

ANNEX VIII

PUBLIC

From: Trial Chamber IX Communications
Sent: 04 March 2020 09:19
To: [REDACTED]
 [REDACTED] Trial Chamber IX Communications;
 [REDACTED]
Subject: Prosecution request to re-classify 5 filings as 'confidential'

Dear parties and participants,

The Chamber notes the request by the Prosecution and the responses by the Defence and the Common Legal Representative for Victims and Legal Representatives for Victims.

First, the Chamber notes that the Defence does not object to the disclosure of the 5 filings in question ('Filings') to the Prosecution. However, it submits that disclosure to the Legal Representatives of the Victims and the Common Legal Representatives of the Victims ('Victim Representatives') would 'blur the line between the Parties and the Participants roles in the proceedings'.

The Common Legal Representative submits that the matter affects the personal interests of the victims and that the Victim Representatives are therefore entitled to make submissions on the issue. The Legal Representative for Victims also request that the Filings be disclosed to them.

The Chamber notes that in its previous decision on a similar matter (disclosure regarding information used by the Defence in its Closing Brief; email by the Chamber on 25/02/20, at 12:33), it ordered that the information in question be disclosed to all parties and participants.

The Chamber explained, that the parties and participants must be able to address in their closing statements the submissions made in the closing briefs of the other parties and participants. The Filings were cited by the Defence in its discussion whether the Chamber respected the accused's right to a fair trial. Therefore, it does not concern the guilt or innocence of the accused uniquely, as alleged by the Defence, but the question whether the Chamber conducted the trial in a fair and impartial manner.

Consequently, it does not conflate the roles of the Prosecution and the Victim Representatives when the latter are allowed making submissions on this matter. In order to enable the Victim Representatives to meaningfully respond, and having taken into account the content of the Filings, the Chamber therefore finds that the Filings will be re-classified as 'confidential'.

Accordingly, the Chamber instructs the Registry to re-classify ICC-02/04-01/15-1200-Conf-Exp; ICC-02/04-01/15-1200;Conf-Exp-Anx; ICC-02/04-01/15-1315-Conf-Exp, ICC-02/04-01/15-1315-Conf-Exp-Anx and ICC-02/04-01/15-1403-Conf-Exp as 'confidential'.

Kind regards,
 Trial Chamber IX

From: Cox, Francisco
 Sent: 04 March 2020 04:42
 To: [REDACTED] Trial Chamber IX Communications
 Cc: [REDACTED]
 [REDACTED]

e Defence in its Closing Brief

Dear Chamber, dear all

The LRVs also support the Prosecution's request.

They join the OPCV in opposing the Defence suggestion that the material in question should be *made* available *only* to the Prosecution and not to the legal representatives of victims.

The LRVs recall that the procedural rights of participating victims in this case have been consistently applied since Single Judge Tarfusser's decision of 27 November 2015 (ICC-02/04-01/15-350). According to that decision, victims' lawyers shall have access to the full casefile, and documents "shall only be withheld from the legal representatives of victims if there are specific reasons warranting this measure" (para.29). The presumption is that victims' legal teams have access to the same material as the Prosecution and Defence, absent a specific justification.

The Defence proposal attempts to turn this principle on its head, and revert to an approach used in early ICC cases (eg *Lubanga*, *Bemba*) whereby the onus fell on victims to justify how their interests are engaged in relation to particular categories of documents. That approach has rightly been rejected as unworkable and inefficient: the Defence (or Prosecution) is not in a position to assess which matters fall within victims' interests; and neither are victims' lawyers in a position to make meaningful submissions on this matter without seeing the material in question. Requiring speculative litigation around whether victims' interests are affected by material which has not yet been seen by victims' lawyers proved to be a waste of Court time and resources. The Chamber has been right to reject this approach in this case. It should not divert from its long-established approach in the final weeks of trial, particularly in the absence of any reasoned rationale being provided by the Defence for this proposed change in victims' procedural rights.

Assuming that the Chamber maintains the requirement for the Defence to provide a *specific reason* for withholding material from the legal representatives of victims, the LRVs submit that the Defence has in this instance provided no such reason. The mere fact that the material is relevant to defences going to Ongwen's criminal responsibility is not a material fact. Significant volumes of such material relating specifically to Ongwen's criminal responsibility have been involved in this case and shared with the legal representatives of victims in order to enable their meaningful participation in the case. The respective roles of the Prosecution and victims have not become "blurred" – this is a matter well within the Chamber to control by limiting the subject and extent of submissions which are made or taken into consideration.

Finally, even if the Chamber does now modify its established approach and require victims to demonstrate their specific interest in the material in question, the LRVs submit that this test can in this instance be met. Questions relating to Mr Ongwen's medical condition are not relevant *only* to his individual criminal responsibility. They are inherently linked with a number of factors which the LRVs have consistently raised throughout trial, concerning the link between abduction and conscription of children and lasting mental health issues. Hundreds of victims participating in these proceedings have an direct personal interest in having the Court understand the complex relationship between their lasting psychosocial harm and their levels of agency. The extent to which Mr Ongwen's own agency might have been vitiated by his medical condition cannot be extricated from those questions. It is also a subject which will inevitably have a bearing on sentencing in the event of a conviction. The victims' must not be denied an opportunity to make submissions on these issues which are crucial to their interests.

It is well within the power of the Chamber – as has been amply demonstrated throughout this trial – to ensure that submissions made are not duplicative of the Prosecution and do not overstep the matters relevant to victims. This is readily achievable without shutting the victims' legal representatives out of the receipt of matters which the Defence thought vital enough to include within its closing brief.

Finally, the LRVs request the Chamber to recall that they are bound by the same rules of professional conduct as counsel for the Defence. Indeed, to some extent their obligations of confidentiality are more stringent, since they are not permitted to inform clients of confidential material received from the parties.

The LRVs respectfully request that the Chamber grants the Prosecution request to reclassified the specified documents as confidential. The Defence request to classify these documents as *ex parte* Prosecution and Defence only should be refused.

Best regards

Joseph Manoba and Francisco Cox

De: [REDACTED]

Enviado: martes, 3 de marzo de 2020 11:29

Para: Trial Chamber IX Communications [REDACTED]

Cc: [REDACTED]

Asunto: RE: disclosure regarding information used by the Defence in its Closing Brief

Dear All,

The CLRV supports the Prosecution's request and asks that the relevant documents are re-classified 'confidential' and therefore accessible to the Legal Representatives as well.

The CLRV notes the Defence's arguments for asking said documents to be reclassified *ex parte* Defence and Prosecution only. However, the documents are used by the Defence to substantiate alleged violations on the part of the Chamber and relates to the mental conditions of the Accused, a matter certainly affecting the personal interests of the victims and on which the Legal Representatives are entitled to submit arguments during the closing statements. As already indicated by the Chamber "*the references mentioned in Closing Briefs must be available to the other parties and participants in order to allow them to respond to the arguments made*".

The CLRV further notes that part of the content of the documents is in any case now available to the Legal Representatives because quoted in the Defence's Closing Brief.

Kind regards,
Paolina Massidda

From: [REDACTED]

Sent: 03 March 2020 15:23

To: Trial Chamber IX Communications; [REDACTED]

[REDACTED] in its Closing Brief

Dear Trial Chamber IX,

By request, the Defence elaborates why it seeks an *ex parte*, Defence and Prosecution only, classification for the five listed items below.

The onus for proving guilt, which includes negating affirmative defences, is on the Prosecution (Party), not the CLRV and LRV (Participants). By granting access the listed items, it would blur the line between the Parties and the Participants roles in the proceedings.

Sincerest regards,

[REDACTED]

[REDACTED]

From: [REDACTED]

Sent: 03 March 2020 14:34

To: Trial Chamber IX Communications [REDACTED]

Subject: Re: disclosure regarding information used by the Defence in its Closing Brief

Dear Trial Chamber IX,

The Defence does not oppose the reclassification of the impugned filings as confidential, *ex parte*, Defence and Prosecution only. Specifically, the Defence refers to documents:

ICC-02/04-01/15-1200-Conf-Exp
 ICC-02/04-01/15-1200-Conf-Exp-Anx
 ICC-02/04-01/15-1315-Conf-Exp
 ICC-02/04-01/15-1315-Conf-Exp-Anx
 ICC-02/04-01/15-1403-Conf-Exp

In addition, the Defence notes the Prosecution's impermissible attempt to litigate and misrepresent the facts via email communication at this point in the trial proceedings. Contrary to the Prosecution, there is no dispute about what exactly was recommended, and in what terms. The ICC-DC medical recommendations are clear - Mr Ongwen was not to attend the hearings on Wednesdays.

Sincerest regards,

From: Trial Chamber IX Communications [REDACTED]

Sent: 03 March 2020 14:29

To: [REDACTED]
 [REDACTED]
 [REDACTED] Trial Chamber IX Communications [REDACTED]
 [REDACTED]

Subject: RE: disclosure regarding information used by the Defence in its Closing Brief

Dear Defence,
 Dear parties and participants,

In view of the urgency of this matter and pursuant to Regulation 34 of the Regulations of the Court, the Chamber hereby orders that responses to the Prosecution request below, if any, must be provided via email until Wednesday, 4 March 2020, 9:00 am.

Kind regards,
 Trial Chamber IX

From: [REDACTED]
Sent: 03 March 2020 13:28
To: Trial Chamber IX Communications
Cc: [REDACTED]
 [REDACTED]

Subject: RE: disclosure regarding information used by the Defence in its Closing Brief

Dear Trial Chamber IX:

For the same reasons articulated by the Chamber in the email below, the Prosecution urgently requests that the Trial Chamber reclassify as Confidential the following five items cited in the Defence Closing Brief:

ICC-02/04-01/15-1200-Conf-Exp (cited at Annex E)

ICC-02/04-01/15-1200-Conf-Exp-Anx (cited at footnotes 151 and 187 and Annex E)

ICC-02/04-01/15-1315-Conf-Exp (cited at Annex E)

ICC-02/04-01/15-1315-Conf-Exp-Anx (cited at footnotes 152-154 and Annex E)

ICC-02/04-01/15-1403-Conf-Exp (cited at footnote 155)

The above-cited items were referenced by the Defence as support for its assertion that the Chamber failed to implement the recommendations of the medical officer of the Detention Centre, as well as its overarching claim that Mr Ongwen is a “mentally disabled defendant” whose rights under international human rights law have not been respected by the Trial Chamber. See Defence Closing Brief, paras. 118-146. As the Trial Chamber stated below, “the references mentioned in Closing Briefs must be available to the other parties and participants in order to allow them to respond to the arguments made.” The Prosecution cannot fully assess the Defence’s arguments or meaningfully respond without access to these items.

It is particularly important that the Prosecution see the exact language used by the medical officer and any examining mental health professionals in these items. In this regard, the Prosecution notes that ICC-02/04-01/15-1321-Conf is not an adequate substitute for ICC-02/04-01/15-1315-Conf-Exp-Anx. At para. 12 of Filing 1321-Conf, the Defence provided a brief seven-line summary of what it “deem[ed] to be disclosable issues within the Report.” The Defence’s summary of the medical officer’s purported recommendation about the Chamber’s sitting schedule was largely paraphrased. See ICC-02/04-01/15-1321-Conf, para. 12(3). However, since there appears to be a dispute about what exactly was recommended, and in what terms, it is essential that all parties and participants have access to the verbatim text of the observations by the Medical Officer.

The Chamber has a clear legal basis for making all these items available to the parties and participants, most prominently pursuant to its Article 64(2) obligation to ensure the fair and expeditious conduct of the proceedings. See Decision 691, paras. 9-23 (citing also Article 64(3)(d) and (6)(d) and rule 84 of the Rules as bases for ordering disclosure of medical information).

The Prosecution makes this request on an urgent basis given the limited time before the Prosecution’s Closing Statement.

Kind regards,



Trial Lawyer

From: Trial Chamber IX Communications

Sent: 25 February 2020 12:33

To:

Trial Chamber IX Communications

Subject: disclosure regarding information used by the Defence in its Closing Brief

Dear parties and participants,

The Defence discusses in its Closing Brief (paras 136-145) the purported failure of the Chamber to implement the recommendations of the medical officer of the Detention Centre.

In this discussion it makes reference to an email communication in which the Chamber ruled on a request by the Defence ('Email Communication', Fn 181).

The Closing Statements are an opportunity for each party and participant, should they wish to do so, to address issues in the Closing Briefs of the other parties and participants. In this regard the Closing Statements are, in part, reactionary to the Closing Briefs of the other parties and participants.

The Defence has displayed its identical view of the purpose of the Closing Statements in several requests (filing -1238, para. 33; filing -1668, paras 1-2, 49-51). The Chamber confirmed this view (decision -1259, para. 16).

This means that the references mentioned in Closing Briefs must be available to the other parties and participants in order to allow them to respond to the arguments made.

The Chamber notes that the Email Communication is only available in redacted form to the other parties and participants at this point in time (filing -1483, Annex 43). These redactions were done in order to protect details about the medical treatment Mr Ongwen was undergoing at the time.

However, the Defence makes the state of health of Mr Ongwen, and its appropriate treatment, a live issue in its Closing Brief. It argues that the Chamber 'did not implement the ICC-DC Medical Officer's recommendations' and 'rejected all the Defence request on this matter', referencing the Email Communication in support (para. 137, Defence Closing Brief). In order for the other parties and participants to meaningfully respond to the issue, it is necessary that they have the entire content of the Email Communication in its unredacted form.

The Chamber also takes into account the content of the information that form the redactions. It finds that the initial considerations redacting the details about Mr Ongwen's medical treatment must stand back, due the Defence's use of the information in the Closing Brief. Accordingly, the Chamber hereby transmits the Email Communication in its unredacted form to the parties and participants.

Kind regards,
Trial Chamber IX

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