

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **3 May 2019**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

Public redacted version of

**Decision on Defence Request for Authorization to Apply Redactions to Item UGA-
D26-0015-1219**

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

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**Victims Participation and Reparations
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Others

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64(6)(c) and 64(7) of the Rome Statute ('Statute') and Rules 73(1) and 81(1) of the Rules of Procedure and Evidence ('Rules') issues the following 'Decision on Defence Request for Authorization to Apply Redactions to Item UGA-D26-0015-1219'.

I. Procedural history and submissions

1. On 8 January 2019, the 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 (the '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 28 January 2019, the Defence provided a report produced on 25 January 2019 (the 'Report') by the Expert Witnesses to the Chamber via an *ex parte* e-mail.³
4. On 13 February 2019, the Office of the Prosecutor (the 'Prosecution') requested the disclosure of the Report prepared by the Expert Witnesses.⁴ On 6 March 2019, the Single Judge ordered the Defence to disclose the Report within 10 days.⁵
5. On 12 March 2019, the Defence requested leave to appeal the decision ordering disclosure of the Report.⁶ This request was rejected by the Single Judge on 15 March 2019.⁷

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 28 January 2019, at 14:05.

⁴ 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.

⁵ Decision on Prosecution Request for Disclosure of a Report Produced by Defence Experts, ICC-02/04-01/15-1475.

6. On 18 March 2019, the Defence provided a redacted version of the Report and requested that the Chamber authorise the proposed redactions (the ‘Request’).⁸ The Defence submits that some proposed redactions implicate lawyer-client privilege and attorney work-product privilege and thus their disclosure would violate Rule 73(1) of the Rules.⁹ Other redactions have been proposed on the basis that they contain information that has been redacted in other contexts.¹⁰ The Defence additionally submits that the remaining redactions have been proposed as they relate to information that is of a sensitive and personal nature and has no relevant bearing on the Defence Expert’s expertise or conclusions.¹¹
7. On 25 March 2019, the Prosecution responded to the Request arguing that the authorisation to apply redactions should be denied (the ‘Response’).¹² The Prosecution submits that all the information in the Report ‘is necessary and relevant for the Prosecution’s preparation’ since any statements in the Report will reflect on that quality of the Expert Witnesses’ methodology and reasoning¹³ as well as their credibility and reliability.¹⁴ The Prosecution also asserts that the question of medical confidentiality is not implicated in the present situation as the Expert Witnesses’ are not Mr Ongwen’s treating physicians, but rather witnesses called on behalf of the Defence.¹⁵ It submits that, to the extent that the Report contains information that is too ‘sensitive and personal’ or was previously redacted in other contexts, such considerations do not form a valid basis for the present redactions as the Expert Witnesses cannot testify ‘on the basis of

⁶ Defence Request for Leave to Appeal ‘Decision on Prosecution Request for Disclosure of a Report produced by Defence Experts’ (ICC-02/04-01/15-1475), notified 6 March 2019, ICC-02/04-01/15-1478-Conf. A public redacted version was filed on 19 March 2019, ICC-02/04-01/15-1478-Red.

⁷ Decision on Defence Request for Leave to Appeal a Decision on Disclosure of a Defence Experts’ Report, ICC-02/04-01/15-1482.

⁸ Defence Request for Authorization to Apply Redactions to Item UGA-D26-0015-1219, ICC-02/04-01/15-1485-Conf-Exp, Defence only (with confidential annex A and confidential *ex parte* annexes B and C). A confidential redacted version was filed the same day, ICC-02/04-01/15-1485-Conf-Red.

⁹ Request, ICC-02/04-01/15-1485-Conf-Red, paras 12-17, 19.

¹⁰ Request, ICC-02/04-01/15-1485-Conf-Red, paras 18, 21, 22, 25-27, 28.

¹¹ Request, ICC-02/04-01/15-1485-Conf-Red, paras 20, 22, 23, 24, 25, 28.

¹² Prosecution’s Response to the Defence’s Request for Authorisation to Apply Redactions to UGA-D26-0015-1219 (Third Defence Expert Report), ICC-02/04-01/15-1490-Conf, paras 1, 12.

¹³ Response, ICC-02/04-01/15-1490-Conf, paras 15-17.

¹⁴ Response, ICC-02/04-01/15-1490-Conf, paras 19-21, 27.

¹⁵ Response, ICC-02/04-01/15-1490-Conf, paras 22-23, 25.

information which has not been shared with those who have a right to question the expert during proceedings’.¹⁶

II. Analysis

8. As a preliminary matter, the Single Judge notes that the confidential-redacted version of the Request is overly redacted. For instance, paragraph 6 of the Request, which contains part of the submissions on the applicable law, is redacted. The Defence also extensively redacted its submissions on the requested redactions. The Single Judge does not see any justification of these redactions. The abstract argumentation of why certain information should be redacted – which does not reveal the specific content – does not need to be redacted. Accordingly, the Single Judge instructs the Defence to file a lesser confidential-redacted version within five days of the notification of this decision. Equally, the Defence is instructed to file a public-redacted version of its Request within five days of the notification of this decision. The Single Judge also instructs the Prosecution to file a public-redacted version, or request reclassification, of the Response within five days of the notification of this decision.

9. The Single Judge will discuss the proposed redactions according to the basis provided for the redaction.

1. Proposed redactions based on lawyer-client privilege or attorney work-product privilege

10. A number of redactions in the background and history section of the Report are proposed on the basis that they implicate lawyer-client privilege and attorney work-product protections. The Defence has been informed, previously, that, in general, no privilege applies to their interactions with the Expert Witnesses as engaging these witnesses to testify with respect to Article 31(1)(a) defences excluded any reasonable expectation of privacy.¹⁷ In the present circumstances, the Single Judge finds no reason to make an exception to this general rule. This is particularly so as the proposed redactions do not implicate this form of privilege. Most of the information the Defence seeks to redact on the basis of privilege simply recounts how, at the request the Defence, the Experts

¹⁶ Response, ICC-02/04-01/15-1490-Conf, paras 23, 26.

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, para. 11.

Witnesses came to visit Mr Ongwen in January 2019. This information does not detail any communications that Mr Ongwen had with his counsel and, as already noted, was voluntarily provided to third parties who are slated to testify before the Chamber regarding Mr Ongwen's mental health. Therefore the protections afforded under Rule 73(1) of the Rules are not implicated in the present circumstances.

11. The background section of the Report also does not constitute protected attorney work-product pursuant to Rule 81(1) of the Rules. First, the background section was written by the Expert Witnesses and not prepared by a party, its assistants or representatives. Second, while the background section makes oblique reference, without any further detail, to reports from the Defence that indicated that Mr Ongwen's health had deteriorated in January 2019, this submission has been openly made by the Defence to the Chamber, parties, and participants.¹⁸ Accordingly, such mental impressions, conclusions, or opinions of Mr Ongwen's counsel are not afforded protection under Rule 81(1) of the Rules.

2. Information that has been redacted in other contexts

12. The Defence justifies a number of redactions on the basis of that the information has already been redacted by the Chamber in other contexts. This fact alone does not mandate that the information be redacted in the present circumstances. The Single Judge must consider whether the redactions remain justified. In reviewing these redactions, the Single Judge finds that most of these redactions remain necessary at this point in time as they detail Mr Ongwen's current medical treatment. The Single Judge will therefore order that such information be redacted from the Report.
13. There are certain details regarding Mr Ongwen's health incident in January 2019 that the Defence requests be redacted on the basis that they have been redacted in a Registry filing.¹⁹ However, the Defence has already made this information available to the

¹⁸ Defence Request for a Stay of Proceedings and for Trial Chamber IX, pursuant to Rule 135 of the Rules of Procedure and Evidence, to Order a Medical Examination of Mr Ongwen, 10 January 2019, ICC-02/04-01/15-1405-Conf-Exp (with confidential and *ex parte* annex A), paras 40-43. A confidential redacted version of the filing and its annex was filed the same day, ICC-02/04-01/15-1405-Conf-Red and ICC-02/04-01/15-1405-Conf-AnxA-Red. A public redacted version of the filing was filed on 22 January 2019, ICC-02/04-01/15-1405-Red2.

¹⁹ Request, ICC-02/04-01/15-1485-Conf-Red, paras 18a, 21, 26, *referring to* Confidential Redacted Version of 'Registry Report on a Self-harm Incident Occurring within the ICC Detention Centre', 8 January 2019, ICC-02/04-01/15-1403-Conf-Exp, 21 January 2019, ICC-02/04-01/15-1403-Conf-Red, paras 4, 6.

Prosecution and participants.²⁰ The Single Judge therefore finds no reason for maintaining these redactions.

3. Proposed redactions of information of a sensitive and personal nature and of marginal relevance

14. Most of the information that the Defence proposes should be redacted because it is of a sensitive and personal nature concerns Mr Ongwen's relationship [REDACTED]. This information, however, has already been made known to the parties and participants by the Defence.²¹ The Single Judge accordingly finds no reason to redact such information.
15. With regard to information that could be 'sensationalised'²² in paragraph seven of the third page of the Report, the Single Judge trusts that the parties and participants will treat such comments with the weight it deserves. Redactions cannot not be justified on the basis that information may be 'sensationalised' or simply because the Defence considers the information to be marginally relevant. By including the comment, the Expert Witnesses have attached some significance to the information in the context of their report. This significance or lack thereof can be further explored during trial proceedings should the Report be used at trial.
16. Finally, the Single Judge finds that information concerning the health of individuals other than the accused should be redacted at this point in time to protect the privacy of these persons. Redactions will therefore be made to paragraph 9 of the Report.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

ORDERS the Defence to file a confidential-redacted and public-redacted version of its Request in accordance with paragraph 8 above;

ORDERS the Prosecution to file a public-redacted version, or request reclassification, of the Response in accordance with paragraph 8 above;

GRANTS the redactions as set out in confidential Annex A of this decision; and

²⁰ See Confidential Redacted Version of 'Defence Request for a Stay of the Proceedings and for Trial Chamber IX, pursuant to Rule 135 of the Rules of Procedure and Evidence, to Order a Medical Examination of Mr Ongwen', filed on 10 January 2019, 10 January 2019, ICC-02/04-01/15-1405-Conf-Red, paras 13, 41.

²¹ See e.g., E-mail from the Defence to Trial Chamber IX Communications on 11 January 2019, at 15:03.

²² Request, ICC-02/04-01/15-1485-Conf-Red, para. 23.

REJECTS the remainder of the Request.

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



Judge Bertram Schmitt, Single Judge

Dated 3 May 2019

At The Hague, The Netherlands