

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 3 August 2015

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN UGANDA

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

Confidential

Decision concerning the restriction of communications of Dominic Ongwen

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Benjamin Gumpert

Counsel for the Defence

Krispus Ayena Odongo

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Cuno Tarfusser, Single Judge exercising the functions of the Chamber, issues this decision concerning the restriction of communications of Dominic Ongwen.

1. On 5 June 2015, the Prosecutor filed her application for orders under article 57 of the Statute and regulation 101 of the Regulations of the Court, including restriction of Dominic Ongwen's use of the telephone (ICC-02/04-01/15-241-Conf-Exp and -Conf-Exp-AnxA).

2. On the same day, the information provided appearing *prima facie* to be relevant, the Single Judge orally instructed the Registrar to put in place restrictions ad interim with regard to Dominic Ongwen's access to the telephone and his visits. Subsequently, the Single Judge decided that the restrictions should remain in place pending a response from the Defence and a comprehensive decision on the application (ICC-02/04-01/15-242), and again until further consideration of the Prosecutor's request that the parties be provided with relevant telephone data and voice recordings (ICC-02/04-01/15-254).

3. In his second decision on the application (ICC-02/04-01/15-267), the Single Judge ordered the Prosecutor to make submissions on whether the restrictions on Dominic Ongwen's communications, or any other appropriate measures, remain necessary to ensure the integrity of the evidence.

4. The Prosecutor argues in her submissions filed on 20 July 2015 (ICC-02/04-01/15-276-Conf and -Conf-AnxA) that the current restrictions should be maintained for the duration of Dominic Ongwen's pre-trial detention, subject to periodic review. The Prosecutor submits that the restrictions are proportionate to the legitimate aim pursued and necessary, *i.e.* the prevention of intentional interference with Prosecution witnesses and ensuring the integrity of the evidence. The Prosecutor argues that full restrictions are

necessary since the current phase of investigation is particularly sensitive, and for it to proceed effectively. The Prosecutor submits that the restrictions will not interfere with Dominic Ongwen's right to a fair trial, including his right to consult with his lawyers, and comprise the least intrusive measure to protect effectively the integrity of his trial and permit the Court to arrive at the truth. In the alternative, the Prosecutor proposes other, lesser, restrictions to be placed on Dominic Ongwen's telephone communication privileges for the duration of his pre-trial detention, subject to periodic review.

5. The Prosecutor further requests the Single Judge to order the Registrar to file in the record of the case confidential and public versions of the transcripts of the six sound recordings at issue.

6. In its response filed on 27 July 2015 (ICC-02/04-01/15-278-Conf with public and confidential annexes), the Defence submits that Dominic Ongwen's right to contact the outside world should be reinstated and that the Prosecutor's first request is "unlawful, a fundamental violation of his human rights and amounts to torture". The Defence argues that the continued restrictions as well as the alternative measures proposed by the Prosecutor are unnecessary and disproportionate, and that the Single Judge should be guided by regulation 175 of the Regulations of the Registry in any decision to lift the restrictions on Dominic Ongwen's communications. The Defence also submits that the excerpts of telephone conversations quoted in the Prosecutor's submissions are exaggerated and taken out of context.

7. With regard to the Prosecutor's request that confidential and public versions of the transcripts of the sound recordings be filed in the record of the case, the Defence submits that the content of the telephone calls is private and that in light of the dispute as to the meaning of the content of the calls, any

publication of the telephone conversations is premature until such time as transcripts and translations of the calls are available for the parties to review.

8. At the outset, the Single Judge considers in relation to the Defence argument that maintaining the restrictions currently in place, as requested by the Prosecutor, would amount to "torture", that the choice of words of the Defence is misplaced, to say the least, and reminds the Defence that the terminology used in its submissions should be well-considered.

9. In the merits, the Single Judge emphasises that the imposition of restrictions on Dominic Ongwen's communications was based on a reasonable suspicion that there had been attempts to exercise some form of influence on persons who possess information relevant to the case (see ICC-02/04-01/15-254, para. 6). At the same time, and as is apparent from the steps undertaken to date, the Single Judge has ensured the review of the restrictions currently in place and does so in this decision.

10. As recalled above, the current restrictions are based on information which led to the finding of a reasonable suspicion that there had been attempts by Dominic Ongwen to exercise via telephone conversations some form of influence on persons who possess information relevant to the case. Subsequent to this finding, the parties were, upon order of the Single Judge, provided with the voice recordings of six telephone conversations of Dominic Ongwen which indeed appeared to be of relevance to the suspicion voiced earlier.

11. In this regard, the Single Judge notes that the parties disagree on the meaning of some excerpts of these telephone conversations and takes note that no official transcripts of the telephone conversations at issue are currently available. At the same time, however, the Single Judge is of the view that the nature and duration of the restrictions on Dominic Ongwen's

communications in place to date necessitate a review of these restrictions, and before any exhaustive transcripts and translations thereof may be available.

12. Having due regard to the interpretation of the excerpts presented by both parties in their respective submissions, the Single Judge is of the view that the information available confirms the reasonable suspicion which formed the basis for the current restrictions on Dominic Ongwen's communications, and considers that in light of this information, certain restrictive measures with regard to the communications of Dominic Ongwen should be maintained at this stage, pursuant to article 57(3)(a) and (c) of the Statute, and regulation 101(2) of the Regulations of the Court.

13. In order to determine the nature and scope of any measures which may be warranted in the case at hand, the Single Judge has to balance the need to preserve the integrity of the evidence and protect it from any interference with the rights of the suspect in detention, with a view to ensuring that any measures imposed are both necessary and proportionate to the objective sought.

14. At this stage, this result can be achieved by, on the one side, weakening the current restrictions and in so doing restoring Dominic Ongwen's contacts with persons other than his lead counsel and assistant to counsel for the most part, and on the other hand imposing measures which enable the Chamber and/or the Registry to intervene without undue delay in case of any future information which may lead to a reasonable suspicion concerning attempts to exercise some form of influence on persons who possess information relevant to the case.

15. Concretely, the Single Judge deems it appropriate to (i) exclude from the currently authorised list of non-privileged telephone contacts of Dominic Ongwen the two individuals which provide the basis for the current

restrictions, and (ii) limit the duration of Dominic Ongwen's non-privileged telephone conversations, which will be actively monitored by the Registry and terminated in case of any suspicious conversation. In this regard, the Single Judge takes note of the Defence argument that contacts with family members are of particular importance to a suspect in detention, but considers that the removal of these two individuals from the list of non-privileged telephone contacts is necessary and proportionate to the aim sought.

16. With regard to the Prosecutor's request included in the proposed alternative measures that certain data on Dominic Ongwen's communications be directly transmitted to the Chamber and the parties, the Single Judge considers that it will be for the Chamber to determine which data can be provided to the Prosecutor and the Defence, for reasons outlined previously (see ICC-02/04-01/15-254, para. 8).

17. While imposing alternative measures, the Single Judge reiterates, at the same time, that any intentional interference with the investigation or proceedings will not be tolerated. If in the future information similar to that which led to the imposition of the initial restrictions is brought to the attention of the Chamber, the Chamber will have to reconsider the possibility of imposing more stringent measures to restrict the communications of Dominic Ongwen.

18. Finally, with regard to the Prosecutor's request that confidential and public versions of the transcripts of the six sound recordings be filed in the record of the case, the Single Judge is of the view that the transcripts and English translations thereof, if the transcripts are in the Acholi language, should be filed in the record of the case as soon as they are available, classified as "confidential, *ex parte*, available to the Prosecutor and the Defence". The Single Judge considers that it is however not necessary at this

stage that these transcripts and their English translations are made available to the public.

FOR THESE REASONS, THE SINGLE JUDGE

ORDERS the Registrar to restrict Dominic Ongwen's non-privileged telephone calls to 200 minutes every month, and to inform Dominic Ongwen that any conversations have to be confined to private matters and are not to involve issues concerning witnesses in the case or the use of codes or pseudonyms;

ORDERS the Registrar to actively monitor all non-privileged telephone calls of Dominic Ongwen, immediately terminate any calls in which either Dominic Ongwen or his interlocutor attempt to interfere with or intimidate individuals who possess information relevant to the case, or interfere with the collection of evidence, and immediately report the matter to the Chamber;

ORDERS the Registrar to immediately inform the Chamber in case any suspicions arise with regard to attempts to influence persons who possess information relevant to the case;

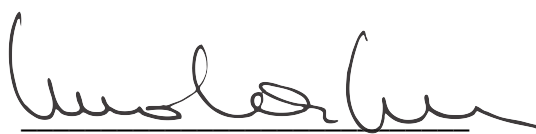
ORDERS the Registrar to remove the two individuals listed as number 1 and number 9 from the list of persons whom Dominic Ongwen is permitted to contact on the telephone, as filed in the record of the case on 26 June 2015 (ICC-02/04-01/15-257-Conf-Exp-Anx);

ORDERS the Registrar to inform the Chamber if any change occurs to the list of persons whom Dominic Ongwen is permitted to contact on the telephone, which will be subject to the authorisation of the Chamber;

ORDERS the Registrar to file in the record of the case as “confidential, *ex parte*, available to the Prosecutor and the Defence”, transcripts and English translations, as appropriate, of the six voice recordings filed as annexes to ICC-02/04-01/15-268; and

REJECTS the requests of the Prosecutor and the Defence in all other respects.

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

A handwritten signature in black ink, appearing to read 'Cuno Tarfusser', written over a horizontal line.

Judge Cuno Tarfusser
Single Judge

Dated this 3 August 2015

At The Hague, The Netherlands