

**Cour
Pénale
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**International
Criminal
Court**

Original: English

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

Date: **10 May 2019**

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***

**Public with Confidential Annex A and
Confidential *Ex Parte* Annexes B and C available to the Defence only**

**Public Redacted Version of
'Defence request for authorization to apply redactions to item UGA-D26-0015-1219'
(ICC-02/04-01/15-1485-Conf-Exp), filed 18 March 2019**

Source: Defence for Dominic Ongwen

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. Having regard to Article 67(1) of the Rome Statute ('Statute'), Rules 73(1), 78, 81(1) of the Rules of Procedure and Evidence ('Rules'), Regulation 103 of the Regulations of the Court ('RoC'), and Article 9(2) and (3) of the Code of Professional Conduct for counsel ('Code') the Defence for Dominic Ongwen ('Defence') requests the Trial Chamber IX ('Trial Chamber') for authorisation to apply redactions to item UGA-D26-0015-1219 ('Report').
2. As per the instructions in this case regarding redactions,¹ the Defence is providing the Report, with the redactions proposed in this request,² concurrently with this application.

II. CONFIDENTIALITY

3. This request is filed *ex parte* Defence only. The Defence has filed a confidential redacted version of this request simultaneously. The reason for the *ex parte* submissions is that making the submissions available to the Prosecution and Legal Representatives for Victims' ('LRVs') would render the redactions ineffective and the request null.

III. APPLICABLE LAW

4. Pursuant to Article 67(1) of the Statute the accused has a right to "to communicate freely with counsel of the accused's choosing in confidence"³, "to conduct the defence [...] through legal assistance of the accused's choosing"⁴, "to obtain the attendance and examination of witnesses" and "raise defences and to present other evidence"⁵, and "[n]ot to be compelled to testify or to confess guilt and to remain silent".⁶
5. Pursuant to Rule 78 of the Rules of Procedure and Evidence ('RPE'): "[t]he defence shall permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the

¹ ICC-02/04-01/15-224, para. 7.

² The Defence notes that the Trial Chamber has the unredacted copy of the Report, which was attached to the email of 28 January 2019, subject line "Report on Mr Ongwen – Ex parte Trial Chamber IX only", sent at 14h05.

³ Article 67(1)(b).

⁴ Article 67(1)(d).

⁵ Article 67(1)(e).

⁶ Article 67(1)(g).

possession or control of the defence, which are intended for use by the defence as evidence for the purposes of the confirmation hearing or at trial.”

6. Rule 81 of the Rules, titled “Restrictions on disclosure” provides at subsection (1) that:

Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.

7. Pursuant to Regulation 103 of the RoC, titled “Health and safety of detained persons”, the Registrar is required to “protect the health and the safety of detained persons”⁷ and “meet the needs of detained persons with disabilities”⁸

8. Article 9 of the Code, titled “Counsel-client relationship” stipulates in subsection (2) that:

In his or her relations with the client, counsel shall take into account the client’s personal circumstances and specific needs, in particular where counsel is representing victims of torture or of physical, psychological or sexual violence, or children, the elderly or the disabled.

9. And, in subsection (3) that:

Where a client’s ability to make decisions concerning representation is impaired because of mental disability or for any other reason, counsel shall inform the Registrar and the relevant Chamber. Counsel shall also take the steps necessary to ensure proper legal representation of the client according to the Statute and the Rules of Procedure and Evidence.

IV. PROPOSED REDACTIONS

10. In light of the legal provisions listed in **paragraph 1** and submissions presented below, the Defence respectfully requests that the Trial Chamber authorise redactions to:

- i. The section in the Report titled [REDACTED], save for the last sentence;⁹
- ii. The section in the Report titled [REDACTED];¹⁰
- iii. Text in paragraph 1 of the section titled [REDACTED];¹¹

⁷ Sub-regulation 103(1).

⁸ Sub-regulation 103(2).

⁹ Report, at 1219.

¹⁰ Report, at 1219 and 1220.

¹¹ Report, at 1221, para. 1.

- iv. Text in paragraph 7 of the section titled [REDACTED];¹²
- v. Text in paragraphs 4, 7, 8 and 9 of the section titled [REDACTED];¹³
- vi. Text in second paragraph of the section titled [REDACTED];¹⁴ and
- vii. Text in third point of the section titled [REDACTED].¹⁵

V. SUBMISSIONS

11. As a preliminary comment, the Defence notes that disclosure of the report was ordered “to meaningfully question [D-0041 and D-0042]”.¹⁶ Where information in the report falls outside of that basis, and particularly where reasons militate against disclosure, the Defence submits that a redaction is justified. Where a redaction is granted, the Defence submits that Rule 78 applies. The Defence need only make the information available to the Prosecution and LRVs if it intends to rely upon it at trial. The Defence has not made a decision about whether this information will be used at trial.

i. The section in the Report titled [REDACTED], save for the last sentence

12. The first paragraph of the Report contains internal and privileged discussions. The Defence submits that the matters contained in this paragraph implicate lawyer-client privilege and attorney work-product privilege. Therefore, disclosure of this material to the Prosecution and LRVs will violate Rule 73(1) of the Rules. 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 protecting legal privilege.
13. The redaction of the abovementioned paragraphs is necessary in order to [REDACTED]. The value of preserving trust between a client and his Counsel is essential to communication between the Accused and his Counsel, and protection of the effective exercise of the fair-trial

¹² Report, at 1221, para. 7.

¹³ Report, at 1221, paras 8-9.

¹⁴ Report, at 1222, second paragraph.

¹⁵ Report, at 1222, third point.

¹⁶ ICC-02/04-01/15-1475, para. 19.

rights contained in Article 67(1)(b), (d), (e), and (g) of the Statute [REDACTED]¹⁷ [REDACTED].¹⁸ [REDACTED]¹⁹ [REDACTED].

14. Article 67(1)(b) is referenced in Rule 73(1) in order to ensure that any exceptions to the recognition of a privilege should not prejudice the statutory right of an accused to communicate with counsel in confidence.²⁰ The prejudice caused to Mr Ongwen by providing the information is high yet will serve little to no value in the proceedings. In light of the above, it would be disproportionate to provide the information to the Prosecution and LRVs.²¹ In a similar situation, the Trial Chamber applied the proportionality test when granting the redactions to information of an extremely personal and sensitive nature. By analogy, the Defence requests that the Trial Chamber apply the redactions in light of both the personal information and lawyer-client privilege.²²
15. Moreover, [REDACTED]²³ As mentioned above, there is an issue of privilege at hand and pursuant to Rule 73(2) of the Rules, the “recognition of a privilege may actually assist in advancing some of the objectives of the Statute, such as protection of the rights of an accused to communicate in confidence with counsel”.²⁴

¹⁷ See, for example, ICC-02/04-01/15-T-45-CONF-ENG, p. 28, lines 15 to 18; ICC-02/04-01/15-T-162-CONF-ENG, p. 65, lines 8-11 and p. 66 lines 21-23.

¹⁸ [REDACTED].

¹⁹ ICC-02/04-01/15-1330-Conf, para. 5. See also email, subject ‘schedule for next hearing bloc’ of 8 March 2018 at 14h58.

²⁰ Donald K. Piragoff, “Evidence” in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, (eds), Edited by Roy S. Lee *et al* (Transnational Publishers Inc, 2001) page 360, p. 6 of Annex B to this request.

²¹ ICC-02/04-01/15-691-Conf, para. 31.

²² ICC-02/04-01/15-691, paras 31, 33-34.

²³ [REDACTED].

²⁴ Donald K. Piragoff, “Evidence” in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, (eds), Edited by Roy S. Lee *et al*, (Transnational Publishers Inc, 2001), page 361, p. 7 of Annex B to this request. See additionally Amnesty International, *The International Criminal Court: Drafting effective rules concerning the trial, appeal and review*, (A1 Index: IOR 40/12/99), July 1999, at pages 18 to 20. Available at:

<https://www.amnesty.org/download/Documents/148000/ior400121999en.pdf> [NB: Piragoff appears to mis-cite the document, the link above seems to be the correct document based on the AI Index: IOR number] According to Piragoff (see above mentioned page 361 and the corresponding footnote) the document from Amnesty International was informally submitted to delegations at the second session of the Preparatory Commission. Additionally Piragoff highlights that the intention of the drafters of the Preparatory Commission was to widen “the notion of privilege beyond the lawyer-client relationship” which led to Rule 73(2) of the Rules that established the criteria “for a finding of privilege” that “require that the relationship in question in which the communication was made: 1) involve a reasonable expectation of privacy and non disclosure, 2) that confidentiality be essential to the type of relationship concerned, and 3) that recognition of the privilege would further the objectives of the Statute and Rules.” See Donald K. Piragoff and Paula Clarke, “Article 69, Evidence” in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Beck et al., 3rd ed., 2016), p. 1719. See Annex C to this request.

16. Pursuant to Article 9(3) of the Code, Counsel for Mr Ongwen has an obligation to notify the Registrar and Chamber where “representation is impaired because of mental disability or for any other reason”. [REDACTED] could therefore also be characterised as internal work product which is not disclosable pursuant to Rule 81(1) of the RPE and protected by attorney work product privilege.²⁵
17. The distribution of the information described in the background paragraph, was made in the course of supporting Mr Ongwen. The information was provided to the Registrar for the purposes of his responsibilities under Regulation 103 of the RoC.²⁶ It should not be used to Mr Ongwen’s prejudice, because [REDACTED]. This implicates the Trial Chamber’s responsibilities of fairness pursuant to Article 64(2) of the Statute.
18. There are additional reasons to redact the section titled [REDACTED] in light of previous decisions and prior practice:
 - a. The subject matter of the third sentence should be redacted because it pertains to information which the Trial Chamber has already accepted redacted from the Prosecution and LRVs.²⁷
 - b. The subject matter of the fourth sentence of the background paragraph is currently not available to the Prosecution and LRVs and should be redacted.²⁸ The Trial Chamber placed the annex under seal at the request of the Defence for being unnecessarily available to at least 86 other members in the Court system.²⁹ The subject matter has also already been redacted from the Prosecution and LRVs.³⁰ The request for a redaction of the fourth sentence is consistent and merited given the under-seal nature of the information and the Trial Chamber’s prior decision.

ii. *The section in the Report titled [REDACTED]*

²⁵ Helen Brady, “Disclosure of Evidence” in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Edited by Roy S. Lee *et al* page 418 (p. 13 of Annex B to this request) “Sub-rule 1 of Rule 81, which is similar to legal professional privilege extending to attorney work product, excludes internal working documents of the parties from being disclosed.” The above quote also cites *The Prosecutor v. Tihomir Blaškić*, ‘Decision on the Production of Discovery Materials’, IT-95-14-PT, 27 January 1997, para. 40, available at: <https://www.legal-tools.org/en/doc/d23e33/>,

²⁶ [REDACTED].

²⁷ See, ICC-02/04-01/15-1403-Conf-Exp-AnxII, third sentence and compare ICC-02/04-01/15-1403-Conf-Exp, para. 4 with ICC-02/04-01/15-1403-Conf-Red, para. 4.

²⁸ ICC-02/04-01/15-1403-Conf-Exp-AnxI.

²⁹ Email of 10 January 2019, subject line ‘RE: Ongwen Defence request for reclassification and/or limitation of access to ICC-02/04-01/15-1403-Conf-Exp-Anx1’ sent at 11h38.

³⁰ Compare, ICC-02/04-01/15-1403-Conf-Exp, para. 8 with ICC-02/04-01/15-1403-Conf-Red, para. 8.

19. As mentioned above in **paragraph 13**, the redaction of the first half of the first sentence in the abovementioned paragraph is necessary in order to protect the confidence and trust of Mr Ongwen to communicate effectively with those that have legal privilege. Lifting the redaction to the abovementioned paragraph [REDACTED].³¹ Lifting the redaction would be disproportionate to Mr Ongwen's right to communicate in confidence. Furthermore, the Defence submits that withholding the information from the Prosecution and LRVs does not cause any prejudice as it is neither relevant to the Defence expert's testimony nor does it hinder an effective and meaningful questioning of the experts during their upcoming testimonies.
20. The requested redactions under this section are of marginal significance and concern information that is highly personal and sensitive in nature. Lifting the redaction of the information to the Prosecution and LRVs would be unnecessary and therefore a disproportionate harm to Mr Ongwen's right to privacy, [REDACTED] personal information, and lawyer-client privilege.
21. In respect of the last sentence of the second paragraph of the section titled [REDACTED], the subject matter should be redacted because it pertains to subject matter for which the Trial Chamber has already accepted redactions from the Prosecution and LRVs.³² The same information is redacted in end of the fourth paragraph under [REDACTED].

iii. Text in paragraph 1 of the section titled [REDACTED]

22. In respect of redactions identified under this section, the Defence notes that the Trial Chamber has ordered that this information be reclassified as 'ex parte'. In particular, the Trial Chamber granted the Defence request for redaction to be applied in respect of the same information in its 17 January email.³³ Given that this information is of marginal relevance, personal nature and its non-disclosure will not prejudice the Prosecution and LRVs, the Defence requests that the Trial Chamber maintain the redactions.

iv. Text in paragraph 7 of the section titled [REDACTED]

³¹ See also, Donald K. Piragoff, "Evidence" in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, (eds), Edited by Roy S. Lee *et al* (Transnational Publishers Inc, 2001) page 360, p. 6 of Annex B to this request.

³² See, ICC-02/04-01/15-1403-Conf-Exp-AnxII, third sentence and compare ICC-02/04-01/15-1403-Conf-Exp, para. 6 with ICC-02/04-01/15-1403-Conf-Red, para. 6.

³³ Email of 17 January 2019, subject line "Decision on Requested Redactions to Email Decision of 24 October 2018", sent at 14h49.

23. The Defence requests redaction to the fourth sentence of **paragraph 6**. The comment by Mr Ongwen has no relevance to the proceedings. As a purported comment by Mr Ongwen taken out of context, it has the potential to be sensationalised yet has marginal to no relevance to the case. Notably, it has no utility to meaningfully question the experts.

v. Text in paragraphs 4, 7, 8 and 9 of the section titled [REDACTED]

24. The Defence requests that the redactions identified in **paragraphs 4, 7, 8, and 9** of this section be applied to the information because of its sensitive and personal nature. Furthermore, the redacted information is neither relevant to D-0041 and D-0042's expertise nor important for understanding of any of their expert reports. Given that the information has no bearing on the Prosecution and LRVs' effective questioning of the Defence experts, there is no prejudice for withholding this information from the Prosecution and LRVs. Thus, the Defence requests that the Trial Chamber authorise the application of redactions in respect of the present information.

vi. Text in second paragraph of the section titled [REDACTED]

25. The Defence proposes that the identified redaction is applied to the sixth sentence of the second paragraph because of its sensitive and personal nature. The redaction of the information in this section has already been litigated and confirmed by the Trial Chamber in its 10 January 2019 email titled "RE: URGENT REQUEST re Defence Filing", in which the Trial Chamber ruled that [REDACTED] and that [REDACTED]³⁴
26. The redaction is also justified due to the same basis identified in **paragraph 18(b)** above. In short, the Trial Chamber has already granted redactions to this same information.³⁵ Hence, the Defence request for authorisation to apply the proposed redaction. The same information is also to be found redacted in the second last sentence of the second paragraph of the section titled [REDACTED] and fourth paragraph of the section [REDACTED] and redactions are requested for the same reason.
27. Additionally, and as discussed above in **paragraph 22**, the Defence requests that the Trial Chamber authorise the application of redaction to the fourth sentence of the second paragraph that [REDACTED]. In this regard, the Trial Chamber granted the Defence request for redaction

³⁴ Email of 10 January 2019, subject line "RE: URGENT REQUEST re Defence Filing", sent at 18h13.

³⁵ Email of 10 January 2019, subject line 'RE: Ongwen Defence request for reclassification and/or limitation of access to ICC-02/04-01/15-1403-Conf-Exp-Anx1', sent at 11h38.

to be applied in respect of the same information in its 17 January email, in which the Trial Chamber ruled that “[t]he redactions proposed in relation to the Chamber’s email decision of 24 October 2018 at 10:18 are granted.”³⁶

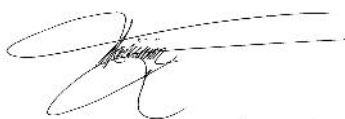
vii. Text in third point of the section titled [REDACTED]

28. In respect of redactions under this section, the Defence reiterates its submissions from **paragraphs 22 and 27** above, and thus requests that the Trial Chamber authorise the application of the redaction identified.
29. In sum, the Defence submits that the imposition of the requested redactions, which are the least intrusive measures available in this instance, cause no prejudice to the Prosecution and LRVs as they are strictly limited to sensitive and personal information, relate to the lawyer-client privilege and internal communications that fall under attorney work-product privilege, and have no relevant bearing on D-0041 and D-0042’s expertise or conclusions in their expert reports.

VI. RELIEF SOUGHT

30. For the reasons set out above, the Defence respectfully requests that the Trial Chamber grant the Defence request for authorisation to apply the proposed redactions to the Report.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 10th day of May, 2019
At The Hague, Netherlands

³⁶ Email of 17 January 2019, subject line “Decision on Requested Redactions to Email Decision of 24 October 2018”, sent at 14h49.