

**Cour
Pénale
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**International
Criminal
Court**

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Date: 7 July 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

**Public Redacted Version of "Defence Response to the Prosecution Filing
ICC-02/04-01/15-482-Conf", filed on 4 July 2016**

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. The Defence for Dominic Ongwen ('Defence') hereby responds to Prosecution filing ICC-02/04-01/15-482-Conf ('Response').
2. The Defence requests Trial Chamber IX ('Chamber') to reject the Prosecution Response.

II. CONFIDENTIALITY LEVEL

3. Pursuant to Regulation 23bis(2), the Defence files this response as confidential. Pursuant to the Chamber's order, the Defence will file a public redacted version on 6 July 2016.¹ Annex A is a communication between the Prosecution and Defence [REDACTED] and has been filed confidential *ex parte* Defence and Prosecution only.

III. PROCEDURAL HISTORY

4. On 16 January 2015, Dominic Ongwen surrendered to the International Criminal Court. On 21 January 2015, Mr Ongwen was admitted to the International Criminal Court Detention Centre ('ICC-DC').
5. On 2 June 2015, the [REDACTED]
[REDACTED]
[REDACTED] convened a meeting to discuss the pending ICC proceedings² with P-0101, P-0226, P-0227, D26-0010 and D26-0013.³ D26-0010 and D26-0013 also have Prosecution designations of P-0214 and P-0221.

¹ ICC-02/04-01/15-T-25-ENG, pg. 4:5-10.

² ICC-02-04/01-15-241-Conf-AnxA-Red, paras 2 and 8.

³ See ICC-02/04-01/15-241-Conf-AnxA-Red.

6. On 3 and 4 June 2015, the Prosecution interviewed P-0226 and P-0227.⁴
7. On 5 June 2015 at 16h45, Benjamin Gumpert, QC contacted Judge Cuno Tarfusser, the Single Judge of Pre-Trial Chamber II, and informed him of a pending urgent request to restrict Mr Ongwen's telephone rights.⁵ Judge Tarfusser ordered a temporary restriction on Mr Ongwen's phone rights at 18h11.⁶ Mr Ongwen received notification of the restriction at 20h15.⁷
8. On 3 August 2015, after receiving several submissions from the Parties and the Registry,⁸ Judge Tarfusser ordered the current restrictions on Mr Ongwen, including the removal of D26-0010 and D26-0013 from Mr Ongwen's non-privileged phone list.⁹
9. From 15 to 19 September 2015, P-0226 and P-0227 gave testimony pursuant to Article 56 of the Rome Statute.¹⁰
10. On [REDACTED] D26-0010 sought advice from the Defence about testifying.¹¹ The Defence advised the witness that it was her choice, and that if she wished to give testimony, she should relay that choice to the ICC officials that called her.¹²
11. On [REDACTED], Judge Tarfusser requested the Parties to work together to have [REDACTED] testify pursuant to Article 56.¹³

⁴See ICC-02/04-01/15-241-Conf-AnxA-Red.

⁵ICC-02/04-01/15-242, para. 1.

⁶ICC-02/04-01/15-242, para. 1.

⁷The Defence notes that Mr Ongwen did not know what he was signing on 5 June 2015. It was not until Mr Obhof met with Mr Ongwen the following week that Mr Ongwen knew what he signed.

⁸See ICC-02/04-01/15-241; ICC-02/04-01/15-248-Conf-Exp; ICC-02/04-01/15-253-Conf; ICC-02/04-01/15-276-Conf; and ICC-02/04-01/15-278-Conf.

⁹ICC-02/04-01/15-283, pg. 8.

¹⁰See confidential transcripts 8-11 in case ICC-02/04-01/15.

¹¹UGA-D26-0010-0015 and UGA-D26-0010-0016.

¹²UGA-D26-0010-0015 and UGA-D26-0010-0016. The Defence notes that the phone call from the ICC officials about testifying via video-link was made a full five (5) hours before it was notified to the Parties (notification at 17h20 CET), and two (2) hours before it was received by CMS (received at 15h35 CET).

¹³See generally ICC-02/04-01/15-T-12-Conf-Eng.

12. From [REDACTED] 2015, the Parties contacted D26-0004 and D26-0005 for the purpose of asking them to give testimony pursuant to Article 56 of the Statute.
13. From 9 to 18 November 2015, P-0099, P-0101, D26-0010, D26-0004 and D26-0005 gave testimony pursuant to Article 56 of the Rome Statute.¹⁴
14. On or about 15 March 2016, Counsel received €1,000 from Mr Ongwen for the purpose of giving the money to Mr Ongwen's family in Coorom. This is the only time that Mr Ongwen has withdrawn money from his account and given money to anyone.
15. On 20 May 2016, pursuant to Judge Tarfusser's 3 August 2015 order, the ICC-DC informed the Chamber and the Defence in an *ex parte* communication about two (2) instances where Mr Ongwen's telephone communications were disconnected by the Registry.¹⁵ The Defence responded to the ICC-DC's report on 25 May 2016.¹⁶ The Chamber gave the Prosecution two (2) days from the reclassification of Registrar's filing 443 and Defence filing 444, to which the Prosecution did not respond.¹⁷
16. On 24 June 2016, the Prosecution filed the Response, alleging that Mr Ongwen tried to interfere with the case by giving his family money.¹⁸

¹⁴ [REDACTED]

[REDACTED]. See ICC-02/04-01/15-413-Conf.

ICC-02/04-01/15-443-Conf-Exp with confidential *ex parte* annexes I-III.

¹⁶ ICC-02/04-01/15-444-Conf-Exp-Red.

¹⁷ Filings 443 and 444 (with annexes) were reclassified and notified to the Parties on 31 May 2016 at 16h42.

¹⁸ ICC-02/04-01/15-482-Conf, para.

21. It was two (2) days from when the Prosecution heard about the meeting in Gulu when it made a request to Judge Tarfusser. For the instant “issue”, the Prosecution waited 25 days before complaining about Mr Ongwen supporting his family. It is truly suspect as to the actual motivation for the Response. As it appears at face value, the Prosecution cannot possibly believe that Mr Ongwen did anything illicit. It appears that the Prosecution only submitted the Response because it wanted to deter the Chamber from ruling in favour of granting Mr Ongwen interim release. If the Prosecution truly believed Mr Ongwen attempted to coerce witness testimony by giving his family money, the Prosecution would have immediately raised this “issue” before the Chamber.

22. The Defence respectfully requests the Chamber to reject the Prosecution Response as a mere stunt to dissuade the Chamber from granting Mr Ongwen interim release. Had the Prosecution actually believed Mr Ongwen attempted to violate Article 70 of the Rome Statute, it would have acted with haste and vigour.

c) *The Prosecution Response violates Mr Ongwen’s right to support his family and his children’s right to be supported by their parent*

23. Pursuant to Article 5 of the Convention on the Rights of the Child (‘CRC’), which 196 nations, including Uganda, have ratified, Mr Ongwen and his family have the duty and responsibility “to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”²⁴ The Defence emphasises that Article 5 of the CRC specifically allows the consideration of local customs in its interpretation.²⁵ Similarly, Article 10(2)(c) of the African Charter on

²⁴ Article 5 of the CRC, found at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>, last accessed on 1 July 2016.

²⁵ Article 5 of the CRC states in full, “States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, o provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”

the Rights and Welfare of the Child ('ACRWC'), of which Uganda has ratified, directs that "[t]he education of the child shall be directed to [...] the preservation and strengthening of positive African morals, traditional values and cultures."²⁶ Articles 17(3) and 18(2) of the African Charter of Human and Peoples' Rights ('ACHPR'), of which Uganda has ratified, require the State to promote and assist people in the fostering of morals traditional values.²⁷ Article 29(7) of the ACHPR requires individuals "[t]o preserve and strengthen positive African cultural values in his relations with other members of the society [...]"²⁸

24. Pursuant to Article 2(2) of the CRC, "States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or **beliefs of the child's parents, legal guardians, or family members.**"²⁹

25. Articles 3(1) and (2) of the CRC state:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration.**

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, **taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.**³⁰

²⁶ Article 11(2)(c) of the ACRWC, found at: <http://www.achpr.org/instruments/child/>, last accessed on 2 July 2016.

²⁷ Articles 17(3) and 18(2) of the ACHPR, found at: <http://www.achpr.org/instruments/achpr>, last accessed on 2 July 2016.

²⁸ Article 29(7) of the ACHPR.

²⁹ Article 2(2) of the CRC. [Emphasis added]

³⁰ Article 3(1) and (2) of the CRC. [Emphasis added]

26. Article 4(1) of the ACRWC echoes that of Article 3(1) of the CRC.³¹ More importantly, Article 20(1) of the ACRWC, which is titled ‘Parental Responsibilities’, states:

1. Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development the child and shall have the duty:

- (a) to ensure that the best interests of the child are their basic concern at all times;
- (b) **to secure, within their abilities and financial capacities, conditions of living necessary to the child's development;** and
- (c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.³²

27. Article 11(1) of the ACRWC grants every child the right to an education.³³

28. Article 13(1) of the Protocol to the African Charter on Human and Peoples’ rights on the Rights of Women in Africa (‘Maputo Convention’), of which Uganda has ratified, “recognise[s] that both parents bear the primary responsibility for the upbringing and development of children and that this is a social function for which the State and the private sector have secondary responsibility [...]”³⁴

29. According to Article 10(1) of the International Covenant on Economic, Social and Cultural Rights, ratified by 164 nations, including Uganda, “[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and

³¹ Article 4(1) of the ACRWC.

³² Article 20(1) of the ACRWC. [Emphasis added]

³³ Article 11(1) of the ACRWC.

³⁴ Article 13(1) of the Maputo Convention, found at: <http://www.achpr.org/instruments/women-protocol/>, last accessed on 2 July 2016.

while it is responsible for the care and education of dependent children. [...].”³⁵ Article 18(4) of the International Covenant on Civil and Political Rights, ratified by 168 nations, including Uganda, states, “[t]he States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”³⁶

30. Article 18 of the ACRWC, titled ‘Protection of the Family’, states:

1. The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development.

2. States Parties to the present Charter shall take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the event of its dissolution. In case of the dissolution, provision shall be made for the necessary protection of the child.

3. No child shall be deprived of maintenance by reference to the parents' marital status.³⁷

31. Articles 19(1) and (2) of the ACRWC grant every child the right to parental care and protection, regardless of whether or not the child is separated from his or her parent.³⁸ Similarly, Articles 16(1)(d) and (e) of the United Nations General Assembly Resolution on the Convention on the Elimination of All Forms of Discrimination against Women (‘CEDW’), of which Uganda has ratified, require

³⁵ Article 10(1) of the International Covenant on Economic, Social and Cultural Rights, found at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>, last accessed on 2 July 2016.

³⁶ Article 18(4) of the ICCPR, found at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>, last accessed on 2 July 2016.

³⁷ Article 18 of the ACRWC. [Emphasis added]

³⁸ Articles 19(1) and (2) of the ACRWC.

the same rights and responsibilities between men and women, regardless of marital status, in regards to matters relating to children, including education.³⁹

32. Article 21(3) of the Rome Statute **requires** the Chamber to apply and interpret the law, which includes the application and interpretation of the Rome Statute and Rules of Procedure and Evidence, consistently with internationally recognised human rights law.⁴⁰ This has been endorsed severally by the Appeals Chamber.⁴¹

33. The Defence first notes that it is public knowledge that the ICC has stated that it will not help support the family of Mr Ongwen.⁴² The Defence and Mr Ongwen are acutely aware of this fact. [REDACTED]

34. Secondly, had the Prosecution conducted an *inter partes* discussion with the Defence, this entire ordeal would have been avoided. The Defence reminds the Prosecution that the Chamber has requested the Parties to have *inter partes* discussions before bringing an issue before the Chamber.⁴³

35. D26-0004, D26-0005 and D26-0010 have all given testimony pursuant to Article 56 of the Rome Statute. To quote Senior Trial Lawyer Benjamin Gumpert, QC, [REDACTED]

³⁹ Articles 16(2)(d) and (e) of the CEDW, found at:

<https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>, last accessed on 2 July 2016.

⁴⁰ Article 21(3) of the Rome Statute.

⁴¹ See ICC-02/11-01/11-278-Red, pg. 38, para. 8 (dissenting opinion of Judge Anita Ušaka), citing to ICC-01/05-01/08-2151-Conf (OA 10), para. 40 and ICC-01/05-01/08-1019 (OA 4), para. 49.

⁴² See [REDACTED]

the family of the father which must provide for his children and their mother. Furthermore, local customs require helping not only those who live with you, your children and their mother (in Mr Ongwen's case, those living in the compound which he lived in until abducted at nine and a half years old), but the extended family. It appears that the Prosecution is lost on Acholi customs and traditions pertaining to family, extended family and one's clan.

40. [REDACTED] the person who the Prosecution names in the Response, is Mr Ongwen's [REDACTED] in Western terminology). The Prosecution knows this fact,⁴⁷ but failed to mention this in its Response. She has also been a registered person on Mr Ongwen's non-privileged phone list far before Judge Tarfusser's decision on 3 August 2015, but the Prosecution has not made a complaint about this potential witness until now. [REDACTED], and the father is not around to help her. So what if Mr Ongwen wants to give [REDACTED] 50,000 UGX (approximately €13.11 on 30 March 2016)?⁴⁸ It is not a crime to help feed your family or to give a gift to them.⁴⁹

41. In relation to [REDACTED] of Mr Ongwen's children.⁵⁰

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁴⁷ UGA-D26-0010-0115, pg 0119 at para. 2.

⁴⁸ Exchange rate found at www.oanda.com, retrieved on 1 July 2016.

⁴⁹

⁵⁰

[REDACTED]

[REDACTED] This cannot take the place of a father's duty and responsibility to provide for his family.⁵² Even though a small amount, Mr Ongwen gave a gesture of support and love to his children in the amount of 50,000 UGX (approximately €13.11 on 30 March 2016).⁵³ It is not a crime to give a gift to your children and their mother.⁵⁴

42. D26-0004, D26-0005 and D26-0010⁵⁵ all have children from Mr Ongwen.⁵⁶ Unlike [REDACTED], their children are not in school. These three (3) women know that the ICC will not help them.⁵⁷ D26-0010 has [REDACTED] [REDACTED] and is able to find work and survive, but not thrive, hence the smaller amount. D26-0004 and D26-0005 [REDACTED] [REDACTED] moved back with the families of their mothers. Mr Ongwen is acutely aware that his children may have no place in those homes unless he and his family 'builds relationships'⁵⁸ with the families to accept, support and care for his children. The families of D26-0004 and D26-0005 frequently [REDACTED] [REDACTED] especially concerning D26-0004, who was told by the Prosecution in August 2015 that Mr Ongwen would probably never come home.⁵⁹

43. Local customs necessitate that the father, or the father's family in the absence of the father, provide for his children. [REDACTED]

[REDACTED]

[REDACTED]

⁵² Article 3(2) of the CRC.

⁵³ Exchange rate found at www.oanda.com, retrieved on 1 July 2016.

⁵⁴ [REDACTED].

⁵⁵ Prosecution designation P-0235, P-0236 and P-0214.

⁵⁶ The Defence notes that all but one of the children from these three (3) women fall outside the facts and circumstances of this case.

⁵⁷ The Defence apprised them of this fact during the early part of its investigations.

⁵⁸ Building family relationships in Acholi customs includes visitations and exchange of gifts between families.

⁵⁹ Discussion between D26-0004 and Defence Team members Thomas Obhof and [REDACTED].

This fact is not disputed. [REDACTED]

[REDACTED]

[REDACTED]⁶⁰ Mr Ongwen knows that this happened, and knows that the Defence and Prosecution have an agreement about the health of the children.

44. [REDACTED]

[REDACTED]

45. Again, the Defence reiterates that D26-0004 and D26-0005 still [REDACTED]

[REDACTED]⁶² As the Prosecution should acutely know, they do not have a regular source of income. They survive as day labourers when there is work, and live mostly off their families. They are trying to provide for their children, and wonder why the father's family is not contributing as it should (again, Mr Ongwen's family in Coorom are subsistence farmers). [REDACTED]

[REDACTED]

⁶⁰ This issue was disclosed and discussed between the Parties and VWU. The Parties and VWU came to the conclusion that no matter the Party, the welfare of the children of D26-0004, D26-0005 and D26-0010 was paramount, and that all medical issues with the children would be shared with VWU and the opposing Party as soon as possible.

⁶¹ [REDACTED].

⁶² The Defence notes that the family is always told that unless the health and welfare of the children or witnesses are at stake, we consider these issues to be a family issue and not to be discussed with the Defence.

46. Notably, Mr Ongwen spoke with the Director of the ICC-DC, Mr Marc Dubuisson, during the middle of May 2016 about the welfare of his children. Mr Ongwen expressed his frustration that he must use the little money he earns through work at the ICC-DC to purchase foodstuffs and non-essential sundries whilst his children do not attend school. Mr Ongwen, along with the Defence, feel that the education of Mr Ongwen's children is paramount. Mr Dubuisson informed Mr Ongwen that the Court cannot pay for the education of Mr Ongwen's children, but that it would attempt to identify external partners that could assist in this matter.⁶³ It is important to note that Mr Ongwen is aware that no representations were made by Mr Dubuisson other than that the Registry would only attempt to find external partners, and that no guarantees were made by the Registry that the external partners would actually assist in the matter.⁶⁴

47. The "issue" the Prosecution conveniently conjures up is called **the traditional values and cultural morals of the family unit in Acholi**. The Prosecution once again⁶⁵ seeks to break the back of a natural and social construct protected by the international community. The word family must be interpreted through local and traditional customs of Northern Uganda, not of Western society.⁶⁶

48. Three (3) of the persons referred to in the Prosecution filing gave sworn testimony before Judge Tarfusser, and all five (5) have given signed statements. The purpose of the Article 56 hearings was to record these testimonies under courtroom conditions to preserve said testimonies.⁶⁷

⁶³ Email from Thomas Obhof to Marc Dubuisson on 31 May 2016 at 15h34 CET, reply email from Virginia Fletcher (on behalf of Marc Dubuisson) to Thomas Obhof on 1 June 2016 at 12h56 CET.

⁶⁴ Email from Virginia Fletcher (on behalf of Marc Dubuisson) to Thomas Obhof on 1 June 2016 at 12h56 CET.

⁶⁵ See the recommendations for Mr Ongwen's phone right restrictions in ICC-02/04-01/15-276-Conf, the Defence's response in ICC-02/04-01/15-278-Conf and the "Defence Request for Conditional Release, or in the Alternative, the Restoration of Mr Ongwen's Communication Privileges", ICC-02/04-01/15-461.

⁶⁶ See Article 5 of the CRC and Article 10(2)(c) of the ACRWC and interpreted through Article 21(3) of the Rome Statute.

⁶⁷ The Defence does not concede the legality of the Article 56 proceedings in this submission.

49. The Defence maintains that the Prosecution's motive for the Response runs contrary to customary international law, international human rights law⁶⁸ and law in the nation which would normally exercise jurisdiction over the case.⁶⁹ The Prosecution Response is nothing more than a red herring. It attempts to distract the Chamber from the true issue that Mr Ongwen qualifies for interim release. Mr Ongwen is accepting his duties and responsibility to his family, which the Prosecution seeks to criminalise. The Defence respectfully requests the Chamber to reject the Prosecution Response.

d) *The Registry is not an evidence collection division of the Office of the Prosecutor*

50. The Prosecution requests that the Chamber order the Registry to review months of audio recordings, recordings which were made with an active listener on the line, and to report the use of the words [REDACTED]

[REDACTED]⁷⁰ This is not the Registry's role within the confines of the Court. It is not an evidence collection division of the Prosecution. Using the Registry as such would destroy the trust that every defence team has in the Registry.

51. Article 43(1) of the Rome Statute charges the Registry with the function of the non-judicial aspects of the administration and servicing of the Court. The Registry is to remain neutral. Moreover, no other Article, Rule or Regulation allows the Prosecution to use the Registry in this manner.

52. The Registry already actively monitors Mr Ongwen's non-privileged telephone calls. The Registrar is already charged with reporting to the Chamber and Defence any time Mr Ongwen talks about the case or commits a violation of the Judge Tarfusser's decision from 3 August 2015. It has done so. To do anymore

⁶⁸ Article 21(3) of the Rome Statute.

⁶⁹ Article 21(1)(c) of the Rome Statute.

⁷⁰ ICC-02/04-01/15-482-Conf, para. 1(c).

goes in contrast with all the legal instruments of the Court and destroys the trust and integrity that all defence teams have with the Registry.

53. The Defence respectfully requests the Chamber to reject the Prosecution's request to annex part of the Registry and turn it into a Prosecution evidence gathering division.

V. RELIEF

54. The Defence respectfully request the Chamber to reject the Prosecution Response in its entirety.

Respectfully submitted,



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Hon. KrispusAyenaOdongo
On behalf of Dominic Ongwen

Dated this 7th day of July, 2016
At The Hague, Netherlands