

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 15 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*, Defence Only

**Defence Response to the Prosecutor's Request under Article 57 and Regulation 101
of the Regulations of the Court**

Source: Defence for Dominic Ongwen

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

The Office of the Prosecutor

Counsel for the Defence

Krispus Ayena Odongo

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

Applicants

(Participation/Reparation)

The Office of Public Counsel for the Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman Von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') responds to the Office of the Prosecutor's ('Prosecution') application to restrict Dominic Ongwen's access to the outside world. The Defence states that the Prosecution's application is without merit and a clear violation of Mr Ongwen's basic human rights. The Defence respectfully requests His Honour, Single Judge Cuno Tarfusser ('Single Judge') to lift the restraints currently imposed on Mr Ongwen.
2. The Defence files this response confidential *ex parte* because it deals with privileged communications between Mr Ongwen and Counsel. It also contains information on Mr Ongwen's approved contact list. A public redacted version is filed concurrently.

II. PROCEDURAL HISTORY

3. On 21 January 2015, Mr Ongwen arrived at the International Criminal Court Detention Centre ('ICC-DC').
4. On 5 June 2015, the Single Judge by urgent request of the Prosecution restricted Mr Ongwen's access to the outside world, with the exception of visits and phone calls to his Counsel.
5. On 8 June 2015, the Single Judge altered the request and allowed the Assistant to Counsel to visit Mr Ongwen.¹ The Defence also received the newly reclassified public filing.²
6. On 9 June 2015, the Defence received the confidential redacted annex to the Prosecution's filing.³

¹ ICC-02/04-01/15-242.

² ICC-02/04-01/15-241.

³ ICC-02/04-01/15-241-AnxA-Conf-Red.

III. SUBMISSIONS

7. The Defence notes that the Prosecution does not allege that Mr Ongwen has violated any law.⁴ The Prosecution merely alleges that Mr Ongwen contacted persons outside the ICC-DC.
8. During Mr Ongwen's introduction to the ICC-DC, he was informed that his non-privileged phone calls would be monitored. He is still well aware that his non-privileged phone calls are recorded and are allowed to be monitored by the Chief Custodial Officer, and that under the Regulations of the Registry, suspected malfeasance is reported to the Registrar, not the Prosecution.
9. In addition, Mr Ongwen was informed during his introduction that he was allowed to use his non-privileged phone calls to contact potential witnesses and ask them to testify for his defence. The Defence notes that as of this date, this case does not have a specific definition of a witness, nor a protocol on contact with an opposing party's witness.
10. On 18 May 2015, Counsel and Assistant to Counsel informed Mr Ongwen of the 26 names of Prosecution witnesses disclosed on Friday, 15 May 2015. Understanding that the Prosecution has failed to propose such a definition or protocol, Counsel and Assistant to Counsel instructed Mr Ongwen not to talk to any of the persons on the list, not to disclose the names of any persons on the list to any person outside the Defence and not to attempt to contact the persons on the list through another person. To this date, Mr Ongwen has followed these instructions and shall continue to follow these instructions until such time the Single Judge instructs otherwise.

⁴ ICC-02/04-01/15-241, para. 15.

The Definition of a Witness

11. The Defence advised Mr Ongwen on contacts to outside persons based on the recent developments on the definition of a witness in other cases before the International Criminal Court.
12. The *Banda and Jerbo*, *Ruto and Sang* and *Muthaura and Kenyatta* cases defined a witness as a "person whom a party or participant⁵ intends to call to testify during the trial proceedings, provided that such intention has been conveyed to the non-calling party, either by the calling party including the individual on its filed witness list,⁶ or by the witness informing the non-calling party that he or she has agreed to be called as another party's witness, or by any other means that establish a clear intention on behalf of the calling party to call the individual as a witness and that this individual has consented thereto."⁷
13. In the *Ntaganda* case, the definition of a witness was changed to "a person whom a party or participant intends to call to testify or whose statement the party or participant intends to rely upon, provided that such intention has been conveyed to the non-calling party or participant by means that establish a clear intention on behalf of the calling party or participant to rely upon the individual as a witness."⁸ The Prosecution advanced this same definition in the *Gbagbo* case (now *Gbagbo and Blé Goudé* case).⁹

⁵ The Defence notes that "or participant" was not included in the *Banda and Jerbo* definition.

⁶ The language used for the *Banda and Jerbo* protocol was slightly different in relation to the List of Witnesses even though the meaning of this small part was the same between the three cases.

⁷ ICC-02/05-03/09-451-Anx, para. 2(d), "Decision on the Protocol on the handling of confidential information and contact of between a party and witnesses of the opposing party"; see also ICC-01/09-01/11-449-Anx, para. 1, "Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call" and ICC-01/09-02/11-469-Anx, para. 1, "Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call".

⁸ ICC-01/04-02/06-412-AnxA, para. 3(f), "Decision on adoption of a Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or a Participant". (emphasis added)

⁹ ICC-01/11-01/11-777-Anx, para. I(e) on page 2/11, "Prosecution's Proposed Protocol on the « divulgation de l'identité des témoins lors des enquêtes, l'utilisation de matériel confidentiel pendant

14. The protocols from the *Kenyan* and *Banda and Jerbo* cases are 34 months and 28 months old respectively. The protocol from *Ntaganda* is 6 months old and the *Gbagbo and Blé Goudé* protocol has not yet been decided by Trial Chamber I. Even so, the Prosecution supported the definition from *Ntaganda* case in the *Gbagbo and Blé Goudé* case. As such, and following the Prosecution's most recent arguments, the persons discussed by the Prosecution are not Prosecution witnesses.
15. The Prosecution used the phrase "potential witness" or "potential Prosecution witness" seventeen times in its public filing.¹⁰ The Defence is at odds looking for an official definition of a "potential Prosecution witness". Until such time that the Prosecution conveys a clear intention to call a person as a witness for the Confirmation of Charges Hearing, the Defence and Mr Ongwen should be free to contact any non-witness for the lawful purpose of its investigation as long as the person agrees to speak to the Defence or Mr Ongwen.¹¹

Alleged Interference and Influence

16. The Prosecution has not demonstrated that Mr Ongwen has interfered with its investigation. All that the Prosecution has written is that a few people, who gathered under the auspices of an NGO, discussed the case and that Mr Ongwen happened to contact one of the persons present. According to the Prosecution, a mobile phone was passed around. No specific indication was given as to how long each person allegedly spoke to Mr Ongwen, but the Defence understands from the context of the Prosecution's allegations that the alleged conversations were extremely short.
17. What is telling is that according to the Prosecution's narrative, the NGO representative told the persons present that they did not have to say anything that would incriminate themselves to the ICC "and that they should just tell the

les enquêtes, la divulgation d'information par inadvertance et les contacts entre une partie et un témoin de la partie adverse »".

¹⁰ See ICC-02/04-01/15-241.

¹¹ That is to say that Mr Ongwen is allowed to contact persons on his approved list of contacts.

truth.”¹² The Defence is rather dumbfounded that an outside NGO instructing people to tell the truth and be informed of their basic human rights is considered possible interference.

18. Furthermore, the Prosecution mentions nothing about possible witnesses being told not to talk to the Prosecution. Quite to the contrary, if you are telling people about their basic human rights and asking them to tell the truth, you are in fact telling people that it is okay to talk to the Prosecution. This fact is made quite clear by Mr Ongwen, who told one former wife on his approved contact list that if the Prosecution wanted to talk to her, she should talk to the Prosecution and tell them the truth. Mr Ongwen has nothing to hide.
19. As for the possible negative influences associated with group meetings as mentioned in paragraph 18 of Prosecution filing 241, those are not unique to this case. People who have gone through similar situations will tend to bond, and meet, and discuss issues about their past. With the case renewed by Mr Ongwen's arrest and surrender, these types of meetings will happen again. It is incumbent upon the parties to ask witnesses and potential witnesses to stay away from such meetings and not discuss their testimony with others. The Prosecution has failed to explain how the revocation of Mr Ongwen's phone privileges, a privilege which is a basic human right, will change people from meeting in such groups. Moreover, the Prosecution fails to show the slightest iota of evidence that Mr Ongwen was involved in the organisation of the alleged meeting.
20. Additionally, the Prosecution's assertion that Mr Ongwen “could simply use previously-agreed coded language” to pass messages and interfere with the Prosecution's investigation is preposterous banter. Since Mr Ongwen's escape from the LRA, he has been under arrest. He has been monitored without fail for the past six months. When would Mr Ongwen have had the time to give a codebook to anyone? Did he secretly make a transmission while under detention of the United States military? Did he sneak a codebook to someone during his 58-

¹² ICC-02/04-01/15-241-AnxA-Conf-Red, para. 17.

minute arrest and surrender by the Central African Republic? When Mr Ongwen escaped the LRA, he expected to go to Uganda and apply for amnesty, not be arrested and detained in the ICC-DC. This jackrabbit pulled from a hat about the use of secret codes is a scare tactic and should be dismissed by the Single Judge.

Proposed Procedures and Requests

21. The Prosecution's proposed procedures and request in paragraph 21-28 of filing 241 are without merit and have no basis in law. To the contrary, the Prosecution's requests are in direct conflict with the procedures outlined in the Regulations of the Registry. Considering that the Prosecution stated that it "does not seek to establish that any criminal offences have been committed in the circumstances described" in filing 241, it has no right to receive Mr Ongwen's contact lists or phone recordings. The Prosecution's request also lies in contrast to a decision taken by Trial Chamber II dealing with the same type of request.¹³
22. Mr Ongwen, as told upon his arrival at the ICC-DC, is allowed to use his non-privileged phone communications to contact persons to act as witnesses for his defence. Mr Ongwen's phone call to his former wife¹⁴ on the day of the meeting, as told to Counsel by Mr Ongwen, was not planned. It was spontaneous! Contrary to the assertions of the Prosecution, coincidences do happen. The Prosecution makes this incident out to be much more sinister than it truly is. The alleged meeting and phone call were not in any way, shape or form planned.
23. It is the responsibility of the Registrar under Regulation 175 of the Regulations of the Registry to review suspected violations of calling privileges. If there is a breach of Regulation 175(1), the Registrar is to report the issue to the Presidency, not the Prosecution. There is a proper procedure, and it should be followed. The Prosecution, which does not seek to establish criminal offences, cannot be given

¹³ See ICC-01/04-01/07-1243-tENG-Red, paras 37-46.

¹⁴ Two of Mr Ongwen's former wives are approved persons listed on his non-privileged contact list.

access to Mr Ongwen's recordings, contact lists or call lists simply because it wants to have them.

IV. RELIEF

24. Mr Ongwen has not attempted to contact any of the Prosecution's witnesses. Mr Ongwen did as he was told by the Registry and Counsel, and now the Prosecution seeks to punish him for it. Mr Ongwen's only "threat" to the Prosecution's investigation is that he seeks to mount a defence of his own. The Defence respectfully requests the Single Judge to lift all restraints to Mr Ongwen's contact to the outside world, as made on 5 June 2015, as amended on 8 June 2015, which were in response to the Prosecution's filing 241.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 15th day of June, 2015
At The Hague, Netherlands