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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding 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 Prosecution response to the “Defence Request for Conditional Release, or in the Alternative, the Restoration of Mr Ongwen’s Communication Privileges”, 24 June 2016, ICC-02/04-01/15-483-Conf

Source: The Office of the Prosecutor

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

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Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes the Defence’s request (“Request”)¹ to grant Dominic Ongwen conditional release or, in the alternative, restore Mr Ongwen’s communication privileges.²
2. First, Mr Ongwen’s detention is still warranted under articles 60(3) and 58(1)(b)³ of the Rome Statute (“Statute”) to ensure that, after evading arrest for over nine years, he appears for trial to face the 70 charges confirmed against him and does not obstruct or endanger the integrity of the trial process.
3. Second, this Chamber found less than a month ago that Mr Ongwen’s existing communication restrictions “remain warranted at the present stage,”⁴ and nothing in the Request warrants reconsideration of this conclusion.⁵ The only articulated basis for the requested unrestricted communication is contact with Mr Ongwen’s “alleged children”⁶. However, Mr Ongwen did not apply to add these children to his approved contact list and therefore has not been denied contact with them. In addition, the Request notably fails to mention that Mr Ongwen is not permitted contact⁷ with [REDACTED]⁸, [REDACTED]⁹. It was [REDACTED] efforts to improperly influence witnesses, following telephone contact with Mr Ongwen, that led to her removal from Mr Ongwen’s contacts and the initial imposition of communication restrictions.¹⁰ The existing

¹ ICC-02/04-01/15-461.

² Request, paras. 1-2.

³ Per article 60(2) of the Rome Statute, a person shall continue to be detained if the Chamber “is satisfied that the conditions set forth in article 58(1) of the Rome Statute are met.”

⁴ ICC-02/04-01/15-450-Red, para. 4.

⁵ See ICC-01/09-02/11-863, para. 11.

⁶ Request, paras. 2, 48, 50, 54, 61, 65, 71, 72, Annexes C and D. The Prosecution does not concede that legal parental rights attach when paternity is not squarely acknowledged to avoid admission of criminal conduct: the fact that Mr Ongwen refers not to his children but to his “alleged children” speaks to this tension. However, because Mr Ongwen never asked for such contact and was therefore not deprived it, the Chamber need not reach this issue.

⁷ ICC-02/04-01/15-283.

⁸ See UGA-OTP-0253-0573 at 0547-0575.

⁹ [REDACTED].

¹⁰ ICC-02/04-01/15-254; ICC-02/04-01/15-283.

communication restrictions are therefore necessary to prevent any further witness interference in Mr Ongwen's trial.

4. Finally, the Prosecution joins the Defence's request to reclassify as confidential the 9 July 2015 report by the Registrar on the content of Mr Ongwen's telephone conversation recordings.¹¹

Confidentiality

5. This document is classified as "Confidential" as it responds to a filing so designated.¹² A public redacted version will be filed.

Relevant procedural history

Mr Ongwen's detention

6. An arrest warrant was issued for Mr Ongwen on 8 July 2005¹³ and made public on 13 October 2005.¹⁴ On 16 January 2015, Mr Ongwen came into the custody of the International Criminal Court.¹⁵
7. On 27 November 2015, the Pre-Trial Chamber Single Judge ("Pre-Trial Judge") found that Mr Ongwen's detention was justified under article 58(b)(i) and (ii)¹⁶ in response to Mr Ongwen's 29 October 2015 request for interim release to the Kingdom of Belgium.¹⁷
8. On 23 March 2016, the Pre-Trial Chamber found substantial grounds to believe that Mr Ongwen committed the 70 charges confirmed against him.¹⁸

¹¹ ICC-02/04-01/15-461, para. 10 (referring to ICC-02/04-01/15-261-Conf-Exp.).

¹² Regulation 23bis(2) of the Regulations of the Court.

¹³ ICC-02/04-01/15-6.

¹⁴ ICC-02/04-01/15-34.

¹⁵ ICC-02/04-01/15-189.

¹⁶ ICC-02/04-01/15-349, para. 14.

¹⁷ ICC-02/04-01/15-332-Red2 at para 20.

¹⁸ ICC-02/04-01/15-422-Conf, paras. 14, 157.

9. Also on 23 March 2016, the Pre-Trial Judge reviewed Mr Ongwen's detention and denied his release given "that there has not been any change in the circumstances requiring Dominic Ongwen's detention since the issuance of the decision of 27 November 2015."¹⁹
10. On 13 June 2016, the Defence filed the Request.²⁰
11. On 15 June 2016, the Single Judge of the Trial Chamber invited observations²¹ on the Request from the Kingdom of the Netherlands and the Republic of Uganda to be submitted by 7 July 2016.

Mr Ongwen's communication restrictions

12. On 5 June 2015, the Pre-Trial Judge, in response to a request by the Prosecution, prohibited all telephone communications by Mr Ongwen other than those to and from his Counsel.²²
13. On 24 June 2015, after reviewing submissions by both parties²³, the Pre-Trial Judge found "reasonable suspicion" that a meeting held in Uganda during which Mr Ongwen spoke by phone from the Court's Detention Centre with five potential Prosecution witnesses "was not innocuous but was held with a view to exercising some form of influence on persons who possess information relevant to the case."²⁴
14. On 3 August 2015, the Pre-Trial Judge, after further reviewing Mr Ongwen's communications while incarcerated, confirmed the existence of "reasonable suspicion that there had been attempts to exercise some form of influence on

¹⁹ ICC-02/04-01/15-421 at para. 4.

²⁰ ICC-02/04-01/15-461.

²¹ ICC-02/04-01/15-469.

²² ICC-02/04-01/15-242, para. 1.

²³ See ICC-02/04-01/15-248-Conf-Exp and –Red (Defence) and ICC-02/04-01/15-253-Conf and –Red (Prosecution).

²⁴ ICC-02/04-01/15-254, para. 6. The Registrar was ordered to prepare a confidential, *ex parte*, Chamber-only report with a list and summary of Mr Ongwen's phone conversations between 25 May and 5 June 2015 (ICC-02/04-01/15-254), which was filed 9 July 2015. ICC-02/04-01/15-261-Conf-Exp and –AnxA.

persons who possess information relevant to the case” and the need for communication restrictions pursuant to article 57(3)(a) and (c) and regulation 101(2).²⁵ Furthermore, the Pre-Trial Judge removed [REDACTED] from Mr Ongwen’s contact list.²⁶

15. On 20 May 2016, the Registry filed a report on its monitoring of Mr Ongwen’s telephone communications.²⁷ Based on this report and a response by the Defence,²⁸ the Chamber evaluated Mr Ongwen’s current communication restrictions and found them justified on 30 May 2016.²⁹ In addition, seven requested individuals were added to Mr Ongwen’s approved communication list, after approval by the Registrar and no objection by the Prosecution.³⁰

16. Mr Ongwen’s trial has been scheduled to begin on 6 December 2016.³¹

Submissions

Mr Ongwen’s continued detention is justified under articles 60(3) and 58(1).

17. Dominic Ongwen does not identify “changed circumstances”³² under article 60(3)³³ to the factors evaluated in previous decisions concerning his detention,³⁴

²⁵ ICC-02/04-01/15-283, paras. 9, 12; pg. 8. Mr Ongwen’s non-privileged telephone calls were ordered to be 1) actively monitored by the Registrar, who would terminate and report any calls “in which either Dominic Ongwen or his interlocutor attempt to interfere with or intimidate individuals who possess information relevant to the case, or interfere with the collection of evidence”; 2) restricted to 200 minutes each month; and 3) “confined to private matters” that do not “involve issues concerning witnesses in the case or the use of code or pseudonyms.” In addition, the Registrar would inform the Chambers of any changes to this list, which would be subject to approval by the Chamber.

²⁶ ICC-02/04-01/15-283, pg. 8.

²⁷ ICC-02/04-01/15-443-Conf-Exp.

²⁸ ICC-02/04-01/15-444-Conf-Exp-Red.

²⁹ ICC-02/04-01/15-450-Red, para. 4.

³⁰ ICC-02/04-01/15-450-Red, para.4.

³¹ ICC-02/04-01/15-449.

³² Changed circumstances are “a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a chamber that a modification of its prior ruling is necessary.” ICC-01/04-02/06-477, para. 10.

³³ Under article 60(3), a previous ruling on detention, release or conditions of release can be modified if a Chamber “is satisfied that changed circumstances so require.” Without citation the Defence asserts that “[t]he 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.” Request, para. 19. Because this standard is not cited and strays outside of the

and thus he should remain incarcerated. Moreover, the conditions warranting Mr Ongwen's continued detention under article 58(1)³⁵ of the Statute persist.

A. Many of the Request's arguments were already addressed and found unpersuasive by the initial detention decision.

18. The Request primarily rehashes old arguments that have already been rejected and thus do not constitute changed circumstances under article 60(3).

19. The Defence argues that "Mr Ongwen will never contemplate absconding,"³⁶ has "willingly attended Court during every hearing and status conference,"³⁷ and "will appear before the court whenever required or asked."³⁸ The initial detention decision addressed these points, finding that Mr Ongwen "evaded arrest for more than nine years after the Court's warrant for his arrest, of which he appears to have been aware," which "demonstrates both his ability and willingness to abscond and manifestly contradicts the Defence statement that he 'appeared before the Court when so required.'"³⁹ In addition, Mr Ongwen allegedly has gainful employment in the Detention Centre and has been able to save at least 1,000 euros, which is a significant amount of money in Uganda and would enable him to abscond if granted interim release there.⁴⁰

applicable 60(3) and 58(1) analysis, the Prosecution does respond to all of the Defence arguments under this framework that are unnecessary to the decision before the Chamber.

³⁴ ICC-02/04-01/15-349, ICC-02/04-01/15-421.

³⁵ Under article 58(1), an arrest warrant issues if a chamber is satisfied that "(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) The arrest of the person appears necessary:(i) To ensure the person's appearance at trial;(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances."; *see also* article 60(2), which states that a person shall continue to be detained if a chamber "is satisfied that the conditions set forth in article 58(1) of the Rome Statute are met."

³⁶ Request, para. 20.

³⁷ Request, para. 23.

³⁸ Request, para. 30.

³⁹ ICC-02/04-01/15-349, para. 16 (internal citation omitted).

⁴⁰ ICC-02/04-01/15-444-Conf-Exp-Red, para. 12. This access to 1,000 euros directly contradicts Mr Ongwen's assertion that he "does not have the financial means to abscond." Request, para. 24.

20. The Defence argues that “[t]here is no immediate incentive to encourage Mr Ongwen to abscond,”⁴¹ he is “not frightened of the 70 charges he faces,”⁴² and he is “convinced [...] that he has a strong defence”⁴³ such that “his best option in life is a fair trial at the ICC.”⁴⁴ Addressing these arguments, the initial detention decision found the “risk of Dominic Ongwen again attempting to evade the proceedings before the Court is compounded by the gravity of the intended charges, comprising 67 different counts of war crimes and crimes against humanity. [...] The very long prison sentence that Dominic Ongwen may face in case of conviction constitutes a strong possible incentive to abscond, increasing the risk of flight.”⁴⁵ The subsequent Confirmation of Charges Decision further increases Mr Ongwen’s incentive to abscond.⁴⁶ The fact that Mr Ongwen faces an unprecedented number of charges carrying a potentially lengthy prison sentence makes him more likely to abscond.⁴⁷

21. The Defence argues that “[s]ince his surrender to the Court, Mr Ongwen has never shown any distrust of the process of this Court.” Rejecting this submission, the initial detention decision found that trust could not be placed in Mr “Ongwen’s respect for the authority of the Court in case he was released,” in part because the Defence took contrary positions on whether Mr Ongwen surrendered voluntarily to the Court.⁴⁸ Mr Ongwen’s recent behavior confirms a

⁴¹ Request, para. 21.

⁴² Request, para. 27.

⁴³ Request, para. 28; *see also* para. 29.

⁴⁴ Request, para. 29.

⁴⁵ ICC-02/04-01/15-349, para 18.

⁴⁶ ICC-02/04-01/05-422-Conf, para. 157.

⁴⁷ *Prosecutor v. Lubanga*, Judgment on Interim Release Appeal, ICC-01/04- 01/06-824 (OA 7), 13 February 2007, para. 136 (finding that it was not error for the Pre-Trial Chamber to consider “the gravity of the crimes allegedly committed by the Appellant” in conjunction with whether the Appellant may abscond); *see also Prosecutor v. Katanga & Ngudjolo*, Judgment on Ngudjolo’s Interim Release Appeal, ICC- 01/04-01/07-572 OA 4, 9 June 2008, paras. 21, 24; *Prosecutor v. Bemba*, Judgment on Interim Release Appeal, ICC-01/05-01/08-323 OA, 16 December 2008, para. 55; *Prosecutor v. Bemba*, Judgment on Prosecution’s Conditional Release Appeal, ICC-01/05-01/08-631-Red OA2, 2 December 2009, paras. 67-68; *Prosecutor v. Mbarushimana*, Judgment on Interim Release Appeal, ICC-01/04-01/10-283 OA, 14 July 2011, para. 21; *Prosecutor v. Gbagbo*, Judgment on Interim Release, ICC-02/11-01/11-278-Red OA, 26 October 2012, para. 54.

⁴⁸ ICC-02/04-01/15-349, para. 17.

lack of respect for authority—two of his calls were terminated this year⁴⁹ for failing to comply with court-ordered restrictions and Registry protocol. If he is unwilling to abide by the Court’s requirements in a constrained environment in which he knew his calls were being monitored, then it follows that he will be likewise unwilling to follow any parameters the Chamber would impose on his requested release.⁵⁰

22. As outlined above, Mr Ongwen has not demonstrated any change in the circumstances that underpinned prior court findings about his likelihood to appear for his trial, incentives to abscond, or overall compliance with court directives.

B. The two allegedly changed circumstances cited by the Defence do not justify the release of Mr Ongwen.

23. The Request identifies two allegedly changed circumstances since Mr Ongwen’s detention was last evaluated⁵¹ on 23 March 2016: the anticipated completion of the Prosecution’s investigations at the end of June 2016⁵² and the “number of charges” confirmed against Mr Ongwen, which “necessitates his personal and on-site involvement” in Uganda to assist in his defence.⁵³ Neither of these situations meets the criteria of “changed circumstances” under article 60(3) because they do not constitute “a new fact satisfying a chamber that a modification of its prior ruling is necessary.”⁵⁴

⁴⁹ ICC-02/04-01/15-450-Red, para. 2.

⁵⁰ ICC-02/04-01/15-349, para. 17 (quoting ICC-02/04-01/15-243, paras. 19-20.) In addition, if Mr Ongwen were released, there is no effective means to prevent contact with witnesses, many of whom are victims of sexual violence or remain vulnerable to the power he exerted over them during their time in captivity.

⁵¹ ICC-02/04-01/15-421 at para. 4. This decision was issued the same day as the decision confirming 70 charges against Mr Ongwen. See ICC-02/04-01/15-422-Conf.

⁵² Request, para. 33.

⁵³ Request, paras. 38-39.

⁵⁴ ICC-01/04-02/06-477, para. 10.

- (i) *The risk of Mr Ongwen's interference with the integrity of the trial process still exists.*

24. The end of the investigation stage of the trial process does not change the circumstances underlying the initial ruling⁵⁵ that Mr Ongwen's detention is "necessary to ensure that he does not obstruct or endanger the investigation *or the court proceedings*."⁵⁶ The decision noted that the "fact that Dominic Ongwen managed to exercise pressure on some witnesses even from within the Court's Detention Centre renders concrete and identifiable the risk that, if released, he may exercise a similar form of pressure over other witnesses, some of whom appear also to have had a personal relationship with Dominic Ongwen or to have been subordinate to him within the Lord Resistance Army hierarchy."⁵⁷

25. This ruling was made in the context of Mr Ongwen's request for release to Belgium, where his efforts would ostensibly have been limited to third parties, telephone, and email.⁵⁸ His current application requests release to the Republic of Uganda,⁵⁹ where almost all Prosecution witnesses currently reside and where Mr Ongwen could have direct contact with witnesses in order to influence their evidence.

26. The Defence assertion that the end of the investigation phase of the trial process constitutes a change in circumstance with regard to the risk of witness interference⁶⁰ is not accurate. In many ways, the risk of witness tampering increases after the conclusion of the investigation because the information put

⁵⁵ As demonstrated by these judicial findings, the Defence is incorrect in intimating that Mr Ongwen's attempts at witness interference were backed only by "Prosecutorial assertions" based on incorrect translations. Request, para. 32.

⁵⁶ ICC-02/04-01/15-349, para. 19 (emphasis added).

⁵⁷ ICC-02/04-01/15-349, para. 23.

⁵⁸ ICC-01/04-01/10-283, para. 60 (finding that in the context of the case, "it is not an unreasonable prediction that phone calls or e-mails may be used to continue to contribute to the commission of crimes.").

⁵⁹ Request, para. 41. Mr Ongwen also indicates a willingness to go to "any country of his choice willing to host him." As no other country is identified, the Prosecution responds specifically only to the Republic of Uganda.

⁶⁰ Request, para. 33.

forward by potential witnesses during the investigation is known.⁶¹ For an accused who has already demonstrated a willingness to interfere with potential witnesses, even from within the Detention Centre, the temptation to do so at this stage of the proceedings—when 70 charges are confirmed against him based on these very witnesses—is greater as trial approaches.

27. Even if the Prosecution's pending motions to admit witness testimony under rule 68 and article 56 are granted, these witnesses represent a minority of the individuals the Prosecution intends to present at trial—an estimated 70 other witnesses will also contribute important evidence. In addition, some of these witnesses may still testify further at trial and could, at any stage, retract admitted evidence.

(ii) *The confirmation of charges does not necessitate Mr Ongwen's release to participate in his defence on-site in Uganda.*

28. The confirmation of charges against an accused does not constitute a changed circumstance justifying in-person and on-site participation in the accused's defence. The charges that were confirmed, and the conduct underlying them, have been known to the Defence since the initial detention decision.⁶² In addition, Mr Ongwen has a capable and experienced Defence team, including local investigators, and has never been precluded from unrestricted contact with his counsel while detained. [REDACTED]⁶³ The Request does not demonstrate that Mr Ongwen's meaningful participation in his defence is hampered by his incarceration.

⁶¹ See, e.g., ICC-02/11-01/11-278-Red, para. 65 (finding that “the disclosure of evidence ‘amplified’ the risk to the investigation and the court proceedings in case of Mr Gbagbo's release. . . . Disclosure enhances the detainee's knowledge of the Prosecutor's investigation” and therefore “may be a relevant factor” in analysis under article 58(1)(b)). As the confirmation proceedings represent yet another form of disclosure of evidence against an accused, the Prosecution submits that this analysis is equally if not more applicable here.

⁶² The “Notice of intended charges against Dominic Ongwen” was filed on 18 September 2015. ICC-02/04-01/15-305-Red2.

⁶³ [REDACTED.]; ICC-02/04-01/15-450-Red, para. 4.

C. The risks articulated in the initial detention ruling can only be managed if Mr Ongwen is detained.

29. Mr Ongwen does not show a change in circumstances to negate the initial detention ruling that “the risks identified [in the order] can only effectively be managed in the Court’s Detention Centre,” finding unsuitable “the possibility of release with conditions.”⁶⁴ This conclusion is magnified by Mr Ongwen’s contradictory request to seek release into Uganda to “cultivate the land and await for [sic] trial”⁶⁵ when less than a year ago he maintained that “due to imminent danger to [his] life in Uganda [...] it is not conceivable that Mr Ongwen would be inclined to escape and return to Coorom” if released to Belgium.⁶⁶

30. As Mr Ongwen survived for 27 years in the bush in and around Northern Uganda, release to Uganda carries a great risk that he could easily abscond, regardless of any conditions imposed on his release.⁶⁷ Uganda borders two non-state parties to the Rome Statute—South Sudan and Rwanda—which are not obliged to cooperate with the Court should Mr Ongwen abscond there. The Court is likewise not equipped to retrieve Mr Ongwen should he melt into the bush or neighbouring countries, as evidenced by the outstanding warrant against Joseph Kony and the nine years that Mr Ongwen himself was able to evade capture.

31. Based on the foregoing, the Prosecution submits that circumstances have not changed since Mr Ongwen’s last detention review, and no further inquiry into the release or detention ruling is required.⁶⁸

⁶⁴ ICC-02/04-01/15-349, para. 24.

⁶⁵ Request, para. 35.

⁶⁶ ICC-02/04-01/15-332-Red2, paras. 12, 14, 18.

⁶⁷ The Request advances a number of implausible conditions (para. 40) given the lack of technological resources available to install and monitor GPS tracking that could show the location of an individual who may abscond into another country. In addition, this technology is useless without personnel on the ground able and equipped to arrest an individual immediately for violation of any imposed conditions.

⁶⁸ ICC-01/04-02/06-477, para. 10.

32. Even if the Chamber concludes that there are changed circumstances under article 60(3), then “their impact on the factors that formed the basis for the decision to keep the person in detention” must be considered.⁶⁹ Such consideration, as illustrated above, supports Mr Ongwen’s continued detention, particularly since the application of articles 60(2) and 58(1) lead to the same conclusion.⁷⁰

The restrictions on Mr Ongwen’s communications are justified and necessary.

A. *Mr Ongwen does not meet the standard for reconsideration of the 30 May 2016 decision upholding the restrictions on his communications.*

33. Though not framed as such, the Request essentially seeks reconsideration⁷¹ of the 30 May 2016 decision by the Chamber that Mr Ongwen’s current communication restrictions were justified, “in particular those concerning the active monitoring of all non-privileged telephone communications of Mr Ongwen.”⁷²

34. The Request does not meet the reconsideration standard.⁷³ Instead of showing “exceptional circumstances”, the Defence outlines general principles of law without applying any of these principles to Mr Ongwen specifically,⁷⁴ argues that a decision justifying communication restrictions must be “necessary” and “proportionate,”⁷⁵ and then alleges without support that “the necessity required

⁶⁹ ICC-01/04-02/06-477, para. 10.

⁷⁰ Article 58(1)(a) is met by the confirmation of charges. Under article 58(1)(b), Mr Ongwen needs to be detained to ensure that he appears for trial and does not “obstruct or endanger” the court proceedings under subparts (i) and (ii). As the fulfilment of only one article 58(1)(b) condition is sufficient to justify continued detention (*see* ICC-01/04-01/06-824, para. 139), the Chamber need not reach subpart (iii) as to whether Mr Ongwen will commit future crimes, which could include interference with witnesses as outlined in article 70. Request, para. 35.

⁷¹ ICC-01/09-02/11-863, para. 11 (noting that a chamber can reconsider its own decisions, “prompted by (one of) the parties or *proprio motu*”).

⁷² ICC-02/04-01/15-450-Red, para. 4.

⁷³ Reconsideration is limited to “exceptional circumstances”, which “can include new facts or arguments” (ICC-01/09-02/11-863, para. 11 (internal quotation marks and citation omitted)), a “clear error of reasoning or that reconsideration is necessary to prevent an injustice.” ICC-01/05-01/13-1896, para. 8 (internal quotation marks omitted).

⁷⁴ Request, paras. 42-45, 49-60, 62-64, 69-71.

⁷⁵ Request, para. 46.

to impose restrictions has not been demonstrated” because the investigation phase of the trial process is drawing to a close.⁷⁶

35. These arguments ignore the analysis conducted by the Chamber and the Pre-Trial Judge in decisions outlining the necessity of the communication restrictions while balancing the rights of Mr Ongwen with “the need to preserve the integrity of the evidence,”⁷⁷ which was not temporally limited to the investigation phase.

36. Further, the Request does not detail any actual deprivation of contact by Mr Ongwen, and thus there is no factual showing that Mr Ongwen’s rights have been violated because of the current communication restrictions. In fact, his requests for certain concessions have been considered and acted upon, resulting in the retraction of the previous prohibition against contact with anyone other than counsel⁷⁸ and the addition of seven requested individuals to Mr Ongwen’s approved communication list.⁷⁹

37. In addition, as outlined above, the conclusion of the investigation phase of the trial process in no way insulates witnesses from intimidation and interference. If anything, the stakes become higher as Mr Ongwen moves closer to his trial.

38. For these reasons, the Request for unrestricted communication does not meet the reconsideration standard, and the Chamber’s 30 May 2016 order should stand.

B. Mr Ongwen’s behavior justifies the need for restrictions on his communications.

39. If the Chamber finds that the Request meets the standard for reconsideration, the communication restrictions are still justified because, as outlined below, the Request was not transparent about the relief sought, and Mr Ongwen continues to interfere with witnesses during his phone calls from the Detention Centre.

⁷⁶ Request, para. 47.

⁷⁷ ICC-02/04-01/15-283, paras. 13-14.

⁷⁸ ICC-02/04-01/15-283, paras. 13-14.

⁷⁹ ICC-02/04-01/15-450-Red, para.4.

- (i) *The Request is not transparent about the sought contact between Mr Ongwen and his “alleged children”.*

40. The Request asks that his “alleged children”⁸⁰ be permitted “to contact, and if financially possible, visit Mr Ongwen”⁸¹ without making a showing that such contact was ever requested and denied. This application also neglects a crucial detail: the children who purportedly seek contact with Mr Ongwen belong to [REDACTED],⁸² [REDACTED] removed from Mr Ongwen’s contact list by the Pre-Trial Judge due to [REDACTED] attempts to interfere with witnesses.⁸³ It seems unlikely that minor children, [REDACTED],⁸⁴ could engage in telephone conversations with Mr Ongwen without the involvement of [REDACTED].

41. Granting the Request would dismantle the protections enacted to safeguard witnesses and potential witnesses from interference, and Mr Ongwen’s behavior supports the continuation of the existing communication restrictions.

- (ii) *Mr Ongwen is still engaging in apparent witness interference.*

42. The communication restrictions are also justified by Mr Ongwen’s recent actions in the terminated calls.⁸⁵ [REDACTED].⁸⁶ [REDACTED]Mr Ongwen then directs that certain payments should be made to Prosecution witnesses and potential

⁸⁰ Request, paras. 2, 48, 50, 54, 61, 65, 71, 72, Annexes C and D.

⁸¹ Request, para. 61.

⁸² Compare the authors of the Annexes C and D to the Defence Request with [REDACTED], UGA-OTP-0253-0573 at 0574-0575. The names of the children are the same.

⁸³ ICC-02/04-01/15-276-Conf, ICC-02/04-01/15-283; [REDACTED].

⁸⁴ [REDACTED], UGA-OTP-0253-0573 at 0574-0575.

⁸⁵ As recently as 30 March 2016, and also on 11 January 2016, two of Mr Ongwen’s telephone conversations were terminated (ICC-02/04-01/15-450-Red, para. 2) [REDACTED].

⁸⁶ [REDACTED.]

witnesses in this case—[REDACTED]⁸⁷⁸⁸⁸⁹⁹⁰⁹¹, potentially amounting to a violation of article 70⁹² of the Statute, [REDACTED].⁹³

43. Paying witnesses and potential witnesses, regardless of their relationship to the accused, and recording messages and otherwise using third parties to pass on prohibited communications [REDACTED] violates the Pre-Trial Judge’s directive “that any intentional interference with the investigation or proceedings will not be tolerated. If in the future information similar to that which led to the imposition of the initial restrictions is brought to the attention of the Chamber, the Chamber will have to reconsider the possibility of imposing more stringent measures to restrict the communications of Dominic Ongwen.”⁹⁴

44. As outlined above, Mr Ongwen has demonstrated that the existing restrictions on his communication are necessary to prevent interference with witnesses and potential witnesses and to ensure the integrity of the evidence.

The reclassification of the 9 July 2015 report by the Registrar is justified.

45. As outlined above, Mr Ongwen continues to engage in witness interference. The 9 July 2015 report by the Registrar⁹⁵ on Mr Ongwen’s phone conversations between 25 May and 5 June 2015 informed the 3 August 2015 finding by the Pre-Trial Judge that there was “reasonable suspicion that there had been attempts to exercise some form of influence on persons who possess information relevant to the case.”⁹⁶ It follows that there is information in this report filed as “confidential, *ex parte*, Chamber only” that is relevant not only for the evaluation

⁸⁷ [REDACTED].

⁸⁸ [REDACTED].

⁸⁹ [REDACTED].

⁹⁰ [REDACTED].

⁹¹ [REDACTED].

⁹² Article 70(1)(c) prohibits “[c]orruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence.”

⁹³ This conduct is addressed in a concurrent filing.

⁹⁴ ICC-02/04-01/15-283, para. 17.

⁹⁵ ICC-02/04-01/15-261-Conf-Exp and –AnxA.

⁹⁶ ICC-02/04-01/15-283, paras. 9, 12.

of the restrictions on Mr Ongwen's communications but also to the concurrent filing on any potential article 70 violations. For these reasons, the Prosecution joins the Defence request to reclassify as confidential the 9 July 2015 report by the Registrar.

Relief requested

46. Based on the foregoing, the Prosecution respectfully requests that the Chamber:

- (i) deny Mr Ongwen's requests for conditional release and reconsideration of the existing communication restrictions, and
- (ii) grant the request to reclassify as confidential the 9 July 2015 report by the Registrar.



Fatou Bensouda
Prosecutor

Dated this 12th day of July 2016
At The Hague, The Netherlands