

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **22 February 2019**

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 “Corrected version of
‘Defence Request for Production of Correspondence Addressed to Mr Ongwen’
(ICC-02/04-01/15-1411-Conf), filed 14 January 2019”
(ICC-02/04-01/15-1411-Conf-Corr), filed 29 January 2019**

Source: Defence for Dominic Ongwen

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

Fatou Bensouda, Prosecutor
 James Stewart, Deputy Prosecutor
 Benjamin Gumpert, QC

Counsel for the Defence

Krispus Ayena Odongo
 Chief Charles Achaleke Taku
 Beth Lyons

Legal Representatives of the Victims

Joseph Akwenyu Manoba
 Francisco Cox

Common Legal Representative for Victims

Paolina Massidda
 Jane Adong

Unrepresented Victims**Unrepresented Applicants
(Participation/Reparation)****The Office of Public Counsel for Victims**

Paolina Massidda
 Caroline Walter
 Orchlon Narantsetseg
States' Representatives

**The Office of Public Counsel for the
Defence**

Xavier-Jean Keita

Amicus Curiae**REGISTRY****Registrar**

Peter Lewis

Counsel Support Section**Victims and Witnesses Unit**

Nigel Verrill

Detention Section**Victims Participation and Reparations
Section****Other**

I. INTRODUCTION

1. Around 28 May 2018 a letter was delivered to the International Criminal Court Detention Center ('ICC' and 'Detention Center'). From information provided to the Defence, the letter appears to have been received from P-214 and P-214's and Mr Ongwen's daughter. The Defence is seeking an order from Trial Chamber IX ('Trial Chamber') for production of the letter sent to Mr Ongwen and his Defence as well as production of material which establishes its chain of custody.
2. The Director of Judicial Services has endorsed the Chief Custody Officer's decision to not provide the letter to Mr Ongwen or his Defence team. Noting that "the fact that the author of the letters seem [*sic*] to be a prosecution witness" it was the Director's "view that the Defence should raise the matter with the relevant Chamber".¹ Pursuant to the Court's legal texts, the letter should be provided to Mr Ongwen and his Defence. Moreover, the Court's legal framework, interpreted through the lens of the international human right to family life, makes the provision of the letter further imperative.
3. Additionally, the Defence requests production of the emails that enabled the Chief Custody Officer to conclude "with a high degree of probability"² that source of the letters was the journalist who inquired with the press office about delivering letters on 13 April 2018.
4. The present request is filed *ex parte* as the Defence submits that the contents of the letters should remain a private matter for Mr Ongwen and the sender of the letter unless they are brought into the proceedings by the Defence. If the Trial Chamber considers that the Prosecution should be notified of the contents of this request, then it is submitted that there should be no provision of the letters themselves to the Prosecution because their contents are protected from disclosure by the international protected human right to privacy.

II. APPLICABLE LAW

5. Pursuant to Article 64(2), the Trial Chamber must "ensure that a trial is fair" and "is conducted with full respect for the rights of the accused".

¹ UGA-OTP-0018-3446.

² UGA-OTP-0018-3442.

6. Subject to Regulation 99(1)(i) of the Regulations of the Court ('RoC') "*Every detained person shall* be entitled, inter alia, to the following: [...] (i) To communicate by letter or telephone with his or her family and other persons."³ Regulation 99(2) RoC specifies that the details shall be "shall be set out in the Regulations of the Registry, including any restrictions necessary in the interests of the administration of justice or for the maintenance of the security and good order of the detention centre."
7. Regulation 169 of the Regulations of the Registry ('RoR') prescribes the procedure for incoming and outgoing mail.
 - a. Sub-regulation 169(2) of the RoR indicates that the Chief Custody Officer shall maintain a log of all incoming and outgoing mail. The log shall clearly show the name of the detained person, the name of the sender or of the addressee, if known, and the dates on which the item was received or sent.
 - b. If the mail falls outside of the senders prescribed in sub-regulation 169(1) then the Chief Custody Officer must review it. Pursuant to sub-regulation 169(3)(a), that review is to screen the mail for breaches of the Regulations of the Registry and Court, other detention rules, or Chamber orders. Also part of the review, pursuant to sub-regulation 169(b) is consideration of whether the mail provides reasonable grounds to believe that the detained person or correspondent is attempting to arrange escape, interfering with or intimidating witnesses, interfere with the administration of justice, "Otherwise disturb the maintenance of the security, safety and good order of the detention centre". Finally pursuant to sub-regulation 169(3)(c) the review also includes consideration of whether the item "[j]eopardises public safety or the rights or freedoms of any person".
 - c. If the letter falls outside of the conditions, in sub-regulation 169(3)(a) through (c), then it "shall be delivered to a detained person".
 - d. If the incoming mail is not to be delivered, then then pursuant to Regulation 169(4)(b), the detained person "shall be informed accordingly".
8. The Trial Chamber has several general powers to order the production of material.

³ Emphasis added.

- a. Article 64(3)(c) states that “[s]ubject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.”; and
 - b. Pursuant to Article 64(6)(d): “(6) [...] the Trial Chamber may, as necessary: [...] (d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties”; and
9. Pursuant to Article 64(6)(f), the Trial Chamber may “[r]ule on any other relevant matters.”
10. According to Rule 84:

In order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64, paragraphs 3 (c) and 6 (d), and article 67, paragraph (2), and subject to article 68, paragraph 5, make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence.

11. Pursuant to Article 21(3), “[t]he application and interpretation of law [at the ICC] pursuant to [Article 21] must be consistent with internationally recognized human rights”.

III. CONFIDENTIALITY

12. Pursuant to Regulations 23*bis* of the Regulations of the Court (‘RoC’), this request is submitted as confidential as it refers to the contents of confidential evidence.

IV. BACKGROUND

13. On 25 June 2015,⁴ the Single Judge of Pre-Trial Chamber II (‘PTC’) re-affirmed an oral order that granted a Prosecution request restricting Mr Ongwen’s communications.
14. Following that order, the Single Judge of the PTC granted two Prosecution requests to institute Article 56 proceedings in relation to several Prosecution witnesses on 27 July 2015⁵

⁴ ICC-02/04-01/15-254, para. 2.

⁵ ICC-02/04-01/15-277-Conf.

and 15 August 2015⁶ respectively. Unlike the 15 August 2015 Article 56 proceedings decision,⁷ the 27 July 2015 decision contains no order on prohibition on contact.

15. On 15 August 2015 the Single Judge partially relaxed the restrictions on Mr Ongwen's communications. The Single Judge required limits on the duration of Mr Ongwen's calls⁸ and, without citation of precisely whom, exclusion "from the currently authorised list of non-privileged telephone contacts of Dominic Ongwen the two individuals which provide the basis for the current restrictions".⁹
16. Pursuant to the Article 56 order, the Single Judge of the Pre-Trial Chamber II heard from P-226¹⁰ and P-227¹¹ between 15 and 19 September 2015 and¹² from P-101,¹³ P-99,¹⁴ P-214,¹⁵ P-236,¹⁶ P-235¹⁷ and P-198¹⁸ between 9 and 18 November 2015.
17. On 28 May 2018, the Defence wrote to the Detention Center inquiring about a letter from P-214 and her daughter [REDACTED].¹⁹ A Defence team member had learned from Mr Ongwen that a letter had been delivered to the Detention Center.
18. On 30 May 2018, the Detention Center replied to the 28 May query.²⁰ It provided the details of its inquiries into the source of the letter. According to the Chief Custody Officer, the letters were provided to the Detention Center [REDACTED].
19. Apparently, [REDACTED]
20. On 31 May 2018, the Defence wrote²¹ to the Director of the Division of Judicial Services ('DJS') requesting a copy of the original email from [REDACTED], the letters, and envelopes in which the letters came. Receipt was confirmed by the Registry that day.²²

⁶ ICC-02/04-01/15-316-Conf.

⁷ *Ibid.*, p. 11.

⁸ ICC-02/04-01/15-283, para. 15.

⁹ ICC-02/04-01/15-283, para. 15; The Trial Chamber decision ICC-02/04-01/15-450-Conf, para. 1 provides no citation indicating who the two individuals are as well. Decision ICC-02/04-01/15-553, para. 1 indicates that these are D26-13 and P-214.

¹⁰ ICC-02/04-01/15-T-8-CONF-ENG; ICC-02/04-01/15-T-9-CONF-ENG.

¹¹ ICC-02/04-01/15-T-10-CONF-ENG; ICC-02/04-01/15-T-11-CONF-ENG.

¹² ICC-02/04-01/15-316-Conf.

¹³ ICC-02/04-01/15-T-13-CONF-ENG; ICC-02/04-01/15-T-14-CONF-ENG.

¹⁴ ICC-02/04-01/15-T-14-CONF-ENG.

¹⁵ ICC-02/04-01/15-T-15-CONF-ENG.

¹⁶ ICC-02/04-01/15-T-16-CONF-ENG.

¹⁷ ICC-02/04-01/15-T-17-CONF-ENG.

¹⁸ ICC-02/04-01/15-T-18-CONF-ENG.

¹⁹ UGA-D26-0018-3440. The ICC-DC confirmed receipt on 29 May 2018 (UGA-D26-0018-3441).

²⁰ UGA-D26-0018-3442.

21. On 8 June 2018, the Registry responded²³ conveying the response of the DJS. It stated:

The envelopes in which the letters came shall be provided to you by the Detention Section. With respect to the related emails, the Registry is under no obligation to share them with any third party, including the Defence team. As regards the letters per se, given the decision taken in this regard by the Chief Custody Officer, which was notified to you, and the fact that the author of the letters seem to be a prosecution witness, it is Marc's view that the Defence should raise the matter with the relevant Chamber. In such a case, the Registry will stand ready to provide the Chamber with any relevant information as may be required.

V. SUBMISSIONS

22. As indicated in the background, the present request for an order to the Registrar is required because the Registry refuses to provide the items requested by the Defence.

A. The letters should be provided to Mr Ongwen and his Defence under the Courts applicable rules

23. The Court's legal regime requires provision of the letter. Regulation 99(1)(i) RoC is unequivocal: *every* detained person shall be entitled to communicate by letter or telephone with his or her family and other persons unless, as per Regulation 99(2) RoC, conditions set out in the RoR specify otherwise. The Defence understands that the letters are from P-214 and Mr Ongwen's daughter and the Registry did not contradict this when it was asserted. Thus it appears that the letters are either from Mr Ongwen's family or "other persons".
24. No restrictions referred to in Regulation 169(3) RoR were referred to.
25. The Chief Custody Officer did not refer to the administration of justice as a basis for denying the delivery of the letters. His reason for denying delivery on the basis that "that the author of the letters seem to be a prosecution witness" could suggest he contemplated this reason. There was no indication that the contents of the letter appeared in any way to interfere with the administration of justice otherwise it would have been mentioned. Therefore, that basis for not delivering it should be rejected.
26. The Defence notes additionally that there can be no basis for relying upon the fact that P-214 is a witness to deny delivery of the letters. Neither justice nor a witness will be interfered with if Mr Ongwen and his Defence receive the letters. Moreover, given that these two individuals

²¹ UGA-D26-0018-3445.

²² UGA-D26-0018-3444.

²³ UGA-D26-0018-3446.

have met recently face to face in the Detention Center between [REDACTED], and the Prosecution and OPCV are aware of this, there is no reason to withhold the letter. Whatever could have been said in the letter now could have been said face to face.

27. Similarly, the existence of the Detention Center visits support the argument that the letter should not be provided to the Prosecution and OPCV. The meetings at the Detention Center between P-214 and Mr Ongwen are recorded. The recordings will not enter the proceedings absent exceptional circumstances. For the purposes of providing the contents to the Prosecution and OPCV, the contents of the letter are no different than the recordings of the in person conversations. There is an expectation of privacy conditioned by the prison circumstances and unless exceptional circumstances occur, there is no automatic reason to provide the contents to the parties and participants.
28. The Court's legal framework requiring the provision of mail to a detained person contained in Regulation 99(1)(i) RoC and Regulation 169(1) RoR also reflects fundamental international human rights as outlined in the jurisprudence of the European Court of Human Rights ('ECtHR') and the *United Nations Standard Minimum Rules for the Treatment of Prisoners* ('the Mandela Rules').²⁴
29. Following the ECtHR case-law, it is an essential part of a prisoner's right to respect for family life²⁵ that the prison authorities assist him or her in maintaining contact with his or her close family.²⁶ Similarly, the Mandela rules state: "[p]risoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits."²⁷
30. The right to respect for family life entails that a public authority cannot arbitrarily interfere with family life of an individual otherwise than in accordance with strict conditions including accordance with law²⁸ and pursuit of a legitimate aim.²⁹ Any interference must be

²⁴ United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955, available at: <http://www.refworld.org/docid/3ae6b36e8.html> [accessed 31 October 2018].

²⁵ Article 8, Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <https://www.refworld.org/docid/3ae6b3b04.html> ('ECHR') [accessed 12 December 2018]

²⁶ ECtHR: *Messina v Italy* (No 2), Application no. 25498/94, Judgment, 28 September 2000, available at: <http://hudoc.echr.coe.int/eng?i=001-58818>, para. 61; *Kurkowski v Poland*, Application no. 36228/06, Judgment, 9 April 2013, available at: <http://hudoc.echr.coe.int/eng?i=001-118332>, para. 95; *Vintman v Ukraine*, Application no. 28403/05, Judgment, 23 October 2014, available at: <http://hudoc.echr.coe.int/eng?i=001-147326>, para. 78.

²⁷ Mandela Rules, para. 37.

²⁸ *Marckx v Belgium*, Application no. 6833/74, 13 June 1979, available at: <http://hudoc.echr.coe.int/eng?i=001-57534>, para. 31.

proportionate to the aim pursued. A branch of the right to family includes ‘informational rights’.³⁰ Briefly, the failure to provide information about a member of the family may entail interference with the right to family life.

31. As there is no good reason to prevent transmission of the letter; withholding the letters is therefore disproportionate. The denial of family correspondences without a legitimate justification is thus an infringement of fundamental human rights. The Trial Chamber must ensure the trial is conducted in “full respect for the rights of the accused” and must apply the ICC legal framework – in this case Regulation 99 RoC and Regulation 169 RoR – “consistent[ly] with internationally recognized human rights” pursuant to Article 21(3). Therefore, simply stated: the provision of the letter is required under international human rights law.
32. The Trial Chamber also has the power to order the production of materials pursuant to Article 64(3)(c), Article 64(6)(d), Article 64(6)(f), and Rule 84.
33. Finally, though the material is not in the possession of the Prosecution, the Defence submits that trial fairness, as per Article 64(2), requires that – in the present specific circumstances – the logic of the disclosure obligations contained in Article 67(2) and Rule 77 should be applied analogously to the Registry. In other words if the material is exculpatory it must be disclosed and if it would be relevant to Defence preparation it must also be disclosed. Anything less would be to suggest that an Accused person can be denied information that might exculpate them or might assist them in seeking to Defend themselves.
34. In the present case, as has been previously argued in relation to other correspondences related to Mr Ongwen’s family, the materials may clarify the nature of the conjugal relations between Mr Ongwen and Prosecution witnesses and therefore may either be exculpatory in terms of Article 67(2) or relevant to the preparation of the Defence as understood in the context of Rule 77 of the RPE. Therefore, the Defence submits that there is yet a further basis for ordering disclosure of the material.

²⁹ See for example Article 8(2).

³⁰ ECHR, *Frühlich v. Germany*, Judgment (Merits and Just Satisfaction), 26 July 2017, Application no. 16112/15, available at: <http://hudoc.echr.coe.int/eng?i=001-185320>, para. 57.

B. The letters contents should not be provided to the Prosecution or OPCV

35. The right to privacy³¹ in respect to correspondences is an international human right applicable before the Court pursuant to Article 21(3). It may be subject to legitimate interference in accordance with the law and as necessary for the protection of important public interests.³² Even in the detention context, the correspondences are covered by the right to privacy. The sender and recipient have an expectation of some privacy.
36. Correspondences are explicitly mentioned in international texts setting out the international human right to privacy. Interference with this right is only permissible where it is necessary and the interference itself is proportionate to the aim pursued. The means of interference must be prescribed by law to avoid being arbitrary and therefore un-necessary. The Regulations of the Registry set out an exhaustive process for interfering with Mr Ongwen's mail. As noted above, no basis for withholding the mail has been asserted. The reasons for withholding the mail are related to public safety and ensuring the integrity of the legal process. These would be the same basis for breaching the privacy of Mr Ongwen's correspondences.
37. As no basis has been raised, the Defence submits that there is no basis for providing the letter to anyone other than Mr Ongwen and his Defence.

C. The provision of the email correspondences that enabled the Registry to determine the origin of the written letters

38. The Director of Judicial Services refused to provide the correspondences which enabled him to draw conclusions about the source of the letters noting that "the Registry is under no obligation to share them with any third party, including the Defence team".
39. The Defence respectfully requests the Trial Chamber to order the Registry to provide these correspondences because, should the letters have evidential value, they are necessary to demonstrate a chain of custody since, according to the Director, the origin of the letters is not entirely clear.

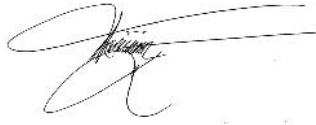
³¹ ICC-01/05-01/13-2275-Conf, A A2 A3 A4 A5, para. 284. See Council of Europe, *European Convention on Human Rights*, 4 November 1950, article 8(1): "Everyone has the right to respect for his private and family life, his home and his correspondence"; ACHR, article 11(2): "No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence [...]"; and United Nations, General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations Treaty Series 14668, Article 17: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence [...]".

³² ICC-01/05-01/13-2275-Conf, A A2 A3 A4 A5, para. 285.

VI. RELIEF

40. For the reasons described above, the Defence respectfully requests Trial Chamber IX to:
- a. ORDER the Registry to provide the correspondences described in paragraph 17 above to the Defence team for Mr Ongwen and Mr Ongwen himself only; and
 - b. ORDER the Registry to provide the email correspondences or other documents, records, or other information that led it to draw its conclusions as to the source of the letter as referred to in paragraphs 19, 38, and 39 above.

Respectfully submitted,



.....

Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 22nd day of February, 2019
At The Hague, The Netherlands