

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/04-01/15
Date: 13 February 2019

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

IN THE CASE OF

THE PROSECUTOR v. DOMINIC ONGWEN

**Public
with Confidential Annex A**

Public Redacted version of the Prosecution Response to the “Defence Request for Orders to the Prosecution in relation to Information Concerning Mr Ongwen’s family”, 30 January 2019, ICC-02/04-01/15-1425-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

Mr Joseph Akwenyu Manoba
Mr Francisco Cox
Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Ms Caroline Walter
Mr Orchlon Narantsetseg

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

Amicus Curiae

States Representatives

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Defence Request¹ should be denied. Granting the request would risk witness interference and threaten the integrity of these proceedings. The provision of information which will facilitate contact between the Accused and victims of his alleged crimes would also violate the spirit of protection measures which have been put in place by the Trial Chamber to protect vulnerable witnesses. As previously noted by the Prosecution², the Accused continues to manifest an apparent belief that the fact the Prosecution witnesses have borne his children legitimises relationships which result solely from his sexual violence³.

2. The Defence in the Request also seeks to re-litigate issues previously decided by the Single Judge of the Trial Chamber without filing a request for re-consideration.

3. The Prosecution has abided by its disclosure obligations and will continue to do so where materials fall under the ambit of its disclosure obligations pursuant to articles 64(3)c and 67(2) of the Rome Statute, and rules 76 and 77 of the Rules of Procedure and Evidence (“Rules”). The Defence has not substantiated the demand for additional disclosure in any of the areas identified in the Request.

4. The Trial Chamber should deny the other measures sought by the Defence in the Request.

¹ ICC-02/04-01/15-1414-CONF

² ICC-02/04-01/15-542-CONF

³ Ibid paras. 19,20

Confidentiality

5. This submission is classified as “Confidential”, pursuant to regulation 23bis (2) of the Regulations of the Court (“RoC”) because the Request was filed confidentially.

Background

6. On 8 June 2015, the Single Judge of Pre Trial Chamber II (‘PTC Single Judge’) granted a Prosecution request⁴ under article 57 of the Rome Statute and regulation 101(2) of the (‘RoC’) restricting Dominic Ongwen’s telephone communications and orally instructed the Registrar acting under regulations 101(3) of the RoC, to restrict Dominic Ongwen’s use of the telephone in the Detention Centre to calls to his Counsel, and to prohibit other telephone communications and visits. On the same day, the PTC Single Judge issued a formal Order confirming these restrictions⁵.

7. On 27 July 2015, the PTC Single Judge granted a Prosecution request for article 56 proceedings in relation to two Prosecution witnesses – P-0226 and P-0227⁶. A second article 56 decision in relation to six other witnesses – P-0099, P-0101, P-0198, P-0214, P-0235 and P-0236⁷ was made on 15 August 2015. The latter decision, *inter alia*, ordered the Defence to refrain from contacting, directly or indirectly, any of the witnesses who were the subject of the decision, including P-0214⁸.

⁴ ICC-02/04-01/15-241-Conf-Exp and- Conf-Exp-Anx A

⁵ ICC-02/04-01/15-242

⁶ ICC-02/04-01/15-277-Conf; They gave evidence on oath pursuant to rule 66 of the Rules of Procedure and Evidence (the “Rules”), on 15, 16, 18 and 19 September 2015 (ICC-02/04-01/15-T-8-CONF-ENG, T-9-CONF-ENG, -T-10-CONF-ENG, -T-11-CONF-ENG).

⁷ ICC-02/04-01/15-316-Conf; They gave evidence on oath pursuant to rule 66 of the Rules of Procedure and Evidence (the “Rules”), on 15, 16, 18 and 19 September 2015 (ICC-02/04-01/15-T-8-CONF-ENG, T-9-CONF-ENG, -T-10-CONF-ENG, -T-11-CONF-ENG).

⁸ ICC-02/04-01/15-316

8. On 3 August 2015, the PTC Single Judge issued an order to the Registrar to remove two individuals, D26-13 and P-0214, from the list of permitted telephone contacts for Mr Ongwen⁹. The Single Judge took measures restricting Mr Ongwen's telephone communications on the basis of 'information which led to the finding of reasonable suspicion that there had been attempts by Mr Ongwen to exercise {...} some form of influence on persons who possess information relevant to the case'¹⁰.

9. On 11 November 2015, the PTC Single Judge issued an order on the protocol governing contact between a party or participant and witnesses of the opposing party or participant ('Contact Protocol')¹¹. The latter prohibited contact with a witness of another party or participant if the intention to call the witness to testify or to rely on his or her statement has been communicated to the party or participant or if this intention is otherwise clearly apparent¹².

10. On 24 June 2016, the Prosecution filed its 'Request for an order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen ('Request')¹³, in which it asked the Chamber to order: i) the Defence to immediately disclose all financial or in kind payments or promises of money made by Mr Ongwen to witnesses in this case; ii) Mr Ongwen to cease payments to such individuals pursuant to article 70 of the Rome Statute ; and iii) the Registry to review Mr Ongwen's communications that reference certain individuals and disclose these conversations to the Prosecution for review regarding possible article 70 violations¹⁴. The Prosecution in the filing alleged that Mr

⁹ ICC-02/04-01/15-283

¹⁰ Ibid, para. 10,12

¹¹ ICC-02/04-01/15-339

¹² Ibid, para. 26-27

¹³ ICC-02/04-01/15-482-CONF

¹⁴ ICC-02/04-01/15-482-CONF, paras 1, 7-8.

Ongwen's payments, although purportedly to his "family", were directed towards Prosecution witnesses and such payments may constitute witness interference in violation of the PTC Single Judge's instructions and potentially an offence under article 70 of the Statute¹⁵.

11. On 4 July 2016, the Defence filed its response to the Request ('Response')¹⁶, in which it offered its explanations as to why Mr Ongwen was providing funds to two potential witnesses in the case.

12. On 10 August 2016, the Single Judge issued a 'Decision on Prosecution Request for an Order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen'¹⁷ in which he ordered *inter alia* 'the Prosecution and the Defence to consult with the VWU in regard to how Mr Ongwen can contribute to the welfare of his children'.

13. On 19 August 2016, the Prosecution and Defence met and reached an amicable agreement pursuant to Decision 521¹⁸. On 24 November 2016, a joint agreement reached for the provision of support to the family of Mr Ongwen was filed¹⁹.

14. On 23 September 2016, the Registry filed the "Registry's Report on Mr Ongwen's Requests to Add New Persons to his Non-Privileged Telephone Contact List ("Registry's Report"), wherein it stated that Dominic Ongwen then asserted that

¹⁵ Ibid, paras 5-6.

¹⁶ ICC-02/04-01/15-490-CONF

¹⁷ ICC-02/04-01/15-521

¹⁸ ICC-02/04-01/15-606

¹⁹ *ibid*

[REDACTED] are the legal guardians of his children and requested their addition to his non-privileged contact list²⁰.

15. On 04 October 2016, the Single Judge issued a Decision²¹, denying Mr Ongwen's request to add four individuals – D-26-13, P-214, P-235 and P-236 to his non privileged telephone contact list and directed the parties to engage in *inter partes* communications and select a neutral third party to facilitate Mr Ongwen's contact with the children approved by the Registry. The parties complied with the order and following extensive consultations with the Registry, set up a mechanism for the telephone communication between the accused and his children²².

16. On 15 August 2018, the Prosecution disclosed an Investigation Report dated 31 January 2018 which indicated that P-227's son whom she bore to Mr Ongwen as a result of the crimes charged²³, had sustained an injury as a result of an accident²⁴.

17. On 1 November 2018, the Defence initiated an *inter partes* query regarding the disclosure of the Investigation Report and requesting disclosure of further or prior incident reports/meeting notes/ documents in the possession of the Prosecution or OPCV that describe any form of hardship experienced by Mr Ongwen's children or alleged children following his detention²⁵.

18. On 8 November 2018, the Prosecution responded noting that although it had disclosed the document as material to the preparation of the Defence, "documents in the possession of the Prosecution {...} that describe any form of hardship

²⁰ See ICC-02/04-01/15-539-CONF-EXP, para. 8

²¹ ICC-02/04-01/15-553

²² Annex A

²³ See ICC-02/04-01/15-533-CONF., para. 558-567

²⁴ UGA-OTP-0282-0522

²⁵ ICC-02/04-01/15-1414-CONF-Anx A

experienced by Mr Ongwen's children or alleged children following his detention are not {...} material to the preparation of the defence simply because of their reference to Mr Ongwen's children''²⁶.

19. On 18 January 2019, the Defence filed its Request.

Submissions

Risk of Witness Interference

20. The Defence Request for information on a child who is the product of crimes with which Mr Ongwen is charged need not and should not be granted where the information falls outside the ambit of the disclosure obligations of the Prosecution and where the mother has not consented to the disclosure of such information. In this instance it must be noted that the witness directed her request for assistance to the Prosecution and not to Mr Ongwen. In fact the Prosecution is aware of no indication that this witness desired any assistance from, or contact with, the Accused in relation to this incident.

21. While the Prosecution is mindful that a familial tie exists between Mr Ongwen and the children who are the offspring of several Prosecution witnesses, such ties do not mean an obligation to disclose information about the wellbeing of these children especially in view of the "reasonable suspicion that there had been attempts to exercise some form of influence on persons who possess information relevant to the case"²⁷.

²⁶ Ibid, page 1.

²⁷ ICC-02/04-01/15-283, paras 9,10,12

22. The Trial Chamber has previously recognised the need to balance the rights of the Accused to contribute to the welfare of his children with the obligation to ensure a fair trial and whilst safe guarding against potential witness interference²⁸. In the view of the Prosecution, the regime already put in place by the Single Judge in filing 521²⁹ and jointly agreed by the parties in filing 606, fully and fairly covers the ambit of the any support to be provided by Mr Ongwen to the children he fathered with Prosecution witnesses³⁰.

23. The Defence allegation that the harm of the accident could have been prevented had the Prosecution promptly disclosed the information is incorrect. Prosecution took immediate steps to attend to the concern of P-0227 when she informed the Office of the incident. The circumstances would not have changed had the Defence been informed immediately as the injury/harm was already sustained anyway.

24. As regards the Defence assertion that P-0227 is not a trial witness, Prosecution recall that the Single Judge already observed that the fact that the evidence of the witness was taken pursuant to Article 56 of the Statute and formally submitted does not ameliorate his concern about possible interference as long as proceedings are ongoing³¹. Furthermore, by the definition of the witness contact protocol³², a witness is defined as “a person whom a party or participant intends to call to testify or on whose statement a party or participant intends to rely”³³ and this definition remains applicable to P-0227, upon whom the Prosecution relies.

²⁸ ICC-02/04-01/15-521

²⁹ Ibid para 18

³⁰ ICC-02/04-01/15-606

³¹ Ibid, para 15

³² ICC-02/04-01/15-339-Anx

³³ Ibid, para. 4(f)

25. In paragraph 37, the Defence argues that since the mothers of the Accused's children are witnesses, then the children are "persons at risk through the activities of the Court". This ignores the fact that the harm to P-0227's son resulted from an accident with no connection whatsoever to the Court. In any event, the Trial Chamber has already taken measures to ensure the protection and provision for the children pursuant to Article 68(1) when it considered "*a more flexible regime {that} might allow Mr Ongwen to contribute to the welfare of his children while safe guarding against potential witness interference*"³⁴.

26. The Prosecution notes that paragraphs 38-52 of the Request are simply a rehearsal of Defence arguments already offered in filing 490³⁵ which were taken into consideration by the Single Judge in reaching decision 521. Furthermore, the informational rights the Defence seeks to rely upon are not unlimited in nature and must be balanced against the right to a fair trial "free from the taint of witness interference"³⁶. The need for preserving the integrity of the proceedings has repeatedly given rise to orders from this Trial Chamber restricting access by Mr Ongwen to Prosecution witnesses³⁷ and the Request fails to demonstrate why the Trial Chamber should derogate from this prudent and justified approach.

27. The Defence asserts that granting the Request will "*streamline the unfolding of the rest of the trial*"³⁸ but fails to take cognisance of the fact that the Chamber has on at least two occasion mandated the Parties to conduct *inter partes* communications in

³⁴ ICC-02/04-01/15-521, para. 18

³⁵ See ICC-02/04-01/15-490-CONF citing Article 5 of the Convention on the Rights of the Child ("CRC"); African Charter on Rights and Welfare of the Child; Protocol on the African Charter on Rights and Welfare of the Child ("Maputo Convention"); Article 10(1) of the International Convention on Economic, Social and Cultural Rights.

³⁶ *ibid*

³⁷ See ICC-02/04-01/15-242, ICC-02/04-01/15-283-Conf, ICC-02/04-01/15-450-Conf, ICC-02/04-01/15-521 and ICC-02/04-01/15-553.

³⁸ Para 64

order to ‘streamline the unfolding of the trial’³⁹. These orders were complied with by both Parties after detailed consultations and the resulting agreement has seen a smooth implementation of the right of the Accused to send support payments to or communicate with his children where appropriate⁴⁰.

28. Far from obstructing the Accused’s support of his children, the Prosecution has made many reasonable accommodations to allow such support whenever possible. As recently as 13 December 2018, the Defence had written by email to the Prosecution requesting its approval for the provision of [REDACTED] by Mr Ongwen to a Prosecution witness – P0214⁴¹. The Prosecution by email response, agreed to the provision of the funds for the support and upkeep of the children⁴².

29. Where a genuine request for assistance has been established concerning the welfare of the children, in the spirit of *inter partes* cooperation, Prosecution, OPCV and the Defence have worked together to ensure that funds and assistance to the children is provided in a timely manner without the risk of direct contact between Mr Ongwen and a Prosecution witness⁴³.

30. It was also the need to shield the Prosecution witnesses while allowing Mr Ongwen access to his children that also informed the decision of the Trial Chamber allowing access to telephone communication between Mr Ongwen without the presence of the mothers⁴⁴. Absent an affirmative disclosure obligation, Prosecution will not unilaterally provide information on children of Prosecution witnesses, to the

³⁹ See ICC-02/04-01/15-521 para 18 and ICC-02/04-01/15-553 para 10

⁴⁰ See Annex A to this filing

⁴¹ Email of [REDACTED] – “URGENT query re: support transfer to P-214” dated 13 December 2018 @18:00

⁴² Email of [REDACTED] dated 14 December 2018 @10:25

⁴³ Email of [REDACTED] dated 30/11/2018 @16:11, 16:25

⁴⁴ ICC-02/04-01/15-553

Accused without the consent of the mothers who are the primary caregivers and bear primary responsibility for the children in the field.

Disclosure Request for Prior Material

31. The Defence requests that the Prosecution disclose any “record describing further follow up, actions taken, or responses provided in relation to the investigative note”⁴⁵. The Prosecution relies on the description of the disclosure review process it has elaborated upon in filing 1341⁴⁶ and will desist from repeating its submissions in that filing. In light of the current Defence request, the Prosecution conducted a fresh electronic search of its evidence database for any undisclosed item containing information related to the Investigation Note. The only two items that were responsive to the search were reviewed by Prosecution Team members and no additional disclosable information was identified.

32. The Appeals Chambers has recognised that the Rule 77 disclosure obligation of the Prosecution while broad, is not unlimited⁴⁷. The present request by the Defence of any information which relates to his children is not limited to information related to the charges in the case or to material facts contained in the charging period or the charges but is an all - encompassing request that falls well outside the ambit of the Prosecution’s disclosure obligations. It is unnecessary for a separate order to be issued by the Chamber where the Prosecution has made every attempt to meet its disclosure obligations.

⁴⁵ Ibid para 57

⁴⁶ ICC-02/04-01/15-1341-CONF. paras. 8,9,10 and 26.

⁴⁷ Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”, ICC-02/05-03/09-501, para 39, 28 August 2013, The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Judgment on the appeal of Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus

The Other Relief Requested Should be Denied

33. The Request for other information under paragraph 57(b) and (c) should be denied as they are speculative and unnecessary.

Conclusion

34. For the reasons set out above, the Request should be denied.



Fatou Bensouda, Prosecutor

Dated this 13th day of February 2019
At The Hague, The Netherlands