



Original: English

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

Date: 24 June 2015

**PRE-TRIAL CHAMBER II**

**Before: Judge Cuno Tarfusser, Single Judge**

**SITUATION IN UGANDA**

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

**Public**

**Decision on a request by the Prosecutor under article 57 of the Rome Statute  
and regulation 101(2) of the Regulations of the Court**

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 the Victims**

**Legal Representatives of the 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**

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**Registrar**

Herman von Hebel

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**Judge Cuno Tarfusser**, Single Judge exercising the functions of the Chamber in the present case, issues this decision on the “Prosecutor’s application for the Pre-Trial Chamber to make orders under article 57 of the Rome Statute and regulation 101 of the Regulations of the Court to restrict Dominic Ongwen’s access to the telephone and to direct that there be a public hearing” (ICC-02/04-01/15-241-Conf-Exp and -Conf-Exp-AnxA), filed on 5 June 2015.

1. The Prosecutor requested, *ex parte*, that the Single Judge: (i) restrict Dominic Ongwen’s use of the telephone in the detention centre to calls to and from his counsel and prohibit all other telephone communications; (ii) order that telephone data and voice recordings be provided to the parties; and (iii) hold a public hearing for the purpose of reminding Dominic Ongwen and third parties that actions which may influence potential witnesses or result in interference with the collection of evidence may amount to offences under article 70 of the Statute and in most domestic jurisdictions.

2. Immediately upon receipt of a courtesy copy of the Prosecutor’s request, the Single Judge orally instructed the Registrar to put in place said restriction *ad interim*, as provided for by regulation 101(3). On 8 June 2015, the Single Judge ordered that the Defence be notified of the Prosecutor’s request and decided that the restriction on Dominic Ongwen’s communications be maintained until a response is obtained from the Defence and a comprehensive decision on the request is taken (ICC-02/04-01/15-242).

3. The Defence responded to the request on 15 June 2015 (ICC-02/04-01/15-248-Conf-Exp and -Red). The Prosecutor, with leave of the Single Judge (ICC-02/04-01/15-252), replied on 22 June 2015 (ICC-02/04-01/15-253-Conf and -Red).

4. Before addressing the specific requests of the Prosecutor, it is appropriate to analyse its premise, contested by the Defence, *i.e.* that during late May and early June 2015 Dominic Ongwen, by way of telephone

communications from the Court's Detention Centre, engaged in activities that may have the potential of tainting the evidence in the case. It is sufficiently established, and indeed agreed by the parties, that in early June 2015 a meeting was held in Uganda under the auspices of a Ugandan non-governmental organisation which included a group of individuals described as "potential Prosecution witnesses" by the Prosecutor. Proceedings in the present case were discussed at the meeting, including opinions as to the guilt or innocence of Dominic Ongwen and the collaboration of participants with the Court. During the meeting, Dominic Ongwen spoke by telephone individually to five attendees of the meeting, all of whom are referred to by the Prosecutor to be "potential witnesses".

5. The Defence argues that the persons to whom Dominic Ongwen spoke are not witnesses by the Prosecutor, and that "the Defence and Mr Ongwen should be free to contact any non-witness for the lawful purpose of its investigation". As to the nature of the meeting, the Defence draws attention to the fact that attendees were told to tell the truth, and submits that regardless of their possible negative influences, such group meetings are "not unique to the case" and the Prosecutor has failed to explain how the revocation of Dominic Ongwen's phone privileges will change people from meeting in such groups.

6. Based on the information available, the Single Judge considers that there is reasonable suspicion that the meeting in question was not innocuous but was held with a view to exercising some form of influence on persons who possess information relevant to the case. The Single Judge agrees with the Prosecutor that "[s]imply gathering a number of potential witnesses in a single location with a view to discussing matters which are *sub* judice may lead to the pollution of those witnesses' accounts and thus interfere with the collection (and later presentation) of accurate evidence". The information that

the organisers of the meeting attempted to impress upon the attendees 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. The fact that the attendees were told to tell the "truth" cannot be taken as negating these concerns. It is also significant that Dominic Ongwen's intervention at the meeting appears to have occurred without the involvement or even prior knowledge of his Defence, making it at least questionable that it took place "for the lawful purpose of [the Defence] investigation".

7. It is irrelevant for the present purposes that the attendees of the meeting were not witnesses of the Prosecutor, but, at this stage, only "potential witnesses". Under articles 57(3)(a) and (c) of the Statute, the Single Judge has the power to prevent any possible interference with the investigation.

8. Thus, the Single Judge agrees that the Prosecutor is, in principle, entitled to have access to information about Dominic Ongwen's telephone communications in the period identified in the request, in order to exercise her powers under article 54(1)(a) of the Statute. The power of the Single Judge to grant to the parties access to telephone data and voice recordings stems from article 57(3)(a) and (c) of the Statute, and has been explicitly confirmed by the Appeals Chamber as falling within the discretion of the Chamber.<sup>1</sup> In order to allow the Single Judge to strike the necessary balance between the different interests at stake with a view to guaranteeing the fairness of the present proceedings, and bearing in mind the ensuing need to limit the transmission of this information to what is necessary in the specific

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<sup>1</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment on the Appeal of the Prosecutor against the 'Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre'", 9 December 2009, ICC-01/04-01/07-1718 (OA 9).

circumstances, the Registrar is instructed to review the voice recordings of the telephone communications in question and submit to the Single Judge a report listing and briefly summarising the content each communication. Following the receipt of the report, the Single Judge will determine which recordings should be provided to the Prosecutor, as well as to the Defence. Until that time, the restrictions on the communications shall remain in place as previously ordered. As for the list of persons whom Dominic Ongwen is permitted to contact on the telephone, it can be transmitted to the Prosecutor and the Defence immediately.

9. In light of the above, the Single Judge considers that the reasons for which the Defence redacted vis-à-vis the Prosecutor certain passages in its response to the request are not valid. The response shall therefore be reclassified.

10. Turning now to the last item of the Prosecutor's request, the Single Judge does not deem it necessary to convene a public hearing for the sole purpose of reminding Dominic Ongwen and the public of the fact that interference with the investigation is punishable under the Statute. Indeed, this decision, which is public, already serves the purpose of making clear that such activities will not be tolerated.

11. Finally, the Single Judge notes that the Defence of Dominic Ongwen, by way of email, requested to be permitted to file a reply to the Prosecutor's reply. The Single Judge, being sufficiently apprised of the relevant matters, considers that there is no need to accord the parties any further opportunity to be heard.

**FOR THESE REASONS, THE SINGLE JUDGE**

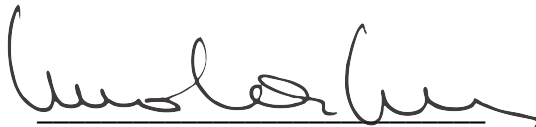
**ORDERS** the Registrar to file in the record of the case, as a matter of urgency, a “confidential, *ex parte*, Chamber only” report listing and summarising the content of Dominic Ongwen’s telephone conversations between 25 May and 5 June 2015;

**ORDERS** the Registrar to file in the record of the case, as “confidential, *ex parte*, Prosecutor and Defence only”, the list of persons whom Dominic Ongwen is permitted to contact on the telephone;

**REJECTS** the Prosecutor’s request to hold a hearing; and

**ORDERS** the Registrar to reclassify as “confidential, *ex parte*, Prosecutor and Defence” document ICC-02/04-01/15-248-Conf-Exp.

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

A handwritten signature in black ink, appearing to read 'Cuno Tarfusser', written over a horizontal line.

**Judge Cuno Tarfusser**  
**Single Judge**

Dated this 24 June 2015

At The Hague, The Netherlands