

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/04-01/15**
Date: **18 October 2019**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

Public

Decision on Defence Request to Lift Communication Restrictions

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 Victims

Joseph Akwenyu Manoba
Francisco Cox
Paolina Massidda

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

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX (‘Single Judge’ and ‘Chamber’, respectively) of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 68(1) of the Rome Statute (the ‘Statute’) and Regulations 23 *bis* and 24(5) of the Regulations of the Court, issues the following ‘Decision on Defence Request to Lift Communication Restrictions’.

I. Procedural history and submissions

1. On 24 June 2015, the Single Judge of Pre-Trial Chamber II (the ‘Pre-Trial Single Judge’) issued a decision on restrictions for telephone communications of the accused.¹ Therein he, *inter alia*, ordered the Registry to transmit to the Office of the Prosecutor (the ‘Prosecution’) the list of persons whom the accused had permitted telephone contacts with (the ‘Telephone Contact List’).² He also allowed temporary restrictions to the accused’s telephone communications, pending a further decision by the Pre-Trial Single Judge.³
2. On 3 August 2015, the Pre-Trial Single Judge issued a further decision on communication restrictions of the accused.⁴ Therein, the Pre-Trial Single Judge considered there to be a reasonable suspicion that the accused attempted to influence potential witnesses via telephone⁵ and installed a system of restricted communication of the accused.⁶ This included an order to the Registry to actively monitor all non-privileged telephone calls and the need for prior authorisation of the Chamber for any changes to the Telephone Contact List.⁷
3. On 30 May 2016, the Single Judge issued a decision related to the restriction of the communication of the accused.⁸ Therein, he found that the contact restrictions remained warranted and installed a system whereby he directed the Registry to approve automatically a request for addition to the Telephone Contact List in cases where the

¹ Decision on a request by the Prosecutor under article 57 of the Rome Statute and regulation 101(2) of the Regulations of the Court, ICC-02/04-01/15-254.

² ICC-02/04-01/15-254, para. 8.

³ ICC-02/04-01/15-254, para. 2.

⁴ Decision concerning the restriction of communications of Dominic Ongwen, ICC-02/04-01/15-283.

⁵ ICC-02/04-01/15-283, paras 9, 10 and 12.

⁶ ICC-02/04-01/15-283, para. 15 and p. 8.

⁷ ICC-02/04-01/15-283, p. 8.

⁸ Decision on issues related to the restriction of communications of Dominic Ongwen, ICC-02/04-01/15-450-Conf. A public redacted version was filed on the same day, ICC-02/04-01/15-450-Red.

Prosecution did not object. Only in case of such objection, would the Single Judge rule on the contested addition.⁹

4. On 13 September 2019, the Single Judge issued a decision on a Defence request to meet with six Prosecution witnesses (the ‘Witness Contact Decision’).¹⁰ Therein, he ordered that the witnesses in question be contacted in order to enquire whether they consent to being contacted by the Defence, as well as ultimately having potentially contact with the accused.¹¹
5. On 27 September 2019, the Defence filed a request related to the accused’s contacts with women who were his so-called ‘wives’ during their time in the bush (the ‘Request’).¹² The Defence requests that communication restrictions between the accused and D-0013, P-0099, P-0101, P-0214, P-0226, P-0227, P-0235 and P-0236 (together, the ‘Witnesses’) relating to telephone calls are removed.¹³ It further asks that the Witnesses be informed that they can request to have contact with the accused, if they wish to do so.¹⁴
6. On 7 October 2019, the Prosecution filed its response (the ‘Prosecution Response’), opposing the Request.¹⁵ It submits that the Request is premature since the outcome of the Witness Contact Decision is not yet known.¹⁶ The Prosecution further repeats its previously expressed position that it does not oppose that witnesses who wish to contact the accused are allowed to do so. However, it opposes any changes to the regime of contact restrictions.¹⁷
7. On 10 October 2019, the Common Legal Representative for Victims (the ‘CLRv’) filed a response (the ‘CLRv Response’), equally submitting that the Request be rejected.¹⁸

⁹ ICC-02/04-01/15-450-Red, para. 4.

¹⁰ Decision on Defence Request to Meet with Six Prosecution Witnesses, ICC-02/04-01/15-1593.

¹¹ Witness Contact Decision, ICC-02/04-01/15-1593, para. 4 and p. 8.

¹² Defence Request to Lift Communication Restrictions Placed Upon Mr Ongwen, ICC-02/04-01/15-1616-Conf, with confidential Annex A, ICC-02/04-01/15-1616-Conf-AnxA.

¹³ Request, ICC-02/04-01/15-1616-Conf, para. 2.

¹⁴ Request, ICC-02/04-01/15-1616-Conf, para. 2.

¹⁵ Prosecution’s Response to the Defence “Request to Lift Communication Restrictions Placed Upon Mr Ongwen”, ICC-02/04-01/15-1628-Conf.

¹⁶ Prosecution Response, ICC-02/04-01/15-1628-Conf, para. 2.

¹⁷ Prosecution Response, ICC-02/04-01/15-1628-Conf, paras 3-4.

¹⁸ CLRv’s Response to Defence Request to Lift Communication Restrictions Placed Upon Mr Ongwen, ICC-02/04-01/15-1631-Conf.

8. On the same day, the Defence filed a request for leave to reply to the Prosecution Response (the ‘Request for Leave to Reply’).¹⁹

II. Analysis

9. As a preliminary matter, the Single Judge notes that no public-redacted version was filed for any submission. With regard to the Request for Leave to Reply,²⁰ he orders the Registry to reclassify the filing as ‘public’. With regard to the other submissions, the Single Judges instructs the parties and participants to file public-redacted versions of their respective filings within five days of notification of this decision.
10. Further, regarding the Request for Leave to Reply, the Single Judge finds that additional submissions are not necessary in order to rule on the matter. Accordingly, the Request for Leave to Reply is rejected.
11. Regarding the substance of the Request, the Single Judge notes that it remains somewhat unclear what the Defence exactly seeks. For instance, the Defence requests the lifting of communication restrictions, while also submitting that it does not request to lift the active monitoring of the telephone calls.²¹ However, the active monitoring – and the ability to terminate a call under specific circumstances – are part of the communication restrictions. Further, the Defence mischaracterises a decision which is decisive to the resolution of the Request.²²
12. Having considered the Request as a whole, the Single Judge finds that the relief sought is two-fold. First, the Defence seeks that the accused be allowed to have contact with the Witnesses²³ – while the elements of the restrictions on contacts such as the active

¹⁹ 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), ICC-02/04-01/15-1632-Conf.

²⁰ Request for Leave to Reply, ICC-02/04-01/15-1632-Conf, para. 2.

²¹ Request, ICC-02/04-01/15-1616-Conf, para. 1. The Defence requests ‘...that the communications restrictions placed upon Mr Ongwen [...] in relation to phone calls are removed’, while in the same paragraph stating that the Request ‘does not seek to lift the communication restrictions in respect to active monitoring’. The Request further states that ‘...none of the legal bases for restricting communication can be justified.’ (para. 33), while later stressing that it does not concern a request to cease the active monitoring regime (para. 52).

²² The Witness Contact Decision did not allow the Defence to meet certain witnesses, as stated by the Defence, but ordered that these persons to be asked in order to provide their informed consent on whether they wish to meet with the Defence.

²³ Request, ICC-02/04-01/15-1616-Conf, para. 58 a.

monitoring still remain in place. It also requests that the Witnesses are informed that they are free to request telephone contact with the accused.²⁴

13. The Single Judge notes that six of the Witnesses concerned by the current Request were already part of the Witness Contact Decision. Therein, the Single Judge stated that the witnesses concerned ‘have the choice to establish contacts with the Defence and the accused, should they wish to do so.’²⁵ The Single Judge also set up a system for them to provide their informed consent to establish contacts with the Defence or the accused.²⁶
14. The Single Judge also notes that the Prosecution has stated in its response as well as in its submission leading up to the Witness Contact Decision that it does not oppose that persons who have provided their informed consent have contact with the accused.²⁷ Therefore, should a witness consent, the Defence is allowed to contact that person.
15. In the meantime, the Registry informed the Chamber that only one of the six witnesses concerned by the Witness Contact Decision wished to have such contact, while the other five declined.²⁸ The Single Judge notes that the Witness Contact Decision specifically also referred to consent regarding ‘potential contacts with the accused’.²⁹ Accordingly, the Single Judge considers that the part of the Request concerning Witnesses being asked whether they wish to have telephone communications with Mr Ongwen is moot with regard to the witnesses that were also subject of the Witnesses Contact Decision.
16. With regard to the second prong of the Request, the Single Judge also does not consider it necessary to inform the witnesses which were also subject of the Witness Contact Decision that they can request to have telephone communication with the accused, if they wish so. Should one of them change their opinion about the subject, they are able to contact the responsible sections in the Registry.
17. In respect of the two remaining witnesses, D-0013 and P-0226, the Single Judge considers that the same considerations expressed in the Witness Contact Decision apply.

²⁴ Request, ICC-02/04-01/15-1616-Conf, para. 58 b.

²⁵ Witness Contact Decision, ICC-02/04-01/15-1593, para. 13.

²⁶ Witness Contact Decision, ICC-02/04-01/15-1593, paras 14-15 and p. 8.

²⁷ Prosecution Response, ICC-02/04-01/15-1628-Conf, para. 3.

²⁸ E-mail of the Registry to Trial Chamber IX Communication on 11 October 2019, at 15:45. The E-mail was to the Chamber only, however the Registry indicated that the parties and participants have been informed of the decision by the witnesses.

²⁹ Witness Contact Decision, ICC-02/04-01/15-1593, para. 14.

Accordingly, the Single Judge orders that these two individuals be contacted in the manner prescribed in paragraphs 14 and 15 of the Witness Contact Decision.³⁰ Regarding the second prong of the Request, the Single Judge does not consider it necessary that the two persons be additionally told that they can have telephone communications with the accused, should they wish to do so. Indeed, being informed of the opportunity to have contact with the accused is part of the informed consent that is sought from these persons.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

ORDERS the Registry to reclassify the Request for Leave to Reply (ICC-02/04-01/15-1632-Conf) as ‘public’;

ORDERS the parties and participants to file public-redacted versions of the other filings or request their reclassification as ‘public’ within five days of the reception of this decision;

REJECTS the Request for Leave to Reply;

ORDERS the VWU and CLRV or Prosecution, where appropriate, to contact witnesses D-0013 and P-0226 to enquire whether they give their informed consent to be contacted by the Defence, in line with paragraphs 14 and 15 of decision ICC-02/04-01/15-1593; and

REJECTS the remainder of the Request.

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



Judge Bertram Schmitt, Single Judge

Dated 18 October 2019

At The Hague, The Netherlands

³⁰ The Single Judge is aware that one of the concerned persons, D-0013, is a Defence witness. However, taking into account Article 68 of the Statute, he still considers it appropriate that the procedure outlined in the Witness Contact Decision is followed.