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No.: ICC-02/04-01/15  
Date: 10 August 2016

**TRIAL CHAMBER IX**

**Before: Judge Bertram Schmitt, Single Judge**

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

**Public**

**Decision on Prosecution 'Request for an order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen'**

To be notified, in accordance with Regulation 31 of the Regulations of the Court, to:

**The Office of the Prosecutor**

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**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  
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**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**Judge Bertram Schmitt**, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court ('Court'), issues the following 'Decision on Prosecution "Request for an order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen"', in the case of *The Prosecutor v. Dominic Ongwen* ('Ongwen case'), having regard to Article 64(6)(f) of the Rome Statute and Regulations 24(5) and 101(2) of the Regulations of the Court.

1. On 3 August 2015, the Single Judge of the Pre-Trial Chamber ('PTC Single Judge') issued the 'Decision concerning the restriction of communications of Dominic Ongwen' ('Communications Decision').<sup>1</sup> The PTC Single Judge took measures restricting Mr Ongwen's telephone communications on the basis of 'information which led to the finding of a reasonable suspicion that there had been attempts by Mr Ongwen to exercise [...] some form of influence on persons who possess information relevant to the case'.<sup>2</sup> Further, the Single Judge wrote that 'any intentional interference with the investigation or proceedings will not be tolerated. If in the future information similar to that which led to the imposition of the initial restrictions is brought to the attention of the Chamber, the Chamber will have to reconsider the possibility of imposing more stringent measures to restrict the communications of Dominic Ongwen.'<sup>3</sup>
2. On 11 November 2015, the PTC Single Judge issued an order on the protocol governing contact between a party or participant and witnesses of the opposing party or participant ('Contact Protocol').<sup>4</sup> The protocol prohibited contact with a

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<sup>1</sup> Decision concerning the restriction of communications of Dominic Ongwen, 3 August 2015, ICC-02/04-01/15-283.

<sup>2</sup> Communications Decision, ICC-02/04-01/15-283, para. 10. *See also* para. 12; and Decision on a request by the Prosecutor under Article 57 of the Rome Statute and Regulation 101(2) of the Regulations of the Court, 24 June 2015, ICC-02/04-01/15-254, para. 6.

<sup>3</sup> Communications Decision, ICC-02/04-01/15-283, para 17.

<sup>4</sup> Order concerning the modalities for the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, 11 November 2015, ICC-02/04-01/15-339 with Annex.

witness of another party or participant if the intention to call the witness to testify or to rely on his or her statement has been communicated to the party or participant, or if this intention is otherwise clearly apparent.<sup>5</sup>

3. On 20 May 2016, the Registry filed the 'Report on the Active Monitoring of Mr. Ongwen Telephone Communications' ('Registry's Report'),<sup>6</sup> whereby it, *inter alia* reported that two telephone conversations involving Mr Ongwen were terminated on 11 January 2016 and 30 March 2016.<sup>7</sup>
4. On 25 May 2016, the defence for Mr Ongwen ('Defence') provided its observations on the Registry's Report, explaining, *inter alia*, the circumstances of the telephone conversations which had been terminated by the Registry.<sup>8</sup> The Defence submitted that Mr Ongwen gave his counsel 1,000 Euros from his savings, which he earned at the Detention Centre, to give to his family and that he was providing advice on how to disperse the monies amongst his family during one of the terminated conversations.<sup>9</sup>
5. On 30 May 2016, the Single Judge issued a 'Decision on issues related to the restriction of communications of Dominic Ongwen',<sup>10</sup> in which he stated that the restrictions of communications ordered by the PTC Single Judge remain warranted at the present stage.<sup>11</sup>

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<sup>5</sup> Annex to the Order concerning the modalities for the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, 11 November 2015, ICC-02/04-01/15-339-Anx, paras 26-27.

<sup>6</sup> Report on the Active Monitoring of Mr. Ongwen Telephone Communications, 20 May 2016, ICC-02/04-01/15-443-Conf-Exp, only available to the Defence and Prosecution (with confidential *ex parte* Annexes I-III). To the extent that this Decision makes reference to confidential or confidential *ex parte* filings, the Single Judge is of the view that the reference to these documents does not undermine the confidentiality of the information.

<sup>7</sup> Registry Report, ICC-02/04-01/15-443-Conf-Exp, pages 4-5

<sup>8</sup> Defence Observations on ICC-02/04-01/15-443-Conf-Exp, 25 May 2016, ICC-02/04-01/15-444-Conf-Exp (a redacted confidential *ex parte*, Defence and Prosecution only, version was also filed, ICC-02/04-01/15-444-Conf-Exp-Red).

<sup>9</sup> ICC-02/04-01/15-444-Conf-Exp-Red, para. 12.

<sup>10</sup> Decision on issues related to the restriction of communications of Dominic Ongwen, 31 May 2016, ICC-02/04-01/15-450-Red.

<sup>11</sup> ICC-02/04-01/15-450-Red, para. 4.

6. On 24 June 2016, the Office of the Prosecutor ('Prosecution') filed its 'Request for an order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen' ('Request'),<sup>12</sup> in which it asks the Chamber to order: (i) the Defence to immediately disclose all financial or in-kind payments or promises of money made by Mr Ongwen to witnesses in this case; (ii) Mr Ongwen to cease payments to such individuals pursuant to Article 70 of the Rome Statute; and (iii) the Registry to review Mr Ongwen's communications that reference certain individuals and disclose these conversations to the Prosecution for review regarding possible Article 70 violations.<sup>13</sup>
  
7. In support of its Request, the Prosecution notes that during the call ultimately terminated by the Registrar, Mr Ongwen directed that certain payments be made to Prosecution witnesses and potential Defence witnesses in the *Ongwen* case and that the conversation be recorded and played to third parties.<sup>14</sup> The Prosecution noted Mr Ongwen's statement that payments to two potential witnesses were to 'cultivate a relationship' and alleges that Mr Ongwen 'may intend the receipt of [money to certain individuals] to favourably affect the dispositions of these witnesses toward Mr Ongwen'.<sup>15</sup> The Prosecution submits that Mr Ongwen's payments, allegedly to his 'family',<sup>16</sup> were directed towards Prosecution witnesses and that such payments constitute witness interference in violation of the PTC Single Judge's instructions and potentially an offence under Article 70 of the Statute.<sup>17</sup>

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<sup>12</sup> 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 (the public redacted version was notified on 12 July 2016).

<sup>13</sup> Request, ICC-02/04-01/15-482-Red, paras 1 and 7-8.

<sup>14</sup> Request, ICC-02/04-01/15-482-Red, paras 2-3.

<sup>15</sup> Request, ICC-02/04-01/15-482-Red, para. 4.

<sup>16</sup> Request, ICC-02/04-01/15-482-Red, para. 5.

<sup>17</sup> Request, ICC-02/04-01/15-482-Red, paras 5-6.

8. On 4 July 2016, the Defence filed its response to the Request ('Response'),<sup>18</sup> in which the Defence asks that the Chamber reject the Request.<sup>19</sup> The Defence alleges that the Request (i) was filed 22 days out of time;<sup>20</sup> (ii) meant to influence the Single Judge's pending decision on Mr Ongwen's interim release and is not a true concern of the Prosecution;<sup>21</sup> and (iii) violates Mr Ongwen's right to support his family and his children's right to be supported by their parent.<sup>22</sup> In response to the Prosecution's request that the Chamber order the Registry to review certain and disclose communications,<sup>23</sup> the Defence asserts that it is not within the Registry's function to undertake such activity.<sup>24</sup> In Annex A to the Defence's filing, the Prosecution implied that the witness protection protocol set forth by the PTC Single Judge did not 'apply with such vigour' to several of the witnesses at issue in the present decision.<sup>25</sup>
9. In its Response, the Defence also proffered details as to the funds Mr Ongwen provided to two of the five potential witnesses in this case.<sup>26</sup> The Chamber notes that the other three potential witnesses were heard by the PTC Single Judge pursuant to Article 56 of the Statute,<sup>27</sup> and that the Chamber recently recognised these witnesses' Article 56 evidence as formally submitted.<sup>28</sup>

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<sup>18</sup> Defence Response to the Prosecution Filing ICC-02/04-01/15-482-Conf, 4 July 2016, ICC-02/04-01/15-490-Conf with confidential *ex parte* Annex A (a public redacted version of the filing was notified on 7 July 2016, and a confidential redacted version of Annex A was notified on 8 July 2016).

<sup>19</sup> Response, ICC-02/04-01/15-490-Red, paras 2 and 54.

<sup>20</sup> Response, ICC-02/04-01/15-490-Red, paras 17-18.

<sup>21</sup> Response, ICC-02/04-01/15-490-Red, paras 19- 22.

<sup>22</sup> Response, ICC-02/04-01/15-490-Red, paras 23- 49.

<sup>23</sup> Request, ICC-02/04-01/015-482-Red, para. 8(c).

<sup>24</sup> Response, ICC-02/04-01/15-490-Red, paras 50-53.

<sup>25</sup> Response, ICC-02/04-01/15-490-Conf-AnxA-Red. The communication related to witnesses who provided evidence pursuant to Article 56 of the Statute.

<sup>26</sup> Response, ICC-02/04-01/15-490-Conf, paras 40-41.

<sup>27</sup> Response, ICC-02/04-01/15-490-Red.

<sup>28</sup> Decision on Request to Admit Evidence Preserved under Article 56 of the Statute, 10 August 2016, ICC-02/04-01/15-520.

10. On 12 July 2016, the Prosecution filed a request asking leave to reply to the Defence's Response ('Leave to Reply Request').<sup>29</sup> The Single Judge rejects this request, as he does not require any further submissions in order to render his ruling.
11. The Single Judge notes that in the 23 May 2016 status conference, the Chamber communicated its expectation that the parties and participants cooperate with each other and engage in *inter partes* communications 'wherever possible'.<sup>30</sup> While the Chamber gave a specific example of requests for disclosure, it is necessary to reiterate that the Chamber's expectation of *inter partes* communication extends to all matters arising in the case where such communication is possible. Consultation was possible in relation to several aspects of the Request.
12. Regarding the timeliness of the Request, the Single Judge is unconvinced by the Defence's assertion that the Request was filed 22 days out of time. The Single Judge's 'Decision on issues related to the restriction of communications of Dominic Ongwen'<sup>31</sup> required the Prosecution to raise objections to the inclusion of additional names within two days after notification of the Defence's request for certain additions to Mr Ongwen's privileged and non-privileged phone list.<sup>32</sup> The Single Judge did not preclude the Prosecution from later raising issues arising out of information contained in the Defence's Observations or in the Registry's Report. As such, the Single Judge considers the Request on its merits.

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<sup>29</sup> Prosecution's Request for Leave to Reply to the 'Defence Response to the Prosecution Filing ICC-02/04-01/15-482-Conf', 12 July 2016, ICC-02/04-01/15-496. On 13 July 2016, the Defence filed a response to the Prosecution's request for leave to reply. Defence Response to Prosecution Request ICC-02/04-01/15-496, 13 July 2016, ICC-02/04-01/15-498.

<sup>30</sup> Transcript of hearing on 23 May 2016, ICC-02/04-01/15-T-25-ENG, page 3, line 21 to page 4, line 1.

<sup>31</sup> Decision on issues related to the restriction of communications of Dominic Ongwen, 30 May 2016, ICC-02/04-01/15-450-Red.

<sup>32</sup> ICC-02/04-01/15-450-Red, para. 5.

13. The Single Judge first notes that the issue of the monies Mr Ongwen distributed to potential witnesses was only brought to the Chamber and the Prosecution's attention incidentally after the Registry terminated Mr Ongwen's phone call for the use of possibly coded language and for contact with unauthorised persons.<sup>33</sup> The Single Judge further notes that Contact Protocol enacted by the PTC Single Judge is still in force.<sup>34</sup>
14. The Defence transferred monies from Mr Ongwen to give to intermediaries who then apparently transferred the monies to potential Prosecution witnesses, without notifying the Chamber or the other participants.<sup>35</sup> This, at the very least, violates the spirit of the existing protocol. The Single Judge cautions the Defence and Mr Ongwen against repeating this behaviour.
15. Based on the information available, and noting the reasons underlying the existing restrictions on Mr Ongwen's telephone communications,<sup>36</sup> 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 recognised as formally submitted does not ameliorate the Single Judge's concern.
16. In light of the above, the Single Judge orders the Defence to disclose all financial or in-kind payments or promises of money made by Mr Ongwen to persons currently identified as potential Prosecution or Defence witnesses in this case.<sup>37</sup>

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<sup>33</sup> See Registry Report, ICC-02/04-01/15-443-Conf-Exp.

<sup>34</sup> ICC-02/04-01/15-339-Anx, para. 26. See Order Scheduling First Status Conference and Other Matters, 4 May 2016, ICC-02/04-01/15-432, para. 4.

<sup>35</sup> See ICC-02/04-01/15-490-Red, para. 14; and ICC-02/04-01/15-444-Conf-Exp-Red, para. 12.

<sup>36</sup> See Communication Decision, ICC-02/04-01/15-283; and ICC-02/04-01/15-450-Red. See also Decision on the Review of Dominic Ongwen's Detention and on the Restriction on Communication, 21 July 2016, ICC-02/04-01/15-503.

<sup>37</sup> For this purpose, 'potential witnesses' are those who appear on a provisional or final witness list. At this time, the only witnesses the Defence has been required to identify before the commencement of trial are those relating to grounds for excluding criminal responsibility. See Defence Notification Pursuant to Rule 79(2) of the Rules of



These witnesses, if called to testify in-court, may be questioned on the matter of monies received from Mr Ongwen. The Defence is to disclose the information on a confidential basis.

17. While the Single Judge is mindful of Mr Ongwen's familial ties to some of the potential witnesses, he notes the Chamber's obligation to ensure that the trial is fair,<sup>38</sup> free from the taint of witness interference. To that end, given the importance of maintaining the integrity of the upcoming testimony in this trial, the Single Judge cannot but order Mr Ongwen to cease direct payments to persons identified as potential witnesses in the *Ongwen* case at the present time.
18. However, the Single Judge notes that he considers that a more flexible regime might allow Mr Ongwen to contribute to the welfare of his children while safeguarding against potential witness interference. Indeed, the Single Judge notes the Defence's statement that the Defence and Prosecution have an agreement about issues related to the health of the children.<sup>39</sup> Thus, the Single Judge orders the parties to consult with the Victims and Witnesses Unit ('VWU') in order to reach an agreement as to how Mr Ongwen can contribute to the welfare of his children while mitigating the risk of witness interference. The parties are to inform the Chamber of their agreement in a joint filing.
19. For example, it may be permissible for Mr Ongwen to support his family indirectly when (i) money is provided by Mr Ongwen to the Registry to give to potential witnesses in Mr Ongwen's family; (ii) the amount and circumstances of

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Procedure and Evidence, 9 August 2016, ICC-02/04-01/15-519-Conf (public redacted version notified same day); Annex A to the Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules of Procedure and Evidence, 9 August 2016, ICC-02/04-01/15-517-Conf-AnxA (public redacted version notified same day); Annex A to the Prosecution's tenth submission of its provisional list of witnesses and provisional witness summaries (P-0048, P-0085, P-0105, P-0138, P-0144, P-0187, P-0202, P-0224, P-0245, P-0258, P-0410, P-0414), 9 August 2016, ICC-02/04-01/15-516-Conf-AnxA.

<sup>38</sup> Article 69(2) of the Statute.

<sup>39</sup> Response, ICC-02/04-01/15-490-Red, para. 43.

the transfer would not unduly influence any potential witness's testimony and (iii) the Prosecution has sufficient advance notice of the transfer.

20. Lastly, the Single Judge notes that in so far as the Prosecution wishes to pursue investigative measures for the purposes of a potential violation of Article 70 of the Statute, a Pre-Trial Chamber is the appropriate chamber to provide authorisation for such investigations, not Trial Chamber IX.<sup>40</sup> Thus, this Chamber is not in a position to authorise the Registry to take action in order to facilitate the Prosecution's 'review regarding possible article 70 violations'.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**PARTIALLY GRANTS** the Request;

**ORDERS** the Defence to disclose all financial or in-kind payments or promises of money made to persons identified as potential witnesses in this case;

**ORDERS** Mr Ongwen to cease direct payments to persons identified as potential witnesses in this case within two days of notification of this filing;

**ORDERS** the Prosecution and the Defence to consult with the VWU in regard to how Mr Ongwen can contribute to the welfare of his children;


**REJECTS** the remainder of the Request; and

**REJECTS** the Leave to Reply Request.

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<sup>40</sup> See Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted version of 'Decision on the prosecution's request relating to Article 70 investigation' of 26 April 2013, 2 May 2014, ICC-01/05-01/08-2606-Red, paras 12-19. Rule 165(1) of the Rules of Procedure and Evidence authorises Chambers to communicate information to the Prosecution, but this provision falls short of authorising a Trial Chamber to authorise investigative measures for purposes of collateral proceedings.

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



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**Judge Bertram Schmitt**  
**Single Judge**

Dated 10 August 2016

At The Hague, The Netherlands