

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 5 June 2015

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN UGANDA

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

**Confidential *EX PARTE* only available to Prosecution and Registry with
confidential *EX PARTE* only available to Prosecution and Registry Annex A**

**Prosecution's application for the Pre-Trial Chamber to make orders under article
57 of the Rome Statute and regulation 101 of the Regulation of the Court to restrict
Dominic Ongwen's access to the telephone and to direct that there be a public
hearing**

Source: The Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor

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Counsel for Dominic Ongwen

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

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REGISTRY

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Counsel Support Section

Victims and Witnesses Section

Detention Section

Victims Participation and Reparations Section

Other

Introduction

1. The Office of the Prosecutor ("the Prosecution") has become aware of allegations that potential witnesses in this case have been the subject of improper suggestions by third parties. Further, those third parties have facilitated telephone contact between Dominic Ongwen himself and potential Prosecution witnesses.
2. The Prosecution asks that the Single Judge order that Dominic Ongwen shall not temporarily be permitted to have further access to the telephone in the Detention Unit, other than to call his Counsel in respect of matters directly related to his defence.
3. The Prosecution asks the Single Judge to order that Dominic Ongwen's list of authorised telephone contacts, together with telephone data and voice recordings from the Detention Unit, from 25 May 2015 until the order requested above may be made, should be made available to the Prosecution and the Defence. This is a period shortly before and after the time when the alleged events referred to above occurred and can be expected to yield data relative to those events.
4. The Prosecution also asks the Single Judge to convene a public hearing, and direct Dominic Ongwen (through interpretation directly into his mother tongue Acholi) that he is not permitted to have contact with any persons who might be witnesses at his trial. The Prosecution respectfully suggests that the Single Judge should also remind persons at large who may be tempted to take action which could influence witnesses or interfere with the collection of evidence that this is a criminal offence.

Confidentiality level

5. Pursuant to regulation 23*bis* of the Regulations of the Court, the Prosecution files this application as “confidential *ex parte*” thus excluding Dominic Ongwen and his Counsel from the circle of readership. The purpose of so doing is to ensure that the Single Judge has an opportunity to consider whether the restriction on Dominic Ongwen’s telephone communications requested by the Prosecution is *prima facie* well evidenced and proportionate. If Dominic Ongwen were to be aware of the Prosecution application while it was under consideration by the Single Judge this would be likely to drive him to further misuse of these communications before they were so restricted.
6. Once the Single Judge has had an opportunity to consider the Prosecution’s application and to make any interim order restricting telephone communications that may be appropriate, the Prosecution submits that it will be appropriate to reclassify this application as public and the Annex as Confidential (*inter partes*). This will enable the Defence to make submissions on the questions of whether there is any factual dispute about the matters set out in the Annex, or about the law, whether any interim orders made should be further extended and whether any other orders by the Single Judge may be appropriate.
7. Annex A should remain confidential, and thus not available for public readership, because it contains full details of the alleged witness interference, which may lead to the identification of the individuals or organisation concerned. This would not be in the interests of justice, at this stage, and poses a risk to the safety of the respective witnesses.

Interference with witnesses: the brief facts

8. At a meeting arranged by individuals identifying themselves as representatives of a Non-Governmental Organisation in Uganda a group of potential

Prosecution witnesses in the proceedings against Dominic Ongwen were assembled. The potential witnesses were asked questions about their intentions and emotions, their beliefs as to whether Dominic Ongwen was guilty or not, whether he should be allowed to return to Uganda and their present or intended collaboration with the International Criminal Court. The questioning was such that not all of the persons attending felt they could give candid answers, apparently for fear of the consequences. The purpose of the meeting appeared to be to foster the notion that Dominic Ongwen should be permitted to return home to Uganda.

9. For a period during the meeting Dominic Ongwen, apparently in coordination with the organisers of the meeting, was himself in telephone contact with the participants, speaking to each of the potential Prosecution witnesses privately from the ICC Detention Unit in the Netherlands.

The Law

10. Article 70(1)(c) of the Rome Statute ("the Statute") makes the corrupt influencing of a witness, interference with the testimony of a witness and interfering with the collection of evidence offences against the administration of justice when they are committed intentionally.
11. Article 57(3)(a) of the Statute permits the Single Judge of the Pre-Trial Chamber "to issue such orders...as may be required for the purposes of the investigation".
12. Article 57(3)(c) of the Statute specifies that those orders may "...provide for the protection and privacy of victims and witnesses, the preservation of evidence..."
13. Regulation 101(2) of the Regulations of the Court permits the Prosecution to "request the Chamber to prohibit...contact between a detained person and any

other person, with the exception of Counsel, if the Prosecutor has reasonable grounds to believe that such contact...could prejudice or otherwise affect the outcome of the proceedings..."

14. Regulation 101(3) of the Regulations of the Court permits, in exceptional circumstances, the making of such an order "prior to the detained person being informed of the request" by the Prosecution. In such a case the detained person shall be informed and given an opportunity to be heard "as soon as practicable" thereafter.

Submissions

15. The Prosecution does not seek to establish that any criminal offences have been committed in the circumstances described above. The Prosecution is concerned with the likely effect of such occurrences rather than any intent which Dominic Ongwen or the organisers of the meeting may have had.
16. The purpose of article 57 of the Statute is to give the Pre-Trial Chamber and the Single Judge sufficient power to ensure that the investigation and the pre-trial stage of proceedings are conducted in an orderly fashion. Article 57(3)(a) of the Statute is deliberately open-ended in its enumeration of the powers of the Pre-Trial Chamber.
17. The occurrences described at paragraphs 8 and 9 above and set out in more detail in Annex A are likely to hamper the investigation and increase pressure on potential witnesses. It may render them unable to testify freely before the Court. This would deprive the relevant Chamber, ultimately, of the opportunity to make a determination of the truth of the matter based on all the evidence.

18. Simply 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.
19. Subjecting potential Prosecution witnesses so gathered to intrusive questioning and express or implied suggestions, from those who may be thought to be in a position of influence or authority, that the proceedings against Dominic Ongwen were unfairly preventing his return 'home' aggravates the initial wrongdoing, puts improper pressure on those individuals and may lead to their reluctance to give evidence contrary to these suggestions.
20. Facilitating a telephone call between Dominic Ongwen himself and the witnesses during the course of the gathering could not be better calculated to instill a feeling in such people that it would not be in their interests to provide evidence which might be to his discredit. Bearing in mind that many such potential witnesses have had violent and damaging experiences at the hand of the combatants during the armed conflict in northern Uganda, and the strong impact of society and purported family ties, such calls are likely to deter potential witnesses from giving an independent and truthful account.

Proposed orders

The Single Judge should prohibit telephone contact other than with Counsel

21. Article 57 of the Statute provides the Single judge with the power to make orders preventing such occurrences in the future.
22. Within its scope, it is submitted, is the power to prevent Dominic Ongwen from communicating with potential witnesses by telephone. This is governed in detail by regulation 101 of the Regulations of the Court. The only way of exercising this power effectively is to restrict Dominic Ongwen's future use of the telephone

from the Detention Unit solely to calls to and from his Counsel directly related to his defence and to prohibit all other telephone communications. To be effective, such an order will require that he be prohibited from gaining access to telephone facilities purportedly provided for other detainees in the Detention Unit.

23. The Prosecution submits that no other lesser measure, such as active monitoring of phone calls, would suffice to prevent similar occurrences in the future. Dominic Ongwen did not hesitate to use the telephone to communicate with the potential witnesses despite the knowledge that all detainees' non-privileged communications are recorded (regulation 174(2) and 174(3) of the Regulations of the Registry). It is thus unlikely he would stop such communications even if a lesser measure, active monitoring, were to be ordered. Moreover, he could simply use previously-agreed coded language.
24. Dominic Ongwen's behaviour in seeking to contact and influence potential witnesses suggests that, if he were to be given notice of the Prosecution application, he would be likely to increase his efforts so as to make the most use of a facility which might shortly be denied to him. Giving him notice might defeat the purpose of applying for the order. The Prosecution submission is that circumstances where a detainee can be shown to have made direct telephone contact with potential Prosecution witnesses, through the facilitation of persons linked with a Non-Governmental Organisation are indeed exceptional, as envisaged by regulation 101(3) of the Regulations of the Court and that the making of a temporary order, immediately followed by the provision of full information to the Defence to enable them to be heard or submit their views, meets the justice of the case.
25. Dominic Ongwen's abuse of his telephone privileges to contact and attempt to influence potential witnesses directly is sufficiently grave and prejudicial to the

pre-trial and trial process that the order sought by the Prosecution is a reasonable and proportionate one.

26. If the proposed restriction on Dominic Ongwen's use of the telephone is not implemented and the behaviour described above continues this may require the implementation of more intrusive protection measures in respect of a much larger number of potential Prosecution witnesses.

The Single Judge should order that telephone data and voice recordings be provided

27. The Prosecution submits that article 57 of the Statute permits the Single Judge to order that the records held by the Detention Unit authorities (and thus ultimately the Registry) of telephone connections made and received by Dominic Ongwen between 25 May and 5 June 2015 be provided to the Prosecution and the Defence. The Detention Unit authorities will have a list of persons whom Dominic Ongwen is permitted to contact on the telephone. The Prosecution requests that this list should be provided so that it can be established whether the individuals present at the meeting are on that list. If they are not, then irrespective of Dominic Ongwen's intent in making the telephone call that he did, and of the effect that that call may have had, he is already in breach of the Detention Unit regulations and should be subject to sanctions for that alone.
28. Further, the Prosecution requests that the relevant sound recordings (of those calls which were not privileged communications between him and his Counsel) be made available to the Prosecution and the Defence. Such an order would have two benefits: it would resolve any disputes that there might be about the accuracy of the allegation concerning Dominic Ongwen's contacts with the individuals concerned and it would enable the Prosecution and the Chamber to gauge the nature and the culpability of those exchanges.

The Single Judge should direct that there be a public hearing

29. Lastly the Prosecution submits that the Single Judge should order that a public hearing be held, for the purpose of reminding Dominic Ongwen and third parties in the most straightforward fashion that actions which may influence potential witnesses or result in interference with the collection of evidence may amount to criminal offences under article 70 of the Statute and in most domestic jurisdictions. Such a reminder is likely both to have deterrent effect upon listeners, and also to ensure that, should events similar to those set out in Annex A occur again, those involved are explicitly put on notice and can make no claim that they were proceeding in ignorance of the law or of the Pre-Trial Chamber's specific dictates.



Fatou Bensouda,
Prosecutor

Dated this 5th day of June 2015
At The Hague, The Netherlands