

**Cour
Pénale
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**International
Criminal
Court**

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

Date: **10 October 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***

Confidential

**Defence Request for Leave to Reply to
‘Prosecution’s Response to the Defence
“Request to Lift Communication Restrictions Placed Upon Mr Ongwen”’
(ICC-02/04-01/15-1628-Conf)**

Source: Defence for Dominic Ongwen

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

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I. SUBMISSIONS

1. The Defence seeks leave to reply, pursuant to Regulation 24(5) of the Regulations of the Court ('RoC'), to the Prosecution response¹ of 7 October 2019 to the 'Defence Request to Lift Communication Restrictions Placed Upon Mr Ongwen'.² As discussed below, the Defence seeks leave to reply to two issues:
 - a. The prejudice to Mr Ongwen's human rights if the Prosecution's conflation of the purposes for the restrictions is accepted by the Trial Chamber; and
 - b. The legal relevance of the Prosecution calling-status of the witnesses.³
2. Pursuant to Regulations 23bis of the RoC, this request is submitted as confidential as it refers to filings of the same classification. Should those filings be re-classified or later filed in public redacted form, the Defence does not object to the present filing being reclassified as public.

A. **The prejudice to Mr Ongwen's human rights if the Prosecution's conflation of the purposes for the restrictions is accepted by the Trial Chamber**

3. The Prosecution's position is that without the active and informed consent of the concerned individuals, the communication restrictions must remain.⁴ The Prosecution itself quotes from the arguments which form the legal basis for the restrictions.⁵ Yet they conflate two different purposes. These quotes concern preventing interference as a purpose,⁶ but the restriction's stated purpose is not about protecting witnesses who have a vulnerable status as suggested by the Prosecution.
4. The Response seeks to justify restrictions on liberty that were based upon one set of considerations with other considerations. The Response references the Single Judge's position⁷ in respect to a Defence request that sought disclosure of information for the purposes of concerns similar to that granted recently.⁸ The Response implicitly portrays the Request as one which seeks to harm the women,⁹ and blurs the Prosecution Request

¹ ICC-02/04-01/15-1628-Conf ('Response').

² ICC-02/04-01/15-1616-Conf ('Request').

³ Response, para. 11.

⁴ *Ibid.*, para. 4.

⁵ *Ibid.*, paras 12 and 13.

⁶ See additionally the confirmation of charges, ICC-02/04-01/15-422-Conf, para. 6 ("the restriction of Dominic Ongwen's communications in the Detention Centre to prevent interference with the evidence").

⁷ Response, para. 17.

⁸ Compare Defence request ICC-02/04-01/15-1414-Conf, para. 31, 32, and 41 and ICC-02/04-01/15-1593.

⁹ Compare Response, para. 18 with Request paras 3 and 57.

arguments about vulnerability with a pre-trial holding concerning the necessity of restrictions where individuals wanted to be in contact.¹⁰

5. The Prosecution arguments obscure the background to the Request. Removing legal limitations on liberty and making contact a possibility through the provision of information to the concerned individuals does not threaten vulnerable individuals. Should Trial Chamber IX ('Chamber') follow the Request to its fullest, the request still does not seek removal of the oversight over additions to Mr Ongwen's list of contacts.¹¹ There is a system which the Chamber has in place that can screen out requests which the Prosecution considers improper.
6. The vulnerability arguments should also be treated with caution. The day of filing the Request, the Prosecution cross-examined D-13¹² around the allegations which led to the communication restrictions, the Article 56 hearings, and the expansion of charges against Mr Ongwen. During the Article 56 hearings, neither the Prosecution nor the Pre-Trial Single Judge considered it relevant to verify the allegations which formed the basis of the restrictions with each woman.¹³ Moreover, the fact that the Prosecution is not opposing potential contact between D-13 and Mr Ongwen in the Response, having cross-examined D-13, calls into question the degree of the concerns over potential interference.
7. The above is to say that the leave to reply is merited to set out the prejudice to Mr Ongwen's human rights that follow from supplanting one set of considerations for the ones suggested by the Prosecution. The Defence noted the human rights issues in respect to restrictions on detained persons where the coercive powers have too great a scope of discretion;¹⁴ however, it did not make submissions upon the human rights law concerning restrictions upon liberty imposed under incorrect bases. The Defence requests permission to set out the legal consequences of transforming the legal basis *post hoc* and retroactively as is seemingly suggested in the Response.

B. The legal relevance of the Prosecution calling-status of the witnesses

8. The Prosecution argues that the end of its case is not a changed circumstance. In paragraph 11 the Prosecution repeats the Pre-Trial Single Judge's comment that "no substantial difference exists in this Court between witnesses who come to testify 'for' one or the other party" to

¹⁰ Response, para. 16, footnote 18.

¹¹ Request, para. 53.

¹² See starting at ICC-02/04-01/15-T-245-CONF-ENG, p. 10.

¹³ A search of the Article 56 transcripts for 'JRP' supports this conclusion.

¹⁴ Request, para. 32.

argue that the end of its case is simply not a relevant fact as to whether the reasons underlying the Regulation 101 RoC restrictions persist. This is inconsistent with the Appeal Chamber's jurisprudence that the stage of the proceedings and the passage of time are factors to be considered with respect to whether restrictions are disproportionate.¹⁵ However this argument raises a new issue in the context of the Request which merits a reply.

9. The status of the Article 56 witnesses as Prosecution or Defence witnesses is important and its improper determination in response to this request would be further prejudicial to the case against Mr Ongwen. It is absolutely essential to note that the Article 56 hearings were at a minimum four and half months before¹⁶ the charges against Mr Ongwen were confirmed¹⁷ and a minimum of a months¹⁸ before the formal filing of new charges. In other words the scope of the actual case to defend was not yet before the Defence and there was inadequate notice at that time. In the words of Mr Bradfield who was involved in the Article 56 hearings for the Prosecution "a significant part of that trial was over before it had even began".¹⁹ Those hearings were a prosecutorial investigative act. The pre-trial Single Judge used them to amend the charges and then confirm those charges.²⁰
10. The formal status of a witness as a Prosecution calling-witness leads to the restrictions on investigations in the witness approach protocol.²¹ The Prosecution has invoked this status in respect to the women²² and previously opposed any form of actual investigative interviews with the Article 56 women.²³ This has denied the Defence of the opportunity to call these individuals – which it is entitled to pursuant to Article 67(1)(e) – or to investigate certain issues that arose following the confirmation of charges or during the Prosecution case.

¹⁵ ICC-01/04-02/06-1817-Red OA4, para. 72.

¹⁶ The Article 56 hearings were conducted between 15 September and 18 November 2015.

¹⁷ Confirmation of Charges, ICC-02/04-01/15-422-Conf, 23 March 2016.

¹⁸ ICC-02/04-01/15-375-Conf-AnxA, 21 December 2015.

¹⁹ UGA-D26-0026-0279, page 374, also available at:
https://brill.com/view/journals/icla/19/3/article-p373_373.xml.

²⁰ ICC-02/04-01/15-422-Conf, para. 102 ("The evidence provided during these testimonies, taken and video recorded for the purposes of the trial, is also relied upon by the Prosecutor for the purposes of the hearing on the confirmation of charges.").

²¹ ICC-02/04-01/15-339-Anx, para. 26.

²² See *inter alia* ICC-02/04-01/15-542, para. 22, ("It is clear from the Document Containing the Charges, and the Prosecution's Pre-Trial Brief, that the Prosecution has a clear intention to rely on witnesses P0214, P-0235 and P-0236. At present, the parties currently disagree as to who is the "calling party" in respect of these three witnesses. The Prosecution submits that it is the relevant calling party in this instance. The Defence, who have themselves taken statements from each witness, was informed of the Prosecution's position on this issue via e-mail on 4 December 2015. As such, to add these three women to the Accused's non-privileged contact list would contravene the provisions and spirit of the Contact Protocol.")

²³ Email, 2 July 2018 11h05, subject 'RE: Request to interview Article 56 witnesses'.

11. Moreover, regardless of the other fair trial issues, the information provided by the Article 56 women may have been impacted by their perception of the party for whom they were testifying.
12. Any finding on this issue should not be taken without the Defence being able to make submissions on this important matter. For this reason the Defence seeks leave to reply to the Response on the issue of the calling-status of the Article 56 witnesses.

C. A Defence reply is in the interest of justice

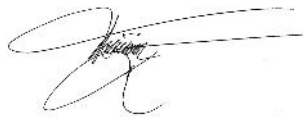
13. The two issues merit a reply. It is in the interests of justice for the Defence to be able to add to and state its position on these legal matters so as to provide a complete picture should the Trial Chamber consider accepting certain Prosecution arguments. The arguments raised by the Prosecution could not be anticipated. The first issue results from a Prosecution argument that goes outside of the nature of the restrictions themselves and the second issue introduces a legal issue that is external to the Request. As the second legal issue is external to the Request, the Defence did not address it and to have done so would have moreover required an extension of the standard page limit due to its complexity.

II. RELIEF

14. For the reasons described above, the Defence respectfully requests Trial Chamber IX to:

GRANT the Defence leave to file a reply to the Response on the two issues identified in paragraph 1 above and described in greater detail in the present filing.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 4th day of October, 2019