

Status Conference

(Closed Session)

ICC-02/04-01/15

1 International Criminal Court

2 Pre-Trial Chamber II - Courtroom 2

3 Situation: Uganda

4 In the case of The Prosecutor v. Dominic Ongwen - ICC-02/04-01/15

5 Single Judge Cuno Tarfusser

6 Status Conference

7 Wednesday, 28 October 2015

8 *(The proceedings start in closed session at 4.47 p.m.) Reclassified as open session

9 SINGLE JUDGE TARFUSSER: Good evening, good late evening.

10 Just for the record always I would ask the parties and the Registry to introduce
11 themselves.

12 Please, the floor is to the Prosecutor.

13 MR GUMPERT: Good evening, your Honour. My name is Ben Gumpert. I'm
14 lead counsel for the Prosecution in the case of Dominic Ongwen. With me today
15 Adesola Adeboyejo, my deputy team leader; Shkelzen Zeneli; Lilian Asiimwe; and
16 our case manager, Ramu Fatima Bittaye.

17 SINGLE JUDGE TARFUSSER: Thank you very much.

18 The Defence, please.

19 MR ODONGO: My Lord, my names are Krispus Ayena Odongo. I'm lead counsel
20 for the Defence. And today I'm accompanied by Mr Thomas Obhof, assistant legal
21 counsel; and Francesca Anzovino, one of the case managers; and Roy Titus Ayena,
22 case manager. Thank you.

23 SINGLE JUDGE TARFUSSER: And the suspect himself is also present as I see.

24 MR ODONGO: The suspect is also --

25 SINGLE JUDGE TARFUSSER: Yeah, yeah.

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1 MR ODONGO: -- present. Yes, My Lord. Sorry.

2 SINGLE JUDGE TARFUSSER: The Registry.

3 MS SCHAUDER: Good afternoon, Mr President. On my right, Mr Richard Lewis,
4 who is a consultant with VWS; Mr Kebba Khan, who is associate team leader; and
5 myself, Natacha Schauder, I'm senior manager of the services unit within the VWS.

6 SINGLE JUDGE TARFUSSER: Thank you very much.

7 I convened this status conference on a short-term notice I must say, but just on
8 23 December -- of course, I think I should ask the court officer to call the case. Thank
9 you.

10 THE COURT OFFICER: Thank you, your Honour.

11 The situation in the Republic of Uganda, in the case of The Prosecutor versus Dominic
12 Ongwen, case reference ICC-02/04-01/15.

13 And we are in closed session.

14 SINGLE JUDGE TARFUSSER: Thank you very much.

15 I think, as I said, I convened this status conference on a short notice on 23 October,
16 just a few days ago, as a matter of clarification. We wanted just to have -- I wanted
17 to have some clarifications. I think we will be through quite quickly because as I see
18 from the documents which have been submitted, I think we are more or less all on the
19 same page.

20 So just to summarise, there is an Article 56 procedure ongoing over on six witnesses.

21 We have to question six witnesses. I think as far as I'm concerned, but then I ask all
22 the parties to contradict me, if necessary, four of them there should be no problem.

23 And I refer to P-99, P-101, P-198 and P-124.

24 P-198 the only problem is that she's speaking a different language, so we have to find
25 a translator in Ateso, which I think is on -- we are on a good track on this matter, but

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1 probably we have, and this is announced, we have to question her last because we
 2 have to train the person, so the more days we have to train the interpreter, the better it
 3 is.
 4 And as far as 99, 101 and 214 concerns I think there is no problem.
 5 I realised, and this is what I -- what determined me at the end to have this status
 6 conference, was the two witnesses 235, in particular, and 236.
 7 As far as 235 is concerned, there is a problem between the OTP and the Defence.
 8 While the OTP says it's an OTP witness, the Defence says it's a Defence witness.
 9 And when I read this I have some problems because I think that a witness is a witness.
 10 It's not a Prosecution witness, it's not a Defence witness, but it's just a person who has
 11 to come here to say the truth. Therefore, it's only a matter who starts the questioning
 12 in basic.
 13 And I think an analogous problem is 236, for the other witness, which I think she
 14 somehow refuses even to come to testify. I have a problem also with this as far as
 15 I think that if the Judge admits a witness or calls a witness to testify, the witness has
 16 to come to testify, it's not just a -- the wishes expressed by a person "I want" or "I want
 17 not." The witness has to come and to say the truth, full stop.
 18 So I would like now to know from the parties if I'm right in these assessments and try
 19 to find a way to facilitate also the witness -- the witnesses who are a little bit reluctant
 20 to come, to find a way who is contacting them and how in order for them to come to
 21 testify.
 22 So obviously together with the VWU because it's more a facilitation and obviously not
 23 an intervention from one or the other side. But as I see also by the documents filed
 24 today by the Defence, we are quite on the same, on the same picture.
 25 So I would give first of all, after this long introduction, I would like to give the floor to

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1 the OTP for its assessment and suggestions. Thank you.

2 MR GUMPERT: Can I ask firstly whether our words are being translated into Acholi
3 and whether we therefore need to observe the normal rather slower pace.

4 SINGLE JUDGE TARFUSSER: You ask me that because I was quite fast.

5 MR GUMPERT: I cast no aspersions on your Honour's words, which were of course
6 magnificent, but I just want to check that perhaps lesser mortals need to speak more
7 slowly.

8 THE COURT OFFICER: Indeed we do have interpretation into Acholi, so please
9 respect the golden rules. Thank you.

10 SINGLE JUDGE TARFUSSER: And I apologise to the translator for having spoken
11 not slowly enough probably. Thank you.

12 MR GUMPERT: Your Honour, I'll try to be concise, but also to set out what I regard
13 as some material facts and just a little bit of history because I think it will help to do
14 so.

15 There are four issues which the Prosecution wants to bring to the Court's attention.
16 Although we don't ask the Court to take action in respect of all four, in respect of
17 some of them we're simply imparting information.

18 The first issue concerns the Witness P-235. She gave a statement which she signed as
19 being true on 8 August. In very brief she said that Dominic Ongwen had had sex
20 with her, made her pregnant and that she didn't have any choice but submitted out of
21 fear. The statement was translated into Acholi before she signed it and the statement
22 makes it clear on its face that it was taken by the Office of the Prosecution, and that's
23 potentially an important matter.

24 A Defence investigator's note, which your Honour will have seen, dated 14 August
25 indicates that on that day she told the Defence -- and there was I emphasise

1 absolutely no impropriety in that contact between the Defence and witness -- that she
2 had been under the impression that the Prosecution investigators she had spoken to
3 previously had in fact been from the Defence. That was what she said she believed.
4 The note doesn't state, that note, 14 August, whether or not a statement was taken by
5 the Defence. And I'll come back to that point.

6 A subsequent note dated 6 October, again a Defence investigation note, indicates that
7 at another meeting with the same witness on that day when Defence investigators
8 talked to her about the possibility of testifying, she said, and your Honours referred
9 to this, "I want to testify for the Defence."

10 It seems clear from the note it makes reference to the fact that what she's told the
11 Prosecution, and the Prosecution's statement is very clear -- is very similar to what
12 she's told the Defence, that the Defence have taken a statement from her, or at least
13 have received information which may become a statement.

14 I pause there because the Prosecution hasn't seen that statement. That's in
15 contradistinction to the statement made by P-214. I should emphasise we haven't
16 asked to see it as yet so I'm again not casting any aspersions, but I note that if there is
17 any possibility of it being used in the course of cross-examination, if for example it
18 contains assertions on which the Defence may wish to cross-examine as being some
19 kind of inconsistency with the testimony that she does give at the Article 56 hearing,
20 then it should be disclosed to the Prosecution in accordance with your order of
21 12 October. And that would then make the position consistent between 235 and 214.
22 The Prosecution spoke to this Witness 235 on 21 October, the purpose of which,
23 having been checked with the Chamber, was to tell her that this procedure was to
24 take place and that she would shortly be being contacted by the VWS, VWU. In any
25 event, the Victims and Witnesses Unit.

1 SINGLE JUDGE TARFUSSER: I think VWU because the Statute says VWU, so I
2 continue with the VWU.

3 MR GUMPERT: I shan't seek to intervene in that nomenclature issue.

4 In any event, by that body. That was the purpose of speaking to her. She said
5 nothing about her wish to testify for the Defence, nor did she say that she wanted to
6 stop talking to the Prosecution, which was something which is contained within the
7 Defence investigator's note.

8 She did say that she was unwilling to give evidence at the procedure that we were
9 telling her we would like her to give evidence at. She said the Prosecution could,
10 and I put this word in inverted commas, "use" - that apparently was her word - what
11 the Prosecution already had from her.

12 Important to note perhaps she said nothing to indicate that the content of her
13 statement or any part of it was either untrue or inaccurate. She wasn't saying, "What
14 I told you before was wrong." She was simply saying, "I don't want to come to
15 court" or "I don't want to give evidence in this procedure."

16 She spelt out five reasons why she didn't want to testify:

17 That she couldn't do it in front of people. I pause to say of course she wouldn't be
18 doing it in front of any people other than the people in court.

19 That it wasn't appropriate for her to talk to big people. I suppose interpreted that
20 may mean people like lawyers and Judges.

21 That any interview should be at her place rather than some other place.

22 That she'd be seen in a bad light. It seems to me that that may go together with the
23 first objection, she couldn't do it in front of people, and she perhaps needs to be
24 reassured that there won't be any question of her being seen in a bad light, not by the
25 people in this court under any circumstances, and no one else will know.

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1 And lastly, that she had undergone some Acholi rituals to help her cope with her
2 experience and she didn't want to rekindle the memories.

3 The Prosecution seeks the leave of the Chamber to recontact P-235 and to make the
4 following matters clear to her:

5 One, that the Chamber's order as it currently stands only permits the taking of
6 testimony from individuals who are willing to give that testimony. That's contained
7 within the order which you made. Subject of course to any further order, but as it
8 stands that's the position.

9 Secondly, as has been emphasised by both the Defence and Prosecution, and this is a
10 point which your Honour has already made and I apologise for repeating it, but I
11 want to spell out what we want to say to her. What's asked of her is that she should
12 effectively come to Court, come to a place where she can give her evidence and tell
13 the whole truth inasmuch as it's relevant to Dominic Ongwen's case. And so her
14 evidence should be the same whichever party she appears for. Or even the case of
15 her being called by the Chamber, it should be the same substance. We want to make
16 that point.

17 Thirdly, and this again picks up a matter which your Honour referred to, if she
18 doesn't testify in the course of the Article 56 proceedings, the Prosecution may
19 exercise its power to ask the Chamber to compel her to give evidence for the
20 Prosecution. That's not a step we would take lightly. We bear in mind that this is a
21 witness whose account is of extreme victimisation. On the other hand, we may take
22 the view that despite that, justice requires that she should come and say what she can
23 at the eventual trial of this matter.

24 So, in other words, the point would be, "Madam Witness, by declining to cooperate
25 with the wishes of the Court at this stage, you shouldn't think that the matter will

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1 then go away. All it will mean or may mean is that at a later stage you may be
2 compelled to give evidence in any event at the trial."

3 And lastly, to say to her that we are confident that the VWU, VWS will do everything
4 in their power to ensure that her concerns about giving evidence in front of big people
5 are properly allayed, that the matter is explained to her and that you the Judge will
6 ensure that she isn't harassed or unfairly treated in any way during the course of the
7 hearing.

8 So those are the four matters which we would like to deal with in a further
9 conversation with her.

10 That's all that I have to say about the first of the four issues concerning P-235. Shall I
11 continue with the remainder of my submissions --

12 SINGLE JUDGE TARFUSSER: Yes, please.

13 MR GUMPERT: -- and then they can be dealt with globally.

14 SINGLE JUDGE TARFUSSER: Yes, please.

15 MR GUMPERT: Issue two concerns P-214. She gave a statement to the Prosecution
16 which she signed as being true on 25 May. And again in micro summary she said
17 that Ongwen summoned her to have sex with him, she complied only out of fear, that
18 she had no option to submit because there were guards with armed -- sorry, guards
19 with sticks nearby and there was an implicit threat that she would be beaten if she
20 didn't submit.

21 On 24 August and 8 October she was interviewed by the Defence. And again I want
22 to emphasise, I'm sure there's no suggestion of it, that that was a perfectly proper
23 procedure by the Defence. And subsequently a statement was prepared of which
24 the Prosecution have been given a copy. And I think your Honour will probably
25 have seen that as well.

1 In the statement paras 23 to 25, which are the heart of it I submit, she said that on the
2 first occasions when they had sex Ongwen did not physically force her to have sex,
3 nor did the guards threaten her. And she goes on to say that Ongwen explained,
4 Mr Ongwen explained this was the way of the bush. Those are her words. And she
5 stated that Mr Ongwen would never force her or threaten her to have sex with him
6 and indeed that if she didn't want to have sex, she would tell him so. In other words,
7 that there had been occasions when she had not wanted to, she told him so and he
8 had not insisted.

9 Again, that's a micro summary, but I hope a fair summary of the kernel of that
10 statement.

11 There is a Defence investigator's note dated 12 October which indicates that on that
12 day she contacted the Defence whose telephone number she already had and told
13 them that, and I quote, "ICC maybe OTP" that's a quotation from the notes, not from
14 her "had called her and told her that she needed to be moved to Kampala so she could
15 testify before NTV."

16 There isn't an explanation of what NTV is in the note, but a googling of those letters in
17 conjunction with Uganda leads me to understand that it's Uganda National
18 Television.

19 I readily accept that may be the impression the lady got. I can equally clearly
20 guarantee that it is not the message which was actually imparted to her, for obvious
21 reasons.

22 She goes on to say, as summarized in the note, that -- sorry, I apologise. I've misled
23 myself.

24 The note recalls that she was advised by the Defence that it was a matter for her
25 whether she testified now or later. And in a further conversation it appears from the

1 note that the witness had at some previous time indicated that she too wanted to give
2 evidence for the Defence rather than the Prosecution and that if this was still the case,
3 she should tell the Prosecution that that was so.

4 On 21 October the Prosecution investigators contacted her with the same purpose, as
5 had been the case with 235, to tell her about the same proceedings. And she was
6 asked if she was prepared to travel to Kampala to give testimony and she agreed to
7 do so. She said nothing about having spoken to the Defence, nothing about being
8 unwilling to give evidence, made no suggestion again that anything she had said in
9 her statement to the Prosecution was inaccurate or untrue.

10 At the present time the Prosecution doesn't seek any order from the Chamber and
11 won't take any further steps to contact that witness. It would seem to be pointless to
12 phone her up and say "Well, I know you've said it's good for us, but we hear now that
13 you've said something different to other people." I think that would only create
14 confusion. There's no profit in it. So we propose for the present time to seek no
15 order and to do nothing more.

16 We might of course approach the Chamber again with a view to seeking the
17 Chamber's leave to having a similar conversation with her as the one I outlined in
18 respect to 235 if at sometime between now and the Article 56 procedure it appears
19 that she changed her mind. But we wouldn't do that without coming back to the
20 Court. I hope we wouldn't have to meet physically again but by notifying the Court
21 and of course the Defence that that was our intention.

22 That's all I have to say on issue two, which is P-214.

23 Issue three concerns Witness P-236. I have some news here which is literally hot off
24 the press. I received an email while I was in this courtroom and I'll come to the
25 essence of that in a moment.

1 According to paragraph 33 of the Defence filing number 314 she's been in regular
2 contact with the Defence. And again I say the Prosecution doesn't suggest for a
3 moment there's any impropriety in that. For instance it is said by the Defence in July
4 and August she is said to have stated that she wished to testify for the Defence.
5 Interviewed by the Prosecution after that time, 25, 27 September, she gave an account
6 which was recorded in the form of a statement and which broadly speaking contains
7 the same allegations as those I have outlined earlier.
8 Ultimately during the course of the three days over which she made the statements
9 which were condensed into a written statement, she indicated that she was not
10 willing to give evidence, although initially it had appeared clear that she was happy
11 to sign her statement and to give evidence. So she retracted from both of those
12 earlier expressed positions.
13 The reason she gave for doing so was pressure from her parents who were concerned
14 that she would be doing harm if she were to be giving evidence for the Prosecution.
15 The Prosecution has been making efforts to contact P-236 since the events of
16 27 September again for exactly the same purpose. We had been unwill -- sorry, we
17 will been unable to do so until today. Today I'm advised that contact has been made
18 and that she is unwilling to cooperate with the Article 56 procedure which she was
19 asked about.
20 In the light of that unwillingness, which I don't believe was explored any further
21 because the purpose of the call was simply to tell her of the Article 56 proceedings
22 and tell her she could expect to be contacted by the Victims and Witness people, we
23 would seek the Court's leave ourselves to contact her again and to make to her the
24 same four points which I outlined in detail in respect of Witness 235.
25 And those are all the submissions that I have in respect of the third issue which was

1 Witness 236.

2 The fourth issue is not so directly connected with the Article 56 procedure, but I've
3 come to the conclusion that it's right nonetheless to raise it with your Honour because
4 I believe that it is conducted albeit somewhat indirectly or at least it may very well
5 may be.

6 The Prosecution is concerned by the content of filing 317. That's a filing made by the
7 Registry on 13 October. I don't know if your Honour or your assistants have access
8 to that, but I can summarise it in any event.

9 In short, that filing discloses that between 5 June and 9 October ten what are
10 described as non-privileged visits were made to Dominic Ongwen by members of the
11 Defence team. The Prosecution has some difficulty in understanding the concept of
12 such visits. All meetings between members of the Defence team and their client
13 should, it seems to us, be concerned with the conduct of his defence. And all such
14 visits should on the face of it, if that's right, attract absolute legal professional
15 privilege and not therefore be monitored.

16 The purpose of meetings which aren't concerned with the conduct of Mr -- conduct I
17 should say of Mr Ongwen's defence and thus do not attract legal professional
18 privilege is difficult to determine.

19 Whatever the position may be, and it may be that that's a conundrum that I'm not
20 able to solve and to which there isn't an immediate answer, but as acknowledged by
21 the Registry in the filing, any visits to Dominic Ongwen which do not attract legal
22 professional privilege should have been the subject of active monitoring, and the
23 Registry concedes that it failed to perform this monitoring in respect of those ten
24 visits.

25 On what appears to have been the last of those non-privileged visits by members of

1 the Defence team, which was on 7 October, Dominic Ongwen is said to have passed a
2 letter to members of the team which is described by the Registry as being a letter to
3 his wife. That letter came to the attention of Defence counsel's assistant, Mr Obhof,
4 and he was aware that its passage was improper and he very properly immediately
5 complied with his duties and informed the Registry and it was that that caused the
6 filing to be made.

7 The Prosecution has not seen that letter which is annex 1 to the filing, nor the
8 translation of it in -- I assume it's into English, it doesn't actually specify, which is
9 annex 2.

10 We'd be happy to receive it even if it's in French. We should be able to manage both
11 languages.

12 The description of the letter, being a communication from Dominic Ongwen to his
13 wife, indeed causes grave concern. Some eight of Dominic Ongwen's, as we would
14 characterise them and have done in our notice document, forced wives are witnesses
15 who have made statements in which they're described as being abducted, raped and
16 enslaved by Dominic Ongwen as we characterise it.

17 The addressee of the letter is unknown to the Prosecution. As the Chamber already
18 knows, and I won't dwell on it, Dominic Ongwen has previously telephoned some of
19 those witnesses, witnesses whom he describes as his wives, in what the Prosecution
20 interpret as likely to be an attempt to dissuade them, either directly or indirectly, from
21 giving evidence against him.

22 It seems highly probable that this letter may have been another such attempt. We
23 don't know because we haven't seen it. And it also seems quite possible that similar
24 letters which escaped the attention of the Registry and of Mr Obhof may have been
25 sent by Dominic Ongwen by similar means in the past.

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1 And as a result of that recitation of facts the Prosecution requests that the Chamber
2 consider making two separate orders. The first, which I foreshadowed, is that the
3 letter and its translation, annex 1 and annex 2 to filing 317, currently withheld from
4 the Prosecution, should be disclosed in full to the Prosecution.

5 And the second is -- and I'm sorry if this sounds draconian, but nonetheless the
6 Prosecution considers it to be appropriate -- there should be no further non-privileged
7 visits by members of the Defence team to Dominic Ongwen. We don't seek to
8 interfere for a moment in the proper conduct of the Defence, but meetings which have
9 no connection with the conduct of his defence are asking for trouble, if I can use that
10 expression. And it can be seen that on this occasion when the letter was discovered
11 by Mr Obhof and revealed that trouble has in the past occurred. And for that reason,
12 we ask the Court to consider making that order.

13 I think that's all that I can usefully say, but I stand ready to answer any questions the
14 Court may have.

15 SINGLE JUDGE TARFUSSER: (Microphone not activated) Let me first give the
16 floor to the Defence before I turn to the VWU because I have some ideas on this order
17 you're requesting for Witness 235 and 236, but I want to first listen to the other -- to
18 the Defence first. Thank you.

19 MR ODONGO: Thank you very much, your Honour. The Defence really doesn't
20 have much to say save for simple comments that we are highly impressed by the
21 direction of the Court to the fact that whichever side a witness gives evidence, it is
22 about the same thing. It doesn't matter whether it is for the Prosecution or for the
23 Defence. All that is important is that the truth has been told and it is for the purpose
24 of helping Court to arrive at the correct decision.

25 I have -- I must hesitate to say that I think from our contact with the Witnesses 235

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1 and 236 in particular I think there was discomfort in the manner in which the
2 Prosecution conducted the interviews, the nondisclosure of the identities of the -- of
3 the investigators. According to the way we discerned from the concern of the
4 witnesses, it would appear like they thought they were being -- there was some form
5 of fraud in the manner in which the information from them was being obtained.
6 On our part we found it a bit disconcerting as to the reason why the Prosecution was
7 not forthright in disclosing their identity and why they made it appear like they were
8 actually conducting the interviews for the Defence of Ongwen. We do not mean to
9 say that we believed their story, but I think it is worthy to mention that if that were
10 true, then you would appreciate the direction from where the witnesses were coming.
11 It was a matter of concern.
12 We also take note of the fact that it's not a matter of choice as to whether a witness
13 agrees or not -- or does not agree to give evidence because at the end of it all, after all,
14 the Court has the power to compel the witness to give evidence. And I think maybe
15 at an appropriate time we may come back to court to seek for permission to go and
16 indulge the relevant witnesses and, you know, try to explain to them the imperatives
17 of the law for them to testify because it doesn't make sense why you should refuse or
18 for that matter a witness should refuse to give evidence only finally to be compelled
19 by Court to give evidence anyway.
20 Of particular concern to us is the question of the filing by the -- by the Registry in
21 respect to non-privileged visits to the witness. Your Honour, we want to make very
22 fervent appeal to the Honourable Court that at no one time did the Defence team ever
23 deliberately conduct itself in a manner as to undermine the privilege with which
24 counsel or assistant counsel can conduct interviews with the witness.
25 On the particular date in issue, the witness intended to communicate to his cousin

1 and not to the wife. It is therefore not true to say that the content of the letter in
2 issue was in any way meant to influence negatively or otherwise the minds of the
3 witness -- I mean of any witness whatsoever not to give evidence against Dominic
4 Ongwen.

5 The Defence wants to be very clear that all the team members have been informed
6 about their professional responsibility and they have been encouraged and we know
7 for a fact that they know that when they visit the witness, there are certain things they
8 cannot raise with the witness because their visit is non-privileged.

9 But serious emphasis is the fact that the letter in issue was not written to any of the
10 wives, so-called wives of Dominic Ongwen. It was indeed written to somebody
11 called Jérôme and Jérôme is a cousin of Dominic Ongwen who is now in stewardship
12 of the family of Dominic Ongwen. So it had nothing to -- I mean it had no bearing
13 whatsoever on the matter before Court, either by way of dissuading the witnesses
14 from giving evidence against Dominic Ongwen or by way of making any statement
15 prejudicial to the interest of justice.

16 I think I'll give to my legal assistant to talk about two and four. Thank you.

17 MR OBHOF: Thank you, your Honour. We would just -- I would just like to
18 remind the Court that the disclosure today of the statement by D26-010 is a draft
19 statement and that while we take great pains to make sure that we listen to
20 everything very carefully and that we write down what is exactly said, that the
21 Defence, along with the Prosecution, does work with interpreters and sometimes
22 when -- especially with the Acholi language there are not that many ways of saying
23 things and as we know that there is no actual word for Prosecutor or Defence attorney
24 and that a lot of times when they're explaining it -- and we've even -- almost always
25 have somebody in the room who speaks Acholi besides the interpreter so we can have

1 somebody to say "Well, that's not exactly what she said."

2 The 214 statement is a draft and we have -- because of the Judge's order on -- that we
3 received in the afternoon of 12 October we have not had a chance to go through
4 her -- go through with her to make sure that everything is correct. Even though, as I
5 said, I did listen for about two days with audio recordings listening to her statement
6 to make sure that I was only writing what she had said.

7 MR ODONGO: And, your Honour, as a final statement, I think I would like to take
8 note of the fact that so far we have had a very cordial relationship with the
9 Prosecution and I think we are more or less reading from the same page. Apart from
10 some of these unfortunate incidents, I think we are working as officers of this
11 Honourable Court and I hope this mood continues and we don't jolt each other too
12 much. Thank you very much, your Honour.

13 SINGLE JUDGE TARFUSSER: Thank you to the Defence.

14 Now I would ask the VWU if they have to add something to what was said if there
15 are things which are not yet on the record.

16 MS SCHAUDER: Not in relation to the matters that were discussed. We are at the
17 Court's disposal to implement any kind of assistance in relation to the appearance of
18 the witnesses that we can provide. Thank you.

19 SINGLE JUDGE TARFUSSER: Thank you.

20 I would just try to summarise also with a view to what the Defence counsel just now
21 said on the cordial relationships between the Prosecution and the Defence and with a
22 view to maintain this relationship.

23 As regards the so-called incident, which is number four, the number four issue, well, I
24 don't think -- because the Defence excused themselves, I don't think we put any blame
25 to the Defence. And I was informed immediately of this incident, and after an

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1 immediate assessment I had with the relevant people of the Registry, I think we came
2 to the conclusion that it was -- there was a little bit of superficiality. There was a
3 mistake. It was not something done in bad faith. I think. I'm really -- I'm quite
4 convinced of that.

5 In any case, I ordered orally to suspend all the non-privileged visits to Dominic
6 Ongwen and that was implemented and I think it's also written in the filing 317.

7 I have to clarify I think just that it is on the record that the case manager is a
8 non-privileged person, the case manager. Privileged is counsel and the deputy
9 counsel. These are the privileged persons to my understanding.

10 So I think that all non-privileged visits have to go through the Judge in order to be
11 authorised. So I think this issue is -- should be from the table.

12 As far as the letter concerns, I read the letter and I couldn't recognize any particular
13 hidden thing which could lead to something; therefore, probably I have maybe
14 forgotten also to reclassify it, but it will be immediately and that -- an order will be
15 immediately reclassified confidential ex parte OTP and Defence so just to -- because
16 it's good that everybody is aware of what is written in there and can draw their own
17 conclusions on that. So there will not be a separate filing but an order -- an oral
18 order I issued now.

19 So this I think issue four is out of the way in the sense of I think it's dealt with. Or
20 not?

21 MR GUMPERT: It probably is, your Honour, but what the Registry filing says is the
22 Registry has cancelled X, the visits. My question, I mean, which implies that the
23 Registry could tomorrow reinstate such visits.

24 SINGLE JUDGE TARFUSSER: But it says something more. It says also
25 that -- excuse me -- unless ordered otherwise by the Single Judge. It's maybe said in

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1 the wrong way, but the meaning is we have blocked the non -- and I will make it sure
2 tomorrow, tomorrow morning, but I think this is -- the sense is we blocked the
3 non-privileged visits and if there should be a request, this request goes through the
4 Judge. So this is the sense of it.

5 MR GUMPERT: Yes, thank you. Then I agree with respect, it does indeed deal
6 with issue four.

7 SINGLE JUDGE TARFUSSER: Okay.

8 As regard the issue one and issue three, I mean the two where the OTP asked, the
9 Prosecution asked to be authorised to contact them and to talk to them in the way you
10 have exposed just now, I would rather turn the whole thing and go to the Defence,
11 together -- and ask the Defence, together with the VWU of course, to intervene with
12 the two witnesses in order to say well, come to this -- or to do the job you would
13 have -- you would have done.
14 I think it's more appropriate now to -- without obviously interfering in the merits, but
15 just to give this signal that they have to come for the reasons you said. I think this
16 would be -- probably would call also the Defence to their -- to its responsibility I think
17 if we all agree. If we don't agree, I state like this and that's it.
18 VWU?

19 MS SCHAUDER: Sorry, your Honour, but they would be called as Chamber
20 witnesses in such a case?

21 SINGLE JUDGE TARFUSSER: As I said before, it's not a problem of Chamber, of
22 OTP or Defence witness. It's a witness. A witness has the obligation to come first
23 and then when they come, the obligation to tell the truth.
24 The only issue I see, but with how I intend it the issue is a small one, who starts the
25 questioning. This is the only problem. But as I say, we don't have leading

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1 questions. I -- also this is -- it's more a burden more than a privilege to start with it,
2 so it's not -- it's not that the problem I would say.

3 MS SCHAUDER: Sorry, your Honour, the question I was asking is that we
4 could -- we could also do it alone. That's also a possibility that the VWS, as VWS as
5 a neutral party would contact the witness and explain that the Chamber would like to
6 hear them. But that's just a proposal on the table.

7 SINGLE JUDGE TARFUSSER: I can -- I understand your proposal, but I think we
8 want to achieve a result and I think the result is easier to achieve -- to be achieved
9 when -- if somebody who knows the person in a certain way, they say "Well, we will
10 testify for the Defence," is facilitating the whole thing. I would say.
11 The OTP, I see the OTP not very happy.

12 MR GUMPERT: No, I -- sorry. Four seconds.

13 I don't wish to express unhappiness. And tactically, if I can use that word, I can see
14 the force of the persuasion, for that is what it will be, legitimate persuasion coming
15 from the side to which the witness has apparently declared an allegiance, an interest,
16 a sympathy, put it that way.

17 I wonder whether, and I'm sure that we could work this out without troubling the
18 Court with it, we could, the Prosecution and the Defence, effectively agree upon a
19 kind of script, these are the points that will be made.

20 I wouldn't seek to say the Prosecution -- that the Defence can only use the words on
21 the piece of paper, they can use whatever words are appropriate, but that the message
22 which will be delivered is a message which has been jointly agreed by the parties. In
23 the light of the submissions, it seems to me that we could pretty effortlessly agree on
24 what the script should say, as I say, without troubling the Court for where the dots
25 and commas should be.

1 SINGLE JUDGE TARFUSSER: Just before I give the floor to the Defence, I'm fine
2 with it. I am trying to achieve a result. The result is to have the witnesses to say
3 what they have to say, whatever -- to say the truth. That's the way. Let's put it that
4 way.

5 So the other possibility would be that the Defence and the Prosecution together with
6 the VWU go there. I mean, I'm open to every possible solution. It's not -- I just
7 want to achieve the result that these people come here and I'm not forced to apply
8 the -- or to order summons to appear. I mean this is the last resort.

9 MR GUMPERT: That would be obviously the least desirable of all. We don't want
10 any compulsion here.

11 Well, may I pick the suggestion which your Honour last made that the call will be
12 made in the presence of a representative of the Prosecution, the Defence and the VWU,
13 that we'll have agreed in advance broadly what we're going to say. It may well be
14 that we'll decide tactically the advantage is if the words are spoken by a member of
15 the Defence team and that we will hope that the combined effect of that message on
16 those two witnesses will be that they will come, come to Kampala I should say,
17 willingly. That's how I propose in light of what your Honour said we proceed.

18 SINGLE JUDGE TARFUSSER: I'm fine with it. I will give the floor to the Defence
19 in order to know what the Defence is thinking about it.

20 MR ODONGO: Your Honour, the issue at end is how do we persuade the witnesses
21 to rise up to their responsibility of giving evidence? And given the complementarity
22 with which we have so far handled this matter between the Prosecution and the
23 Defence, it is my absolute conviction that as it were the end justifies the means. It
24 doesn't matter how that is achieved.

25 First of all, I am not sure why the two witnesses ultimately decided to decline to come

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1 to testify. If we knew, it might be easier. But given the fact that they seem to be
2 more sympathetic to the Defence, I mean according to what my brother on the
3 opposite side has said, it would appear it might be for the general good of both
4 parties and indeed the Court if the duty to talk to them was given to the Defence.
5 Because from what I glean from what has been said here, it would appear they
6 are -- they seem to be under the impression that they are coming to give evidence
7 against the accused -- or I mean the suspect and yet this is not what the Court is about.
8 The Court is about evidence in its own right telling the truth, what the witness has to
9 say. It doesn't matter whether it is for or against the witness. It's just about what
10 the witness knows about the case.

11 So in this case, provided they have more confidence in the Defence, I do not see any
12 harm in the simple function of persuading the witness to come to testify.

13 But if I am wrong in this and the Prosecution thinks it might be prejudicial to their
14 case, then we can reach a middle ground for all the three parties to find a modicum of
15 operation by which the witnesses may be persuaded to come. But that would be a
16 much longer way of doing it. But it all depends. If the Prosecution is (indiscernible)
17 about it and they are disinclined to believe that the Defence can do a good job and
18 pursue it, I mean to perform the single function of persuading the witnesses to come
19 to testify, we leave it to the wisdom of Court to, you know, come out with the shortest
20 cut to achieving this single purpose. Thank you.

21 Your Honour, I have been given information that it would appear some of the
22 witnesses now have formed the opinion that Prosecution is actually going after them
23 and that's why they are kind of reluctant. So involving the Prosecution at this point
24 may be a disservice.

25 MR GUMPERT: Au contraire. We could assure them that their fears, if they have

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1 them, are unjustified.

2 SINGLE JUDGE TARFUSSER: But let me put the question to both of you: Is this
3 done by telephone or by going?

4 MR GUMPERT: I would submit in the first instance, because we want this resolved
5 and quickly, by telephone.

6 SINGLE JUDGE TARFUSSER: Yes.

7 MR GUMPERT: If any of the parties think because the aim hasn't been achieved
8 over the telephone that there would be an advantage in making a visit, we could do
9 that too. I hope to avoid it. It's time-consuming and expensive. It should be a
10 secondary course of action. My proposal is that the first contact should be made by
11 telephone.

12 SINGLE JUDGE TARFUSSER: Yes, but if it's made by telephone, I don't see any
13 harm in doing it together. I mean I think we should -- you should by tomorrow,
14 after tomorrow sit together, we are here, together with the VWU and try to achieve
15 this result.

16 And if it doesn't work out and we have to go to the field, I think we shouldn't go all
17 because otherwise this is budgetary -- it becomes a budgetary problem as well, so I
18 mean -- I think we should just find out who goes there from VWU of course, but
19 somebody who is already there and I think it's more the Defence that --

20 MR GUMPERT: We have staff in country too.

21 SINGLE JUDGE TARFUSSER: Okay.

22 MR GUMPERT: Let's hope that we don't -- I'm confident that tomorrow, I'm
23 meeting Mr Obhof in any event tomorrow about other matters, I'm confident that in
24 all probability that if we have the numbers we could liaise with VWU, VWS and get
25 this done tomorrow.

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1 SINGLE JUDGE TARFUSSER: Well, that would be a good idea and I would be very
2 happy if I was informed by the end of the week of how it turned out because in order
3 to continue to organise things for the hearings.

4 Mr Obhof.

5 MR OBHOF: Yes, your Honour. Thank you. Dealing with these -- both these
6 witnesses, seeing them separately, I know at least for Witness P-235 it might be
7 easier if Honourable Krispus Ayena speaks to her.
8 When it comes to P-236, I think it would best, and I know this might sound strange,
9 but Philip Adonga, who is one of our people down in country, if he makes the contact
10 to her. 236 did attempt to call Philip on Monday and he did not answer the phone.
11 He called me immediately to let me know that she attempted to contact him and that
12 he let the phone just die out until she stopped answering. It might be easier if Philip
13 called her and asked her. That's something I could discuss with Ben tomorrow
14 morning.

15 SINGLE JUDGE TARFUSSER: Yes, I mean it's now up to you to find out. I just
16 want you both to liaise in order to achieve the result together with the VWU, of
17 course. This is the mission you have and if we all agree, I think we could also leave
18 it here if there are no other questions or issues to be discussed.

19 MR ODONGO: Your Honour, I am not too sure whether I understand your
20 directives or order in respect to lifting the ban on the non-privileged visit. I am
21 saying this because I know the psyche of my client and I'm so far away. Mr Obhof at
22 the moment is also out of The Hague, he's away in Kampala. And according to our
23 observation, we must -- it would appear our client needs constant, you know, visit to
24 keep his spirit up.

25 SINGLE JUDGE TARFUSSER: Yes, but the spiritual visits have been granted. The

1 spiritual visits, right, have been granted?

2 MR ODONGO: Your Honour, it's a different matter being visited by --

3 SINGLE JUDGE TARFUSSER: You're talking about spirits.

4 MR ODONGO: No, no, no. Well, lifting his spirit is not all about the pastor and
5 things. It's about people he has confidence in, people he has been working with, you
6 know, talking to him about diverse matters, not necessarily the spiritual things. And
7 we see that every time he is visited he seems to gain more and more confidence, he
8 gets happier. So if there is no compelling reason, provided the permission is got
9 from the Judge, that that should be okay.

10 SINGLE JUDGE TARFUSSER: I would ask you to submit a list of names, not too
11 many, of course, one or two names of these potential visitors you are envisaging and
12 we will -- I will then ask the Prosecutor what they think about it and screen them and
13 then I will decide on it, okay? Quickly, I will -- you know, I'm not -- I'm one who
14 decides quite quickly.

15 MR ODONGO: Yes, that is evident, your Honour.

16 SINGLE JUDGE TARFUSSER: So if you submit a short list of names of potential
17 visitors, we will decide on that.

18 MR ODONGO: Much obliged, your Honour. We shall do that.

19 SINGLE JUDGE TARFUSSER: Okay.

20 MR ODONGO: Yes.

21 SINGLE JUDGE TARFUSSER: Is there some other issue to be raised?

22 MR GUMPERT: No.

23 SINGLE JUDGE TARFUSSER: So we will --

24 MR GUMPERT: The remaining issue was one where I told the Court I wasn't asking
25 the Court to do anything.

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1 SINGLE JUDGE TARFUSSER: That's why I said no action. I said no action.

2 MR GUMPERT: Quite right.

3 SINGLE JUDGE TARFUSSER: Also because it's -- well, no.

4 MR GUMPERT: I'm sorry, contradicting myself. There is one matter. It's not
5 really a matter that I'm in the first instance asking for an order, but I raised in the
6 course of my outline of the position with regard to P-235, the appearance from the
7 Defence investigation notes that there is in existence a statement. And of course
8 ultimately it's a matter for the Defence to comply with the order of the Court, but it
9 seems to me that if she has made a statement from which they will be duty-bound to
10 seek to contradict her, if she makes a contrary statement in evidence, then that's
11 plainly a document which ought to be disclosed in accordance with your order of the
12 12th.

13 SINGLE JUDGE TARFUSSER: Absolutely yes. And if it's not disclosed, of course
14 they cannot use it for cross-examination or not, but I don't know if it exists, if yes, or
15 what the Defence wants to do with this written statement.

16 MR OBHOF: We do have two draft statements for, as we would call her, D26-004
17 and one draft statement D26-005, that is P-235 and 236 respectively.

18 First we discussed about because they were only draft that we weren't going to
19 submit them, but by request of the Prosecution we did submit the one for P-214
20 today.

21 As for 235, that can be submitted by Friday, week's end.

22 But with 236, because there -- whilst I was away before the ban came in there was one
23 more interview with her. I would like Philip, who is down in Gulu, to take a look at
24 and add or subtract anything there from thereof with -- in relation to 236.

25 But by 235, we could have those to you quite quickly.

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1 MR GUMPERT: I'm not particularly -- I mean as soon as possible. I wouldn't
2 seek -- I'm not asking for an order. It's something which can again be dealt with
3 between the parties. And I quite understand the desire to make sure that a
4 statement is as close to being final and has been properly scrutinized before it's sent to
5 the other side. Provided we have them in reasonable time before the witness is
6 heard, there can be no harm.

7 SINGLE JUDGE TARFUSSER: We could say by next week sometime?

8 MR OBHOF: Oh, very easily. I'll be back down in Gulu this week, so -- I'll be back
9 down on Friday afternoon.

10 SINGLE JUDGE TARFUSSER: Okay. Thank you very much.

11 I think we have no other issue, so this status conference is closed. Thank you to all
12 of you for the cooperation. I'm a bit clearer in my head what's going to happen in a
13 few days, and I hope you will succeed by convincing with the good manners the two
14 ladies to come to say the truth, that's what it is about.

15 And thank you to all of you. I will not quote everybody, but to all of you.

16 And the status conference is adjourned. Thank you very much.

17 THE COURT USHER: All rise.

18 *(The hearing ends in closed session at 5.55 p.m.) Reclassified as open session

19 RECLASSIFICATION REPORT

20 Pursuant to Trial Chamber IX's Order, ICC-02/04-01/15-584-Conf, dated 4 November
21 2016, the confidential version of the transcript becomes Public.