclosure of the Third Report by Defence Experts, ICC-02/04-01/15-1446-Conf, with confidential annex A. A public redacted version of the Request and annex were filed on 14 February 2019.

anticipated testimony of the Expert Witnesses¹⁰ and that it therefore needs to be provided with the Report in order to effectively ‘test or challenge the basis and/or the methodology on which the [Expert Witnesses] reached their conclusions.’¹¹

8. Further, the Prosecution submits that the Expert Witnesses’ interaction with the accused do not fall under the medical privilege and that, since the Report is related to the accused’s fitness to stand trial, it must be disclosed.¹²
9. On 18 February 2019, the Common Legal Representative of Victims (‘CLR V’, together with the Legal Representative of Victims ‘Victim Representatives’) filed its response, supporting the Request and submitting that the Report should also be made available to the Victim Representatives (‘CLR V Response’).¹³
10. On 25 February 2019, the Defence filed its response, submitting that the Request be rejected (‘Response’).¹⁴ It argues that it does not intend to use this item for purposes at trial at this point, that it was intended only for informational purposes to assist the Registry in the care for the health of the accused and does therefore not fall under disclosure obligations of Rule 78 of the Rule of Procedure and Evidence (‘Rules’).¹⁵

II. Analysis

11. As a preliminary matter, the Single Judge notes that no public version of the CLR V Response has been filed, despite the announcement in the motion to do so

¹⁰ Request, ICC-02/04-01/15-1446-Red, para. 9.

¹¹ Request, ICC-02/04-01/15-1446-Red, para. 10.

¹² Request, ICC-02/04-01/15-1446-Red, para. 13.

¹³ CLR V Response to the “Prosecution’s Request for Disclosure of the Third Report by Defence Experts”, ICC-02/04-01/15-1450-Conf.

¹⁴ Defence Response to Prosecution’s Request for Disclosure of the Third Report by Defence Experts, ICC-02/04-01/15-1462, with confidential annex A.

¹⁵ Response, ICC-02/04-01/15-1462, para. 2.

‘in due course’.¹⁶ The Single Judge reminds all parties and participants to file public redacted versions of their confidential submissions concurrently. The CLRV is ordered to either request reclassification of its response as ‘public’ or file a public-redacted version thereof within 3 days of notification of this Decision.

12. The Chamber notes its prior jurisprudence regarding the disclosure obligations of the Defence with regard to its witnesses.¹⁷ It reiterates the rationale that these disclosures were done to enable the non-calling party to ‘meaningfully question this witness’.¹⁸ In this sense the Chamber previously ordered the Defence to disclose material which was in some manner foundational for the report of an expert witness¹⁹ or material which was provided by the Defence to the expert in order to produce his or her report.²⁰
13. While the Defence’s intention to rely on a specific item as evidence for the purposes at trial is therefore relevant for Rule 78 of the Rules, it cannot be the sole factor for the determination whether a disclosure obligation exists.
14. The Chamber notes that the terms of reference by the Defence to the Expert Witnesses state under the heading ‘objectives and scope’ that two areas should be addressed for the production of the report, one of them being ‘...(2) mental health issues related to Mr Ongwen’s participation in the proceedings.’²¹ This is explained further by requesting the Experts Witnesses to assess the effect the

¹⁶ CLRV Response, ICC-02/04-01/15-1450-Conf, para. 4.

¹⁷ Decision on the ‘Prosecution Request for Disclosure of Material Underlying the Defence Psychiatric Expert Report’, 21 February 2017, ICC-02/04-01/15-709; Decision on Prosecution Request for Disclosure of Material Provided to Defence Expert, 11 February 2019, ICC-02/04-01/15-1443.

¹⁸ ICC-02/04-01/15-1443, para. 8.

¹⁹ ICC-02/04-01/15-709, paras 12-13.

²⁰ ICC-02/04-01/15-1443, paras 8-9.

²¹ UGA-D26-0015-1035, at 1036.

proceedings had on the accused and providing several instructions regarding the assessment of the current state of health.²²

15. The second report produced by the Expert Witnesses ('Expert Report'), which is intended to be used during trial, states that the assessment of the accused was done under the terms of reference.²³ It contains a section concerning the accused's state of mind during the proceedings²⁴ and numerous sections on his current state of health.²⁵
16. With the terms of reference the Defence has therefore linked the current state of health of the accused to the testimony of the Expert Witnesses and instructed them that it be part of the Expert Report. By ordering the Expert Witnesses to make the (further) Report on the accused's state of health the Defence created a document which is necessarily connected to the Expert Report since it covers, partly, the same subject.
17. The Chamber's e-mail sent in reply to the Defence's informal provision of the Report does not contradict this finding. The Chamber just indicated that, should the Defence have any intention to make use of the Report, it must make a formal request and disclose it to the other parties. This does not mean that the Report is exempted from any disclosure obligation, which is governed by a separate procedure which, *inter alia*, requires an *inter partes* discussion before seizing the Chamber.
18. The Defence cannot instruct expert witnesses it intends to call to produce a report on a topic which is essential to the experts' testimony and then argue that it is for informational purposes only. It is clear that the Defence itself considers the two reports inextricably linked. When providing the Chamber with the

²² UGA-D26-0015-1035, at 1036 and 1037.

²³ UGA-D26-0015-0948, at 0950.

²⁴ UGA-D26-0015-0948, at 0955.

²⁵ UGA-D26-0015-0948, from 0961 to 0970.

Report, it indicated that the Chamber should 'consider this report as a supplement to previously filed reports from [the Expert Witnesses].'²⁶

19. Accordingly, the Single Judge finds that the Report must be disclosed in order to allow the other parties to meaningfully question the Expert Witnesses. The Defence is instructed to disclose the Report within 10 days of the reception of this decision.


FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

ORDERS the CLRV to either request reclassification of its response as 'public' or file a public-redacted version thereof in accordance with paragraph 11;

GRANTS the Request; and

ORDERS the Defence to disclose the Report under the conditions provided in paragraph 19.

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



Judge Bertram Schmitt, Single Judge

Dated 6 March 2019

At The Hague, The Netherlands

²⁶ ICC-02/04-01/15-1462-Conf-AnxA.