

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 13 June 2016

TRIAL CHAMBER IX

Before:

**Judge Bertram Schmitt, Single Judge
Judge Péter Kovács
Judge Raul C. Pangalangan**

SITUATION IN UGANDA

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

**Public with Public Annexes A and B and Confidential *ex parte* Defence and
Prosecution only Annexes C and D**

**Defence Request for Conditional Release, or in the Alternative, the Restoration of
Mr Ongwen's Communication Privileges**

Source: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. Pursuant to Article 60(3) of the Rome Statute, the Defence for Dominic Ongwen ('Defence') hereby requests Trial Chamber IX ('Chamber') to grant interim release to Mr Dominic Ongwen.
2. In the alternative, but without prejudice to the aforementioned, the Defence requests the Chamber to reinstate Mr Ongwen's right to communicate with the outside world, and in particular, the right to have telephone contact with his alleged children.
3. Mr Ongwen has been under detention pursuant to an ICC arrest warrant since he surrendered to the United States Special Forces on 6 January 2015. He was transferred to the International Criminal Court Detention Centre ('ICC-DC') on 21 January 2015.¹
4. Since 5 June 2015, Mr Ongwen has enjoyed limited access to his family members following various orders from His Honour, Judge Cuno Tarfusser.²
5. Respectfully, the current restrictions imposed on Mr Ongwen's liberty and right to contact the outside world are no longer necessary, disproportionate and the continued use of those restrictions violates his and other persons' fundamental human rights, and therefore should be lifted without delay.

¹ ICC-02/04-01/15-189-Conf-Exp, paras 17-18.

² ICC-02/04-01/15-242, 8 June 2015 (Judge Tarfusser reinforced the oral order prohibiting all communication from Mr Ongwen to the outside world, except for communications with his Lead Counsel and modified to include contact with the Assistant to Counsel); ICC-02/04-01/15-254, 24 June 2015 (Judge Tarfusser ordered the Registrar to file in the record a report listing and summarising the content of Mr Ongwen's telephone conversations between 25 May and 5 June 2015); and ICC-02/04-01/15-283-Conf, 3 August 2015 (Judge Tarfusser, *inter alia*, ordered the Registrar to restrict Mr Ongwen's non-privileged telephone calls to 200 minutes, and inform Mr Ongwen not to talk about witnesses in the case of use codes or pseudonyms in his conversations, to actively monitor all non-privileged telephone calls and terminate them immediately if Mr Ongwen attempts to interfere with or intimidate individuals who possess relevant information relevant to the case or otherwise interfere with the collection of evidence and immediately report to the Chamber, to remove two names from the list of persons whom Mr Ongwen was permitted to call, to inform the Chamber in case of any changes to the list of permitted persons, and to file in the record transcripts of the voice recordings filed as annexes to ICC-02/04-15-268.).

II. CONFIDENTIALITY LEVEL

6. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court, the Defence files Annexes C and D as confidential *ex parte* Defence and Prosecution only as these are correspondences from children under the age of 18 years old and personal correspondence is not generally subject to disclosure.

III. BACKGROUND

7. On 6 January 2015, with the assistance of the Séléka rebel group, Mr Ongwen surrendered to United States Special Forces. He was handed over to the ICC on 16 January 2015, and transferred to the ICC-DC on 21 January 2015.³
8. On 5 June 2015, the Prosecution's request to restrict Mr Ongwen from any contact with the world outside the ICC-DC with the exception of Counsel was granted by Judge Tarfusser.⁴
9. On 24 June 2015, Judge Tarfusser ordered the continued restrictions to Mr Ongwen's rights until such time that the Registrar reviews Mr Ongwen's telephone calls from 25 May 2015 through 5 June 2015 ('Telephone Recordings') and files a comprehensive report to Judge Tarfusser summarising the conversations.⁵
10. On 9 July 2015, the Registrar filed his report on the conversations captured in the Telephone Recordings.⁶ The Defence notes that this report is still confidential *ex parte*, and requests the Chamber to reclassify it confidential.

³ See ICC-02/04-01/15-Conf-Exp.

⁴ ICC-02/04-01/15-242.

⁵ ICC-02/04-01/15-254.

⁶ ICC-02/04-01/15-261-Conf-Exp.

11. On 13 July 2015, Judge Tarfusser issued the second decision on the Prosecution Submission Pursuant to Filing ICC-02/04-01/15-256, ordering that the sound recordings of six (6) telephone communications be made available to the Prosecutor and the Defence.⁷ This was implemented by the Registrar on the same day.⁸
12. Judge Tarfusser further ordered the Prosecution to make submissions as to “whether the restrictions on Dominic Ongwen’s communications, or any other appropriate measures, remain necessary to ensure the integrity of the evidence.”⁹ The Defence replied to the Prosecution’s recommendations¹⁰ on 27 July 2015, arguing that the restrictions requested by the Prosecutor in the first alternative clearly violated Mr Ongwen’s fundamental human rights and that any restrictions should be guided by the Regulations of the Registry.¹¹
13. On 3 August 2015, Judge Tarfusser ordered the current restrictions on Mr Ongwen’s phone calls, balancing the *prima facie* evidence of possible witness interference with Mr Ongwen’s rights whilst under detention.¹²
14. On 27 November 2015, after receiving submissions from the Parties,¹³ Judge Tarfusser decided that Mr Ongwen did not meet the test outlined in Article 58(1) (b) for interim release.¹⁴
15. On 23 March 2016, after receiving submissions from the Parties and Participants,¹⁵ Judge Tarfusser decided that there were no changed circumstances which warranted the release of Mr Ongwen from the ICC-DC.¹⁶

⁷ ICC-02/04-01/15-267, para. 5.

⁸ See ICC-02/04-01/15-268-Conf-Exp-Anx1-6.

⁹ ICC-02/04-01/15-267, para. 6.

¹⁰ ICC-02/04-01/15-276-Conf.

¹¹ ICC-02/04-01/15-278.

¹² ICC-02/04-01/15-283-Conf, paras 13-16.

¹³ See ICC-02/04-01/15-332-Conf and ICC-02/04-01/15-333-Conf.

¹⁴ ICC-02/04-01/15-349-Conf.

¹⁵ See ICC-02/04-01/15-416-Corr, ICC-02/04-01/15-417, ICC-02/04-01/15-418 and ICC-02/04-01/15-419.

16. On 23 May 2016, His Honour Judge Bertram Schmitt, Presiding Judge of the Chamber, ordered the Defence to file any submissions on Mr Ongwen's continued detention by 13 June 2016.¹⁷

17. On May 30, 2016, the Single Judge stated that the restrictions of communication ordered by Judge Tarfuser remained warranted at the present stage.¹⁸

IV. SUBMISSIONS

A. Mr Ongwen should be Granted Interim Release from the ICC-DC

18. Article 60(3) requires the Chamber to review its previous ruling on detention periodically. Guidance about the standard to employ are found in both Articles 60(2) and (3). The Chamber should be guided by the changed circumstances for detention through Article 58 (1)(b).

19. The different factors which are involved in making a decision under Article 60(3) are: 1) risk to abscond, 2) risk to endanger the investigation, 3) prevention of further crimes, 4) length of detention and 5) conditions, if any, to be placed on the Accused if released.

i. Mr Ongwen will appear at the Court when asked by the Court

20. Mr Ongwen will never contemplate absconding. He surrendered to the due process of the law in this court of his own volition. He could have opted to be handed over to the government of Uganda forces, which, given the recent attitude of the government towards ICC, would have opted to deliver him to Uganda and try him in the International Crime Division of the High Court of

¹⁶ See ICC-02/04-01/15-421.

¹⁷ ICC-02/04-01/15-T-25-ENG, pg. 6:11-14.

¹⁸ ICC-02/04-01/15-450, para. 4

Uganda. He did not choose the latter because he is aware that, unless he clears himself through the due process of the law presented by ICC, he has no place in Uganda; particularly in his local community in Amuru District, northern Uganda.

21. There is no immediate incentive to encourage Mr Ongwen to abscond. He is acutely aware of the dire economic situation in Uganda which has forced and continue to force many people northern Uganda to flee their home country in search of greener pastures. More fundamentally, the fact that it is the Government of Uganda that referred his case to the ICC, it is not lost on Ongwen absconding and going back to Uganda would be a certain recipe for trail in Uganda when detained in the Uganda Detention Center, which is horribly under squalid conditions.
22. Since his surrender to the Court, Mr Ongwen has never shown any distrust of the process of this Court. On the other hand, he has seized every opportunity availed to him by the ICC-DC to improve himself; especially the opportunity of learning, which he has seized with zeal.
23. Even though he currently resides at the ICC-DC, Mr Ongwen has willingly attended Court during every hearing and status conference. There is no any reasonable hypothesis upon which to suggest that Mr Ongwen may be tempted not to appear before the Court for all status conferences, hearings, opening statements, presentation of evidence, closing statements, judgments and any other times asked or required of the Court.
24. Additionally, Mr Ongwen does not have the financial means to abscond. He has no hidden cash or kind. His only money is that which he earns by working at the ICC-DC.

25. The financial disability of Mr Ongwen is compounded by his complete ignorance about the world outside the Great Lakes Region of Africa. So it cannot be suggested that he might be tempted to abscond to some country in the west or anywhere else. Certainly the last risk he would be willing to take is to be anywhere where Kony's men may get hold of him.
26. Mr Ongwen also does not have any international connections or alleged networks to the LRA or its alleged contributors. The Prosecution and Participants have not provided anything close to a semblance of evidence that Mr Ongwen has contacts to any of these supposed networks. All that has been presented is speculation and hearsay.
27. Finally, Mr Ongwen is not frightened of the 70 charges he faces. The number appears overwhelming, but Mr Ongwen survived 27 years in the bush. After escaping his death sentence on 27 December 2014, he walked through unimaginable terrain for eight (8) days until camping with the Séléka rebel group on 4 January 2015.
28. Mr Ongwen is convinced by the explanation of his Defence Team that he has a strong defence for the reason that as a child soldier, abducted at the age of only 9.5 years, indoctrinated and seriously brutalised by scores of detentions.
29. Mr Ongwen has also been advised by his Defence, which advise he has taken seriously, that the Defence of duress is available to him for those conducts that might amount to offences, had they not occurred under the circumstances dictated by Kony's exceptionally brutal reprisals (normally death) for disobeying his orders. Mr Ongwen has been encouraged to know and accept that his best option in life is a fair trial at the ICC.
30. Mr Ongwen, if released, will appear before court whenever required or asked.

ii. Mr Ongwen will not endanger the investigations of the Prosecution

31. The Prosecution has stated that its investigation will conclude on 30 June 2016.¹⁹

32. Contrary to former Prosecutorial assertions, Mr Ongwen has never attempted to influence any potential witnesses in their testimony. Judge Tarfusser enacted the current restrictions on Mr Ongwen's phone privileges before Acholi and English transcripts were made.²⁰ Judge Tarfusser ordered the restrictions based on a reasonable suspicion raised by the Prosecution, which the Defence challenged, in an effort to strike a balance between the Prosecution's reasonable suspicion, for the preservation of evidence and Mr Ongwen's fundamental rights.²¹ Since this time, English translations have been produced,²² and the Defence renews its assertions that nothing within the transcripts should be interpreted as an attempt to influence negatively on the potential witnesses' testimony.

33. In any case, the Prosecution's supplementary investigations are complete at the end of the June 2016. There are no investigations to endanger. And even though the Defence disputes the applicability of Rule 68(2) and (3) to this case, as modified by the ASP in ICC-ASP/12/Res.7, if the Prosecution feels that this rule as amended is applicable, then it would be to the detriment of Mr Ongwen for them not to testify.

34. If released, Mr Ongwen poses no threat to the Prosecution's investigation.

¹⁹ ICC-02/04-01/15-438, para. 5.

²⁰ ICC-02/04-01/15-283, para. 11.

²¹ ICC-02/04-01/15-283, paras 12-13. The Defence does not argue that Judge Tarfusser acted outside the confines of the law when determining the restrictions enacted and Mr Ongwen. He made a reasoned decision based upon the limited information at the time to preserve the integrity of the proceedings.

²² See ICC-02/04-01/15-342-Conf-Exp, Annexes II, IV and VI; ICC-02/04-01/15-Conf-Exp-362-AnxII; and ICC-02/04-01/15-367-Conf-Exp-361, Annexes I and III.

iii. Mr Ongwen will not commit future crimes

35. It bears stating again that Mr Ongwen left the LRA voluntarily. He has renounced anything that may or may not have happened in the past. The Legal Representatives and the Prosecution have not provided any evidence to Court to prove that there is a secret network of former LRA, and that, if such secret network ever exists, it would trust a person who voluntarily surrendered to the ICC. This is a Court of fact and law, not rumours and conjecture. If granted interim release, Mr Ongwen will go back to his family home, cultivate the land and await for trial.

iv. Mr Ongwen's length of detention should not deter the Chamber from granting interim release

36. The Defence realises that Mr Ongwen faces the most charges ever before an international court or tribunal, but argues that this fact should not deter the Chamber from granting interim release.²³ Defence further argues that it is rather the strength of the accused's defence than the length of the charges that would be material to assessment of the propensity of the accused to abscond. Mr Ongwen is an accused, not a convicted person. He has the right to seek release pending and during trial.

37. Mr Ongwen has been under detention since surrendering on 6 January 2015. By the time of these submissions, Mr Ongwen will have spent 525 days under detention, 515 of which were under the care of the ICC. His right to participate in his defence, *i.e.* to ask people to testify on his behalf, has been seriously curtailed since 5 June 2015.

²³ The Defence admits that this is one of the many factors which the Appels Chamber has stated must be taken into consideration when determining whether a suspect or accused should be released pending and during trial. The standard means both the time spent in detention and the possible time faced by the Accused if convicted.

38. Unlike the general practice of weighing it negatively against an accused when the number of charges against an accused is high, the exact opposite is true when the charges reach astronomical proportions. Granting Mr Ongwen interim release would enable him to participate actively in his defence. He would be able to talk and visit with his attorneys any day and at any time he is needed. Defence investigators would be able to conduct their duties with Mr Ongwen at their side. With the trial starting in December 2016, it is vital to his defence that he be able to travel occasionally with his investigators on missions so his attorneys can better prepare his case. The number of charges necessitates his personal and on-site involvement.

39. Respectfully, the Defence asserts that the number of charges against Mr Ongwen requires his on-site assistance, and therefore should be released to aid Defence investigators in the field.

v. Mr Ongwen will abide by any conditions on interim release as the Chamber deems appropriate and necessary to secure his presence during the proceedings

40. Whilst the Defence maintains that conditions are not warranted to secure Mr Ongwen's attendance at the proceedings, the Defence understands that the Chamber might be wary to release any accused without limitations. The Defence suggests the following conditions would be more than adequate to track Mr Ongwen during release to ensure his appearance at the Court during the proceedings:

- a. Weekly reporting requirements – Mr Ongwen would happily report to the ICC Field Office, Ugandan Police or UPDF/CPU²⁴ on a weekly basis (or as the Chamber determines is appropriate). Furthermore, Mr Ongwen would happily call a designated persons from the Registry

²⁴ CPU is a facility in Gulu which the Government of the Republic of Uganda debriefs and houses returning LRA.

whenever required or desired to further aid the Court to track his location.

- b. GPS tracking – Mr Ongwen accepts and agrees that if released, the Chamber might require an irremovable GPS tracking device on his person. The Defence observes that this would be the most efficient way of tracking and locating Mr Ongwen outside of the ICC-DC.
- c. Guarantee from the Republic of Uganda – As the Defence seeks to have Mr Ongwen released to his family home, the Defence requests the Chamber, through the Registry, to seek a guarantee from the Government of the Republic of Uganda that Mr Ongwen will attend all requested or required proceedings of the trial.
- d. No contact with Prosecution witnesses – As currently in place, if released, Mr Ongwen agrees not to contact Prosecution witnesses and to report immediately any attempts of Prosecution witnesses to contact him.

CONCLUSIONS FOR SECTION A

41. The Defence respectfully requests the Chamber to grant Mr Ongwen interim release until the beginning of the trial. He could either be granted the right to go and stay in the Republic of Uganda under the supervision of the International Criminal Court or allowed to stay any country of his choice willing to host him. The Defence contends that the changed circumstances of the culmination of the Prosecution's supplementary investigations, compounded by the necessity of Mr Ongwen to participate actively in his own investigations, along with a guarantee from the Government of the Republic

of Uganda, or any such other country that may grant him temporary residence, warrant that he be granted interim release pending trial.

B. The Continued Phone and Visitation Restrictions Are Not Warranted and Should Be Lifted

42. “Imprisonment and other measures that result in cutting off persons from the outside world are afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty. Therefore, the prison system shall not, except as incidental to justifiable separation or the maintenance of discipline, aggravate the suffering inherent in such a situation.”²⁵

43. The rights of a detained person are enshrined in the Regulations of the Court (‘RoC’). Of relevance to this motion, Regulation 91(1) of the RoC mandates for the treatment of detained persons with humanity and respect for the inherent dignity of the human person. Regulation 99(1)(i) of the RoC provides for the *right* to communicate by letter or telephone with family members or other persons.²⁶

44. Regulation 101 of the RoC provides the limitations for the above rights, and therefore is an exception, not the rule, and applies only in specific circumstances. The relevant part, Regulation 101(2) provides as follows:

2. The Prosecutor may request the Chamber seized of the case to prohibit, regulate or set conditions for 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:

(b) Could prejudice or otherwise affect the outcome of the proceedings against a detained person, or any other investigation;

(c) Could be harmful to a detained person or any other person;

²⁵ Rule 3 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (‘Nelson Mandela Rules’).

²⁶ The Defence notes that Regulation 99(1) of the RoC uses the verb “shall” and not “may”, creating a right and not a privilege for detained persons.

- (d) *Could be used by a detained person to breach an order for nondisclosure made by a judge;*
- (e) *Is against the interests of public safety; or*
- (f) *Is a threat to the protection of the rights and freedom of any person.*

45. It is clear from practice at international tribunals that necessity and proportionality are key considerations in ordering exceptions to fundamental rights and privileges enshrined in the law. Any measures that constitute an important restriction on the rights provided for by the detention regime set forth in the Regulations can only be imposed if the requirements of necessity and proportionality are met.²⁷

46. For the continued restrictions to remain, this Chamber is bound to give a reasoned decision, and from this reason, it must be clear which interest is protected and any limitation should be based upon the protection of such interest.²⁸ The Chamber's decision must explain how the limitation of contacts is a necessary and proportionate measure.²⁹

47. The Prosecution submissions of 20 July 2015 only sought restrictions for the pre-trial detention phase, where the investigations at the time were allegedly sensitive. The Prosecution further submitted that these restrictions could be subjected to periodic review.³⁰ Since then, the Prosecution admitted that its

²⁷ ICC-01/04-01/07-322. *See also* CC-01/04-01/06-108; ICTY, *The Prosecutor v Slobodan Milosevic* [IT-02-54], Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel (1 November 2004), para. 17, where the Appeals Chamber stated that "[w]hen reviewing restrictions on fundamental rights such as this one, many jurisdictions are guided by some variant of a basic proportionality principle: any restriction of a fundamental right must be in service of 'a sufficiently important objective,' and must 'impair the right... no more than is necessary to accomplish the objective'; and ICTY, *The Prosecutor v Fatmir Lima*) [IT-03-66], Decision on Fatmir Limaj's Request For Provisional Release, para.13, where the Appeals Chamber stated that "when interpreting Rule 65(B) and (D) of the Rules, the general principle of proportionality must be taken into account. A measure in public international law is proportional only when it is (1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target".

²⁸ ECCC, *The Prosecutor v IENG Sary Case* No. 002/19-09-2007-ECCC/OCJ (PTC05), Decision on Appeal Concerning Contact Between the Charged Person and His Wife, para. 17.

²⁹ *Ibid*, para. 18.

³⁰ *See* ICC-02/04-01/15-276, paras 1, 3, 13, 27, 30 and 33.

investigations were almost complete,³¹ essentially abating these circumstances. There is no evidence before the court today of threats of witness intimidation. As such, the necessity required to impose restrictions has not been demonstrated and the Chamber must be satisfied by a showing from the Prosecution that continued restrictions will protect the integrity of investigations, if any.

48. The proportionality test has to be met in these circumstances. The Defence submits that the continued restrictions on Mr Ongwen's right to speak to his alleged children is not proportional to his best interests as a detainee, who is presumed innocent until proven otherwise. It is also against the best interests of his alleged children who need the devotion and love of their father, especially since they cannot afford to visit him. With the Prosecution's supplementary investigations ending on 30 June 2016, and the Article 56 proceedings from September and November 2015, the Defence avers that the Prosecution cannot submit justifiable reasons to the continued restrictions.

i. Continued Restrictions Infringe on Mr Ongwen's Fundamental Human Rights

49. Contact with the outside world for detained persons is a right, not a privilege, and is recognised both in international and domestic jurisdictions. Detained persons like Mr Ongwen may lose the right to free movement, but retain other rights as human beings, including the right to be in contact with their families. As enshrined in Article 21(3) of the Rome Statute, "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights...", *i.e.* the Chamber must consider the below treaties, conventions, declarations and rules when interpreting the application of restrictions to Mr Ongwen. This right is not only for the detained person, but also equally applies to family members who are not in

³¹ ICC-02/04-01/15-438, para. 5.

prison who retain the right to contact their incarcerated loved ones. This Chamber should ensure that these relationships are maintained and developed and communication privileges should be based on this principle.

50. Mr Ongwen is still presumed innocent under Article 66 of the Rome Statute, which said status should be reflected in his treatment at the Detention Centre. Further, the length of his pre-trial detention must be considered in determining the access he has to his family and alleged children.

51. Article 12 of the Universal Declaration of Human Rights provides that no one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence.

52. Article 10 of the International Covenant on Civil and Political Rights ('ICCPR') provides that all persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person. Similarly, Article 23 of the ICCPR states that the family is the natural and fundamental group unit of society and is entitled to protection by the society and the state.

53. Principle 19 of The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted on 9 December 1988, states that a detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to *reasonable* conditions and restrictions as specified by law or lawful regulations.

54. Rule 58 the Nelson Mandela Rules provides that prisoners shall be allowed under necessary supervision to communicate with their family and reputable

friends at regular intervals, both by correspondence and by receiving visits. Rule 106 of the Nelson Mandela Rules states that special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his family as are desirable in the best interests of both. The Defence submits that it is in the best interests of both Mr Ongwen and his alleged children to nurture their bond.

55. International criminal tribunals are also mindful of the right of detainees to stay in contact with the outside world. Rule 58 of the ICTY Detention Rules provides that detainees are entitled to communicate with their families and other people with whom it is in their legitimate interest to correspond. The right is subject to such conditions of supervision and time constraints as the Commanding Officer deems necessary as well as prohibitions, regulations or conditions set for contact at the request of the Prosecutor pursuant to Rule 64 of the Rules of Detention.

56. Regional bodies are also mindful of the fundamental obligation to ensure that prisoners are treated with humanity, reasonableness and the need to ensure that reasonable accommodations are in place to allow them to stay in contact with their families.

57. Guideline 31 of the Robben Island Guidelines for the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Africa echoes the established principle regarding the right of persons deprived of their liberty to be visited by and correspond with their family members. The commentary of course is mindful of the usual security constraints that would be imposed on the detained person's interaction with his family.

58. The European Prison Rules require that subject to certain restrictions, prisoners be allowed to communicate as often as possible with their families

via letter, telephone or other forms of communication.³² For instance, the European Court of Human Rights has recognised the right to marry while in prison.³³

59. Principle XVIII of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas also provides for the same guarantees to persons deprived of their liberty to have contact with their families with limited restrictions consistent with international law.

60. As outlined above, the maintenance of the family ties, even if incarcerated, is a fundamental right under recognised international human rights law. Again, considering that the Prosecution's end date of its supplementary investigations, the Defence cannot foresee any lawful reasons to deny Mr Ongwen of this fundamental right.

ii. *Mr Ongwen's Alleged Children Rights are Infringed by the Continued Restrictions on Mr Ongwen*

61. As alluded to above, the Chamber must not only consider Mr Ongwen's rights, but the rights of Mr Ongwen's alleged children. These children have the right to know and have contact with Mr Ongwen. Following the guidance of Articles 21(1)(b) and (c) and Article 21(3), the Defence requests that these minors be allowed to contact, and if financially possible, visit Mr Ongwen.

62. The Chamber should first be guided by the Convention on the Rights of the Child ('CRC'). Article 3(1) of the CRC requires courts of law, amongst other institutions, to consider primarily the best interests of the child. Article 7 of the CRC grants every child "the right to know and be cared for by his or her parents." Article 9(3) of the CRC states that "States Parties shall respect the

³² Rules 24.1, 24.2 of the European Prison Rules.

³³ *Hamer v. United Kingdom* (1979) 24 DR 5, (1979) 4 EHRR 139.

right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests." This right is applicable even if the parent is incarcerated.

63. The African Charter on Human and Peoples' Rights recognises that "family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral."³⁴ The State has the duty to assist families in developing these morals.³⁵ Finally, the State has the obligation to ensure that the rights of children, as enshrined in international declarations and covenants, are respected.³⁶ The African Commission has decided that the rights enshrined in Article 18(1) include persons under detention.³⁷ Similarly, Article 10 of the International Covenant on Economic, Social and Cultural Rights and Article 17 of the American Convention on Human Rights echo the same morals and promotion of the family unit.³⁸

64. Article 24(3) of the Charter of Fundamental Rights of the European Union states that "[e]very child shall have the right to maintain on a regular basis a personal relationship and **direct contact** with both his or her parents, unless that is contrary to his or her interests."

65. The Defence first highlights that the Chamber must do what is in the best interests of the children. When determining what is in the best interest for the child, the Defence asks the Chamber to read confidential *ex parte* annexes C and D. The author's mother of confidential *ex parte* annex C contacted the

³⁴ Article 18(1) of the African Charter on Human and Peoples' Rights.

³⁵ Article 18(2) of the African Charter on Human and Peoples' Rights.

³⁶ Article 18(3) of the African Charter on Human and Peoples' Rights.

³⁷ Communication 274/03 and 282/03 – *Interights, ASADHO and Madam O. Disu v. Democratic Republic of Congo*, Adopted at the 54th Ordinary Session of the African Commission on Human and Peoples' Rights, held from 22 October to 5 November 2013 in Banjul, The Gambia. See Annex A for the hyperlink.

³⁸ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 and Organization of American States (OAS), *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969.

Defence during the week starting 30 May 2016, asking if the author wrote a letter, would the Defence deliver it to the Chamber. Whilst writing the letter to the Chamber, the author of confidential *ex parte* annex D asked to write a letter too.

66. Contact with Mr Ongwen is vital for these children. Denying them the right to talk to Mr Ongwen causes them distress, anguish and pain, especially after they gained the freedom to talk to Mr Ongwen after his surrender, only to have it stripped away by the Court. As such, the Defence requests the Chamber to reinstate the rights of Mr Ongwen's children to maintain the parent-child relationship which they were forming in 2015.

iii. Mr Ongwen is a Vulnerable Detainee with Special Needs

67. Mindful of the importance of maintaining family contact as discussed earlier, the Defence submits that the fact that Mr Ongwen is detained in The Netherlands, far away from Uganda should be considered by this Honourable Chamber. As a foreign national thousands kilometres from home, Mr Ongwen's contact with his family members is of paramount importance. His impoverished and marginalised background, as well as political, and geographical constraints, make family visits a mere dream at this point, further isolating him from his family and the outside world.

68. In addition, and without prejudice to Mr Ongwen's right to apply and be granted interim release, he has been in custody for over one and a half years and his applications for provisional release have been denied thus far, making the possibility of him reuniting with his family marginal. Lifting the restrictions on Mr Ongwen's phone privileges is especially important under these circumstances to avoid psychological hardship on Mr Ongwen as we move into the trial phase.

69. United Nations Office on Drugs and Crime Handbook on Prisoners with Special Needs, 2009 (UNODC Handbook), recognises the isolation suffered by foreign prisoners and provides for considerations for detainees held in foreign countries. The UNODC Handbook also emphasises the importance of maintaining contact with the outside world as an essential element of social reintegration and works as a form of post release support since isolation affects one's reintegration within the community if their links to the community and the family have been suspended.³⁹

70. The special status of foreign prisoners is also recognised by the Council of Europe, Committee of Ministers, through its Recommendation No. R (84) 12 Concerning Foreign Prisoners.⁴⁰ It provides that foreign prisoners whose conditions of detention are generally more difficult should be treated in such a manner as to counterbalance, so far as possible, these disadvantages.

71. Rule 107 of the Nelson Mandela Rules states that consideration shall be given to the future of a prisoner after their release and that they should be encouraged and provided assistance to maintain such relations with persons outside the prison as may promote the detainee's rehabilitation and the best interests of his family. In Mr Ongwen's case, the continued restrictions will severely affect his interactions with his alleged children and deprive those children of fatherly love, guidance and affection.

CONCLUSIONS FOR SECTION B

72. The Defence concedes that at this point, Mr Ongwen has privileges to call several members of his family. The Defence requests the Chamber to be mindful of the fact that Mr Ongwen was abducted as a child and spent all of his adult life in the bush. Having contact with his alleged children is vital to

³⁹ UNODC Handbook, pg. 85 and 93.

⁴⁰ Adopted by the Committee of Ministers on 21 June 1984 at the 374th meeting of the Ministers' Deputies.

his psychological and emotional healing process, especially as we move into the trial phase of the case. Accordingly, the Defence respectfully request the Chamber to restore Mr Ongwen's right to talk to, and have visits from, his alleged children.

V. RELIEF

73. The Defence respectfully request the Chamber to grant Mr Ongwen interim release pending trial to the Republic of Uganda, with or without conditions.

74. In the alternative, the Defence requests the Chamber to reinstate Mr Ongwen's and his children's rights to maintain their family relationship.

Respectfully submitted,



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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 13th day of June, 2016

At Kampala, Uganda