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No.: ICC-02/04-01/15
Date: **29 September 2015**

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN UGANDA

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

**Public
with confidential Annex A**

**Public redacted version of "Prosecution's further submissions pursuant to filing
ICC-02/04-01/15-267", 20 July 2015, ICC-02/04-01/15-276-Conf**

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Benjamin Gumpert

Counsel for Dominic Ongwen

Mr Krispus Ayena Odongo

Legal Representatives of Victims

Legal Representatives of 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

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Section

Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section

Other

Introduction

1. The Office of the Prosecutor (“Prosecution or OTP”) requests that the current restrictions on Dominic Ongwen’s communications be maintained for the duration of his pre-trial detention, subject to periodic review. The outcome of the Prosecution’s *prima facie* analysis of the telephone communications and call data records provided by the Registry demonstrates Dominic Ongwen’s willful interference with the evidence in this case. Maintaining the current restrictions does not interfere with Dominic Ongwen’s fair trial rights. It is the least intrusive means of guarding the integrity of this case.
2. The content of the six sound recordings reinforce the previous submissions made by the Prosecution that Dominic Ongwen’s telephone communications could prejudice or otherwise affect the outcome of the proceedings. As described below, this meets the “reasonable grounds to believe” threshold, as required in regulation 101(2)(b) of the Regulations of the Court (“RoC”), and is met in this instance.
3. The Prosecution submits that the current restrictions are proportionate to the legitimate aim pursued and necessary, namely, the prevention of intentional interference with Prosecution witnesses and ensuring the integrity of the evidence. Given that the current phases of the investigation is particularly sensitive, and in order for it to proceed effectively, full restrictions are necessary. However, these restrictions may be subject to periodic review and amended if circumstances permit.

Procedural history

4. On 5 June 2015, the Prosecution applied to the Single Judge for orders under article 57 of the Rome Statute ("Statute") and regulation 101 of the RoC to restrict Dominic Ongwen's access to the telephone ("Request").¹ On the same day, the Single Judge orally instructed the Registrar to put in place the requested restrictions *ad interim*, as provided for under regulation 101(3) of the RoC. The Single Judge restricted Dominic Ongwen's use of the telephone in the detention centre to calls with his counsel and prohibited all other telephone communications and visits.
5. On 8 June 2015, the Single Judge ordered that the Defence be notified of the Prosecutor's Request and decided that the restrictions on Dominic Ongwen's communications be maintained until a response is obtained from the Defence and a comprehensive decision on the Request is taken.² The Defence responded on 15 June 2015.³
6. The Prosecution, with leave of the Single Judge,⁴ replied on 22 June 2015.⁵
7. On 24 June 2015, the Single Judge issued the first decision on the Request,⁶ ordering, *inter alia*, the Registrar to file in the record of the case, as a matter of urgency, a "confidential, *ex parte*, Chamber only" report listing and summarising

¹ ICC-02/04-01/15-241-Conf-Exp and -Conf-Exp-AnxA.

² ICC-02/04-01/15-242.

³ ICC-02/04-01/15-248-Conf-Exp and -Red.

⁴ ICC-02/04-01/15-252.

⁵ ICC-02/04-01/15-253-Conf and -Red.

⁶ ICC-02/04-01/15-254.

the content of Dominic Ongwen's telephone conversations between 25 May and 5 June 2015 ("Registry's Report"). The latter was filed on 9 July 2015.⁷

8. On 13 July 2015, the Single Judge issued the second decision on the Request, ordering that the sound recordings of six telephone communications be made available to the Prosecutor and the Defence.⁸ This was implemented by the Registrar on the same day.⁹
9. The Single Judge further ordered the Prosecution to make submissions by 12.00 on 15 July 2015, as to "whether the restrictions on Dominic Ongwen's communications, or any other appropriate measures, remain necessary to ensure the integrity of the evidence".¹⁰
10. On 15 July 2015, the Prosecution filed initial submissions requesting that the restrictions on Dominic Ongwen's communications be maintained until the Registry transmitted the call data information, allowing for the Prosecution to make fully informed submissions, an extension for which was sought until 20 July 2015.¹¹
11. On 16 July 2015, the Registry transmitted to the Prosecution the call data information pertaining to the six sound recordings.¹²

⁷ ICC-02/04-01/15-261-Conf-Exp and -AnxA.

⁸ ICC-02/04-01/15-267, para.5.

⁹ ICC-02/04-01/15-268.

¹⁰ ICC-02/04-01/15-267, p.5, disposition.

¹¹ ICC-02/04-01/15-269. The request for an extension to provide further submissions upon receipt of the call data information was approved via e-mail. E-mail from Chambers Legal Officer to OTP Trial Lawyer, 14 July 2015, 16:05.

¹² ICC-02/04-01/15-270-Conf-Exp and -Anx1.

Confidentiality

12. Pursuant to regulation 23*bis* of the Regulations of the Court, the Prosecution files this application as “confidential” as it contains sensitive information that is, at present, classified as confidential. A public redacted version will be filed shortly.

Submissions

13. The Prosecution submits that the justification for the Request, namely to prevent witness interference, remains valid. The current restrictions on Dominic Ongwen’s communications should therefore be maintained for the duration of his pre-trial detention, subject to periodic review.
14. In its response to the Request, the Defence submitted that Dominic Ongwen contacted persons without knowing they were Prosecution witnesses, and that any such contact was innocent, “[REDACTED]” and “coincidental”.¹³ The disclosed six sound recordings do not support this position.
15. Although the Prosecution has not had sufficient time to generate transcripts and translations of the six sound recordings, its *prima facie* analysis reveals that Dominic Ongwen contacted persons whom he knew to be Prosecution witnesses, seeking to interfere with or improperly influence their testimony. The following excerpts, expanded in Annex A, demonstrate this proposition.¹⁴

¹³ ICC-02/04-01/15-248-Conf-Exp, para.22.

¹⁴ The following translations should be considered draft and provisional, until such time the six sound recordings are transcribed and translated in full.

25 May 2015

16. [REDACTED]:

“[REDACTED]”.¹⁵

17. [REDACTED]:¹⁶

“[REDACTED]”.¹⁷

2 June 2015

18. [REDACTED]:

“[REDACTED]”.¹⁸

19. [REDACTED]: “[REDACTED]”.¹⁹ [REDACTED]:

“[REDACTED]”.²⁰

20. [REDACTED]:

“[REDACTED]”.²¹

¹⁵ “[REDACTED]”. ICC-02/04-01/15-268-Conf-Exp-Anx6, 00:58.

¹⁶ [REDACTED].

¹⁷ [REDACTED].” ICC-02/04-01/15-268-Conf-Exp-Anx6, 12:47. [REDACTED].

¹⁸ “[REDACTED].” ICC-02/04-01/15-268-Conf-Exp-Anx4, 00:30.

¹⁹ “[REDACTED].” ICC-02/04-01/15-268-Conf-Exp-Anx4, 00:30.

²⁰ “[REDACTED].” ICC-02/04-01/15-268-Conf-Exp-Anx3, 07:08.

²¹ “[REDACTED].” ICC-02/04-01/15-268-Conf-Exp-Anx3, 10:49.

3 June 2015

21. [REDACTED] “[REDACTED].”²²

22. [REDACTED]:

“[REDACTED].”²³

23. [REDACTED].²⁴

24. [REDACTED] “[REDACTED].”²⁵ [REDACTED]:

“[REDACTED].”²⁶

25. [REDACTED]: “[REDACTED].”²⁷ [REDACTED].

26. [REDACTED].

27. For this reason, and to prevent any further interference with potential witnesses from occurring, directly or through the use of third parties, the current restrictions on Dominic Ongwen’s communications should be maintained for the duration of his pre-trial detention, subject to periodic review.

28. Dominic Ongwen has demonstrated – in the first few months of his detention – that he cannot be trusted to exercise the telephone communication privileges afforded to him at the Detention Centre responsibly. Maintaining the current

²² “[REDACTED].” ICC-02/04-01/15-268-Conf-Exp-Anx2, 00:28. [REDACTED].

²³ “[REDACTED].” ICC-02/04-01/15-268-Conf-Exp-Anx2, 00:46.

²⁴ “[REDACTED].” ICC-02/04-01/15-268-Conf-Exp-Anx2, 09:15.

²⁵ “[REDACTED].” ICC-02/04-01/15-268-Conf-Exp-Anx1, 54:10.

²⁶ “[REDACTED].” ICC-02/04-01/15-268-Conf-Exp-Anx1, 55:02.

²⁷ “[REDACTED].” ICC-02/04-01/15-268-Conf-Exp-Anx1, 55:02.

communication restrictions will not interfere with Dominic Ongwen's right to a fair trial, including his right to consult with his lawyers. This is the least intrusive measure to protect effectively the integrity of Dominic Ongwen's trial and permit the Court to arrive at the truth.

29. The Prosecution submits that this primary relief is the best way to achieve a proportionate balance between seeking the truth on the one hand, and balancing the rights of Dominic Ongwen on the other.
30. However, if the Single Judge is not minded to grant the primary relief sought, the Prosecution suggests in the alternative that the Single Judge order other, lesser, restrictions be placed on Dominic Ongwen's telephone communication privileges for the duration of his pre-trial detention, subject to periodic review:
 - a. restrict Dominic Ongwen's phone calls to the 200 minutes every month that the Registry provides free of charge;
 - b. prohibit Dominic Ongwen's contact with certain persons, including potential witnesses in this case [REDACTED];
 - c. any conversations that Dominic Ongwen makes be confined to private matters and must not touch on issues relating to witnesses in the case or involve the use of codes or pseudonyms;²⁸
 - d. order the Registry to inform the Prosecution should any change occur to the list of approved callers for Dominic Ongwen and, if so, permit the Prosecution to make submissions on the appropriateness of any person added to the list; and/or
 - e. order the Registry actively monitor all telephone calls, including potential witnesses in this case [REDACTED]
 - f. order the Registry to provide to the Court and both parties monthly call data records on all telephone calls;

²⁸ See ICC-01/04-01/07-1498-tENG-Red, para.31.

- g. order the Registry immediately terminate any calls in which either Dominic Ongwen or the interlocutor attempt to interfere with or intimidate witnesses or interfere with the collection of evidence and immediately report the matter to the Chamber and the parties.

31. Although they would not be able to prevent Dominic Ongwen from interfering with the evidence against him in this case, these lesser restrictions would make it feasible for the Court to access critical information within a reasonable time, and hold Dominic Ongwen to account, if similar allegations were to arise again. They find support in the relevant provisions of the Regulations of the Registry.²⁹

32. Finally, given that the issue of restrictions being placed on Dominic Ongwen is a matter of public record, the Prosecution requests the Single Judge to order the Registrar to file into the record of the case, confidential and public versions of the transcripts of the six sound recordings.

Relief sought

33. Based on the foregoing, the Prosecution submits that the Single Judge should maintain for the duration of his pre-trial detention, the current restrictions imposed on Dominic Ongwen's communications in order to prevent witness interference and ensure the integrity of the evidence, subject to periodic review.

34. In the alternative, if the Single Judge concludes that the present restrictions are not justified, the Prosecution proposes a set of measures described at paragraph 30, above.

²⁹ See regulations 173(5) and 175.

35. Finally, the Prosecution requests the Single Judge to order the Registrar to file into the record of the case, confidential and public versions of the transcripts of the six sound recordings.



Fatou Bensouda,
Prosecutor

Dated this 29th day of September 2015
At The Hague, The Netherlands