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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

Public

**Decision on Mr Ongwen's Request to Add New Persons to his Non-Privileged
Telephone Contact List**

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

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Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Dominic Ongwen* ('Ongwen case'), having regard to Regulations 23 *bis* and 101 of the Regulations of the Court ('Regulations'), issues the following 'Decision on Mr Ongwen's Request to Add New Persons to his Non-Privileged Telephone Contact List'.

A. Background and submissions

1. On 3 August 2015, the Single Judge of the Pre-Trial Chamber ('PTC Single Judge') issued a decision restricting Mr Ongwen's telephone communications.¹ In that decision, the PTC Single Judge, *inter alia*, ordered the Registrar to remove two individuals, D26-13² and P-214, from the list of persons whom Mr Ongwen is permitted to contact on the telephone.³ This measure was taken on the basis of 'a reasonable suspicion that there had been attempts to exercise some form of influence on persons who possess information relevant to the case'.⁴
2. On 30 May 2016, the Single Judge set forth the procedure for the addition of names to the list of persons Mr Ongwen is permitted to contact on the telephone.⁵ Accordingly, Mr Ongwen is to communicate proposed names to the Chamber and the Office of the Prosecutor ('Prosecution').⁶ The Prosecution is then to have two days to raise objections to the addition of those names.⁷ In the absence of objections, the proposed names shall be considered approved, subject to the

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

² D26-13 also has the witness designation P-221.

³ ICC-02/04-01/15-283, page 8.

⁴ ICC-02/04-01/15-283, para. 9, *referencing* 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. *See also* paras 10 and 12.

⁵ Decision on issues related to the restriction of communications of Dominic Ongwen, 30 May 2016, ICC-02/04-01/15-450-Red, para. 4; and Decision on the Review of Dominic Ongwen's Detention and on the Restriction on Communication, 21 July 2016, ICC-02/04-01/15-503, para. 19.

⁶ ICC-02/04-01/15-503, para. 19.

⁷ ICC-02/04-01/15-503, para. 19.

ordinary procedure at the Court's detention centre and approval by the Registry.⁸

3. On 22 September 2016, the Registry filed its report on Mr Ongwen's request for additions to his non-privileged telephone contact list ('Report'),⁹ to which an addendum was filed on 27 September 2016 ('Addendum').¹⁰ In its Report, complemented by the Addendum, the Registry details that Mr Ongwen has requested to be allowed to speak on the telephone with the following persons: (i) D26-13 as legal guardian of three of his children; (ii) P-236 as legal guardian of two of his children; (iii) P-235 as legal guardian of three of his children; and (iv) P-214 as legal guardian of two of his children.¹¹ In the Addendum, the Registry also notes that the Defence provided the Registry with DNA analysis evidence establishing Mr Ongwen's paternity of six of the children.¹²
4. On 27 September 2016, the Prosecution filed its observations on the Report ('Prosecution Observations').¹³ The Prosecution opposes the addition of the four names to Mr Ongwen's non-privileged telephone contact list.¹⁴
5. The Prosecution notes that Mr Ongwen is charged with committing crimes against three of proposed persons: P-214, P-235 and P-236.¹⁵ The Prosecution also notes that D26-13 and P-214 were previously removed from Mr Ongwen's

⁸ ICC-02/04-01/15-503, para. 19.

⁹ Registry's Report on Mr Ongwen's Request to Add New Persons to his Non-Privileged Telephone Contact List, 22 September 2016, ICC-02/04-01/15-539-Conf-Exp, Defence and Registry only (the Report was notified on 23 September 2016, on the same day, the Report was reclassified to confidential *ex parte* Defence, Registry and Prosecution only). To the extent that this Decision makes reference to confidential *ex parte* filings, the Single Judge is of the view that the referenced information does not warrant confidential *ex parte* treatment at the present time.

¹⁰ Registry's addendum to 'Report on Mr Ongwen's Requests to Add New Persons to his Non-Privileged Telephone Contact List' (ICC-02/04-01/15-539-Conf-Exp), 27 September 2016, ICC-02/04-01/15-545-Conf-Exp.

¹¹ Report, ICC-02/04-01/15-539-Conf-Exp, para. 8; Addendum, ICC-02/04-01/15-545-Conf-Exp, paras 8-10. *See also* Prosecution observations on the 'Registry's Report on Mr Ongwen's Requests to Add New Persons to his Non-Privileged Telephone Contact List', ICC-02/04-01/15-542-Conf-Exp, para. 1.

¹² Addendum, ICC-02/04-01/15-545-Conf-Exp, para. 9.

¹³ Prosecution Observations, ICC-02/04-01/15-542-Conf-Exp.

¹⁴ Prosecution Observations, ICC-02/04-01/15-542-Conf-Exp, paras 1, 13 and 26.

¹⁵ Prosecution Observations, ICC-02/04-01/15-542-Conf-Exp, para. 3.

contact list after indications of witness interference.¹⁶ The Prosecution argues that adding the four names to Mr Ongwen's telephone contact list would risk witness interference and threaten the integrity of the proceedings.¹⁷ The Prosecution submits that three of the persons, P-214, P-235 and P-236, are Prosecution witnesses and that their addition to the telephone contact list would violate the provisions and spirit of the witness Contact Protocol currently in force.¹⁸

6. The Prosecution states that, in principle, it does not object to Mr Ongwen communicating with his children in Uganda but objects to his communication with witnesses already removed for reasons of witness interference, or with witnesses against whom he is alleged to have committed sexual and gender-based crimes.¹⁹ The Prosecution submits that the Defence should propose a neutral third-party, subject to approval by the Chamber and the Prosecution, to facilitate contact with his children in Uganda.²⁰
7. Pursuant to the Chamber's instruction,²¹ on 29 September, the defence for Mr Ongwen ('Defence') filed its response to the Report, the Prosecution Observations, and the Addendum ('Defence Response').²² The Defence asserts that Mr Ongwen requests to speak to his children, and not to any witness or potential witness.²³ The Defence invites the Prosecution to *inter partes* discussions to determine the best course of action to facilitate Mr Ongwen's communication with his children.²⁴ The Defence states that it has no objections to a third party

¹⁶ Prosecution Observations, ICC-02/04-01/15-542-Conf-Exp, paras 2, and 14-15.

¹⁷ Prosecution Observations, ICC-02/04-01/15-542-Conf-Exp, paras 2-3, and 16-20.

¹⁸ Prosecution Observations, ICC-02/04-01/15-542-Conf-Exp, para. 2, 13, 21-22.

¹⁹ Prosecution Observations, ICC-02/04-01/15-542-Conf-Exp, para. 23.

²⁰ Prosecution Observations, ICC-02/04-01/15-542-Conf-Exp, para. 4 and 24-25.

²¹ Email from the Chamber to the parties and Registry on 26 September 2016 at 17.58.

²² Defence Response to ICC-02/04-01/15-539-Conf-Exp, ICC-02/04-01/15-542-Conf-Exp and ICC-02/04-01/15-545-Conf-Exp, 29 September 2016, ICC-02/04-01/15-546-Conf-Exp, Defence, Prosecution, Registry, and VWU only.

²³ Defence Response, ICC-02/04-01/15-546-Conf-Exp, para. 23.

²⁴ Defence Response, ICC-02/04-01/15-546-Conf-Exp, para. 25.

facilitator for such communications and understands that any such communications would be non-privileged and actively monitored.²⁵

B. Analysis

8. As a preliminary issue, the Single Judge notes the Prosecution's submission as to the classification of the documents underlying this decision.²⁶ The Single Judge agrees with the Prosecution that the only details requiring redaction are the identities of the witnesses and their children. Further, the Single Judge sees no reason that the legal representatives of victims should be denied access to the filings underlying this Decision. Thus, the Single Judge instructs the Registry to reclassify ICC-02/04-01/15-539-Conf-Exp, ICC-02/04-01/15-542-Conf-Exp, ICC-02/04-01/15-545-Conf-Exp and ICC-02/04-01/15-546-Conf-Exp as 'confidential'. The parties and the Registry are also to file a public redacted version of these same filings.
9. As to Mr Ongwen's request to add the four names to his non-privileged telephone contact list, the Single Judge notes that the Chamber has an obligation to ensure that the trial is fair,²⁷ free from the taint of witness interference and undue coercion. In light of this obligation, the Single Judge cannot authorise Mr Ongwen to have telephone contact with these persons, all of whom are either Prosecution witnesses²⁸ or persons previously removed²⁹ from his contact list as a result of the PTC Single Judge's 'reasonable suspicion that there had been attempts to exercise some form of influence on persons who possess information

²⁵ Defence Response, ICC-02/04-01/15-546-Conf-Exp, para. 26.

²⁶ See Prosecution Observations, ICC-02/04-01/15-542-Conf-Exp, para. 5.

²⁷ Article 64(2) of the Statute.

²⁸ P-214, P-235 and P-236. In this regard, the Single Judge recalls, as already observed, that the fact that the evidence of the concerned witnesses, taken pursuant to Article 56 of the Statute, was recognised as formally submitted does not ameliorate his concern about possible interference as long as proceedings are on-going. See Decision on Prosecution 'Request for an order that Mr Ongwen cease and disclose payment to witnesses and that the Registry disclose certain calls made by Mr Ongwen', 10 August 2016, ICC-02/04-01/15-521, para. 15.

²⁹ D26-13, as well as P-214.

relevant to the case’.³⁰ In this respect, the Single Judge also recalls his holding that the restrictions of Mr Ongwen’s communications – which include the removal of certain persons from Mr Ongwen’s telephone contact list – remain warranted.³¹ Including the four persons on Mr Ongwen’s telephone contact list would create an impermissible threat to the integrity of the present proceedings.

10. However, the Single Judge does not consider it problematic for Mr Ongwen to have telephone contact with his children, in so far as the ordinary procedures within the detention centre are met and communication is facilitated through a neutral third party. The Single Judge notes that the Registry stated that the ordinary procedure within the Detention Centre can be considered completed in relation to only six of the ten children Mr Ongwen wishes to contact.³² However, the Single Judge accepts P-214 and D26-13’s statements as to Mr Ongwen’s paternal relationship to the four remaining children.³³ Thus, in relation to all ten children, the Single Judge instructs the parties to consult and reach an agreement on a neutral third party to facilitate Mr Ongwen’s contact with the children.
11. The Single Judge reminds Mr Ongwen that these telephone conversations will be actively monitored.³⁴ In actively monitoring Mr Ongwen’s telephone conversations with his children, the Registry shall terminate any conversation where there is suspicion of an attempt to coerce or interfere with witnesses or victims through the children.

³⁰ ICC-02/04-01/15-283, paras 9, 10 and 12.

³¹ Decision on issues related to the restriction of communications of Dominic Ongwen, 30 May 2016, ICC-02/04-01/15-450-Red, para. 4.

³² The Detention Centre deems its ordinary procedure complete in relation to the children for whom DNA evidence established Mr Ongwen’s paternity. Addendum, ICC-02/04-01/15-545-Conf-Exp, para. 11.

³³ Transcript of hearing of 11 November 2015, ICC-02/04-01/15-T-15-Conf-ENG, page 30, lines 2 to 5; and Addendum, ICC-02/04-01/15-545-Conf-Exp, para. 10.

³⁴ ICC-02/04-01/15-283, page 8.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

DENIES Mr Ongwen's request to add four individuals – D26-13, P-214, P-235 and P-236 – to his non-privileged telephone contact list;

ORDERS the Registry to reclassify ICC-02/04-01/15-539-Conf-Exp, ICC-02/04-01/15-542-Conf-Exp, ICC-02/04-01/15-545-Conf-Exp and ICC-02/04-01/15-546-Conf-Exp as confidential;

ORDERS the parties and the Registry to file public redacted versions of the filings underlying this Decision within 14 days of notification of the present decision;

ORDERS the parties to engage in *inter partes* communications and select a neutral third party to facilitate Mr Ongwen's contact with the children approved by the Registry;

ORDERS the Registry to add the ten children listed in the Report and Addendum to Mr Ongwen's non-privileged telephone contact list conditional on communication between the children and Mr Ongwen being facilitated through the selected neutral third party; and

ORDERS the Registry to immediately terminate any calls in which there is suspicion that Mr Ongwen is attempting to interfere with or coerce individuals who possess information relevant to the case, and immediately report the matter to the Chamber.

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



Judge Bertram Schmitt
Single Judge

Dated 4 October 2016

At The Hague, The Netherlands