

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/04-01/15
Date: 12 February 2019

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

Public

**Decision on Defence Request for Production of Correspondence Addressed to
Mr Ongwen**

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

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Detention Section

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Others

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*, having regard to Article 64(2) of the Rome Statute ('Statute'), Regulations 24(5) and 99(h) and (i) of the Regulations of the Court, and Regulation 169(3) of the Regulations of the Registry, issues the following 'Decision on Defence Request for Production of Correspondence Addressed to Mr Ongwen'.

I. Background and submissions

1. On 8 June 2015, the Single Judge of Pre-Trial Chamber II ('PTC Single Judge') issued a written order prohibiting 'all communication from Dominic Ongwen to the outside world, except for communications with' his lead and assistant counsel.¹
2. On 3 August 2015, the PTC Single Judge lessened the restrictions on Mr Ongwen's communications.² The PTC Single Judge: (i) excluded from Mr Ongwen's list of non-privileged telephone contacts two individuals (P-214 and another individual) who were the basis for the existing restrictions, and (ii) limited the duration of Mr Ongwen's non-privileged telephone conversation, which were to be actively monitored.³
3. On 12 October 2015, the PTC Single Judge granted a Prosecution request for Article 56 proceedings for six witnesses, including P-214.⁴ The PTC Single

¹ Order Concerning a Request by the Prosecutor under Regulation 101(2) of the Regulations of the Court, ICC-02/04-01/15-242, p. 4.

² Decision Concerning the Restrictions of Communications of Dominc Ongwen, ICC-02/04-01/15-283, para. 14.

³ Decision Concerning the Restrictions of Communications of Dominc Ongwen, ICC-02/04-01/15-283, para. 15, p. 8, *referring to* ICC-02/04-01/15-257-Conf-Exp-Anx.

⁴ Decision on "Second Prosecution application to the Pre-Trial Chamber to Preserve Evidence and take Measures under Article 56 of the Rome Statute", ICC-02/04-01/15-316-Conf. A public redacted version was filed on 23 March 2016, ICC-02/04-01/15-316-Red. Eight witnesses ultimately appeared before the Pre-Trial Chamber in Article 56 proceedings. *See also* Decision on the "Prosecution application for the Pre-Trial Chamber to Preserve Evidence and Take Measures under Article 56 of the Rome Statute", 27 July 2015, ICC-02/04-01/15-277-Conf. A public redacted version was filed on 23 March 2016, ICC-02/04-01/15-277-Red.

Judge also ordered the Defence to refrain from contacting any of the witnesses who were subject to the decision.⁵ P-214 testified in Article 56 proceedings on 11 November 2015.⁶

4. On 4 October 2016, the Single Judge denied Mr Ongwen's request to add P-214, *inter alios*, to his non-privileged contact list, noting that witnesses such as P-214 had been previously removed from Mr Ongwen's 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 relevant to the case' ('October 2016 Decision').⁷ The Single Judge further found that it was not 'problematic for Mr Ongwen to have telephone contact with his children, in so far as the ordinary procedures with the detention centre are met and communication is facilitated through a neutral third party'.⁸
5. On 28 May 2018, the Detention Centre notified Mr Ongwen of a decision to retain the letters addressed to Mr Ongwen from P-214 and P-214 and Mr Ongwen's daughter. These letters contain similar content and were written in what appeared to be identical handwriting ('Requested Letters').⁹
6. From 28 May 2018 and 8 June 2018, an email exchange took place between the Defence and the Registry discussing the provenance and provision of the

⁵ Decision on "Second Prosecution application to the Pre-Trial Chamber to Preserve Evidence and take Measures under Article 56 of the Rome Statute", ICC-02/04-01/15-316-Red, para. 18.

⁶ ICC-02/04-01/15-T-15-CONF-ENG.

⁷ Decision on Mr Ongwen's Request to Add New Persons to his Non-Privileged Telephone Contact List, ICC-02/04-01/15-553, para. 9, p. 8, *referring to* Decision Concerning the Restriction of Communications of Dominic Ongwen, ICC-02/04-01/15-283, paras 9-10, 12.

⁸ October 2016 Decision, ICC-02/04-01/15-553, para. 10, p. 8.

⁹ Annex I of Registry's Observations on 'Defence Request for Production of Correspondence Addressed to Mr Ongwen', ICC-02/04-01/15-1418-Conf-AnxI. Considering the similarity in content, form, and provenance between the letters from P-214 and P-214 and Mr Ongwen's daughter, the Single Judge will treat the letters collectively.

Requested Letters.¹⁰ On 8 June 2018, the Registry recommended that the Defence raise the matter with the Chamber.¹¹

7. On 14 January 2019, the defence for Mr Ongwen ('Defence') filed a request ('Defence Request') seeking production by the Registry of the Requested Letters and emails establishing their chain of custody ('Requested Emails').¹² The Defence argues that withholding family correspondences, without a legitimate justification, is an infringement of fundamental human rights.¹³ The Defence further argues that the Chamber can compel the production of the Requested Letters through a disclosure regime analogous to Article 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence.¹⁴ The Defence asserts that Mr Ongwen has a right to privacy and there is no legitimate basis upon which to circumscribe this right by providing the Requested Letters to the Prosecution or the Office of Public Counsel for Victims ('OPCV').¹⁵ With respect to the Requested Emails, the Defence argues that, should the Requested Letters have evidential value, the emails are necessary to demonstrate their chain of custody since the origin of the letters is not entirely clear.¹⁶
8. On 23 January 2019, the Registry filed observations on the Defence Request, stating that it defers to the Chamber's determination of this matter and does not oppose the transmission of the letters to Mr Ongwen ('Registry's

¹⁰ Annex III of Registry's Observations on "Defence Request for Production of Correspondence Addressed to Mr Ongwen", ICC-02/04-01/15-1418-Conf-AnxIII.

¹¹ Annex III of Registry's Observations on "Defence Request for Production of Correspondence Addressed to Mr Ongwen", ICC-02/04-01/15-1418-Conf-AnxIII.

¹² Defence Request for Production of Correspondence Addressed to Mr Ongwen, ICC-02/04-01/15-1411-Conf-Exp, paras 1-3, 40. On the Chamber's instruction, this document was reclassified as confidential on 17 January 2018, ICC-02/04-01/15-1411-Conf. The Defence filed a corrected version on 29 January 2019, ICC-02/04-01/15-1411-Conf-Corr.

¹³ Defence Request, ICC-02/04-01/15-1411-Conf-Corr, paras 23-31.

¹⁴ Defence Request, ICC-02/04-01/15-1411-Conf-Corr, paras 32-34.

¹⁵ Defence Request, ICC-02/04-01/15-1411-Conf-Corr, paras 35-37.

¹⁶ Defence Request, ICC-02/04-01/15-1411-Conf-Corr, paras 38-39.

Observations’).¹⁷ The Registry considered that delivery of the letters may violate the spirit and principles underlying the October 2016 Decision, which prohibited any contact between P-214 and Mr Ongwen, and therefore withheld the letters in accordance with Regulation 169(3)(a)(iv) and (b)(iii) of the Regulations of the Registry¹⁸ until the Chamber could provide guidance on their transmission.¹⁹ As regards the Requested Emails, the Registry argues that it is under no obligation to transmit these emails as they do not fall under Regulation 169 of the Regulations of the Registry.²⁰

9. On 28 January 2019, the Defence requested leave to reply to the Registry’s Observations (‘Request to Reply to Registry’s Observations’).²¹ In light of the Registry’s Observations, the Defence supplements and clarifies paragraphs 24 and 25 of the Defence Request.²² The Defence asserts that the Registry has not provided a basis for concluding that the October 2016 Decision prevented the delivery of the Requested Letters.²³ The Defence asserts that the October 2016 Decision sought to limit communication originating from Mr Ongwen to certain specific persons rather than communications that originate from persons outside the Detention Centre.²⁴ The Defence argues that communications originating outside the Detention Centre cannot interfere with the administration of justice or coerce witnesses when Mr Ongwen is not able

¹⁷ Registry’s Observations on “Defence Request for Production of Correspondence Addressed to Mr Ongwen”, ICC-02/04-01/15-1418-Conf-Exp with confidential *ex parte* annexes I-III, para. 12. On the Chamber’s instruction, the Registry’s observations along with annexes I and III were reclassified as confidential, ICC-02/04-01/15-1418-Conf-Red.

¹⁸ Registry’s Observations, ICC-02/04-01/15-1418-Conf-Red, paras 5-6.

¹⁹ Registry’s Observations, ICC-02/04-01/15-1418-Conf-Red, paras 7-9.

²⁰ Registry’s Observations, ICC-02/04-01/15-1418-Conf-Red, para. 10.

²¹ Defence Request for Leave to Reply to ‘Confidential Ex Parte 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’ (ICC-02/04-01/15-1418-Conf-Red), filed 23 January 2019, ICC-02/04-01/15-1422-Conf-Exp. On the Chamber’s instruction, this document was reclassified as confidential on 29 January 2019, ICC-02/04-01/15-1422-Conf.

²² Request to Reply to Registry’s Observations, ICC-02/04-01/15-1422-Conf, para. 3.

²³ Request to Reply to Registry’s Observations, ICC-02/04-01/15-1422-Conf, para. 3.

²⁴ Request to Reply to Registry’s Observations, ICC-02/04-01/15-1422-Conf, para. 5.

to direct messages to witnesses such as P-214.²⁵ The Defence further argues that there is no indication that the content of the Requested Letters interfere with the administration of justice, and even if there was some indicia of an interference with the administration of justice, the Defence should be given the opportunity to make submissions on the matter or be provided with the letters.²⁶

10. On 29 January 2019, the Prosecution responded to the Defence Request ('Prosecution Response').²⁷ The Prosecution does not oppose the Defence Request as long as: i) the correspondence has been reviewed by the Chamber; (ii) delivery of the correspondence does not breach any pre-existing order of the Chamber and does not offend the Court's administration of justice or Regulation 169(3)(a) of the Regulations of the Registry; and (iii) consideration is given as to whether the Prosecution should be allowed to have access to the correspondence.²⁸ The Prosecution asserts that 'unchecked correspondence between P-214 and the Accused risks witness interference and threatens the integrity of the proceedings'.²⁹
11. On 31 January 2019, the Defence requested leave to reply to the Prosecution Response ('Request to Reply to Prosecution Response').³⁰ The Defence further seeks to clarify that its request is limited to the provision of the Requested Letters and not a request for the establishment of an unchecked regime of written communications between Mr Ongwen and P-214.³¹ The Defence reiterates that the Registry regime already in place involves the monitoring of

²⁵ Request to Reply to Registry's Observations, ICC-02/04-01/15-1422-Conf, para. 6.

²⁶ Request to Reply to Registry's Observations, ICC-02/04-01/15-1422-Conf, para. 7.

²⁷ Prosecution Response to the "Defence Request for Production of Correspondence Addressed to Mr Ongwen", ICC-02/04-01/15-1424-Conf.

²⁸ Prosecution Response, ICC-02/04-01/15-1424-Conf, paras 1, 12-13, 15.

²⁹ Prosecution Response, ICC-02/04-01/15-1424-Conf, paras 2, 14, 16.

³⁰ Defence Request for Leave to Reply to the Prosecution Response to the "Defence Request for Production of Correspondence Addressed to Mr Ongwen" (ICC-02/04-01/15-1424-Conf), filed 28 January 2019, ICC-02/04-01/15-1429-Conf.

³¹ Request to Reply to Prosecution Response, ICC-02/04-01/15-1429-Conf, paras 7-8.

all incoming and outgoing correspondence.³² The Defence asserts that the Prosecution Response argues for a decision on issues that go beyond those presented by the Defence Request and it would be prejudicial if the Chamber took a decision reviewing the communication restrictions between Mr Ongwen and P-214 absent affording the Defence an opportunity to file further submissions.³³

II. Analysis

12. As a preliminary matter, the Single Judge notes that the Defence filed a Request to Reply to the Registry's Observations and a Request to Reply to the Prosecution Response pursuant to Regulation 24(5) of the Regulations of the Court. Both replies provide important clarifications and address new issues raised by the Registry and the Prosecution. The Chamber therefore grants the Defence leave to reply in both instances, despite the procedural irregularity in which the Defence filed the merits of its replies in their request for permission to file them.³⁴ As a result of the substantive replies being already before the Chamber, the Defence need not provide any further submissions.
13. The Single Judge recalls that the Chamber has an obligation to ensure that the trial is fair³⁵ and 'free from the taint of witness interference and undue coercion'.³⁶ In light of this obligation, the Single Judge has refrained from placing P-214 on Mr Ongwen's non-privileged contact list because there was 'reasonable suspicion that there have been attempts to exercise some form of influence on persons who possess information relevant to the case'.³⁷ The Single

³² Request to Reply to Prosecution Response, ICC-02/04-01/15-1429-Conf, para. 8.

³³ Request to Reply to Prosecution Response, ICC-02/04-01/15-1429-Conf, para. 11.

³⁴ Regulation 29(1) of the Regulations of the Court.

³⁵ Article 64(2) of the Statute.

³⁶ October 2016 Decision, ICC-02/04-01/15-553, para. 9.

³⁷ Decision Concerning the Restrictions of Communications of Dominc Ongwen, 29 September 2015, ICC-02/04-01/15-283, paras 9, 10, 12, p. 8; October 2016 Decision of the Single Judge, para. 9. *See also* Decision on

Judge further recalls his finding that restrictions on Mr Ongwen's communication remain warranted.³⁸ The Single Judge notes that this finding has not been challenged by the parties or participants in the filings currently before the Chamber.

14. The Single Judge is of the opinion that summarily allowing correspondence from Prosecution witnesses, such as P-214, who have been excluded from Mr Ongwen's non-privileged contact list, would circumvent the aim of the no-contact orders. The Defence is correct to point out the attendant risks are lower for correspondence originating outside the Detention Centre.³⁹ However, considering P-214 and her children had a face-to-face meeting with Mr Ongwen,⁴⁰ it is conceivable that a written communication originating from an individual outside the Detention Centre could later become the basis for a bilateral conversation with Mr Ongwen. The Single Judge accordingly finds it prudent to establish a procedure by which future correspondence raising concerns under Regulation 169(3)(a)(iv) of the Regulations of the Registry can be expeditiously brought to the attention of the Chamber.
15. Should the Registry consider that correspondence addressed to Mr Ongwen from a Prosecution witness may be in violation of any orders of the Chamber, the Registry should notify the Chamber, as well as the Prosecution and Defence, of the existence of the correspondence, its author, and the reasons for withholding the correspondence. The Prosecution will then have two days to object to the transmission of the correspondence to Mr Ongwen. In the absence of any objection on the part of the Prosecution requiring resolution by the

a Request by the Prosecutor under Article 57 of the Rome Statute and Regulation 101(2) of the Regulations of the Court, 25 June 2015, ICC-02/04-01/1-254, paras 4-6.

³⁸ Decision on Issues Related to the Restriction of Communications of Dominic Ongwen, 31 May 2016, ICC-02/04-01/15-450-Red, para. 4.

³⁹ Request to Reply to Registry's Observations, para. 6; Request to Reply to Prosecution's Response, paras 9-10.

⁴⁰ On 30 November 2018, the Chamber granted a request by the Defence for P-214 and her children to visit Mr Ongwen. Trial Chamber IX email to the Parties and Participants, 30 November 2018 at 17:06.

Single Judge, the correspondence shall then be transmitted to Mr Ongwen, subject to the ordinary procedure at the Court's Detention Centre. Should the Prosecution make an objection requiring resolution by the Single Judge, the correspondence shall then be provided to the Chamber to assist in its determination.

16. In the present circumstances, the Requested Letters have been provided to the Chamber.⁴¹ The Single Judge has no reason to believe these letters include any indicia of witness interference or coercion on the part of Mr Ongwen or interfere with the administration of justice. The Single Judge therefore orders the transmission of the letters to Mr Ongwen and the Defence. At this point in time, the Chamber also finds no reason to interfere with Mr Ongwen's right to privacy by ordering the provision of the letters to the Prosecution or the OPCV. Having found that the Requested Letters do not violate any order of the Chamber or interfere with the administration of justice and can therefore be provided to the Mr Ongwen, the Single Judge need not consider whether any disclosure obligations cover such material.⁴²
17. With respect to the Requested Emails, should the Defence determine that the Requested letters have evidential value and seek their submission into evidence, the Chamber will consider at that point in time any renewed request for the Requested Emails.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS, IN PART, the Defence Request;

GRANTS the Request to Reply to the Registry's Observations and the Request to Reply to the Prosecution Response;

⁴¹ Annex II to the Registry's Observations on "Defence Request for Production of Correspondence Addressed to Mr Ongwen", ICC-02/04-01/15-1418-Conf-Exp-AnxII.

⁴² Defence Request, ICC-02/04-01/15-1411-Conf-Corr, paras 32-34.

ORDERS the Registry to provide Mr Ongwen and the Defence with the Requested Letters;

DENIES, without prejudice, the request of the Defence for the provision of the Requested Emails;

INSTRUCTS the Registry, the Prosecution, and the Defence to follow the procedure set out in paragraph 15 for any future correspondence falling under it; and

ORDERS the Defence, Registry, and Prosecution to file public redacted versions or request reclassification of the Defence Request (ICC-02/04-01/15-1411-Conf-Corr), the Registry's Observations (ICC-02/04-01/15-1418-Conf-Red), the Prosecution Response (ICC-02/04-01/15-1424-Conf), the Request to Reply to the Registry's Observations (ICC-02/04-01/15-1422-Conf), and the Request to Reply to the Prosecution Response (ICC-02/04-01/15-1429-Conf) within 10 days of the notification of the present decision.

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

A handwritten signature in black ink, appearing to read 'Bertram Schmitt', written over a horizontal line.

Judge Bertram Schmitt, Single Judge

Dated 12 February 2019

At The Hague, The Netherlands