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**International
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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul Cano Pangalangan

SITUATION IN UGANDA

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

Public Redacted Version of Filing No. ICC-02/04-01/15-1631-Conf

**CLRV's Response to Defence Request to Lift
Communication Restrictions Placed Upon Mr Ongwen**

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The Common Legal Representative of the Victims¹ (the “CLRv”) opposes the “Defence Request to Lift Communication Restrictions Placed upon Mr Ongwen” (the “Request”).² The CLRv represents six of the eight persons concerned by the Request, namely: P-0099 (a/02101/16), P-0214 (a/02119/16), P-0227 (a/02112/16), P-0226 (a/02105/16), P-0235 (a/02115/16) and P-0236 (a/02149/16) (referred together as the “Vulnerable Witnesses”).

2. As a matter of principle the CLRv recalls that the persons concerned by the Request are still vulnerable and deplores the Defence’s *modus operandi* aiming at filing numerous applications in relation to said individuals (even after the issuance of relevant rulings of the Chamber) which potentially could have the effect of re-traumatisation if contacted several times just to verify their wishes. The Defence had all the necessary information to file a consolidated request instead of continuously addressing the Chamber on the matter of communication and contact between the Defence, the Vulnerable Witnesses, the Accused and and/or his children.

3. The CLRv submits that the part of the Request seeking meetings with the Vulnerable Witnesses is moot by virtue of the recent ruling of the Single Judge of the Trial Chamber (the “TC Single Judge”). Furthermore, the part of the Request related to the lifting of the restrictions of communication imposed upon Mr Ongwen should be rejected because: (i) the circumstances underlying the relevant ruling – as detailed

¹ See the “Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights” (Pre-Trial Chamber II, Single Judge), No. [ICC-02/04-01/15-350](#), 27 November 2015, p.19; the “Decision on issues concerning victims’ participation” (Pre-Trial Chamber II, Single Judge), No. [ICC-02/04-01/15-369](#), 15 December 2015, pp. 10-11; the “Second decision on contested victims’ applications for participation and legal representation of victims” (Pre-Trial Chamber II, Single Judge), No. [ICC-02/04-01/05-384](#), 24 December 2015, pp. 20-22; and the “Decision on the ‘Request for a determination concerning legal aid’ submitted by the legal representatives of victims” (Trial Chamber IX, Single Judge), No. [ICC-02/04-01/15-445](#), 26 May 2016, para. 13.

² See the “Defence Request to Lift Communication Restrictions Placed Upon Mr Ongwen”, No. ICC-02/04-01/15-1616-Conf, 27 September 2019 (the “Request”).

infra in the procedural background - remain unchanged; (ii) the risk of interference with the Vulnerable Witnesses remains at present; and (iii) specific procedures for contacting the Vulnerable Witnesses and their children - which balance the necessity to protect the integrity of the trial proceedings and Mr Ongwen's family rights - are already in place.

II. PROCEDURAL BACKGROUND

4. On 5 June 2015, the Single Judge of Pre-Trial Chamber II (the "PTC Single Judge") orally instructed the Registrar to put in place restrictions *ad interim* with regard to Mr Ongwen's telephone access (the "Decision No. 242").³ On 24 June 2015, the PTC Single Judge rendered the "*Decision on a request by the Prosecutor under article 57 of the Rome Statute and regulation 101(2) of the Regulations of the Court*" and found that:

*"[...] early June 2015 a meeting was held in Uganda under the auspices of a Ugandan nongovernmental organisation which included a group of individuals described as 'potential Prosecution witnesses' [the "2015 Meeting"]. Proceedings in the present case were discussed at the meeting, including opinions as to the guilt or innocence of Dominic Ongwen and the collaboration of participants with the Court. During the meeting, Dominic Ongwen spoke by telephone individually to five attendees of the meeting, all of whom are referred to by the Prosecutor to be "potential witnesses". [...] Based on the information available, the Single Judge considers that there is reasonable suspicion that the meeting in question [...] was held with a view to exercising some form of influence on persons who possess information relevant to the case [...]"*⁴

5. Therefore, the PTC Single Judge ordered the Registrar, *inter alia*, to file in the record of the case the list of persons whom Mr Ongwen is permitted to contact by telephone.⁵ The CLRV had not yet been appointed at the time and thus has no access

³ See the "Order concerning a request by the Prosecutor under regulation 101(2) of the Regulations of the Court" (Pre-Trial Chamber II, Single Judge), No. [ICC-02/04-01/15-242](#), 08 June 2015, paras. 1-5 (the "Decision No. 242").

⁴ See the "Decision on a request by the Prosecutor under article 57 of the Rome Statute and regulation 101(2) of the Regulations of the Court (Pre-Trial Chamber II, Single Judge), No. [ICC-02/04-01/15-254](#), 25 June 2015, para. 4 and 6.

⁵ *Idem*, p. 7.

to said list. On 13 July 2015, the PTC Single Judge decided to maintain the restrictions in place on Mr Ongwen's communications.⁶

6. On 27 July 2015, the PTC Single Judge rendered the "*Decision on the Prosecution application for the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute*" and found that P-0226 and P-0227 attended the 2015 Meeting which had the potential of tainting the evidence and that a unique investigative opportunity with respect to these witnesses existed pursuant to article 56 of the Rome Statute (the "Statute").⁷

7. On 3 August 2015, the PTC Single Judge issued the "*Decision concerning the restriction of communications of Dominic Ongwen*" (the "Decision No. 283") and further maintained the restrictions on Mr Ongwen's communications, pursuant to article 57(3)(a) and (c) of the Statute and regulation 101(2) of the Regulations of the Court, since the information available confirmed the reasonable suspicion, forming the basis for the initial restrictions.⁸ The PTC Single Judge also excluded P-0214 and D26-13 from the authorised list of non-privileged telephone contacts of Mr Ongwen and ordered the Registry to actively monitor Mr. Ongwen's telephone conversations.⁹ The PTC Single Judge stressed that such phone calls should be immediately terminated in case either Mr Ongwen or his interlocutor would attempt to interfere with or intimidate individuals having information relevant to the case or interfere with the collection of evidence.¹⁰

⁶ See the "Second decision on a request by the Prosecutor under article 57 of the Rome Statute and regulation 101(2) of the Regulations of the Court" (Pre-Trial Chamber II, Single Judge), No. [ICC-02/04-01/15-267](#), 13 July 2015.

⁷ See the "Decision on the 'Prosecution application for the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute'" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-277-Conf, 27 July 2015, paras. 5 and 8 and p. 9. A public redacted version of the decision was filed on 23 March 2019, see ICC-02/04-01/15-277-Red.

⁸ See the "Decision concerning the restriction of communications of Dominic Ongwen" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-283-Conf, 3 August 2015, para. 2. Pursuant to Pre-Trial Chamber II's instruction, this decision has been reclassified as "Public" on 29 September 2015, para. 9 (the "Decision No. 283").

⁹ *Idem*, para. 15.

¹⁰ *Ibidem*, p. 8.

8. On 12 October 2015, the PTC Single Judge rendered the *“Decision on the ‘Second Prosecution application to the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute’”* (the Decision No. 316) indicating that P-0214 helped in organising the 2015 Meeting and thus there existed a unique investigative opportunity with respect of the former “wives” of Mr Ongwen or witnesses P-0099, P-0101, P-0198, P-0214, P-0235 and P-0236 who attended said meeting.¹¹ Additionally, the PTC Single Judge ordered the Defence to refrain from contacting any of said witnesses in order to preserve the judicial process and to accord them the maximum protection.¹²

9. On 11 November 2015, the PTC Single Judge rendered the *“Order concerning the modalities for the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant”* (the “Decision No. 339 or the “Contact Protocol”)¹³ prohibiting the parties and participants, including the Accused, to contact or interview a witness of a calling party or participant.¹⁴

10. On 30 May 2016, the TC Single Judge issued the *“Decision on issues related to the restriction of communications of Dominic Ongwen”* (“Decision No. 450 or the “Phone Communication Regime During Trial”) [REDACTED].¹⁵ The TC Single Judge ruled that [REDACTED]¹⁶. It further ruled that [REDACTED].¹⁷

¹¹ See the “Decision on the ‘Second Prosecution application to the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute’ (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-316-Conf, 12 October 2015, paras. 10-16. A public redacted version of the decision was filed on 23 March 2019. see No. ICC-02/04-01/15-316-Red (the “Decision No. 316”).

¹² *Idem*, para. 18.

¹³ See the “Order concerning the modalities for the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant” (Pre-Trial Chamber II, Single Judge), No. [ICC-02/04-01/15-339](#), 11 November 2015 (the “Decision No. 339 or the “Contact Protocol”).

¹⁴ See the “Protocol on the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant” (Pre-Trial Chamber II, Single Judge), No. [ICC-02/04-01/15-339-Anx](#), paras. 4 and 26.

¹⁵ See the Decision on issues related to the restriction of communications of Dominic Ongwen (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-450-Conf-Exp, 30 May 2016, paras. 1-2. Pursuant to

11. On 21 July 2016, the Trial Chamber (the “Chamber”) rendered the *“Decision on the Review of Dominic Ongwen’s Detention and on the Restriction on Communication”* noting that: (i) the Registry had taken certain precautions based on the concerns that Mr Ongwen may have infringed the decisions restricting his telephone communications and that said information bolstered the Chamber’s concern about the ability and willingness of the Accused to interfere with witnesses, rendering thus the imposition of restrictions on Mr Ongwen’s communications necessary; and (ii) Mr Ongwen has ample communication privileges as he is permitted visitors and telephone communications with persons on his privileged and non-privileged phone lists.¹⁸

12. On 10 August 2016, the TC Single Judge issued the *“Decision on Prosecution ‘Request for an order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen’”* instructing, *inter alia*, the Defence and the Prosecution to consult with the VWU on how Mr Ongwen could contribute to the welfare of his children while mitigating the risk of witness interference.¹⁹ [REDACTED].²⁰

13. On 4 October 2016, the TC Single Judge rendered the *“Decision on Mr Ongwen’s Request to Add New Persons to his Non-Privileged Telephone Contact List”* (the “Decision No. 553”) and recalled that (i) the Chamber has an obligation to ensure that the trial is fair, free from the taint of witness interference and undue coercion. In light of this obligation, the TC Single Judge did not authorise Mr Ongwen to have

Trial Chamber IX’s instruction, dated 18 November 2016, this document is reclassified as “Confidential” (the “Decision No. 450”).

¹⁶ *Idem*, para. 4.

¹⁷ *Ibidem*.

¹⁸ See the “Decision on the Review of Dominic Ongwen’s Detention and on the Restriction on Communication” (Trial Chamber IX), No. [ICC-02/04-01/15-503](#), 21 July 2016, paras. 14 and 16-19.

¹⁹ See the “Decision on Prosecution ‘Request for an order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen’” (Trial Chamber IX, Single Judge), No. [ICC-02/04-01/15-521](#), 10 August 2016, paras. 4 – 9 and 18.

²⁰ See the “Joint Defence and Prosecution Observations Pursuant to ICC-02/04-01/15-521, Paragraph 18”, No. ICC-02/04-01/15-606-Conf-Exp, 24 November 2016. Pursuant to Trial Chamber IX’s Decision No. [ICC-02/04-01/15-1593](#), dated 13 September 2019, this document is reclassified as “Confidential”.

telephone contact with witnesses D26-13, P-0214, P-0235 and P-0236 who are either Prosecution witnesses or persons previously removed from his contact list. Indeed, including these persons on the Accused's telephone contact list would create an impermissible threat to the integrity of the proceedings; (ii) however, Mr Ongwen may have telephone contact with his children, given such communication is facilitated through a neutral third party, agreed upon by the parties; and (iii) Mr Ongwen's telephone conversations were to be actively monitored and terminated if a suspicion of an attempt to coerce or interfere with witnesses or victims through the children was to be detected by the Registry.²¹

14. On 13 April 2018, the Prosecution concluded the presentation of its evidence.²²

15. On 12 February 2019, the TC Single Judge issued the "*Decision on Request for Disclosure and Related Orders Concerning Mr Ongwen's Family*" (the "Decision on Disclosure Request") recalling that Mr Ongwen's contacts have been restricted following indications of witness interference which threatens the fair and expeditious conduct of the proceedings.²³ On the same day, the TC Single Judge issued the "*Decision on Defence Request for Production of Correspondence Addressed to Mr Ongwen*" and held, *inter alia*, that: (i) P-0214 was previously not included on the Accused's non-privileged contact list as the restrictions on Mr Ongwen's communications remain warranted; (ii) allowing correspondence from Prosecution witnesses, such as P-0214, would circumvent the aim of the no-contact orders; and (iii) should the Registry consider that correspondence addressed to Mr Ongwen from a Prosecution witness may be in violation of any orders of the Chamber, it should notify the Chamber and the parties of the existence of the correspondence, its author, and the

²¹ See the "Decision on Mr Ongwen's Request to Add New Persons to his Non-Privileged Telephone Contact List" (Trial Chamber IX, Single Judge), No. [ICC-02/04-01/15-553](#), 04 October 2016, para. 9-11.

²² See the "Notice of the Prosecution's completion of evidence presentation", No. [ICC-02/04-01/15-1225](#), 13 April 2018.

²³ See the "Decision on Request for Disclosure and Related Orders Concerning Mr Ongwen's Family" (Trial Chamber IX, Single Judge), No. [ICC-02/04-01/15-1444](#), 12 February 2019, paras. 29-30 (the "Decision on Disclosure Request").

reasons for withholding the correspondence (the “Correspondence Regime During Trial”)²⁴.

16. On 13 September 2019, the TC Single Judge rendered the “*Decision on Defence Request to Meet with Six Prosecution Witnesses*” and held that (i) witnesses P-0099, P-0101, P-0214, P-0227, P-0235 and P-0236 testified under article 56 of the Statute about alleged sexual and gender based crimes committed directly by Mr Ongwen and are vulnerable; (ii) however, said witnesses have the choice to establish contact with the Defence and the Accused, should they wish to do so.²⁵ Therefore, the TC Single Judge established a procedure for the VWU – and the CLRV in case of dual status individuals - to contact the Vulnerable Witnesses in order to seek their informed consent, according to paragraph 28 of the Contact Protocol, on whether they wish to have any contact with the Defence or the Accused.²⁶

17. On 27 September 2019, the Defence filed the Request.²⁷ On 7 October 2019, the Prosecution filed its response.²⁸

III. CONFIDENTIALITY

18. Pursuant to regulation 23*bis* (2) of the Regulations of the Court, the present submission is filed confidential following the classification chosen by the Defence and because it refers to information bearing the same classification. A public redacted version will be filed in due course.

²⁴ See the “Decision on Defence Request for Production of Correspondence Addressed to Mr Ongwen” (Trial Chamber IX, Single Judge), No. [ICC-02/04-01/15-1445](#), 12 February 2019, paras. 13-15.

²⁵ See the “Decision on Defence Request to Meet with Six Prosecution Witnesses”, No. [ICC-02/04-01/15-1593](#), 13 September 2019, paras. 12-16.

²⁶ *Idem*.

²⁷ See the Request, *supra* note 2.

²⁸ See the Prosecution’s Response to the Defence “Request to Lift Communication Restrictions Placed Upon Mr Ongwen”, No. ICC-02/04-01/15-Conf, 07 October 2019.

IV. SUBMISSIONS

19. In the Request, the Defence asks 1) for the removal of the restrictions of phone communications placed upon Mr Ongwen vis-à-vis D26-13, P-0099, P-0101, P-0214, P-0226, P-0227, P-0236, and P-0235;²⁹ and 2) for an order requiring VWU to explain to the Vulnerable Witnesses that they can request to have contact with Mr Ongwen.³⁰

20. At the outset, the CLRV submits that the second part of the Request is moot. As recalled above, the TC Single Judge already ruled that the Vulnerable Witnesses (in particular, P-0099, P-0101, P-0214, P-0227, P-0235 and P-0236) have the choice to establish contacts with the Defence and/or the Accused, should they wish to do so.³¹ Consequently, the TC Single Judge already instructed the VWU (together with the CLRV or the Prosecution, depending on status of the individuals concerned) to contact the persons in question in order to seek their consent.³² While D26-13 and P-0226 were not part of the previous Defence's application which gave rise to the ruling, the same course of action has to be followed. Consequently, there is no need for the Chamber to render another decision, setting up a differing or even parallel procedure on the matter. The process of contacting the Vulnerable Witnesses is already undertaken. As a result, the Chamber must reject the second part of the Request.

21. As for the first part of the Request, the CLRV underlines that the Defence fails to differentiate the exact legal basis for the various issues affecting the Vulnerable Witnesses. Indeed, it proceeds in presenting generic arguments challenging the rulings contained in many of the above mentioned decisions on restrictions of

²⁹ See the Request, *supra* note 2, para. 1.

³⁰ *Idem*, para. 2.

³¹ See the "Decision on Defence Request to Meet with Six Prosecution Witnesses", *supra* note 25, paras. 12-16.

³² *Idem*.

communication. Therefore, it could be argued that the reliefs sought *de facto* amount to several separate requests for reconsideration of previous rulings.

22. Yet, contrary to the Defence's arguments, the precise legal basis of the restrictions concerning each Vulnerable Witness is clear and unambiguous. As mentioned comprehensively in the procedural history *supra*, the effects of the relevant decisions are as follows:

- (a) P-0099 - Communication is restricted by the PTC Single Judge (pursuant to Decision No. 242, No. 316, No. 339 (or the Contact Protocol)) and maintained by the TC Single Judge (pursuant to Decision No. 450);
- (b) P-0214 - Communication is restricted by the PTC Single Judge (pursuant to Decision No. 242, No. 238, No. 316, No. 339 (or the Contact Protocol)) and maintained by the TC Single Judge (pursuant to Decision No. 450). The TC Single Judge also refused to add P-0214's name to the non-privileged list of phone communications (pursuant to Decision No. 553);
- (a) P-0226 - Communication is restricted by the PTC Single Judge (pursuant to Decision No. 242, No. 339 (or the Contact Protocol)) and maintained by the TC Single Judge (pursuant to Decision No. 450);
- (b) P-0227 - Communication is restricted by the PTC Single Judge (pursuant to Decision No. 242, No. 339 (or the Contact Protocol)) and maintained by the TC Single Judge (pursuant to Decision No. 450);
- (c) P-0235 - Communication is restricted by the PTC Single Judge (pursuant to Decision No. 242, No. 316, No. 339 (or the Contact Protocol)) and maintained by the TC Single Judge (pursuant to Decision No. 450). The TC Single Judge also refused to add P-0235's name to the non-privileged list of phone call (pursuant to Decision No. 553);

- (c) P-0236 - Communication is restricted by the PTC Single Judge (pursuant to Decision No. 242, No. 316, No. 339 (or the Contact Protocol)) and maintained by the TC Single Judge (pursuant to Decision No. 450). The TC Single Judge also refused to add P-0235's name to the non-privileged list of phone call (pursuant to Decision No. 553);
- (d) D26-13 - Communication is restricted by the PTC Single Judge (pursuant to Decision No. 283 and maintained by the TC Single Judge (pursuant to Decision No. 450). The TC Single Judge also refused to add D26-13's name to the non-privileged list of phone call (pursuant to Decision No. 553);
- (e) P-0101 - Communication is restricted by the PTC Single Judge (pursuant to Decision No. 242, No. 316, No. 339 (or Contact Protocol)) and maintained by the TC Single Judge (pursuant to Decision No. 450);
- (f) P-0198 - Communication is restricted by the PTC Single Judge (pursuant to Decision No. 242, No. 316, No. 339 (or Contact Protocol)) and maintained by the TC Single Judge (pursuant to Decision No. 450).

23. As for the arguments concerning changed circumstances, allegedly meriting the review of the restrictions of communication imposed upon Mr Ongwen, the CLRV opposes each of them as follows:

- i) *The Prosecution case has ended* - The fact that the Prosecution has completed its presentation of evidence has no bearing on the restrictions of communication of the Accused. The Contact Protocol does not limit in any way the prohibition of contact to the end of the Prosecution case.³³ Moreover, even after the close of the Prosecution case, the TC Single Judge already issued three decisions which maintained the restrictions of communication imposed earlier by the PTC Single Judge. In the Decision

³³ See the Contact Protocol, *supra* note 13.

on Disclosure Request, the TC Single Judge held, *inter alia*, that: (i) Mr Ongwen's contacts have been restricted due to certain indications of witness interference which threatens the fair and expeditious conduct of the proceedings; and (ii) the Mr Ongwen is also charged with sexual and gender based crimes in relation to seven alleged "forced wives" or Prosecution witnesses. Thus, unwanted involvement by the Accused in the lives of these victims and their children risks further victimisation and harm to the health and development of the children concerned.³⁴ Moreover, in the Decision setting the Correspondence Regime During Trial, the TC Single Judge also stressed that the Chamber has an obligation to ensure that the trial is fair and free from the taint of witness interference and undue coercion and thus the restrictions on Mr Ongwen's communication remain warranted³⁵. As recently as 13 September 2019, the TC Single Judge also held that the individuals that the Defence seeks to contact are vulnerable and their testimonies concern alleged sexual and gender based crimes committed directly by Mr Ongwen and thus prohibited the Defence to gather any case related information from the Vulnerable Witnesses.³⁶

- ii) *Substantial time has elapsed since the original alleged interference* - As mentioned *supra*, the TC Single Judge already found as recently as February³⁷ and September 2019³⁸ that the individuals that the Defence seeks to contact remain as vulnerable as before and the restrictions on Mr Ongwen's communication remain warranted. The passage of time has no

³⁴ See the Decision on Disclosure Request, *supra* note 23, paras. 29-30.

³⁵ See the "Decision on Defence Request for Production of Correspondence Addressed to Mr Ongwen", *supra* note 24, para. 13.

³⁶ See the "Decision on Defence Request to Meet with Six Prosecution Witnesses", *supra* note 25, paras. 12-16.

³⁷ See the "Decision on Defence Request for Production of Correspondence Addressed to Mr Ongwen", *supra* note 24, para. 13.

³⁸ See the "Decision on Defence Request to Meet with Six Prosecution Witnesses", *supra* note 25, paras. 12-16.

impact upon the *rationale* of the rulings on the restrictions of communication. Thus, there is no reason for the Chamber to deviate from these legal and factual findings.

iii) *The putting in place of an agreement that was created to ensure confidence and transparency in respect to transfers of money from Mr Ongwen to family members; and The transfer of funds to family members pursuant to that agreement and the spirit of that agreement* – Transfers of money do not cancel the reasoning of the decisions on the matter. To the contrary, the TC Single Judge stressed that “*the issue of the monies Mr Ongwen distributed to potential witnesses was only brought to the Chamber and the Prosecution’s attention incidentally after the Registry terminated Mr Ongwen’s phone call for the use of possibly coded language and for contact with unauthorised persons. [...] The Defence transferred monies from Mr Ongwen to give to intermediaries who then apparently transferred the monies to potential Prosecution witnesses, without notifying the Chamber or the other participants. This, at the very least, violates the spirit of the existing [Contact Protocol]. [...] Based on the information available, and noting the reasons underlying the existing restrictions on Mr Ongwen’s telephone communications, the Single Judge is concerned about the possible impact Mr Ongwen’s payments may have on the testimony of potential witnesses in this case.*”³⁹ Consequently, the TC Single Judge suggested that “*it may be permissible for Mr Ongwen to support his family indirectly when (i) money is provided by Mr Ongwen to the Registry to give to potential witnesses in Mr Ongwen’s family; (ii) the amount and circumstances of the transfer would not unduly influence any potential witness’s testimony and (iii) the Prosecution has sufficient advance notice of the transfer*”.⁴⁰ In other words, such transfers of

³⁹ See the “Decision on Prosecution ‘Request for an order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen’”, *supra* note 19, paras. 13-14.

⁴⁰ *Idem*, para. 19.

money may, in fact, potentially interfere with Vulnerable Witnesses depending on their context.

- iv) *Mr Ongwen has had extensive communication with his children over an extended period of time without any concerns of interference being raised –this communication has been consented to by the mothers* – Obviously, the decisions on the restrictions of communication deal principally with Mr Ongwen, not with his children. Mr Ongwen’s children are not witnesses in this case. They are neither subject to article 70 of the Statute. Therefore, the fact that the Accused has communication with his children does not in any way mitigate the risk of witness interference.
- v) [REDACTED] – The person concerned is not a witness for either party or participants. Therefore, the Contact Protocol and other decisions on the restrictions of communication do not apply to her. Simply, the fact that she visited Mr Ongwen is irrelevant to the matter at hand.
- vi) *Mr Ongwen has received a correspondence from P-0214 that was sent voluntarily by her; and Mr Ongwen has met with P-0214 in the Detention Center and there have been no allegations of interference* – In the Decision establishing the Correspondence Regime During Trial, the TC Single Judge recalled that P-0214 was not placed on Mr Ongwen’s telephone contact list because there had been attempts to exercise some form of influence on persons having information relevant to the case.⁴¹ Thus, the TC Single Judge re-affirmed that the restrictions on Mr Ongwen’s communication remain warranted.⁴² Moreover, the TC Single Judge opined that a written communication originating from an individual outside the Detention Centre could later

⁴¹ See the “Decision on Defence Request for Production of Correspondence Addressed to Mr Ongwen”, *supra* note 24, para. 13.

⁴² *Idem.*

become the basis for a bilateral conversation with Mr Ongwen.⁴³ Consequently, the fact that Mr Ongwen was able to receive a correspondence from P-0214 should be a cause of concern for the future rather than a mitigating factor for interference. While P-0214 did visit Mr Ongwen with the approval of the Chamber, the Defence fails to appreciate the fact that each individual witness is unique and has dissimilar personal and security needs. One witness, P-0214 in this case, cannot represent or speak for all the Vulnerable Witnesses.

- i) *Confirmation from the Detention Center that Mr Ongwen has not had his phone conversation cut since 30 March 2016 and received only one warning there after concerning the use of coded language.* The very fact that Mr Ongwen received such a warning after having been advised numerous times not to use a coded language (through the issuance of Decisions No. 283, No. 450 and No. 553) is enough to cause alarm of witness interference. Thus, the Defence's arguments in this regard are meritless.

24. The CLRV recalls that the Chamber has consistently ruled that "*reconsideration is exceptional and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice*".⁴⁴ Additionally, "*new facts and arguments arising since the decision was rendered may be relevant to this assessment*".⁴⁵ Yet, none of the arguments raised by the Defence demonstrates a clear error of reasoning nor do they show that it is necessary to reconsider the decisions on the restrictions of

⁴³ *Ibidem*, para. 14.

⁴⁴ See the "Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance" (Trial Chamber IX), No. [ICC-02/04-01/15-468](#), 15 June 2016, para. 4. See also the "Decision on the Defence Request for Partial Reconsideration of the Decision under Rule 68(2)(b) of the Rules of Procedure and Evidence" (Trial Chamber IX), No. [ICC-02/04-01/17-711](#), 23 February 2017, para. 4; and the "Decision on Defence Request for Reconsideration of Decision ICC-02/04-01/15-1147 and Objections to Victim Participation" (Trial Chamber IX), No. [ICC-02/04-01/15-1152](#), 26 January 2018, para. 6.

⁴⁵ See the "Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance", *supra* note 44, para. 4.

communication in order to prevent an injustice. Neither does the Defence present any new facts and new arguments warranting the reconsideration of said rulings.

25. Additionally, the Defence argues that the Contact Protocol was adopted during the Prosecution's investigation and the proceedings under article 56 of the Statute and thus should be varied due to the changed circumstances mentioned *supra*.⁴⁶ The CLRV submits that nowhere in the Contact Protocol it states that the PTC Single Judge intended that the provisions of said protocol shall apply only to the investigation stage or the proceedings pursuant to article 56 of the Statute. To the contrary, the TC Single Judge already ruled twice that the Contact Protocol enacted by the PTC Single Judge is still in force at the trial stage.⁴⁷ This was reaffirmed as recently as 13 September 2019 while entertaining the Defence's request to meet with six prosecution witnesses.⁴⁸ There is no reason for the Chamber to depart from these rulings since the Defence fails to present any new facts and new arguments warranting the variation of the Contact Protocol at the trial phase of the proceedings.

26. Lastly, the CLRV recalls that the TC Single Judge already issued a series of rulings on the matter, striking a balance between the necessity to keep the integrity of the trial proceedings and Mr Ongwen's right to family life, including the decisions establishing the Phone Communication and Correspondence Regime During Trial. Indeed, the TC Single Judge stated recently that:

"Within the contact restrictions regime, Mr Ongwen is entitled to: (i) have telephone contact with his children, in so far as the ordinary procedures within the detention centre are met and communication is facilitated through a neutral third party and (ii) add people to his contact list without any further ruling from the Chamber so long as the Prosecution does not object. These procedures give Mr Ongwen reasonable

⁴⁶ See the Request, *supra* note 2, paras. 38-40.

⁴⁷ See "Decision on Prosecution 'Request for an order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen'", *supra* note 19, para. 13. See also the Order Scheduling First Status Conference and Other Matters (Trial Chamber IX, Single Judge), No. [ICC-02/04-01/15-432](#), 4 May 2016, para. 4.

⁴⁸ See the "Decision on Defence Request to Meet with Six Prosecution Witnesses", *supra* note 25, para. 12.

*flexibility to speak with his family members when they want to speak with him and there are no concerns about compromising the fairness of the proceedings”.*⁴⁹

27. In conclusion, Mr Ongwen has ample communication privileges.⁵⁰ Moreover, as mentioned earlier, the TC Single Judge already instructed the VWU (together with the CLRV or the Prosecution, depending on the status of the witnesses concerned) to contact the P-0099, P-0101, P-0214, P-0227, P-0235 and P-0236 in order to seek their consent on whether they wish to have any contact with the Defence and/or the Accused.⁵¹ The process of contacting these Vulnerable Witnesses is on-going.

28. Therefore, the CRLV submits that the restrictions on communication with regard to the Accused are still warranted and that the current regimes for said restrictions and related developments make the reliefs sought in the Request moot and unnecessary.

V. CONCLUSION

29. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Chamber to reject the Request.



Paolina Massidda
Principal Counsel

Dated this 23th day of October 2019

At The Hague, The Netherlands

⁴⁹ See the Decision on Disclosure Request, *supra* note 23, para. 33.

⁵⁰ See the “Decision on the Review of Dominic Ongwen’s Detention and on the Restriction on Communication”, *supra* note 18, para. 19.

⁵¹ See the “Decision on Defence Request to Meet with Six Prosecution Witnesses”, *supra* note 25, p. 14.