

**Cour
Pénale
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**International
Criminal
Court**

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

Date: 18 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

Public

Public redacted version of “Prosecution’s Response to the Defence “Request to Lift Communication Restrictions Placed Upon Mr Ongwen””, 7 October 2019, ICC-02/04-01/15-1628-Conf

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 Defence “Request to Lift Communication Restrictions Placed Upon Mr Ongwen”¹ is obscure. It appears that the Defence is asking for the following things:

- (1) That communication restrictions preventing the accused from calling the witnesses named in the Defence Request should be removed;²
- (2) That the Chamber should review and lift all the communications restriction currently imposed on the accused;³
- (3) That the VWU should be ordered to inform the witnesses that they can ask to communicate with Mr Ongwen if need be;⁴
- (4) That the provision of the “Witness Approach Protocol” be revised.⁵

2. The Defence Request is premature because the results of the inquiries ordered by Trial Chamber IX’s “Decision on Defence Request to Meet with Six Prosecution Witnesses” (“Decision 1593”) are, as yet, unknown. The Chamber may consider inclusion of D-0013 and P-0226 in the procedures outlined in Decision 1593.

3. As already indicated the Prosecution will not oppose contact between the individuals who have reached an *informed decision* to establish contact with the accused in accordance with Decision 1593.

4. For all individuals who have not expressed a positive and informed decision that they wish to have contact with the accused the existing restrictions should remain. There are no “changed circumstances” that warrant a lifting of these restrictions. The Chamber has recently heard excerpts of the conversations that the

¹ ICC-02/04-01/15-1616-Conf (“Defence Request”).

² Defence Request, para.1 and Relief.

³ Defence Request, para.34.

⁴ Defence Request, para.22 and Relief.

⁵ ICC-02/04-01/15-339, Defence Request, para.38.

accused had with witnesses which first caused those restrictions to be imposed. The restrictions imposed were not predicated on the completion of a particular stage of the proceedings. The women concerned maintain their status of vulnerable witnesses and/or alleged victims, entitled to protection under article 68 of the Statute, beyond the issuance of a final judgment in this case.

Confidentiality

5. This document is filed confidentially because it responds to a confidential filing. The Prosecution will file the public redacted version of this response as soon as a public redacted version of Defence Request or a public decision is available.

Submissions

The process initiated by Decision 1593 is ongoing

6. The Prosecution submits that the Defence Request is premature. The Chamber laid out a clear process to be followed to enable certain individuals to reach an informed decision on potential contact with the Defence or the accused.⁶

7. Given that D-0013 and P-0226 are not covered by Decision 1593, the Prosecution submits that the Chamber may consider their inclusion in the same procedure as the other six individuals listed therein. They too should have the opportunity to come to an *informed decision* on any potential contact with the accused.

8. Any subsequent addition of such individuals to the non-privileged telephone contact list of the accused should only be done based on an individualised request from the concerned individual through the VWU to the Chamber. The parties and

⁶ Decision 1593, paras.14-16.

the legal representatives of the concerned individuals, should file their observations prior to Chamber's ruling on it.

9. If additions to the non-privileged telephone contact list of the accused are made, the Prosecution submits that any subsequent contact between the individuals added and the accused should be on the strict basis that all the telephone communications will be actively monitored and that there is to be no discussion of the evidence or issues in the case. The Prosecution notes that the Defence Request "does not seek to lift communication restrictions in respect to active monitoring regime."⁷

Other existing restrictions should remain

10. The Defence submits that 'changed circumstances, context of the right to family life, and lack of necessity' mean that the existing restrictions on communications are no longer justified. None of the 'changed circumstances' listed in the Defence Request are in fact 'changed circumstances'; they are not directly linked to, nor do they justify the lifting of the existing restrictions.⁸

11. The duration of the exiting restrictions was not predicated on the completion of the Prosecution's case. Nor of that of the Defence's case for that matter. As the Pre-Trial Chamber II's Single Judge ("Pre-Trial Single Judge") pointed out in one of the earlier decisions in this case "no substantial difference exists in this Court between witnesses who come to testify "for" one or the other party." He made this finding in the context of Defence's contact with P-0235 which, in the context of the proceedings at the time, just like the Defence's scheduling of an interview with P-0214, was found to be inappropriate.⁹

⁷ Defence Request, para.1.

⁸ Defence Request, paras.33-34.

⁹ See ICC-02/04-01/15-316-Conf "Decision on the "Second Prosecution application to the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute", para.17.

12. The Defence makes a partial reference to one of the reasons for which the restrictions were put in place.¹⁰ With regard to that reason, the Pre-Trial Single Judge made clear references to the existence of reasonable suspicion of meetings held “with a view to exercising some form of influence on persons who possess information relevant to the case” and that “organisers of the meeting attempted to impress upon the attendees [who included individuals listed in the Defence Request] the importance of Dominic Ongwen’s return to Uganda, and Dominic Ongwen’s personal intervention, by telephone, in the meeting are factors of particular concern.”¹¹ In addition the Single Judge referenced “the need to preserve the integrity of the evidence and protect it from any interference” and cautioned that “any intentional interference with the investigation or proceedings will not be tolerated”.¹²

13. The Single Judge of Trial Chamber IX, (“Single Judge”), when considering Mr Ongwen’s payments to witnesses, *inter alia*, found that: “Based on the information available, and noting the reasons underlying the existing restrictions on Mr Ongwen’s telephone communications, the Single Judge is concerned about the possible impact Mr Ongwen’s payments may have on the testimony of potential witnesses in this case. The fact that three of the affected potential witnesses’ evidence, taken pursuant to article 56 of the Statute, was recognized as formally submitted does not ameliorate the Single Judge’s concern.”¹³ All of these concerns and those in the preceding paragraph, remain live issues in this case. The proceedings are still ongoing and will be until the issuance of a final judgment.

¹⁰ Defence Request, para. 9.

¹¹ See ICC-02/04-01/15-254 “Decision on a request by the Prosecutor under article 57 of the Rome Statute and regulation 101(2) of the regulations of the Court” para.6.

¹² See ICC-02/04-01/15-283 “Decision concerning the restriction of communications of Dominic Ongwen”, paras.13 and 17.

¹³ See ICC-04/02-01/15-521 “Decision on Prosecution ‘request for an order that Mr Ongwen cease and disclose payments to witnesses and the registry disclose certain calls made by Mr Ongwen” at para.15.

14. The reference by the Defence to the agreement with regard to the transfers of money has no direct bearing on the lifting of existing restrictions. To the contrary, the concerns raised by the Prosecution and the role given to the neutral third party to facilitate requested support payments, emphasize the importance of maintaining the existing restrictions.¹⁴

15. The reference by the Defence to the fact that Mr Ongwen's telephone communication has only been cut once since March 2016 and that he was only warned once thereafter, on 13 July 2017 concerning the use of coded language, does not support the Defence Request. The fact that these things occurred at all shows once more why the restrictions are still required. Annex A of the Defence Request does not include the full text of the attachments referenced therein. Their subject-lines alone [REDACTED] and the wording of the email message by the Defence referencing the alleged violations of the orders by PTC II and TC IX by the accused,¹⁵ make clear he has engaged in repeated behaviour toward witnesses which can reasonably be interpreted as being improper and show why the restrictions and the rationale behind putting them in place, still remain.¹⁶

16. With regard to Defence's references to the 'context of the right to family life' the Prosecution re-iterates its prior submissions with regard to the vulnerable status of the individuals as either vulnerable witnesses and/or alleged victims of the sexual and gender based violence against them by the accused.¹⁷ The Prosecution also notes that, in as early as 3rd of August 2015, in considering similar submissions by the

¹⁴ See ICC-02/04-01/15-606-Conf "Joint Defence and Prosecution Observations Pursuant to ICC-02/04-01/15-521, paragraph 18" at paras.3-4 and 9. See also the concerns raised in the Prosecution's Request for an order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen, 24 June 2016, ICC-02/04-01/15-482-Conf (with the public redacted version notified on 12 July 2016) at paras.2-6.

¹⁵ See Annex A of the Defence Request.

¹⁶ See examples of the violations of the restrictions on communications by Mr Ongwen as in the Registry's "Report on the active monitoring of Mr Ongwen's telephone communications" ICC-02/04-01/15-443' of 20 May 2016 (reclassified as Conf-Ex Parte only available to Prosecution and the Defence on 31 May 2016).

¹⁷ See the most recent at ICC-02/04-01/15-1577-Public "Prosecution's response to "Defence Request to Meet Selected Individuals" (ICC-02/04-01/15-1574-Conf)", paras.3-6.

Defence concerning two of the individuals in the Defence request (P-0214 and D-0013), the Single Judge found the removal of the two individuals from the list of non-privileged telephone contacts as necessary and proportionate to the aim sought.¹⁸

17. On 12 February 2019, the Single Judge, when restricting the accused's access to family information considered that both 'the reasons for the contact restrictions regime and the nature of the charges in this case' were relevant. He, *inter alia*, reasoned that "Mr Ongwen is also charged with sexual and gender based violence crimes in relation to seven alleged 'forced wives', meaning that the actions the accused seeks to take based of the Family Information directly concern Prosecution witnesses who are his alleged victims. With this in mind, the Single Judge is not persuaded by the Defence's arguments that unfettered access to the Family Information is necessary to ensure his children's right to health."¹⁹

18. The Single Judge recognised that unwanted involvement by the accused in the lives of these alleged victims and their children risked further victimisation as well as harm to the health and development of the children concerned. Those concerns remain as valid today as they were eight months ago.

¹⁸ See ICC-02/04-01/15-283 "Decision concerning the restriction of communications of Dominic Ongwen", para.15.

¹⁹ ICC-02/04-01/15-1444, Decision on Request for Disclosure and Related Orders Concerning Mr Ongwen's Family" 12 February 2019 at para.30

Conclusion

19. For the reasons stated above, the Chamber should dismiss the Defence Request in totality.



Fatou Bensouda, Prosecutor

Dated this 18th day of October 2019

At The Hague, the Netherlands