

**Cour
Pénale
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**International
Criminal
Court**

Original: **English**

No.: ICC-02/04-01/15
Date: 13 February 2019

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

IN THE CASE OF

THE PROSECUTOR v. DOMINIC ONGWEN

Public

Public Redacted Version of the Prosecution Response to the “Defence Request for Production of Correspondence Addressed to Mr Ongwen”, 28 January 2019, ICC-02/04-01/15-1424-Conf

Source: The Office of the Prosecutor

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

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Other

Introduction

1. The Prosecution does not oppose the Defence Request for Production of Correspondence Addressed to Mr Ongwen,¹ subject to the following conditions: 1) such correspondence has been reviewed by the Trial Chamber pursuant to articles 64(2), 64(6)(e) of the Rome Statute, or by the Registry pursuant to regulations 169(3)(a) of the Regulations of the Registry (“RoR”) as ordered by the Chamber, 2) the Trial Chamber determines that the correspondence does not breach any pre-existing orders of the Chamber² and does not offend against the Court’s administration of justice³ or regulation 169(3)(a) of the RoR. The Chamber should also consider whether, the Prosecution should be allowed to have access to the correspondence.

2. Allowing unchecked correspondence between P-0214 and the Accused risks witness interference and threatens the integrity of these proceedings, particularly with regards to the vulnerable victims who have testified regarding, among other acts, forcible marriage, rape and sexual slavery. The Accused has previously demonstrated a tendency to seek to influence and manipulate the behaviour of his victims, including by using the offspring of his sexual violence to legitimise his contact and relationship with the victims.

¹ ICC-02/04-01/15-241-Conf

² ICC-02/04-01/15-241-Conf-Exp and -Conf-Exp-AnxA.

³ Article 70(1)c of the Rome Statute; Offences against the administration of justice.

Confidentiality

3. This submission is classified as “Confidential”, pursuant to regulation 23*bis* (2) of the Regulations of the Court (“RoC”) and Trial Chamber’s instruction dated 16 January 2019 reclassifying the initial Defence filing as Confidential.

Background

4. On 8 June 2015, the Single Judge of Pre Trial Chamber II (“PTC”) granted the Prosecution request⁴ under article 57 of the Rome Statute and regulation 101(2) of the RoC restricting Dominic Ongwen’s telephone communications and orally instructed the Registrar acting under regulation 101(3) of the RoC, to restrict Dominic Ongwen’s use of the telephone in the Detention Centre to calls to his Counsel, and to prohibit other telephone communications and visits. On the same day, the Single Judge issued a formal Order confirming these restrictions.⁵

5. On 27 July 2015, the Single Judge granted a Prosecution request for article 56 proceedings in relation to two Prosecution witnesses – P-0226 and P-0227.⁶ A second article 56 decision in relation to six other witnesses – P-0099, P-0101, P-0198, P-0214, P-0235 and P-0236⁷ was made on 15 August 2015. The latter decision, *inter alia*, ordered the Defence to refrain from contacting, directly or indirectly, any of the witnesses who were the subject of the decision, including P-0214.⁸

⁴ ICC-02/04-01/15-241-Conf-Exp and -Conf-Exp-AnxA.

⁵ ICC-02/04-01/15-242.

⁶ ICC-02/04-01/15-277-Conf; They gave evidence on oath pursuant to rule 66 of the Rules of Procedure and Evidence (the “Rules”), on 15, 16, 18 and 19 September 2015 (ICC-02/04-01/15-T-8-CONF-ENG, T-9-CONF-ENG, -T-10-CONF-ENG, -T-11-CONF-ENG).

⁷ ICC-02/04-01/15-316-Conf; They gave evidence on oath pursuant to rule 66 of the Rules of Procedure and Evidence (the “Rules”), on 15, 16, 18 and 19 September 2015 (ICC-02/04-01/15-T-8-CONF-ENG, T-9-CONF-ENG, -T-10-CONF-ENG, -T-11-CONF-ENG).

⁸ ICC-02/04-01/15-316.

6. On 3 August 2015, the Single Judge of the Pre-Trial Chamber (“PTC Single Judge”) issued an order to the Registrar to remove two individuals, D26-13 and P-0214, from the list of permitted telephone contacts for Mr Ongwen.⁹

7. On 4 October 2016, the Trial Chamber issued the “Decision on Mr Ongwen’s Request to Add New Persons to his Non-Privileged Telephone Contact List”,¹⁰ where the Chamber denied Mr Ongwen’s request to add P-0214 and three other individuals to his non-privileged telephone contact list. The restrictions on Dominic Ongwen’s use of the telephone are premised upon the “reasonable suspicion that there had been attempts to exercise some form of influence on persons who possess information relevant to the case”.¹¹

8. On 11 November 2017, P-0214 testified as a Prosecution witness.¹²

9. On 20 July 2018, the Prosecution became aware through defence disclosure¹³ that P-0214 and her daughter had written to the Accused. Registry filing 1418¹⁴ reveals that the letters and the retention decision by the ICC Detention Unit Chief Custody Officer (“CCO”) were notified to Mr Ongwen on 28 May 2018.¹⁵ The Accused was notified of the right to file a complaint under Chapter 5, Section 5 of the RoR should he oppose the retention.

⁹ ICC-02/04-01/15-283.

¹⁰ ICC-02/04-01/15-553.

¹¹ *Ibid*, para. 9.

¹² ICC-02/04-01/15-T-15-CONF-ENG.

¹³ UGA-D26-0018-3446; Defence Disclosure package 49, Rule 78, 20 July 2018.

¹⁴ ICC-02/04-01/15-1418-CONF-RED; Registry’s “Confidential *EXPARTE* Redacted version of “Registry’s Observations on ‘Defence Request for Production of Correspondence Addressed to Mr Ongwen” only available to the Registry and the Defence, with Confidential Annexes I and III *EXPARTE* only available to the Defence and Registry and Confidential Annex II *EXPARTE* only available to the Registry” was reclassified as Confidential and notified to the Prosecution on 24 January 2019.

¹⁵ *Ibid*, para. 4.

10. On 30 November 2018, the Chamber, through an email communication, granted a request¹⁶ by the Defence for P-0214 and her children to visit Mr Ongwen at the ICC Detention facilities.¹⁷

11. From 5 to 16 December 2018, P-0214 and her children,¹⁸ visited the Accused in the ICC detention facilities in The Hague.

Submissions

Provision of the Letters to the Defence and the Accused

12. In principle, the Prosecution does not oppose the application by the Defence, subject to certain conditions discussed below. This is in view of the fact that the Accused and P-0214 have already had a face to face meeting recently at the ICC Detention Unit between 5 and 16 December 2018. That visit was the subject of passive monitoring due to the presence of the children, pursuant to regulation 183 of the RoR.¹⁹

13. However, before the correspondence is made available to the Accused, the Prosecution respectfully proposes that a procedure analogous to the one established by the Pre-Trial Chamber, in respect of telephone calls made by the Accused to witnesses in this case, should be adopted.²⁰ It is for the Trial Chamber (or its designee) to make a determination that the letters are not in breach of any existing orders on confidentiality or witness protection, nor constitute an offence against the administration or a breach of regulation 169(3)b of the RoR.

¹⁶ Trial Chamber communication on private visit dated 30 November 2018 @17:06.

¹⁷ Defence Request by email dated 30 November 2018 @ 16:12.

¹⁸ *Ibid*, footnote 12.

¹⁹ Trial Chamber IX Communications of 30 November 2018 @ 17:06.

²⁰ ICC-02/04-01/15-254.

14. Restrictions on the telephone communications between Mr Ongwen and P-0214 were imposed because of concerns over witness interference. Notwithstanding the face to face meeting between P-0214 and the Accused last December, allowing the establishment of unchecked written communication between them would impinge on the protections enacted in the previous decisions of the Chamber to safeguard witness interference with victim witnesses against whom the Accused is alleged to have committed sexual and gender based crimes.

Safeguarding the integrity of the Proceedings - Provision of the Letters to the Prosecution

15. The Prosecution does not seek to have access to the letters in the first instance. As proposed above,²¹ the letters can first be provided *ex parte* to the Chamber, allowing the Chamber to decide if and to what extent the letters need to be provided to the Prosecution and/or the participants in order to safeguard the integrity of the proceedings pursuant to article 64(2) of the Statute.

16. The Prosecution notes that Dominic Ongwen's communications were restricted in the first place because of his attempts to exercise influence on highly vulnerable persons possessing information relevant to the case. For example, in the past the Accused had been willing to offer financial incentives to witnesses, as was demonstrated when he offered 1000 euros to witnesses without the knowledge of the Chamber and other participants,²² resulting in a warning from the Chamber.²³ Several witnesses, including P-0214, remain highly vulnerable even now in light of their economic circumstances²⁴ and may thus be subject to improper influence without the protection of the Chamber.

²¹ *Ibid*, para. 13; ICC-02/04-01/15-254.

²² ICC-02/04-01/15-521.

²³ *Ibid*, para. 15.

²⁴ See Email Query re: support transfer to P-214 dated 13/12/2018 @18:00 requesting the provision of [REDACTED] by the Accused to P-0214 for the purpose of school fees for the children, food, clothing and other necessary support.

Conclusion

17. The Prosecution does not oppose the Defence Request provided that the letters are examined and assessed by the Trial Chamber (or by the ICC Detention Unit or another organ designated by the Trial Chamber), and that based on such an assessment, the Chamber determines that letters have no bearing to the conduct of the case and do not breach any existing orders on confidentiality or witness protection, nor offend against the administration of justice. The Chamber should also consider whether, the Prosecution should be allowed to have access to the correspondence.



Fatou Bensouda, Prosecutor

Dated this 13th day of February 2019
At The Hague, The Netherlands