

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 22 June 2015

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Presiding Judge

SITUATION IN UGANDA

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

Public

Public Redacted Version of "Prosecution's reply to the Defence response to the Prosecution's application under article 57 and regulation 101 of the Regulations of the Court" 22 June 2015

Source: The Office of the Prosecutor

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

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Other

Introduction

1. The Prosecution notes that the Defence Response¹ (“filing 248”) to its application for the Pre-Trial Chamber to make orders under article 57 of the Rome Statute and regulation 101 of the Regulations of the Court² (“filing 241”) does not contest the facts of the events during the relevant meeting as set out in filing 241.
2. On the contrary, in filing 248, the Defence suggests that the telephone call that Dominic Ongwen made, during which he spoke to potential Prosecution witnesses, who had been summoned to the premises of an NGO to discuss his case, was a “coincidence”.³
3. The Defence further submits that, in making the call, Dominic Ongwen was exercising a “basic human right”.⁴ The Defence asserts that the orders sought by the Prosecution (restricting Dominic Ongwen’s future ability to make such telephone calls, and requesting relevant telephone records and voice recordings held by the Detention Unit authorities to be made available to the Prosecution and the Defence) “are in direct conflict with the procedures outlined in the Regulations of the Registry”.⁵
4. The Prosecution submits that there is no such conflict. Regulation 173 of the Regulations of the Registry establishes the conditions under which telephone calls may be made by Dominic Ongwen. The making of the orders sought by the Prosecution will enable the Single Judge to establish whether Dominic Ongwen has complied with those conditions. It will also enable the Single Judge to establish, irrespective of the commission of any criminal offence, the

¹ ICC-02/04-01/15-248-Red.

² ICC-02/04-01/15-241-Conf-Exp, reclassified as “Public” by virtue of order ICC-02/04-01/15-242.

³ Filing 248, para.22.

⁴ Filing 248, para.19.

⁵ Filing 248, para.21.

extent to which Dominic Ongwen's actions present a risk to the administration of justice.

Confidentiality

5. Pursuant to regulation 23bis of the Regulations of the Court, this filing is classified as "confidential", in order to protect persons who have suffered certain types of crimes. A public redacted version will be filed simultaneously.

Submissions

6. In paragraph 15 of filing 248, the Defence submits that "until such time that the Prosecution conveys a clear intention to call a person as a witness for the Confirmation of Charges Hearing, the Defence and Mr Ongwen should be free to contact any non-witness for the lawful purpose of its investigation, as long as the person agrees to speak to the defence or Mr Ongwen".
7. So far as "the defence" (i.e. the members of Dominic Ongwen's legal team) are concerned, the Prosecution accepts that this may be so. But as a statement of Dominic Ongwen's entitlements, it is incorrect. The Defence's position would entitle him to use his telephone privileges at the Detention Unit to contact by telephone all the victims of the crimes which he is alleged to have committed whenever he chooses to do so, until they are nominated by the Prosecution as witnesses. This would include, for example, [REDACTED] of which Dominic Ongwen was the alleged direct perpetrator.
8. Regulation 173(4) of the Regulations of the Registry states that all telephone calls by a detained person shall require the prior authorisation of the Registrar, who shall have regard to, *inter alia*, information previously provided by the detained person about the "telephone contact".

9. The Prosecution submits that the words “telephone contact” must be interpreted to mean every person to whom a detained person speaks in the course of a telephone call, and not just the person who is the principle or registered user of a particular telephone number. Any other interpretation would enable detained persons to evade the process of information giving and authorisation which the Regulations of the Registry require, by making calls to “authorised” persons and then having the telephone handed to “unauthorised” persons.
10. Regulation 173(1) requires the Chief Custody Officer to “maintain a log of all telephone calls” showing “the name and telephone number of the caller” and the time, date and duration of the call.
11. The Prosecution submits that, in order to give effect to regulation 173(4), and to give sense to regulation 173(1), the word “caller” must refer to the other person to whom a detained person is speaking, irrespective of who initiated the contact. It would be pointless, where a detained person makes a call, for the log to show the name of the detained person who had made a call, and the telephone number of the Detention Unit, but not to record the name and telephone number of the person receiving the call. This would prevent the use of the log for the purpose of auditing compliance with regulation 173(4).
12. The Prosecution is unable to comment on whether Dominic Ongwen was informed that “he was allowed to use his non-privileged phone calls to contact potential witnesses and ask them to testify for his defence”.⁶ If this was indeed all that he was told about his permitted use of the telephone, it was a deficient account.

⁶ Filing 248, para.9.

13. The Defence is correct that the Prosecution has not alleged that Dominic Ongwen has “violated any law”.⁷ Specifically, the Prosecution has stated that it does not seek to establish that he or any other person has committed any criminal offences (particularly those contrary to article 70 of the Rome Statute). The Prosecution has requested that the list of authorised telephone contacts which the Registrar is required to keep be provided to the Prosecution and the Defence to establish whether Dominic Ongwen has violated regulation 173, with the ultimate aim of enabling the Chamber to gauge the nature of his contact with the persons concerned.
14. If that list shows that Dominic Ongwen had previously sought authorisation to contact each of the persons to whom he spoke during the telephone call, that in each case he had provided adequate information about his previous relationship with them, and that he had been granted authorisation by the Registrar to speak with each of them, the indignation expressed in the Defence’s response will have some merit. If it does not, then his actions when using the telephone on that date were a breach of the Regulations and the question will arise as to why Dominic Ongwen was talking to unauthorised telephone contacts.
15. Contrary to the Defence’s assertions, the Prosecution’s requested relief is not in conflict with the procedures outlined in the Regulations of the Registry. Article 57(3)(a) and (c) of the Statute permits the Single Judge to grant the requested measures independently of the procedure outlined in regulation 175(9), which applies when it is the Registrar who discovers the breach of the Regulations.⁸

⁷ Filing 248, para.7.

⁸ See regulation 175(8) of the Regulations of the Registry.

16. Irrespective of whether the Regulations have been breached, the Pre-Trial Chamber should establish whether Dominic Ongwen's telephone conversation may have affected the individuals concerned and whether his remarks, and intention at the time he made them, were innocent.
17. To do this, the Pre-Trial Chamber will need to establish what was said. Since regulation 174 of the Regulations of the Registry requires calls to be recorded, a recording of the telephone conversation will exist. This recording should now be transcribed and translated so that the Parties, and the Chamber, can understand what was said, and what the consequences of it are likely to have been for the individuals to whom Dominic Ongwen was speaking. The Court has a duty, pursuant to article 68, to protect victims regardless of whether any person is guilty of wrongdoing.
18. Lastly, the Defence argues that the Prosecution's request "lies in contrast" to a decision by Trial Chamber II.⁹ That decision was reversed by the Appeals Chamber, which, *inter alia*, reasoned that, in as far as information obtained from the monitoring procedures in regulations 174 and 175 of the Regulations of the Registry is concerned, "the parties may request access to such information, and access may be granted by the relevant Chamber. In this respect, the Chamber would decide to what extent the information would be disclosed to any of the parties, bearing in mind the specific circumstances and the fairness of the proceedings".¹⁰
19. The Prosecution relies upon the finding of the Appeals Chamber and submits that it represents clear authority that the orders sought by the Prosecution in filing 241 are lawful.

⁹ The Defence referred to Decision ICC-01/04-01/07-1243-tENG-Red, paras.37-46. See Filing 248, para.21.

¹⁰ See the Appeals Chamber Judgment ICC-01/04-01/07-1718, para.49.

Relief sought

20. The Single Judge should maintain the restraints imposed on Dominic Ongwen's communications and grant the Prosecution's requests as outlined in its filing 241.



Fatou Bensouda,
Prosecutor

Dated this 22nd day of June 2015
At The Hague, The Netherlands