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**International
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Court**

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

Date: **23 October 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 with Confidential Annex A

**Public redacted version of
‘Defence Request to Lift Communication Restrictions Placed Upon Mr Ongwen’
(ICC-02/04-01/15-1616-Conf), filed 27 September 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**

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I. INTRODUCTION

1. The Defence requests that the communications restrictions placed upon Mr Ongwen on D26-13, P-226, P-227, P-101, P-99, P-214, P-236, and P-235 in relation to phone calls are removed. Specifically, the Defence submits that maintaining a prohibition on contact between Mr Ongwen and these individuals is not or no longer justified. The present request does not seek to lift the communication restrictions in respect to active monitoring regime ordered on 3 August 2016¹ and re-affirmed thereafter.²
2. Additionally, the Defence requests that Trial Chamber IX ('Trial Chamber') order an appropriate entity – the Victims' and Witness's Unit ('VWU') – to explain to the women that they can request to have contact with Mr Ongwen if they so choose. As discussed below,³ the Defence considers this necessary due to the particular circumstances and the complex legal procedure leading up to the present request.
3. At the outset, the Defence seeks to make absolutely clear that the current request is to remove barriers to communication and does not seek to argue that there should be communication or that there must be communication. The Defence submits that whether the above mentioned individuals wish to be in contact with Mr Ongwen will be their choice; however, it is not for the court – through the imposition of restrictions – to pre-determine this for these individuals.
4. The request is being brought before the Trial Chamber because the Prosecution has made it clear in various ways that it would not support the content of the request. This includes dragging its feet on a Defence interview with P-214 despite previously undertaking to facilitate such an interview,⁴ opposing contacting some of the women in respect to contact between Mr Ongwen and his and their children,⁵ and opposing the Defence motion to interview several of the Article 56 individuals.⁶ Notwithstanding decisions to the contrary,⁷

¹ ICC-02/04-01/15-283, p. 8.

² ICC-02/04-01/15-450-Red, para. 4.

³ See para. 24 to 33.

⁴ ICC-02/04-01/15-1574-Conf-AnxA. *See also* email on 8 May 2019 at 16h12, subject 'RE: Information and request for order to Registry', in a Prosecution email relating to the witness approach protocol, Lead Counsel for the Prosecution states on behalf of the Prosecution "In the light of the Chamber's decision concerning the state of the witness, the Prosecution undertakes to convey this message faithfully and speedily." Another senior member of the Prosecution stated in an email 9 May 2019 at 17h19 (subject 'RE: Information and request for order to Registry') that she undertakes on behalf of the Prosecution to "to convey the Chamber's decision to the witness as expeditiously as possible in order to facilitate the contact by the defence".

⁵ ICC-02/04-01/15-1574-Conf-AnxB.

⁶ ICC-02/04-01/15-1577-Conf.

Trial Chamber IX has given indications that he would reject a simple request to add some of these individuals to Mr Ongwen's phone list.⁸ The Defence therefore considers that it is preferable to raise the issue in a more comprehensive manner with supporting legal argumentation rather than piece-meal in respect to each individual.

5. The Defence submits that the present request for the removal of the specified communication restrictions has merit given (1) changed circumstances since the restrictions were imposed, (2) the context of the right to family life, and (3) the absence of their necessity to safeguard the interests identified.

II. APPLICABLE LAW

6. Pursuant to Regulation 101(2) of the Regulations of the Court ('RoC') "The Prosecutor may request [...] to prohibit, regulate or set conditions for contact between a detained person and any other person [...], if the Prosecutor has reasonable grounds to believe that such contact" is being pursued for one or any of six grounds.
7. Pursuant to Article 21(3), "[t]he application and interpretation of law pursuant to [Article 21] must be consistent with internationally recognized human rights".

III. CONFIDENTIALITY

8. Pursuant to Regulations 23*bis* of the Regulations of the Court ('RoC'), this request is submitted as confidential as it refers to individuals who could be endangered or harassed should their names be made public.⁹ Additionally, given the nature of the request, which concerns individuals who [REDACTED], the Defence considers that the request should remain confidential or be filed in redacted form following the conclusion of litigation.

IV. BACKGROUND

9. On 25 June 2015,¹⁰ the Single Judge of Pre-Trial Chamber II ('PTC' and 'PTC Single Judge') re-affirmed an oral order that granted a Prosecution request pursuant to Regulation 101(2) of

⁷ The Trial Chamber permitted contact between Mr Ongwen and P-214 in [REDACTED] 2018 and ICC-02/04-01/15-1593 wherein the Single Judge has tentatively permitted contact between the Defence and six individuals.

⁸ ICC-02/04-01/15-553, para. 9.

⁹ See paras 18, 34(f), and 34(g).

¹⁰ ICC-02/04-01/15-254, para. 2.

the RoC placing formal restricting Mr Ongwen's communications. The restrictions were justified on the basis of avoiding "some form of influence on persons who possess information relevant to the case".¹¹

10. 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 2015¹² and 12 October 2015¹³ respectively. Unlike the 15 October 2015 Article 56 proceedings decision,¹⁴ the 27 July 2015 decision contains no order on prohibition on contact for the Defence in respect to the individuals who would be questioned pursuant to Article 56.
11. On 3 August 2015 the PTC Single Judge partially relaxed the restrictions on Mr Ongwen's communications. The Single Judge required *inter alia* limits on the duration of Mr Ongwen's calls,¹⁵ instituted active monitoring,¹⁶ notification of the PTC upon changes to the call-list,¹⁷ 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".¹⁸ Other than what was ordered, the PTC Single Judge rejected¹⁹ the Prosecution request for strict restrictions²⁰ "in all other respects".²¹
12. Pursuant to the Article 56 order, the PTC Single Judge heard from P-226²² and P-227²³ between 15 and 19 September 2015 and²⁴ from P-101,²⁵ P-99,²⁶ P-214,²⁷ P-236,²⁸ P-235²⁹ and P-198³⁰ between 9 and 18 November 2018.

¹¹ *Ibid.*, para. 6.

¹² ICC-02/04-01/15-277-Conf.

¹³ ICC-02/04-01/15-316-Conf.

¹⁴ *Ibid.*, p. 11.

¹⁵ ICC-02/04-01/15-283, para. 15 and p.8.

¹⁶ *Ibid.*, p. 8.

¹⁷ *Ibid.*, p. 8.

¹⁸ ICC-02/04-01/15-283, para. 15 and p. 8; 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.

¹⁹ ICC-02/04-01/15-283, p. 9.

²⁰ ICC-02/04-01/15-283, para. 4.

²¹ *Ibid.*

²² ICC-02/04-01/15-T-8-CONF-ENG; ICC-02/04-01/15-T-9-CONF-ENG.

²³ ICC-02/04-01/15-T-10-CONF-ENG; ICC-02/04-01/15-T-11-CONF-ENG.

²⁴ ICC-02/04-01/15-316-Conf.

²⁵ ICC-02/04-01/15-T-13-CONF-ENG; ICC-02/04-01/15-T-14-CONF-ENG.

²⁶ ICC-02/04-01/15-T-14-CONF-ENG.

²⁷ ICC-02/04-01/15-T-15-CONF-ENG.

²⁸ ICC-02/04-01/15-T-16-CONF-ENG.

²⁹ ICC-02/04-01/15-T-17-CONF-ENG.

³⁰ ICC-02/04-01/15-T-18-CONF-ENG.

13. On 11 November 2015, the PTC Single Judge adopted a protocol on contact between a party or participant and witnesses of the opposing party or of a participant ('Witness Approach Protocol').
14. On 31 May 2016, the Single Judge of Trial Chamber IX ('Single Judge') set forth the procedure for the addition of names to the list of persons Mr Ongwen is permitted to telephone.³¹ The regime on Mr Ongwen's communications was not changed – he continues to be actively monitored – but rather the modality of adding names was slightly modified.
15. On 4 October 2016, the Single Judge rejected a request by Mr Ongwen to add D26-13, P-214, P-235 and P-236 to his non-privileged telephone contact list.³² The Defence explained, that that request was made so as to facilitate contact with between Mr Ongwen and his children who did not have their own phones. The Single Judge granted a measure whereby a neutral third party facilitated contact with between Mr Ongwen and his children.
16. On 24 November 2016, the Defence notified³³ Trial Chamber IX ('Trial Chamber'),³⁴ that [REDACTED].
17. On 11 January 2019, Defence wrote to the Trial Chamber and requested an investigation into the claim made by P-214 that she was not told when approached to testify in the Article 56 hearings that she would be a Prosecution witness and that her intent was to be a Defence witness.³⁵ Following an exchange of arguments, the Trial Chamber indicated the Defence should seek the information itself³⁶ and then following further arguments indicated that "the Defence is free to request an interview in accordance with the procedure prescribed in the [Witness Approach Protocol]".³⁷
18. On 15 January 2019, the Defence requested³⁸ the provision of the correspondences from P-214 and her daughter [REDACTED] which the Defence became aware of on 28 May 2018. In following exchanges, the Defence clarified that its 15 January request was not one "for unchecked written communications [...]. The request was whether Mr Ongwen can receive

³¹ ICC-02/04-01/15-450-Red.

³² ICC-02/04-01/15-553.

³³ ICC-02/04-01/15-606-Conf-Exp.

³⁴ ICC-02/04-01/15-521, para. 18.

³⁵ Email, sent 11 January 2019 15h03, subject 'Information and request for order to Registry'.

³⁶ Email, sent 8 May 2019 15h38, subject 'RE: Information and request for order to Registry'.

³⁷ Email, sent 10 May 2019 14h20, subject 'decision in light of further requests pertaining to the Defence's request to interview P-214'.

³⁸ ICC-02/04-01/15-1411-Conf.

two letters.”³⁹ The Single Judge accepted this explanation⁴⁰ in his decision of 12 February 2019 and did not rule upon the wider issue of communication restrictions.

19. On 19 July 2019, the Trial Chamber ordered the Defence to make a formal written submission in respect to its *inter partes* request to interview P-99, P-101, P-214, P-227, and P-235.⁴¹ In response to the Defence request,⁴² the Prosecution made a proposal⁴³ for the VWU to approach said women, evaluate whether contact should occur, and make the request. The Defence sought leave to reply to this proposal on the basis that a reply would be more procedurally organised and expeditious given the request in the present Defence filing.⁴⁴
20. On 13 September 2019,⁴⁵ the Single Judge granted the Defence request to meet P-99, P-101, P-214, P-227, P-235, and P-236 and accepted the Prosecution proposal, but rejected the Defence leave to reply.

V. SUBMISSIONS

21. At present some kind of communication restrictions exist for D26-13, P-226, P-227, P-99, P-101, P-214, P-235, and P-236. The process through which communication restrictions have been imposed has evolved through several different but overlapping mechanisms. For some individuals there may be overlapping legal bases; however, the Defence submits that none of the legal bases can now be justified in barring contact – should contact be wanted by the respective individuals.
22. As touched upon in its request for reply,⁴⁶ the Defence requests an order from the Trial Chamber to communicate to the women that it is possible to request telephone communications with Mr Ongwen through the VWU should they wish so and that their request will be considered by the Trial Chamber. This is necessary to give substance to the present request. The Defence notes that the present request concerns two more⁴⁷ individuals than the six who were the basis of the 27 August 2019. In total it concerns eight.

³⁹ ICC-02/04-01/15-1429, paras 7 and 11.

⁴⁰ ICC-02/04-01/15-1445, paras 11 and 12.

⁴¹ Email, 19 July 2019 at 18h20, subject: ‘RE: Request pursuant to Protocol 339-Anx, paras 30-37’.

⁴² 27 August 2019, ICC-02/04-01/15-1574-Conf.

⁴³ ICC-02/04-01/15-1577, para. 9.

⁴⁴ ICC-02/04-01/15-1583, para. 5.

⁴⁵ ICC-02/04-01/15-1593.

⁴⁶ See para. 19 above.

⁴⁷ P-226 and D26-13.

23. An additional reason for this second request is that, as explained in the next section, the complex legal reasons/basis for the prohibition on communication appears to include the possibility that there is no explicit legal textual provision limiting communication but rather an *ad hoc* practice whereby the Trial Chamber refuses additions of individuals to Mr Ongwen's telephone list. There is no formal restriction to remove in such case. Nevertheless, it is important for these women to understand that a request will be considered if they wish to make one.

A. The legal basis for restricting communications

24. In deliberating upon this request, the Defence notes that the Trial Chamber will have to carefully identify the correct assessment to be applied to each individual. A Defence review of the procedure indicates differing legal bases may apply to different individuals and therefore maintaining restrictions upon communication must be justified under different regimes.
25. The written record indicates that the PTC first put a blanket communication restriction in place excepting Mr Ongwen's Lead Counsel and Legal Assistant.⁴⁸ It then relaxed this regime on 3 August 2015 by requiring active monitoring calls while maintaining the Regulation 101(2) restrictions on D26-13 and P-214.⁴⁹
26. The analysis in respect to the other women is more complex. In respect to P-226 and P-227, no clear order was put in place to prevent communication. When the first Article 56 decision, which concerned these women was taken on 27 July 2015, there was the blanket communication's restriction in place. Five days after the first Article 56 decision, as noted above,⁵⁰ the Pre-Trial Single Judge modified the restrictions by only maintaining a restriction on the two individuals.
27. On 18 August 2015, a Decision on the Prosecution's submissions on the conduct of proceedings was taken. Although dealing largely with logistics and such matters as order of questioning, the Pre-Trial Single Judge stated that he was "of the view that it is not necessary in the particular circumstances at hand to adopt specific guidelines for the conduct of proceedings"⁵¹ but that "a number of matters laid out in the principles suggested by the

⁴⁸ ICC-02/04-01/15-254.

⁴⁹ ICC-02/04-01/15-283, p. 8.

⁵⁰ See para. 11 above.

⁵¹ ICC-02/04-01/15-293-Conf, para. 12.

Prosecutor should be self-evident in the specific circumstances at issue”.⁵² The PTC Single Judge also rejected witness preparation.⁵³ The PTC Single Judge seemed to have taken it as a given that there should have been limited-to-no communication with P-226 and P-227 before their hearings and that particularly the Defence should not be in contact. This understanding was confirmed by way of email of Lead Counsel for the Prosecution requesting to conduct a Prosecution and Defence familiarisation session on 20 August 2015 which was granted the following day.⁵⁴

28. On 12 October 2015, the PTC Single Judge, in granting a second round of Article 56 hearings, ordered the “Defence to refrain from contacting, directly or indirectly, any of the witnesses subject to the present decision”.⁵⁵ Those witnesses were P-99, P-101, P-198, P-214, P-235, and P-236. The Prosecution sought the PTC Single Judge’s authorisation for the Prosecution contact these individuals on 13 October 2015 to following the decision which was granted on 13 October 2015. The Prosecution considered the instructions from the prior Article 56 as a guideline for the second set of hearings.
29. During the course of the second round of Article 56 hearings from 28 October to 18 November 2015, on 11 November, the Pre-Trial Chamber adopted the Witness Approach Protocol which put in place the usual regime whereby a party must request an interview through the calling party and not contact them directly.
30. Therefore, following from the preceding three paragraphs, for D26-13 and P-214, the original Regulation 101(2) RoC restrictions may be in force, and the explicit basis for prohibiting communication between Mr Ongwen and the others is the Witness Approach Protocol.
31. However, unfortunately, uncertainty remains as to whether the Regulation 101(2) RoC total communication bans restrictions are assumed to be in place by the Trial Chamber. The decision on a request for information about Mr Ongwen’s family⁵⁶ refers in footnote 8 to the Regulation 101(2) restrictions being created in relation to P-227. The Defence has reviewed the trial record and not identified the point at which this occurred. Similarly Regulation 101 RoC is referred to in the 4 October 2016 decision from the Single Judge rejecting the addition

⁵² *Ibid.*

⁵³ *Ibid.*, paras 14 and 15.

⁵⁴ Email, sent 21 August 2016 10h22, subject “RE: Familiarisation is Okay”.

⁵⁵ ICC-02/04-01/15-316-Conf, p. 11.

⁵⁶ 12 February 2019, ICC-02/04-01/15-1444.

of D26-13, P-214, P-235 and P-236 to Mr Ongwen's phone list.⁵⁷ In respect to P-235 and P-236, there is no articulation in the trial-record that a restriction on any communication restriction remains in place.

32. It seems that rather than affirm a clear prohibition on contact the Trial Chamber has simply been unwilling to permit these names to be added to Mr Ongwen's contact list which is to say that a *de facto* discretionary restriction on communication has been applied. In this respect, the Defence notes that European Court of Human Rights ('ECtHR') jurisprudence, in the context of prisoner's communications, requires that where the right to family life is implicated the scope of discretion exercised by public authorities must be indicated in domestic law with reasonable clarity and the scope and manner of exercise of the relevant discretion conferred on the public authorities must also be clear so as to ensure to individuals the minimum degree of protection.⁵⁸
33. Whichever is the legal basis, the Defence submits that the changed circumstances, context of the right to family life, and lack of necessity lead to the conclusion that none of the legal bases for restricting communication can be justified.

B. Changed circumstances

34. The Defence submits that there are changed circumstances that merit both review of the communication restrictions regime and lifting of the absolute restrictions on phone contact between Mr Ongwen and the individuals. These changed circumstances are:
 - a. The Prosecution case has ended;⁵⁹
 - b. Substantial time has elapsed since the original alleged interference;⁶⁰
 - c. [REDACTED];
 - d. [REDACTED];⁶¹

⁵⁷ ICC-02/04-01/15-553, see p. 1 and para. 9.

⁵⁸ ECtHR, *Piechowicz v. Poland*, Judgment, 17 April 2012, Application no. 20071/07, para. 212 ("The expression "in accordance with the law" not only necessitates compliance with domestic law, but also relates to the quality of that law. Consequently, domestic law must indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities so as to ensure to individuals the minimum degree of protection to which they are entitled under the rule of law in a democratic society.") (hereafter '*Piechowicz v Poland*'), available at: <http://hudoc.echr.coe.int/eng?i=001-110499>.

⁵⁹ 13 April 2018, ICC-02/04-01/15-1225.

⁶⁰ Allegation made 5 June 2015, ICC-02/04-01/15-241.

- e. Mr Ongwen has had extensive communication with his children over an extended period of time without any concerns of interference being raised⁶² – this communication has been consented to by the mothers;
- f. The revelation that a visit by [REDACTED] to visit Mr Ongwen might “inflamm the passion”⁶³ of “other former wives” of Mr Ongwen;
- g. Mr Ongwen has had visits from [REDACTED] several times, most recently in [REDACTED], and there have been no allegations of interference following those visits;
- h. Mr Ongwen has received a correspondence from P-214 that was sent voluntarily by her;⁶⁴
- i. Mr Ongwen has met with P-214 in the Detention Center and there have been no allegations of interference; and
- j. Confirmation from the Detention Center that Mr Ongwen has not had his phone conversation cut since 30 March 2016 and received only one warning thereafter concerning the use of coded language.⁶⁵

1. Regulation 101(2) RoC communication restrictions

- 35. These changed circumstances or new facts impact upon the reason for the imposition of the communication restrictions. Changed circumstance (a) above lessens the potential harm to the integrity of the proceedings since all Prosecution witnesses have now testified. Changed circumstance (b), (e), (g), (h), (i), and (j) demonstrate that the perceived risk of interference is greatly exaggerated since contact has been had under monitored conditions and in over almost three and a half years no allegation have surfaced. Furthermore, [REDACTED]. This transparency removes a barrier to possible misperception of improper influence.
- 36. The original basis for restrictions was not based upon the nature of the crimes – indeed the charges had not even been filed when several of the women testified; however, the Prosecution has argued in respect to these women that the nature of the allegations was

⁶¹ See for example ICC-02/04-01/15-1574-Conf-AnxC.

⁶² ICC-02/04-01/15-553, para. 1.

⁶³ UGA-D26-0018-3407.

⁶⁴ ICC-02/04-01/15-1445.

⁶⁵ See Confidential Annex A to this filing.

relevant to communication restrictions.⁶⁶ The present request does not seek information without consent but it is worth noting that points (e) through (i) cast doubt that the restrictions could be justified on the basis that at least some of the women do not want to be in contact with Mr Ongwen.

37. The Prosecution has previously objected on the basis of potential witness interference if there are communications. The Defence submits that the changed circumstances and new facts alleviate this concern. Notwithstanding prior Defence arguments concerning the interpretation of the facts leading up to the communication restrictions, the factors identified in paragraph 34 above attenuate the risk identified by the Single Judge of the PTC which have been affirmed the Trial Chamber Single Judge.

2. *Witness Approach Protocol*

38. The changed circumstances are also relevant to the application of the Witness Approach Protocol and merit its re-consideration or variance in relation to this specific circumstance.
39. The Protocol was adopted on 11 November 2015 with a view to balancing the interests of victims, the integrity of the investigations, the duties of the Prosecution, and rights of the Accused.⁶⁷ The Contact Protocol was adopted in the midst of the Article 56 proceedings. The new facts and change circumstances did not occur until after the Article 56 proceedings. As early as February 2016, the Prosecution recognised that “the normal drivers for concern about ‘improper’ contact do not apply with quite such vigour to [three Article 56 individuals]”.⁶⁸ Nevertheless, despite the fact that a telephone-list addition-request was so that Mr Ongwen could speak with his children who reside with their mothers, the Prosecution has appeared to argue that Witness Approach Protocol is applicable to Mr Ongwen’s telephone conversations even where they do not concern the details of the trial.⁶⁹
40. Even if the Witness Contact Protocol was the correct balance in respect to the individuals called during the Article 56 proceedings based on what was known then, the changed circumstances or new facts show that it is not the correct document to apply now. The Witness Approach Protocol regulates the manner by which investigations are undertaken in respect to witnesses of a non-calling party. Its purpose did not take into account the balancing

⁶⁶ ICC-02/04-01/15-1424-Conf, para. 14.

⁶⁷ ICC-02/04-01/15-339, para. 1.

⁶⁸ ICC-02/04-01/15-490-Conf-Exp-AnxA.

⁶⁹ ICC-02/04-01/15-542-Conf, paras 21-22.

of concerns related to family life, the care of children, private matters, and inter-personal relationships between the Accused and post-testimony individuals. Factors (e) to (i) merit review of the balance struck by the Witness Approach Protocol in these specific circumstances, and the Defence submits, justifies a variation of them to enable the possibility of non-case-related communication between Mr Ongwen and any of D26-13, P-226, P-227, P-101, P-99, P-214, P-236, and P-235 should they want to be in communication.

3. *Request for a notice be given to the women*

41. Factors (f), (g), and (h) provide an indication that some of the women want to be in communication. However, there are also some indications that there is uncertainty as to whether they are permitted to do so.⁷⁰ Beyond the fact that Mr Ongwen is not able to add some of the women to his phone list, the precise legal basis for this are not wholly clear. Indeed the Common Legal Representative for Victims ('CLRv') appears to be under the impression that there are Regulation 101(2) restrictions on all women.⁷¹ The new facts and change circumstances militate in favour of at least notifying the women that a request is possible if wanted.

C. **Context of family life**

42. The Witness Approach Protocol must be compliant with Article 21(3) and was conceived for another purpose, it is either not applicable, or must be interpreted in a manner which enables the right to family life to be fulfilled as much as possible.
43. It is submitted that a context of the right to family life is the back-drop to the present request. The Single Judge has accepted that the right to family life is engaged with respect to Mr Ongwen and his children.⁷² It has also assessed their best interests in compliance with international human rights law and the Convention on the Rights of the Child.⁷³ As noted above, the children of many of these women are in contact with Mr Ongwen. This is with the consent of those women.⁷⁴ Witness P-214 was also permitted to have contact with Mr

⁷⁰ ICC-02/04-01/15-1574-Conf-Corr, para. 30 *referring to*: [REDACTED] ("[REDACTED]").

⁷¹ ICC-02/04-01/15-1581, para. 3.

⁷² ICC-02/04-01/15-1444, para. 23.

⁷³ *Ibid.*

⁷⁴ D-0005/P-0236: UGA-OTP-0271-3100-R01 (specifically stating that [REDACTED]); D-0004/P-0235: UGA-OTP-0271-3093-R01 (noting that she thought it was great for [REDACTED]); and D-0010/P-0214: UGA-OTP-0271-3097-R01 (noting she was worried about [REDACTED]).

Ongwen for the purpose of discussing the upbringing of the children this last December⁷⁵ and the Trial Chamber has permitted contact on these matters.⁷⁶

44. This context of family life has two implications. The first responds to an objection that has been raised in other contexts and may be expected to be raised by the Prosecution. The second concerns objections to the present request based upon a strict construction of the Witness Approach Protocol.
45. Firstly, and as acknowledged by the Single Judge,⁷⁷ in respect to a future Prosecution objection on the basis that the concerned individuals are alleged victims of sexual and gender based violence, the Defence notes that it is not for the Prosecution or CLRV to fully define the response or relationships of these individuals *even* in the event that the allegations are proved beyond a reasonable doubt. Testimony from witnesses called by the Prosecution has illustrated individuals who share similar backgrounds in respect to the SGBC allegations against Mr Ongwen.⁷⁸ That and other evidence, such as the visits of [REDACTED] and P-214, suggests that out of the difficult circumstances in the bush some individuals were able to find various forms of reconciliation with the circumstances into which they were thrown.
46. The Defence cannot know whether the individuals subject to communication restrictions want to be in contact with Mr Ongwen, currently consent to being contacted, or have been given legal advice on the question, but the Defence submits, as has been accepted by the Single Judge in another context,⁷⁹ that it would be incorrect and possibly paternalistic to substitute an opinion as to the best choice for these individuals on this important matter in their life.
47. Secondly, the Witness Approach Protocol could be raised as a bar to the present request because its definition of a party includes the Accused. The context of the right to family life rebuts or challenges this line of thinking. Pursuant to Article 21(3) of the Statute the Witness Contact Protocol must have been created and now applied “consistent with internationally recognized human rights”. Interference with family life through detention pursuant to the

⁷⁵ December 2018.

⁷⁶ ICC-02/04-01/15-1593, para. 14.

⁷⁷ ICC-02/04-01/15-1593, para. 13.

⁷⁸ See for example ICC-02/04-01/15-T-41-CONF-ENG, p. 22, line 9 to p. 24, line 22.

⁷⁹ ICC-02/04-01/15-1593, para. 13.

jurisprudence of the ECtHR “must remain proportionate” to a legitimate “pressing social need”.⁸⁰

48. The Approach Protocol was conceived of in the context of investigations. Its sole exception⁸¹ to no contact between a party and the calling party is for the purpose of investigations.⁸² It simply does not contemplate the possibility that contact could be needed, for example, for the purpose of ensuring that children are raised with coordinated input from both their parents or that communication might be desired to maintain some form of relationship – whether that is arms-length or more familial. As discussed above,⁸³ the new facts and changed circumstances show that what might have been thought impossible by the Prosecution at the beginning of the case, that some of these women have an interest in having some form of contact or relationship with Mr Ongwen, is in fact the case.
49. The context of family life also supports the request for the Trial Chamber to make an order that these women should know that they can request contact – if for example they want to discuss their children’s upbringing with Mr Ongwen. The Prosecution⁸⁴ and CLRV⁸⁵ seem to claim that they are not aware of a clear request for communication but it also appears that they have not asked the individuals.

D. The restrictions are not necessary or proportionate

50. The present regime is not necessary to protect the interests such as the integrity of the proceedings or the women themselves. The Defence submits that removing any restrictions beyond active monitoring is a more proportionate balance.
51. The reason that the restrictions are particularly not necessary is due to the active monitoring regime. The Registry has demonstrated that it will step-in where it considers there are concerns for the integrity of the proceedings. Court actions have conveyed to Mr Ongwen that he should not discuss the details of his case and any further concerns can be mitigated through active-monitoring. The same has been demonstrated through P-214’s visits to the Detention Centre. An email from the Detention Centre confirms, and the Defence emphasises, that over the last three and half years of actively monitored calls, Mr Ongwen has

⁸⁰ See for example *Piechowicz v Poland*, para. 212.

⁸¹ ICC-02/04-01/15-339-Anx, para. 26.

⁸² *Ibid.*, para. 29.

⁸³ See para. 36 above.

⁸⁴ ICC-02/04-01/15-1577, para. 7.

⁸⁵ ICC-02/04-01/15-1581, para. 17

not had his phone cut off and only one warning has been issued to not use coded language.⁸⁶ That Detention Centre visit has also demonstrated the feasibility of constructive exchanges between Mr Ongwen and the women who are the focus of the individual SGBC charges.

52. As a relevant aside, for the reasons in the prior paragraph, the present request should not be construed as a request to cease the active monitoring regime put in place by the Single Judge of the PTC and later affirmed by the Trial Chamber.
53. The present request is also not one seeking the Trial Chamber to stop exercising its oversight over Mr Ongwen's phone list. Mr Ongwen will still need to request additions and if there are reasons why it is not appropriate for an individual to be in contact then the Prosecution will be in a position to raise these at the correct moment.
54. Finally, the necessity for the communications restrictions in respect to the seriousness of the alleged crimes is also not made out. Firstly, the seriousness of the crimes *simpliciter* is not a factor found within the Witness Approach Protocol, nor is it a basis for placing restrictions under Regulation 101(2) RoC. Secondly, as discussed above in respect to issues orbiting the right to family life, and as has been pointed out in prior submissions and decisions, beyond jeopardising the proceedings, whether the women consent to contact should be the central issue – not whether any individual thinks they should or should not have contact. If an individual does not wish to have contact, then they will not have contact. This is simpler and affirms the dignity and agency of all individuals concerned, rather than applying a blanket restriction on communication.

E. Concluding remarks

55. The Defence concludes with three remarks. Firstly, it reserves its right to supplement the present submissions in the future. As the changed circumstances show, there has been a steady accumulation of facts which keep unveiling a picture that show that at least some of the Article 56 individuals did not want, or at least now do not want, to be barred from contact with Mr Ongwen.
56. Secondly, as discussed above the overlapping legal regimes that have been applied to restrict communication between Mr Ongwen and these women are complex and overlapping. They reach far back into the pre-trial phase to before many charges were even presented and the

⁸⁶ See Annex A. The Defence complained that in fact the latter warning on its face concerned vague use of words not actual codes.

start and end points of each regime have not been clearly articulated at all stages procedures. The Defence has sought to present the full picture; however, if the Defence has failed to identify an issue of importance to the Trial Chamber in respect to this request, then the Defence respectfully requests the Trial Chamber to direct it to make submissions on said point so that the full matter of restrictions can be properly addressed.

57. Finally, the Defence underscores that the present request concerns removing the procedural barriers. It is neither a demand for contact nor is it sought to put any pressure on these individuals to contact Mr Ongwen.

VI. RELIEF

58. For the reasons described above, the Defence respectfully requests Trial Chamber IX to:
- a. **REMOVE** restrictions barring communication between Mr Ongwen and D26-13, P-226, P-227, P-101, P-99, P-214, P-236, and P-235; and
 - b. **ORDER** the VWU to notify D26-13, P-226, P-227, P-101, P-99, P-214, P-236, and P-235 that, should they desire to have telephone communications with Mr Ongwen, that they can request it through the VWU who will present the request to the Trial Chamber and that the Trial Chamber will consider the request.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 23rd day of October, 2019
At The Hague, The Netherlands