

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 6 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 with Public Annex A

Public Redacted Version of “Defence Consolidated Reply to Prosecution and Joint LRV Responses to the Defence’s Request for Conditional Release or Restoration of Phone Rights”

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 replies to Prosecution¹ and LRVs² responses on the Defence's request for conditional release, or in the alternative, restoration of Mr Ongwen's phone rights.³
2. The Defence's position has not changed. Trial Chamber IX ('Chamber') should grant Mr Ongwen conditional release, or at the least, allow Mr Ongwen to speak to his children.

II. CONFIDENTIALITY LEVEL

3. Pursuant to Regulation 23bis(1), the Defence files this reply as confidential *ex parte* Defence and Prosecution only as it contains information about [REDACTED]. Pursuant to the Chamber's order, the Defence files a confidential version concurrently and shall file a public redacted versions on 6 July 2016.⁴

III. SUBMISSIONS

4. The Defence incorporates by reference its submissions in ICC-02/04-01/15-461 and "Defence Response to the Prosecution Filing ICC-02/04-01/15-482-Conf".⁵

A) *The Prosecution's arguments against interim release are flawed*

5. Detention is the exception, not the rule.⁶ Changed circumstances have occurred which justify the interim release of Mr Ongwen.

¹ ICC-02/04-01/15-483-Conf.

² ICC-02/04-01/15-484.

³ ICC-02/04-01/15-461.

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

⁵ Filed on 4 July 2016.

⁶ PTC II, ICC-01/05-01/08-475, paras 36 and 77; PTC I, ICC-01/04-01/10-163, para. 33; PTC I, ICC-02/11-01/11-454, para. 55. *See also* Article 5(3) of the European Convention on Human Rights; Article 7(1)(a) of the African Charter on Human and Peoples' Rights (granting the right to appeal decisions violating fundamental rights); and Articles 7(5) and (6) of the American Convention on Human Rights.

6. The Prosecution down-plays the changed circumstances forwarded by the Defence and misrepresents pertinent information to the Chamber.⁷

7. An Appeals Chamber decision which the Prosecution cites⁸ to discourage the Chamber from granting interim release on the basis of the amount of material the Prosecution has disclosed has two dissenting opinions. Both disagree with the majority that “a detention decision cannot be based alone on the abstract factor that the disclosure process has started.”⁹ The Chamber should not continue to propagate the Prosecution’s continued use of disclosure to warrant detention.¹⁰ Disclosure of relevant material in the hands of the Prosecution to the Accused is a requirement under the Rome Statute and Rules of Procedure and Evidence.¹¹ If this Prosecution premise is unqualified, interim release would be reduced to a virtual impossibility in violation of fundamental human rights principles.

8. Second, the fact that [REDACTED] has been added to Mr Ongwen’s non-privileged list means absolutely nothing in relation to the investigation.¹² The Prosecution knows that pursuant to Judge Tafsuser’s decision of 3 August 2015, Mr Ongwen is forbidden from talking about anything other than private matters when calling persons on his non-privileged phone list.¹³ This was reaffirmed by Judge Tafsuser *via* email to the Prosecution on 3 November 2015 at 16h05 CET.¹⁴ The Chamber should not consider Mr Ongwen’s ability to make non-privileged phone calls as an aid to the Defence investigations.

⁷ ICC-02/04-01/15-483-Conf, paras 26-28.

⁸ ICC-02/04-01/15-483-Conf, fn. 61.

⁹ ICC-02/11-01/11-278-Red, pg. 49, para. 31 (dissenting opinion of Judge Anita Ušaka, joined by Judge Errki Kourula on pg. 53, para. 2).

¹⁰ ICC-02/04-01/15-483-Conf, para. 26.

¹¹ *For example see* Articles 61(3)(b) and 67(2) of the Rome Statute and Rules 76(1) and (2) and Rule 77 of the Rules of Procedure and Evidence.

¹² *See* ICC-02/04-01/15-483-Conf, para. 28.

¹³ ICC-02/04-01/15-283, pg. 8.

¹⁴ This email dealt with privileged visits, but the same standard applies whether determining privileged visits and privileged telephone calls.

9. Third, the Prosecution argues that any conditions, including those suggested by the Defence,¹⁵ could not properly track Mr Ongwen.¹⁶ The application of the Prosecution's arguments means that no one could be released to non-Western nations. The Defence has used GPS devices in Coorom, Uganda. The Defence has used mobile telephones in Coorom, Uganda. The Defence has even been to the local police station covering that area. The only question relevant to this issue is that of the manner of recharging the devices. The simple response is that Mr Ongwen's family in Coorom, Uganda has solar panels and the instruments necessary to charge battery-operated technology.
10. Fourth, the Defence explained the issues of the telephone incidents in Defence filing 444 and "Defence Response to the Prosecution Filing ICC-02/04-01/15-482-Conf". Accepting the argument of the Prosecution on this matter is to accept one that conflicts with internationally recognised human rights law (*i.e.* the right to communicate with one's family).¹⁷
11. Fifth, the Defence notes that the Legal Representative for the Victims once again writes of Victims' fears of Mr Ongwen's release without justification.¹⁸ As stated throughout this reply, and other submissions, Mr Ongwen has not attempted to influence witnesses or potential witnesses of the Court.
12. [REDACTED].¹⁹ Mr Ongwen's time in the bush is over.²⁰ Had Mr Ongwen wanted to remain in the bush, he could have easily joined the Aboro or Janjaweed.²¹ Mr Ongwen did not do that; he requested to surrender to the

¹⁵ ICC-02/04-01/15-461, para. 40.

¹⁶ ICC-02/04-01/15-483-Conf, para. 30 and fn. 67.

¹⁷ Again, the Defence vehemently denies the accusations that Mr Ongwen used coded language in either telephone calls on 11 January or 30 March 2016.

¹⁸ ICC-02/04-01/15-484, para. 19.

¹⁹ [REDACTED].

²⁰ See ICC-02/04-01/15-483-Conf, para. 30.

²¹ ICC-02/04-01/15-243, para. 20.

UPDF.²² After his surrender to the United States Forces, he was informed that he would be sent to the ICC. Mr Ongwen did not fight extradition from CAR, even though that was his legal right.²³ Mr Ongwen has cooperated with the Court, and has shown no indication that he would flee to neighbouring states if released. Whilst the Prosecution does not have to prove that Mr Ongwen will flee, the Prosecution must still show that an actual possibility exists that Mr Ongwen might flee, which it has not done.

B) *Mr Ongwen deserves his phone rights reinstated if not granted interim release*

13. First, the Defence did not request in filing ICC-02/04-01/15-461 for the removal of the actively listener as the Prosecution states.²⁴ The Defence's request was for the restoration of Mr Ongwen's and his children's internationally recognised human rights to speak to each other.²⁵

14. Second, the Prosecution's application of the standard for reconsideration in the *Kenyatta case* is inappropriate.²⁶ This issue does not deal with a procedural issue *per se*, but a substantive internationally recognised right under human rights law.²⁷ Furthermore, if this issue dealt with reconsideration of active monitoring, Regulation 175(4) of the Regulations of the Registry allows for the reconsideration of active telephone monitoring every month.²⁸

²² ICC-02/04-01/15-243, para. 20.

²³ See Article 59 of the Rome Statute

²⁴ ICC-02/04-01/15-483-Conf, para. 33.

²⁵ See ICC-02/04-01/15-461, paras 42-71.

²⁶ ICC-02/04-01/15-483-Conf, para. 34.

²⁷ See generally ICC-02/04-01/15-461 and "Defence Response to the Prosecution Filing ICC-02/04-01/15-482-Conf".

²⁸ Regulation 175(4) of the Regulations of the Registry, which states, "Should the period of monitoring exceed one calendar month, the Registrar shall review the situation at the end of each calendar month in consultation with the Chief Custody Officer, and may decide to extend the period of active monitoring of the detained person's telephone calls. Any decision to extend the period shall be reported to the Presidency and shall be notified to the detained person and to his or her counsel prior to its implementation."

15. The current restrictions placed on Mr Ongwen stem from Judge Tarfusser's decision of 3 August 2015, which the restrictions in question were implemented on 5 June 2015.²⁹ The Defence has yet to find an internationally recognised human rights treaty which requires "a clear error of reasoning" or "exceptional circumstances"³⁰ for the reconsideration of the deprivation of a human right. To the contrary, the Defence maintains that for the continued deprivation of an internationally recognised human right, the Chamber must justify with a well-reasoned decision why the deprivation, which has been in place for over a year, is still justified. The Defence argued that the justifications given on 3 August 2015 are no longer valid.
16. As for the Prosecution's argument about [REDACTED]³¹ supported by the Legal Representatives for the Victims,³² the Defence's request for the restoration of Mr Ongwen's phone rights was not limited [REDACTED], but encompasses all of Mr Ongwen's children.³³ Paragraphs 65 and 66 of Defence filing 461 are an example of the effect of what deprivation of a child's right will do to him or her.³⁴
17. It was the Prosecution that amended the charges to include those which relate to Mr Ongwen's family. The Prosecution should accept some responsibility to ensure that Mr Ongwen can talk to his children. The Prosecution requested that Mr Ongwen be deprived of talking to anyone who may have conceived children with Mr Ongwen.³⁵ All of these children live with their mothers. The Prosecution knows this.

²⁹ ICC-02/04-01/15-241, para. 1.

³⁰ See ICC-02/04-01/15-483-Conf, fn. 73.

³¹ ICC-02/04-01/15-483-Conf, paras 40-41.

³² ICC-02/04-01/15-484, para. 28.

³³ See ICC-02/04-01/15-461, paras 42-71.

³⁴ ICC-02/04-01/15-461, paras 65-66 and confidential *ex parte* annexes C and D.

³⁵ ICC-02/04-01/15-276-Conf, para. 30(b).

18. Contact with Mr Ongwen's children does not require any of the mothers to talk to Mr Ongwen. There are many pragmatic ways of addressing Prosecution requests without completely depriving children and their father of any contact. For example, the VWU, or any other person/organisation as the Chamber deems fit, may act as an intermediary for contacts. As a relevant aside, the Defence notes that children – [REDACTED] - understand how to answer a phone.

19. Furthermore, the Defence's request was transparent. The Prosecution's response fails to consider local customs and traditions of Acholi. An example is that the [REDACTED].³⁶

20. The Chamber must also know that the Prosecution was informed on 22 June 2016 during the meeting on agreed facts that the Defence agreed to stipulate biological parentage of all children for whom a positive DNA is returned by NFI. This is also evidenced by the recent filing of the joint submission on agreed facts.³⁷ The word "alleged" should not be considered anymore when reading Defence filing ICC-02/04-01/15-461.

C) Mr Ongwen did not attempt to interfere with the case

21. The Prosecution cites a passage from a telephone conversation between D26-0013 and Mr Ongwen on 2 June 2015 as potential interference with witnesses.³⁸ The Prosecution fails to understand the context of the recording. Mr Ongwen speaks of politics, not his case.³⁹ At that time, Mr Ongwen was worried about the government interfering with his family.

³⁶ The Defence has incorporated by reference arguments made in ICC-02/04-01/15-461 and "Defence Response to the Prosecution Filing ICC-02/04-01/15-482-Conf" about the internationally recognised human rights laws that do not require genetic parentage, but the belief that the child belongs to the parents.

³⁷ ICC-02/04-01/15-487-Conf-AnxA. The Defence notes that parental lineage is only relevant if the birth falls within the temporal jurisdiction of the case, and thus not at issue for the case.

³⁸ ICC-02/04-01/15-483-Conf, fn. 83.

³⁹ ICC-02/04-01/15-367-Conf-Exp-AnxI, pg. 2:21-24.

22. The passage in ICC-02/04-01/15-342-Conf-Exp-AnxVI, found in footnote 86 of Prosecution filing ICC-02/04-01/15-483-Conf, was a conversation between Mr Ongwen and someone on Mr Ongwen's approved list, and all persons mentioned in the passage were, at that time, on Mr Ongwen's approved list. Most notably, the context of the conversation in footnote 86 is taken out-of-context. In the passage immediately before the quote in footnote 86, Mr Ongwen asked [REDACTED] to talk to the Prosecution, and then to have [REDACTED] inform [REDACTED] about the conversation.⁴⁰ Mr Ongwen did not want D26-0010 to be ostracised by his family for talking to the Prosecution.

23. The Defence also refers to "Defence Response to the Prosecution Filing ICC-02/04-01/15-482-Conf"⁴¹ for its discussion about the allegations against Mr Ongwen paying witnesses.

D) Defence request pursuant to Rule 118(3) of the Rules of Procedure and Evidence

24. Pursuant to Rule 118(3) of the Rules of Procedure and Evidence, the Defence requests its required annual hearing on Mr Ongwen's pre-trial detention.

IV. RELIEF

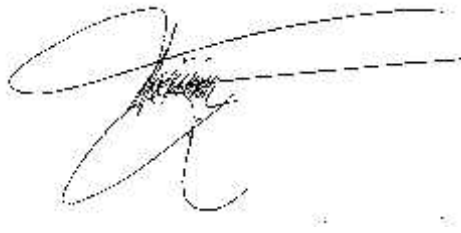
25. The Defence respectfully requests the Chamber to:

- a. Grant Mr Ongwen interim release to the Republic of Uganda,
- b. Allow Mr Ongwen to talk to his children if he is not released, and
- c. Schedule the annual status conference as required pursuant to Rule 118(3) of the Rules of Procedure and Evidence.

⁴⁰ ICC-02/04-01/15-342-Conf-Exp-AnxVI, pg. 11:280-286.

⁴¹ Filed on 4 July 2016.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 6th day of July, 2016

At The Hague, Netherlands