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

Date: **27 May 2016**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Peter Kovacs
Judge Raul C. Pangalangan

SITUATION IN UGANDA

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

Public

**with public Annexes 1 and 2, and confidential, *EX PARTE*, only available to
Prosecution and the Registry Annex 3**

**Public redacted version of “Prosecution’s Request to Obtain DNA Samples from
Dominic Ongwen”, 13 August 2015, ICC-02/04-01/15-288-Conf-Exp**

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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Introduction

1. The Office of the Prosecutor ("Prosecution") requests the Pre-Trial Chamber to authorise the collection of DNA samples from Dominic Ongwen by qualified Prosecution personnel.

Confidentiality

2. This application and its annexes are filed as *ex parte and* confidential pursuant to articles 54(1)(b) and 68 of the Rome Statute ("Statute") and rules 81(2) and (4) of the Rules of Procedure and Evidence. The information contained in this filing refers to on-going investigations on sexual and gender based crimes ("SGBC") allegedly committed by Dominic Ongwen. Further, if he were to learn in advance of the Prosecution's intention to secure a non-consensual sample of his DNA, he might take steps to frustrate this procedure. Finally, this application contains information that identifies vulnerable witnesses who would, if their identities were made public, be subject to undue speculation, potentially exposing them to safety and security risks as a result.
3. Some of these witnesses have already been the subject of interference as a result of the actions of Dominic Ongwen and officials of a non-governmental organisation, identified in a previous filing.¹ As a consequence, orders restricting Dominic Ongwen's access to telephone communications have been issued by the Single Judge seized of the matter.²

¹ ICC-02/04-01/15-256-Conf, paras.7 and 8.

² ICC-02/04-01/15-283-Conf.

Procedural background

4. On 8 July 2005, Pre-Trial Chamber II issued warrants of arrest, under seal, against Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo, and Dominic Ongwen for war crimes and crimes against humanity.³ The Chamber also issued requests for their arrest and surrender to the Republic of Uganda.⁴
5. On 21 January 2015, Dominic Ongwen was transferred to the Court's detention facilities.
6. On 26 January 2015, Dominic Ongwen made his initial appearance before the Single Judge then responsible for carrying out the functions of the Pre-Trial Chamber.⁵
7. On 28 January 2015, the first Status Conference in the case against Dominic Ongwen was held. At the Status Conference the Prosecution indicated that it was "giving serious consideration to adding sexual and gender based crimes".⁶
8. On 6 February 2015, Pre-Trial Chamber II severed the proceedings against Dominic Ongwen from the case of *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*.⁷
9. On 20 July 2015, the Prosecution requested the Detention Unit to provide DNA samples from Dominic Ongwen. On 21 July 2015, the Detention Centre Chief Custody Officer, Paddy Craig, directed the Prosecution to request the

³ ICC-02/04-01/05-1-US-Exp; ICC-02/04-01/05-2-US-Exp; ICC-02/04-01/05-4-US-Exp; ICC-02/04-01/05-8-US-Exp; ICC-02/04-01/05-10.

⁴ ICC-02/04-01/05-12-US-Exp; ICC-02/04-01/05-13-US-Exp; ICC-02/04-01/05-14-US-Exp; ICC-02/04-01/05-15-US-Exp; ICC-02/04-01/05-16.

⁵ ICC-02/04-01/15-T-4-ENG.

⁶ ICC-02/04-01/15-T-5-ENG, p.23.

⁷ ICC-02/04-01/05-424+Anx.

Chamber's authorisation to obtain such a sample as none had been obtained when Dominic Ongwen was first remanded in the Court's detention facility.⁸

10. On 22 July 2015, the Prosecution wrote to the Defence team requesting a DNA sample from Dominic Ongwen. In its request, the Prosecution stressed the truth-seeking obligation that underlay its request. The Defence rejected the request on the basis that it was "premature... considering the current state of the case".⁹

Submissions

The Prosecution's Obligation to Establish the Truth

11. As part of its obligations pursuant to article 54(1) of the Statute, the Prosecution has a duty to establish the truth and to extend its investigations to cover incriminating and exonerating circumstances equally. This obligation, notwithstanding the adversarial design of proceedings before the Court, imposes an active and "continuous"¹⁰ duty upon the Prosecution to "establish the truth".
12. In pursuit of this obligation, the Prosecution intends to rely on various types of evidence, including DNA evidence, to determine the paternity of some of the children allegedly fathered by Dominic Ongwen following the abduction and captivity of some of the Prosecution's prospective witnesses.
13. At least five of the witnesses - those cited in this filing - have named Dominic Ongwen as the father of some or all of their children. These five witnesses have provided samples to enable DNA testing to be conducted.

⁸ See attached as Annex 1, the response by the Detention Centre, Chief Custody Officer, Paddy Craig.

⁹ See attached as Annex 2, the correspondence exchanged by both Parties.

¹⁰ Prosecutor v. Katanga and Ngudjolo Chui, ICC 01/04-01/07-T-81, 25 November 2009, pp.16-17, 34.

14. Although Dominic Ongwen has admitted paternity of some of the children, the Prosecution's obligation is to present clearly to the Chamber the totality of the evidence collected in support of the SGBC it will allege Dominic Ongwen committed. DNA evidence, while by no means required to prove SGBC, could nonetheless bolster the evidence at the Prosecution's disposal. Likewise, depending on the results, it could also bolster the case argued by the Defence. Thus, DNA evidence plays an important role in the truth-seeking function of the proceedings of this Court.

Witness P-99

15. P-99 was among the first of Dominic Ongwen's "wives" to have DNA testing. She was abducted in February 1998 at the age of 14 and transferred to his household shortly afterwards. She subsequently became Dominic Ongwen's "wife" and bore him a son. Since she escaped from the LRA, the witness has [REDACTED]. Both P-99 and the son that she alleges to be Dominic Ongwen's have voluntarily provided samples for DNA testing by the Prosecution.

Witness P-101

16. P-101 was also Dominic Ongwen's "wife". She was abducted in August 1996 and stayed with him for almost a decade until her escape in 2004. She bore him two children when she was in captivity. She was pregnant with a third when she escaped from the LRA. She has since had the child. P-101 and her three children have all provided samples for DNA testing by the Prosecution.

Witness P-198

17. [REDACTED].

Witness P-214

18. P-214 was abducted in June 2000 when she was 17 years old. She spent 10 years in captivity with the LRA as Dominic Ongwen's "wife". During this time, she gave birth to two of his children. After she escaped from the LRA [REDACTED]. The children that she alleges to be Dominic Ongwen's have provided samples for DNA testing by the Prosecution.

Witness P-227

19. P-227 was abducted from her home in April 2005 when she was 19 years old. She eventually became Ongwen's "wife" and bore him a son. The witness has [REDACTED]. The witness and the son that she alleges to be Ongwen's, have provided samples for DNA testing by the Prosecution.

20. The Prosecution is still in the process of identifying and obtaining statements from Ongwen's other "wives". It has identified at least two others who have four children between them, and hopes to obtain statements and body tissue samples from them. Altogether, the Prosecution has identified at least 13 children allegedly fathered by Dominic Ongwen. More may yet surface during the course of its investigations.

DNA Information and Analysis

21. DNA the genetic blueprint of every life form, provides a unique vehicle for individual identification, since no two people, with the exception of identical twins, have the same DNA. Scientists are able to perform a technique known as DNA profiling which can identify a person, and establish paternity, to a very high probability. Obtaining samples from Dominic Ongwen for DNA

testing will enable the profiles from those samples to be compared with the profiles from samples obtained from the children identified above. The ultimate objective is to ensure that these test results, in combination with other relevant evidence, can be presented before the Court in order to establish the truth.

The Request does not Offend Dominic Ongwen's Right Against Self-Incrimination

22. Obtaining DNA samples from Dominic Ongwen will not affect his right against self-incrimination enshrined in article 55(1) of the Statute. Dominic Ongwen is not being asked to confess his guilt. Neither do the measures which may be taken involve any infringement on his person. Rather, the Prosecution requests that an order be made to gather readily available physical evidence which may assist the Judges to arrive at the truth in this case.

23. The right against self-incrimination, as recognised by the Statute, has its roots in human rights law. Within the context of the European Court of Human Rights ("ECtHR") jurisprudence, this right has been extended only as far as it relates to the right of an accused to remain silent.

24. The ECtHR jurisprudence makes a distinction between the right against self-incrimination, as it applies to testimonial evidence, and the obtaining of physical evidence, such as bodily fluids and tissues, from a suspect.¹¹

25. In *Saunders v. United Kingdom*, the ECtHR held that:

"[T]he right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of

¹¹ Jalloh v. Germany, ECtHR, 11 July 2006, paras.102 and 112; Heaney and McGuinness v. Ireland, ECtHR, 21 December 2000, para.40; O'Halloran and Francis v. UK, ECtHR, 29 June 2007, para.47.

material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.”¹²

26. The Prosecution adopts the reasoning of the ECtHR in *Saunders* and submits that a distinction should be made between materials that exist “independent of the will of the suspect” (in this case, Dominic Ongwen), and which will be subject to the compulsory powers of the Court, and conduct requiring the activity on Ongwen’s part, such as speaking or handing over incriminatory materials.¹³

27. In the United States, the Supreme Court in *Schmerber v. California*¹⁴ issued a similar ruling, whereby it distinguished between “testimonial or communicative” evidence and “real or physical” evidence. The Court held that compelling an accused to provide the former would violate the privilege against self-incrimination but that physical evidence, which was neither an accused’s testimony nor evidence relating to some communicative act, was not inadmissible on grounds of privilege, even if it is taken under compulsion. Under the *Schmerber* interpretation, Ongwen’s privilege would not apply to the material that the Prosecution wishes to collect in this case.

28. The US Ninth Circuit Court of Appeals later confirmed this notion. Following *Schmerber* explicitly, in *United States v. Reynard*, the court held that the taking of DNA evidence does not infringe the privilege against self-incrimination because “blood samples and DNA profiles are physical, rather than testimonial.”¹⁵

¹² *Saunders v. UK*, ECtHR, 17 December 1996, para.69.

¹³ *Funke v. France* 256 ECtHR, 25 February 1993.

¹⁴ *Schmerber v. California*, 384 US 757 (1966).

¹⁵ 473 F.3d 1008 at 1021 (2007).

29. Similarly, in Germany, the privilege against self-incrimination does not impede the access to genetic material of a suspect. Paragraphs 81(a), 81(e) and 81(f) of the German Code of Criminal Procedure (StPO) explicitly provide for the corporal inspection of a suspect, including the taking of blood samples and other bodily intrusions for the purposes of performing DNA analysis.
30. The preceding paragraphs show that the privilege against self-incrimination, as recognised by the Statute, does not operate as a bar for the adoption of intrusive measures aimed at collecting genetic material from the suspect and performing scientific analysis of that material.

Proposed Process

31. The Prosecution seeks to collect samples of Dominic Ongwen's hair, and saliva residue. These, it is submitted, will best be obtained by seizing the toothbrush, hairbrush and/or comb and pillow case or other similar items of nominal value which Dominic Ongwen is using at the time when any order resulting from this application is carried out. As is apparent, none of the proposed measures involves any form of intrusion into Ongwen's body. To the extent that they intrude into Ongwen's sphere of privacy, the Prosecution submits that any such intrusion is negligible and amply justified by the importance of the instant investigative goals. Thus, the measures proposed are necessary, adequate and proportionate.
32. The taking of the samples will be performed by qualified officers of the Prosecution's Scientific Response Unit in accordance with appropriate and established procedures.

33. The samples collected will be sent to the Netherlands Forensic Institute (“NFI”) which is the premier national and independent forensic laboratory in the Netherlands.

34. The Prosecution undertakes to file an *inter partes* version of this request so soon as the sample collection has been carried out, and to share the results of the DNA testing with the Defence once the results are provided by the NFI.

Relief Requested

35. For the foregoing reasons, the Prosecution requests the Pre-Trial Chamber to order the Registry to permit appropriately qualified Prosecution personnel to conduct the collection of the objects specified in paragraph 31 above from Dominic Ongwen.



Fatou Bensouda,
Prosecutor

Dated this 27th day of May 2016

At The Hague, The Netherlands