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Pénale
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**International
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Date: **6 August 2024**

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN UGANDA

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

Public with Public Annexes A-F

Third Public Redacted Version of "**Defence Response to the Prosecution's Request to Maintain Dominic Ongwen's Isolation from the Outside World**", filed on 27 July 2015 as ICC-02/04-01/15-278-Conf

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 requests the Single Judge, His Honour Judge Tarfusser ('Single Judge') to reinstate Mr Ongwen's right to contact the outside world without haste. As of the date of this filing, Mr Ongwen has not had contact with anyone outside the ICC Detention Centre walls for 52 days. The Prosecution's first request to restrict Mr Ongwen's from contact with the outside world is unlawful, a fundamental violation of his human rights and amounts to torture. Contrary to the Prosecution's submission, the continued restrictions placed upon Mr Ongwen are unnecessary and grossly disproportionate. Similarly, the Prosecution's alternative request to place "lesser restrictions" on Mr Ongwen's rights is unnecessary, disproportionate and violates his right to privacy as a suspect.
2. The Defence submits that the Regulations of the Registry ('RoR') should guide the Single Judge in his decision to lift the restrictions to Mr Ongwen's contact to the outside world and deny the Prosecution's attempt to violate Mr Ongwen's human rights.

II. CONFIDENTIALITY LEVEL

3. The Defence files this response confidential as it discusses material classified as confidential *ex parte* Defence and Prosecution only. Annex F is also filed confidential because it contains correspondence between the Defence and the Chief and Deputy Chief of the ICC Detention Centre. A public redacted version is filed concurrently.

III. PROCEDURAL HISTORY

4. On 5 June 2015, the Prosecution filed a request with the Single Judge to restrict Mr Ongwen from any contact with the world outside the ICC Detention Centre, with the exclusion of Counsel.¹ The Single Judge granted the Prosecution request late that afternoon.
5. On 8 June 2015, the Single Judge issued a decision granting the Defence access to the Prosecution filing.²
6. On 15 June 2015, the Defence responded to the Prosecution request, stating that the Prosecution did not allege that Mr Ongwen had committed illegal acts and that Mr Ongwen should have his right to contact the outside world reinstated.³ With leave, the Prosecution replied to the Defence's response on 22 June 2015.⁴
7. On 24 June 2015, the Single Judge 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 the Single Judge summarising the conversations.⁵
8. On 9 July 2015, the Registrar filed his report on the Telephone Recordings and the conversations contained therein.⁶

¹ ICC-02/04-01/15-241.

² ICC-02/04-01/15-242.

³ ICC-02/04-01/15-248-Conf-Exp.

⁴ ICC-02/04-01/15-253-Conf.

⁵ ICC-02/04-01/15-254.

⁶ ICC-02/04-01/15-261-Conf-Exp.

9. On 13 July 2015, the Single Judge ordered the Prosecution to file its recommendation on the continued restrictions by 12h00 on 15 July 2015 based on the telephone conversations contained in six audio files the Single Judge ordered to be disclosed by the Registrar.⁷ The six audio recordings were disclosed by the Registrar and the Parties were granted access to the audio files at 17h55 on 13 July 2015.⁸
10. On 15 July 2015 at 11h35, the Prosecution filed a request for an extension of time, stating that it needed “[m]ore time...to listen to and analyse the content of the six sound recordings, which amount to over four hours of telephone conversation in Luo.”⁹
11. On 20 July 2015, the Prosecution filed further submissions on six audio recordings,¹⁰ requesting that Mr Ongwen be permanently denied contact with the outside world for the remainder of his pre-trial detention, subject to periodic review (‘First Request’).¹¹ In the alternative, the Prosecution proposed lifting the restrictions, subject to certain lawful and specific unfound requests (‘Alternative Request’).

IV. SUBMISSIONS

The Prosecution’s First Request Will Violate Mr Ongwen’s Fundamental Human Rights

12. The restriction on Mr Ongwen’s contact with anyone outside the ICC Detention Centre, save for Counsel and Assistant to Counsel, is a violation of his fundamental human rights, specifically the right to be free from torture.

⁷ ICC-02/04-01/15-267, pg. 5.

⁸ ICC-02/04-01/15-268 and confidential ex parte annexes 1-6.

⁹ ICC-02/04-01/15-269, para. 12. The Defence notes that the phone conversations are in *Acholi*, not Luo.

¹⁰ ICC-02/04-01/15-276-Conf.

¹¹ *Ibid*, para. 13.

13. The Prosecution cavalierly forgets that Mr Ongwen is a human being, and as such, must be treated like one. It is the opinion of the Defence that the Prosecution asks for the alternative relief¹² since it is acutely aware that the Prosecution's First Request violates Mr Ongwen's fundamental human rights. The Defence informed the Prosecution of the human rights violation in June,¹³ of which it filed a response thereto,¹⁴ and reiterates its position below.

14. The Standard Minimum Rules for the Treatment of Prisoners ('UN Standards') observes that "[d]iscipline and order shall be maintained with firmness, but with *no more restriction than is necessary* for safe and well-ordered community life."¹⁵ It also strictly forbids any cruel, inhuman or degrading punishment.¹⁶ Finally, it prohibits "any other punishment that may be prejudicial to the...mental health of a prisoner [and] [i]n no case may such punishment be contrary to or depart from the principle stated in rule 31."¹⁷ As discussed below, the Defence absolutely insists that isolation from contact with the world outside of the ICC Detention Centre during pre-trial detention constitutes a clear cruel and inhuman punishment to which no reasonable person could refute.

15. The UN Standards further stipulate that contact with both the outside world and family are paramount to the proper treatment of both prisoners and untried persons.¹⁸ The Prosecution's First Request is not only an affront to the standard for untried persons, but also to convicted persons.

¹² ICC-02/04-01/15-276-Conf, paras 29-30.

¹³ ICC-02/04-01/15-248-Conf-Exp, para. 1.

¹⁴ ICC-02/04-01/15-253-Conf.

¹⁵ Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 633 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Rule 27, attached as Annex A [emphasis added].

¹⁶ *Ibid*, Rule 31.

¹⁷ *Ibid*, Rule 32(2).

¹⁸ *Ibid*, Rule 37 and Rule 92. The Defence notes that the UN Rules differentiates between convicted persons and untried persons, granted the untried persons more liberties because they are innocent until proven guilty.

16. Most importantly, the UN Standards requires the detaining entity to be forward looking. Special attention must be given to the detainee's future and relationship with his/her family and social reintegration.¹⁹ These are minimum standards required of a convicted person. Mr Ongwen is still a suspect. The message on family relations with the forward outlook on reintegration is so vitally important that the Special Rapporteur on the Question of Torture highlighted this issue in his 2004 report on a visit to Spain about its detainees.²⁰

17. On 9 December 1988, the United Nations General Assembly adopted the "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment".²¹ The Defence draws attention to following principles of that Resolution:

- a. **Principle 1** - All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.
- b. **Principle 6** - No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.²² *No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.*²³
- c. **Principle 15** - Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

¹⁹ *Ibid*, Rules 79-80.

²⁰ Report of the Special Rapporteur on the question of torture, Theo van Boven, Addendum, "Civil and Political Rights, Including the Question of Torture and Detention", E/CN.4/2004/56/Add.2, 6 February 2004, para. 51, Attached as Public Annex E.

²¹ See UNGA Res 43/173 of 9 December 1988, attached as Public Annex B.

²² As found at the end of the Resolution, footnote 1 states "[t]he term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time"

²³ Emphasis added.

- d. **Principle 19** - 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.²⁴

18. In asking for Mr Ongwen's isolation from the outside world, the Prosecution is asking the Single Judge to endorse a cruel and inhuman act of punishment, i.e. torture. Mr Ongwen's rights should not have been denied for more than a matter days, but now the Prosecution wants his rights denied *ad infinitum*. The Prosecution's First Request in filing 276 clearly violates reasonable conditions and restrictions allowable under the law. Such treatment constitutes torture.

19. Similarly, the Council of Europe's Committee of Ministers emphasised that contact with the outside world, especially contact with family members, should be maintained.²⁵ Apart from telephone or written correspondence, the Committee of Ministers stressed that the state/prison must help facilitate visits by family members to foster as normal as possible relationships.²⁶

20. In terms of discipline and punishment, the Committee of Ministers declared that "[d]isciplinary procedures shall be mechanisms of last resort"²⁷ and that "[t]he severity of any punishment shall be proportionate to the offence".²⁸ Finally, Section 60.4 clearly forbids the Prosecution's First Request, stating that

²⁴ Annex B, Principles 1, 6, 15 and 19.

²⁵ See Council of Europe Committee of Ministers Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, Adopted 11 January 2006, Section 24.1-12 (Contact with the outside world), attached as Public Annex C.

²⁶ *Ibid*, Section 24.4.

²⁷ *Ibid*, Section 56.1.

²⁸ *Ibid*, Section 60.2.

“[p]unishment shall not include a total prohibition on family contact”, which is what the Prosecution advocates.²⁹

21. The Defence submits that the Prosecution’s First Request is not proportional to the issue at hand. One can only see the First Request as punishment, a punishment which has the direct and obvious consequences of mental distress and torture. Not being able to contact one’s family, as recognised by the Committee of Ministers, and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment,³⁰ is a human rights violation and must be allowed.

22. The Defence requests that the Single Judge deny the Prosecution’s First Request as it violates Mr Ongwen’s basic human rights and amounts to torture.

Should the Single Judge Decide to Emplace Restrictions, He should Follow Regulation 175 of the Regulations of the Registry and not the Prosecution’s Alternative Request

23. The RoR’s contains the body of rules which govern the policies of non-judicial functions of the Court.³¹ The Registrar works at the behest of the Presidency.³² The Registry is a neutral organ, not an evidence collection unit for the Prosecution.

24. The Prosecution offers its own impromptu guidelines to the Single Judge.³³ It blithely rejects the material fact that Mr Ongwen is a suspect, not an accused, and definitely not a convicted person. Even though Mr Ongwen resides within the

²⁹ *Ibid*, Section 60.4 [emphasis added].

³⁰ See European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment, “2nd General Report on the CPT’s activities covering the period 1 January to 31 December 1991”, Ref: CPT/inf(92)3[EN], 13 April 1992, para. 51, attached as Annex D.

³¹ See Article 43(1) of the Rome Statute, read in conjunction with Rule 14 of the Rules of Procedure and Evidence and Regulation 1(1) of the RoR.

³² Article 43(2) of the Rome Statute.

³³ ICC-02/04-01/15-276-Conf, para. 30(a)-(g).

ICC Detention Centre, he still has the right to privacy, subject to restrictions placed upon him by the Single Judge, the Registrar and the Custodial Officer.

25. The Defence notes paragraphs 30(c), (d), (f) and (g) of Prosecution's Alternative Request. It takes issue with:

- a. Paragraph 30(c) - No basis in law exists for restrictions to Mr Ongwen's right to ask people to testify on his behalf. On the contrary, it is a fundamental human right to ask people to be witnesses on his/her behalf and to partake in his own defence.³⁴
- b. Paragraph 30(d) - No basis in law exists for the *Prosecution* to receive and make submissions on who Mr Ongwen may or may not speak to without it being reviewed first by the Single judge or Presidency. Mr Ongwen has been made aware of the people disclosed on 15 May 2015, and knows that he may not talk with them or about them.³⁵ The Chamber is also aware of those names. Any control over who Mr Ongwen speaks to or receives visits from should come from the Chief Custodial Officer, the Registrar and/or the Single Judge. Mr Ongwen has been forthright with disclosing the relationship of his contacts, and shall always be honest about those relationships. It is the understanding of the Defence that the ICC Detention Centre verifies this information.³⁶ It is for the Chamber and the Registrar to issue orders on this and regulate Mr Ongwen's public list, not the Prosecution. If the Chamber deems it appropriate to have submissions on a person added to the list, it is for the Chamber to disclose the person's name and request submissions. The Defence sees this request as a proverbial fishing expedition.

³⁴ For example, see Article 61(6)(c) of the Rome Statute and Article 14(3)(e) of the International Convention on Civil and Political Rights, attached as Public Annex F. The Defence stipulates though that Mr Ongwen may not discuss issues relating to confidential witnesses to non-privileged persons.

³⁵ Mr Ongwen was not aware until mid-June of OTP-101's alias.

³⁶ The Defence cannot say with certainty though. It can only assume this because the ICC Detention Centre refused to inform the Defence of the process when it requested it, citing that it does not give the information out to third parties, even defence teams. See Confidential Annex G. The Defence's assumptions come from the manner in which Counsel and Assistant to Counsel receive telephone calls from Mr Ongwen.

- c. Paragraph 30(f) - No basis in law exists for the Prosecution to request the call data records. Again, Mr Ongwen has a limited expectation of privacy as a suspect being detained. As required by the RoRs, the records should be inspected by the Registrar, and any issues of impropriety should be brought to the attention of the Single Judge, not the Prosecution. The Defence sees this request as a fishing expedition for evidence and will have the chilling effect of intimidating people from talking to Mr Ongwen, further isolating him from the world.
- d. Paragraph 30(g) - No basis in law exists for the direct disclosure of data from the Registrar to the Prosecution without the Single Judge or the Presidency reviewing it first. The Registrar can only report this to the Single Judge. What if a translator misheard something? What if something was taken out of context (which you will read more about below)? The Defence sees this request as another fishing expedition.

26. Any request to have information given directly from the Registrar to the Prosecution without first being reviewed by the Single Judge must be denied.

27. The Defence notes again its issues with the Prosecution's continued use of "potential witnesses". These are not Prosecution witnesses, and there is currently no protocol in place to regulate these "potential witnesses". Mr Ongwen should not be denied to speak with someone merely because the Prosecution wants to shield them from speaking to the Defence. There is a significant difference from speaking to someone and from threatening or trying to negatively influence someone. The first is legal, the second is not. As long as the contact remains within the legal realm, the Prosecution cannot be allowed to regulate who Mr Ongwen does and does not talk to.³⁷

³⁷ The Defence stipulates that the list of witnesses disclosed on 15 May 2015 are people that Mr Ongwen is not allowed to talk to without approval from the Prosecution.

28. The Defence contends that the Single Judge should be guided by Regulation 175 of the RoR, as it has written previously.³⁸

The Prosecution's Excerpts of Mr Ongwen's Phone Conversations are Misleading

29. The Prosecution alleges that Mr Ongwen is interfering with witnesses. It quotes selected paragraphs of his phone recording to demonstrate this. The Defence submits that the phone intercepts quoted are exaggerated and completely out of context. For example, in paragraph 16 the Prosecution alleged that Mr Ongwen issued clear instruction to [REDACTED] not to speak to the Prosecution. The Prosecution only quoted this phrase: "[T]his is the end of you meeting the people asking question".³⁹

30. The prosecution ignored the overall circumstances he was taking which was more of laughter, playful and joking. The prosecution also ignored the phone discussion before and after that alleged phrase hence removing the innocent statement away from the context and giving it the force and tone of command, whereas note. Before that statement quoted by the Prosecution, Mr Ongwen said:

*"En gin ma agoni iye cim ni, ni kong aniang kong, pien [REDACTED] onongo pe oniang, guwaci doki giwinyi ni icito irwate ki dano mo, ma gin pe giniang, loke do bedo ning ning, awace ni an aye amini freedom me cito, ka onong bene akwere onong bene in pe icito, an aye ni iciti"*⁴⁰.

Translated to English as:

³⁸ See ICC-02/04-01/15-248-Conf-Exp, para. 23.

³⁹ ICC-02/04-01/15-276-Conf, para. 16.

⁴⁰ ICC-02/04-01/15-268-Conf-Exp-Anx6, starting at 00:46.

“That is the reason I called you, because the [REDACTED] had not understood, they said that they heard you went meeting some people they do not know, how is that, I told him I am the one who gave you freedom to meet them, that if I had stopped you, you would not have gone”.

31. This is indication that Mr Ongwen is the one who actually advised the witnesses to meet the Prosecution, short of that, the witness would have not probably met and talk to the Prosecution. This is not a character of one impeding the investigation but rather aiding it.

32. Immediately before and after the unfortunate statement Ongwen stated:

*“Ga wayi ka ngati mo pe otimo ba kwedo ne kadi bed ni ikwed tek tek dong pe lare, gini weng tye open kamaleng, kit kwo ma ngat acel acel obedo ka kwo kwede, ocake wa ki gang pa mine ocito kwede wa I lum. Kadi ma onongo tye bot gamente ne weng gingeyo weng open, ducu kadi kiwaci kinyeny weng ducu no kore pe tiyo, in bene dong agikini me rwate ki dano mukene ma dong mito penyi dong ogik kwede enu bene. ... Eno gi oolo wi ki peny mapol nono, en gin ma oweko an awaci iciti pien koni I cazwa mukene kiwaci an agengo nge bala, ci oweko awaci in iciti wek gin owiny ki itgi”.*⁴¹

Translated to English as:

“If someone has not done wrong, no matter how forcefully you investigate the matter it won’t be possible. Everything is in the open, the way each person was leading his life right from his mother’s house right into the jungle, even those who are in the Government side, all is in the open, even if you investigate it is nothing, even you this is the end of you meeting other

⁴¹ ICC-02/04-01/15-268-Conf-Exp-Anx6, at 02:27-03:11.

people asking you question, it ought to stop with that. ... They will just stress your head with many question for nothing, that is why I said you should go and meet them, because sometimes they may say that I am covering my wrong deeds, that is why I said you go so that they can listen with their ears"

33. Mr Ongwen in the last part of the discussion still insist that the lady should meet "the people" (i.e. Prosecution) so that they know the truth and not misunderstand him to be hiding anything. The recording must be viewed in the totality, not as isolated sentences.

34. The Prosecution alleges that Mr Ongwen is asking a witness to divulge the content of her testimony to a third party. Mr Ongwen appears to emphasize that what [REDACTED] should be told is that Mr Ongwen wants these women to talk to the Prosecution. Mr Ongwen expressly emphasized that "*say you did not go by yourself I am the one who sent you to go and talk.*" The Prosecution acknowledges this quote, but conveniently left out Mr Ongwen's emphasis.

35. On the allegation that Ongwen advised his wives to be wise, there is a phrase that was unfortunately left out of the quote in prosecution footnote 18,⁴² we emphasized it here below in bold:

*"... obed mon maryek I kit me lok, **ingeyo ni polotik kombedi tye lamal,** peny mukene kipenyo, kace in no lok mo peke jo mukene aye giromo lok ata ma nongo pe guniang"*

Translated to English as:

⁴² ICC-02/04-01/15-276-Conf, at fn 18.

*“... You be wise women in the way of talking, **you know there is a lot of politics (lies, deceit, fraud) these days**, for you there is no problem, the others (i.e. Prosecution) may talk without understanding”*

36. Mr Ongwen advised them to be truthful and honest, and to be alive to tricky question and dishonest conduct that may lead them to lie.

37. At paragraph 23, the prosecution is alleging that Min Bak is waiting to see Ongwen so she can “spoil the investigation” against him.⁴³ When taken out of context, this suggests that she is waiting to reach some kind of agreement with Mr Ongwen, which is not true. The footnote⁴⁴, which is fairly accurate, depicts Mr Ongwen being held hostage, in that if he does not treat her nicely, she will lie to Prosecution investigators and help convict him. That is why before that statement Ongwen said if she would speak truthfully and clearly like [REDACTED], then there would be no problem.⁴⁵

Publication of Public Redacted Transcripts of Annexes ICC-02/04-01/15-268-Conf-Exp-Anx1-6

38. The content of Mr Ongwen’s phone calls is private. The Prosecution puts forth no basis in the law why Mr Ongwen’s calls, which the Prosecution only has because a suspect is being held in detention, should be publicly available, even in redacted form. Disclosure of the recordings will have a chilling effect on Mr Ongwen’s right to contact people from the outside world. If allowed, now not only would the call recipients be worried about the calls being listened to, but also whether the content of the recordings would be available for the entire world to read. It is an outrage to one’s rights as a human being, especially one which is still a suspect.

⁴³ *Ibid*, at para. 23.

⁴⁴ *Ibid*, at fn 24.

⁴⁵ ICC-02/04-01/15-268-Conf-Exp-Anx2, at 09:08.

39. Furthermore, a dispute exists as to the meaning of the content of the phone calls.

The Defence has shown above where the Prosecution has put forth what appears to be misleading quotations in its submissions. Until such time where both Acholi transcripts and English translations are available for the Parties to inspect, review and suggest changes, an order to make private telephone conversations public is premature.

V. RELIEF

40. The Defence respectfully requests the Single Judge:

- a. To deny the Prosecution's First Request;
- b. To deny the Prosecution's Alternative Request;
- c. To restore Mr Ongwen's right to contact people outside the ICC Detention Centre, and if the Single Judge determines that restrictions are required, that he follow the guidelines in Regulation 175 of the Regulations of the Registry and not the ones submitted by the Prosecution; and
- d. To reject the Prosecution's request to order the Registry to publish public redacted versions of the transcripts of ICC-02/04-01/-15-Conf-Exp-Anx1-6.

Respectfully submitted,



.....
Chief Charles Achaleke Taku

On behalf of Dominic Ongwen

Dated this 6th day of August, 2024

At Maryland, USA