

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: **1 April 2020**

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***

CONFIDENTIAL

**Defence Omnibus Response to Prosecution and Participants on
Ending Communication Restrictions on Mr Ongwen Following Closing Arguments**

Source: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby responds to submissions¹ provided by the Prosecution and Participants in response to an instruction from Trial Chamber IX ('Trial Chamber') to provide submissions on "any view on the upholding of the regime of contact restrictions currently applying to the accused".²
2. In a nutshell, the Defence submits that any plausible basis for imposing the restrictions has collapsed or dissipated and so the restrictions should be removed. The positions espoused by the Prosecution and Participants are mere over-statements or mis-recalling of the justification that gave rise to the decision for the restrictions. Substituting the current arguments of the Prosecution and Participants – which are speculative – for the actual previous judicial justifications, to maintain otherwise unjustifiable restrictions, is prejudicial to Mr Ongwen and should therefore be disregarded, especially in light of Mr Ongwen's consistent good behaviour.
3. In respect to the Article 56 witnesses, the Defence submits that the present measures are not necessary to safeguard the concerns raised by the Prosecution and Common Legal Representative for Victims ('CLRv'). Below the Defence notes that in the event that the Trial Chamber considers the CLRv request has relevance to the communication restrictions, then less restrictive measures should be considered as opposed to that proposed by the CLRv.³

II. CONFIDENTIALITY

4. Pursuant to Regulation 220(2) of the RoR and 23bis(2) of the Regulations of the Court ('RoC'), and because this is a response to filings of the same classifications, the present filing is categorised confidential. Otherwise the Defence does not object to the filing being made public as it does not contain any confidential information within it.

¹ Collectively referred to as 'Responses'.

² Email, sent 26 February 2020 at 18h09, subject 'responses for relief requested in paragraph 731 of the Defence Closing Brief' ('Trial Chamber Instructions').

³ See para.40.

III. BACKGROUND

5. On 12 February 2019, the Single Judge of the Trial Chamber granted transmission of a letter originating from P-214 to Mr Ongwen and put in place a procedure for the Registry to follow if it considered that the transmission of correspondences may violate a judicial order.⁴
6. On 27 September 2019, the Defence requested the removal of communication restrictions in respect to seven individuals.⁵ In the 18 October 2019 decision on the Defence request,⁶ the Trial Chamber considered part of the request moot in light of a prior decision but ordered the application of that prior decision to two witnesses.
7. On 24 February 2020, the Defence filed its Closing Brief in which it made submissions in respect to the interference with Mr Ongwen's human rights through the communication restrictions and requested immediate release of Mr Ongwen.⁷
8. On 26 February 2020, the Trial Chamber instructed the Prosecution and Participants by email to respond by 20 March 2020 on the issue of immediate release and to "also include in their submissions any view on the upholding of the regime of contact restrictions currently applying to the accused".⁸ The Trial Chamber instructed "the Defence to file its response on the submissions concerning the new issue of contact restrictions within the statutory time limit of Regulation 34(b) of the Regulations of the Court".
9. On 16 March 2020, the Common Legal Representative for Victims ('CLRv') filed submissions on the release of Mr Ongwen and the current restrictions on communication and contacts.⁹ The CLRv asked the Trial Chamber to reject the request for immediate release and the CLRv requested the maintenance of the current regime of communication restriction with an alternative measure of an order to Mr Ongwen to refrain from contacting in any way witnesses P-99, P-214, P-226, P-227, and P-235.

⁴ ICC-02/04-01/15-1445.

⁵ ICC-02/04-01/15-1616-Conf.

For the full background on the communication restrictions, see paras 9-20 of that filing.

⁶ ICC-02/04-01/15-1616-Conf.

⁷ ICC-02/04-01/15-1722-Conf-Corr ('Defence Closing Brief').

⁸ Email, sent 26 February 2020 at 18h09, subject 'responses for relief requested in paragraph 731 of the Defence Closing Brief'.

⁹ ICC-02/04-01/15-1728-Conf ('CLRv Submissions').

10. On 17 March 2020, the Defence sought clarification as to whether the deadline for response to the CLRV was to run from 16 March or 20 March.¹⁰ The Defence also requested an extension of the page limit for a response to 60 pages given that the response was to potentially three separate filings although it anticipated that it would be unlikely to require the full limit. The Trial Chamber granted the request and ordered that all responses may be made on 1 April 2020. The Trial Chamber granted, pursuant to Regulation 37 of the RoC, a 25-page maximum Defence response given that it would most likely contain argumentation which is identical to all three potential submissions from the Prosecution and Participants.¹¹
11. On 20 March 2020, the Prosecution filed its response to the request for the release of the Mr Ongwen and the current restrictions on communication and contacts.¹² The Prosecution requested that the Trial Chamber not grant the request for immediate release and keep Mr Ongwen in detention subject to the existing restrictions on his communications. On the same day, the Legal Representative for Victims ('LRV') filed their response on the release of the Mr Ongwen and the current restrictions on communication and contacts.¹³ The LRV supported the CLRV Submissions and requested the Trial Chamber to uphold the current communication regime applicable to Mr Ongwen.

IV. SUBMISSIONS

12. The Defence notes its prior position in its Closing Brief.¹⁴ Two points of particular importance to the Responses are (a) the imposition of restrictions based on allegations of Mr Ongwen's conduct which was not proven and therefore unjustifiably punishes Mr Ongwen,¹⁵ and (b) the regime was an arbitrary interference with liberty and family life¹⁶ because the legal basis of the restrictions in respect to various individuals was convoluted, kept shifting, or was missing.¹⁷ The basis for imposing the restrictions has collapsed or dissipated and so the restrictions should be removed.

¹⁰ Email, sent 17 March 2020 at 17h21, subject 'Request for clarification and possible variation of deadline and page-limit'.

¹¹ Email, sent 18 March 2020 at 9h22, subject 'Decision on Request for clarification and possible variation of deadline and page-limit'.

¹² ICC-02/04-01/15-1729-Conf ('Prosecution Response').

¹³ ICC-02/04-01/15-1730-Conf ('LRV Response').

¹⁴ See Defence Closing Brief, paras 147 to 155.

¹⁵ Defence Closing Brief, paras 148 and 149.

¹⁶ *Ibid.*, para. 150.

¹⁷ *Ibid.*, para. 153.

A. The communication restrictions are not necessary nor proportionate

13. To examine the continued necessity of the communication restrictions, it is necessary to examine the circumstances under which they were imposed.¹⁸ Trial Chamber VI noted three important factors to the assessment of whether communication restrictions are proportionate. These are: the time that has since passed since the restrictions were initially placed, the stage of the proceedings, and whether the restrictions have been relaxed over time.¹⁹
14. The factors identified by Trial Chamber VI in the *Ntaganda* case are relevant to the issue of whether the communication restrictions are necessary or proportionate in the *Ongwen* case. Since the restrictions were first imposed, almost five years have passed. Some of the restrictions have been relaxed. For example, in the first initial months the restrictions were loosened;²⁰ this occurred further when Mr Ongwen was granted permission to speak with his children.²¹
15. Both the Prosecution and the CLRV emphasise that the stage of proceedings should not be a consideration because *inter alia* the possibility of interference with sentencing witnesses²² and indirectly through arguing about threats to the integrity of the proceedings.²³ The Defence suggests that these arguments should be rejected.
16. The stage of the proceedings should lead to the removal of communication restrictions, both for the reasons articulated by Trial Chamber VI, which it should be noted were adopted at a slightly earlier stage of proceedings than the present, but also because of the circumstances of the present case. There have not been repetitions of the allegations which led to the communication restrictions. The Prosecution has not objected to Mr Ongwen having visitors who were witnesses following their testimony.²⁴ This included one of the Article 56 witnesses who visited him and there has since been no adverse incidents recorded from her visit.²⁵ This underscores that there is no threat to the integrity of the proceedings by removing the communication restrictions.

¹⁸ ICC-01/04-02/06-2236-Red, para. 21.

¹⁹ *Ibid.*, paras 25 and 26.

²⁰ ICC-02/04-01/15-283.

²¹ ICC-02/04-01/15-553.

²² Prosecution Response, para. 10.

²³ Prosecution Response, para. 15 and CLRV Submissions, para. 16.

²⁴ Email, sent 30 October 2018 15h02, subject 'RE: Request for Courtesy Visits'.

²⁵ ICC-02/04-01/15-1616-Conf, para. 34(i).

17. As mentioned above, to maintain the communication restrictions it is necessary to examine the circumstances under which they were imposed. They were imposed in the context of very early pre-trial investigatory phase, which was emphasised by the Prosecution itself when it stressed in an early filing that full-restrictions were needed “[g]iven that the current phases of the investigation is particularly sensitive”.²⁶ The Single Judge of the Pre-Trial Chamber had this in mind²⁷ albeit giving a decision for the implementation of less restrictive measures than were requested by the Prosecution. Importantly, as discussed by the Defence in the Defence Closing Brief, the Prosecution has failed to make out the factual basis for the restrictions.²⁸
18. The restrictions’ impact upon Mr Ongwen, which have been in place for an extended period of time, should also not be downplayed. When personal liberty is very limited, as for Mr Ongwen, every additional reduction in liberty – such as limitations on phone time with family – is experienced even more severely. Given this, it is further concerning that there is no record available to the Defence, beyond decisions coming out of related litigation, of any periodic assessment of the necessity of the restrictions by the Trial Chamber.
19. It is worth mentioning two matters that are legally connected to the communication restrictions. Firstly, the Trial Chamber previously put in place a mechanism for the delivery of letters which, in the opinion of the Registry, could be in violation of an order of the Trial Chamber.²⁹ Though strictly speaking the mechanism only operates in relation to communication restrictions in place, for completeness, the Defence notes that if the communication restrictions are not necessary then neither, for practical purposes, is the letter delivery mechanism.
20. Secondly, to the extent that the rules around visitors to see Mr Ongwen at the Detention Centre are related to the communication restrictions on Mr Ongwen,³⁰ so as to avoid any future dispute, the Defence submits that the Trial Chamber, in removing all communication restrictions, should confirm that Mr Ongwen is subject to the standard Detention Centre visitors regime without any further limitations or requirements.

²⁶ ICC-02/04-01/15-276-Conf, para. 3.

²⁷ ICC-02/04-01/15-283, para. 4.

²⁸ See Defence Closing Brief, para. 148.

²⁹ ICC-02/04-01/15-1445, para. 15.

³⁰ See, for example, ICC-02/04-01/15-503, para. 19 (“The Chamber again notes that Mr Ongwen has ample communication privileges. He is permitted visitors and telephone communications with persons on his privileged and non-privileged phone lists. Further, he is able to add additional persons to either list, subject to certain conditions.”).

i. *The arbitrariness of the measures*

21. The restrictions are by definition neither necessary nor proportionate as a matter of law. A restriction which has a legally-incorrect or non-existent basis is by definition neither necessary nor proportionate. In this respect, the Defence recalls its prior submissions³¹ that it is unfortunate that “uncertainty remains as to whether the Regulation 101(2) RoC total communication bans restrictions are assumed to be in place by the Trial Chamber.”³²
22. While the Defence will respond below to some of the issues raised in the Responses, to be a fair process and be able to fully respond to the legal arguments in the Responses, it is necessary to know with clarity which restrictions measures apply to whom, what their justification is, and what are their content. This is not the case here.

ii. *The Prosecution and Participants misrepresent the basis for the restrictions and speculate about Mr Ongwen's future actions in a prejudicial way*

23. Perhaps due to their unclear content and the convoluted way in which the restrictions evolved, the Prosecution and CLRV submissions, which are also supported by the LRV, are based predominantly upon a misreading or misrepresentation of the communication restriction decisions, as already stated above. The Defence submits that once the Trial Chamber examines the manner by which the Responses misread the basis for the communication restrictions, beyond removing the communication restrictions, the only point requiring consideration is the regime in respect to the Article 56 witnesses.
24. It is incorrect for the Prosecution to state that Mr Ongwen “was found to have exercised pressure on some witnesses from within the Court's own Detention Centre”³³ and that this was one of the reasons why communication restrictions were imposed. Records in respect to the said context shows a finding of “a reasonable suspicion” of “attempts to exercise some form of influence”,³⁴ but the findings in respect to “pressure” relate to third parties, and in particular an NGO in Uganda, and one of the witnesses the Prosecution called in respect to the Article 56 hearings.

³¹ ICC-02/04-01/15-1616-Conf, paras 30-32.

³² *Ibid.*, para. 31.

³³ Prosecution Response, para. 10.

³⁴ See ICC-02/04-01/15-254, para. 6; ICC-02/04-01/15-283, paras 9 and 10; ICC-02/04-01/15-450-Red, para. 1, and ICC-02/04-01/15-533, para. 9.

25. The Trial Chamber is also urged to disregard the Prosecution submissions that Mr Ongwen “may still exercise pressure on witnesses in these proceedings”³⁵ for being speculative and prejudicial. This is also true of the claim made that the restrictions are necessary to protect against “unlawful interference or pressure”.³⁶ Again, no finding of unlawfulness was made and the record shows there have been no concerns for an extended period of time. Mr Ongwen benefits from the presumption of innocence. It cannot be presumed that because he has been charged with crimes, he will therefore commit Article 70 offences.
26. Similarly, the CLRV submission that the restrictions are necessary “to ensure the safety of the witnesses and victims, prevent breaches of confidentiality and ensure the integrity of the proceedings”³⁷ is similarly prejudicial and speculative. As just noted, there has not been a finding in relation to pressure. Imputing conduct which was not established and then speculating that further similar conduct will occur is injurious to Mr Ongwen’s reputation without basis and not of assistance in determining the issue at hand.

iii. The vulnerability of the witnesses is not a justification for maintaining the restrictions and does not justify the same restrictions being imposed

27. The Prosecution³⁸ and CLRV³⁹ responses emphasise the vulnerability of the witnesses as a basis for maintaining the communication restrictions. Firstly, the record shows that this was not a basis for imposing the measures and therefore logically it cannot be a continuing basis for maintaining the measures. The Prosecution and CLRV are seeking to switch reasons given for the restrictions with those given for the Article 56 hearings.
28. This is inappropriate and should not be permitted. The pre-trial reasoning concerning vulnerability centred on **the circumstances in Uganda**. In particular there was a concern that third parties would impact upon the trial testimony of the Article 56 witnesses. It is unfair to attribute this to Mr Ongwen and suggest that it has a bearing on measures which should relate to his conduct. Should the Trial Chamber consider this a relevant factor, it will have to impose the measures on this new basis rather than simply maintain them.

³⁵ Prosecution Response, para. 11.

³⁶ *Ibid.*, para. 11.

³⁷ CLRV Submissions, para. 16.

³⁸ Prosecution Response, para. 11.

³⁹ CLRV Submissions, para. 16.

29. Secondly, as discussed below⁴⁰ it is not necessary to impose the current restrictions on the basis of the vulnerability of the witnesses.

iv. *In the Ntaganda case, communication restrictions have been comprehensively removed despite much more serious allegations*

30. Mr Ongwen's behaviour demonstrates that none of the restrictions are necessary or proportionate. The active monitoring regime and limitations on time for calls should be removed immediately. As discussed previously,⁴¹ 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 which demonstrates that the perceived risk of interference is greatly exaggerated since, in over almost three and a half years, no allegations have surfaced. The Defence submits that the Ntaganda Trial Chamber reasoning is applicable here; it stated:

the standard passive monitoring regime deployed by the Registry, coupled with the deterrent effect of the previously-ordered restrictions, is sufficient at this stage to address the level of risk presented by the accused in relation to potential misuse of his non-restricted telephone privileges.⁴²

31. To the extent that the limitations on call time are premised upon limited Acholi speaking staff, removing the need for active monitoring alleviates this concern and further confirms that Mr Ongwen should not have his phone privileges unnecessarily curtailed.

32. In the decision in Ntaganda ending communication restrictions, Trial Chamber VI considered that the Registry verifying identification of a candidate for the phone list is a sufficient safeguard.⁴³ It must be recalled that Mr Ntaganda was alleged to have:

- a. abused his entitlement to communications by speaking to non-registered interlocutors without prior approval of the Registry;
- b. used coded language to disguise attempts to disclose confidential information or to interfere with witnesses;
- c. disclosed the identity of Prosecution witnesses in circumstances which the Chamber found to be of grave concern;

⁴⁰ See para. 40.

⁴¹ ICC-02/04-01/15-1616-Conf, paras 34(j) and 35.

⁴² ICC-01/04-02/06-2236-Red, para. 28.

⁴³ *Ibid.*, para. 32.

- d. intended to engage in a serious form of witness interference; and
 - e. instructed his interlocutors to coach witnesses, or directly told his interlocutors which story to tell, stressing the need to tell the story in the manner as described by him and the necessity of synchronising the stories.⁴⁴
33. These allegations are *prima facie* more serious allegation than has ever been alleged against Mr Ongwen and the extent of investigations against Mr Ntaganda were much more advanced.⁴⁵ Moreover, Mr Ntaganda had been admonished four times to avoid use of vague and coded language at the point the lifting of restrictions was granted.⁴⁶ If Mr Ntaganda's behaviour is the yard-stick for the necessity of communication restrictions, then the Defence submits that maintaining the contact list control regime is certainly not necessary.

B. Communication and the Article 56 individuals

34. The Defence submits that no order to Mr Ongwen forbidding contact such as that requested by the CLRV is required and moreover there is a compelling basis to not unnecessarily seal the lines of communication.
35. Firstly, in raising the result of the 'Decision on Defence Request to Meet with Six Prosecution Witnesses'⁴⁷, the Prosecution and CLRV are bringing in an issue which is inapposite to the specific reasons that the communication restrictions were put in place in 2015. Whatever the positions taken by the Article 56 individuals are now, they are not relevant to whether the 2015 measures, which were taken to prevent conduct comprising "some form of influence" where there was already a line of communication, are still necessary.
36. Secondly, such an order is neither necessary nor proportionate. Mr Ongwen has been explained that the women do not want to be in contact and will not contact them. If the restrictions are lifted, it will still require consent from the women to communicate with them.

⁴⁴ ICC-01/04-02/06-2236-Red, para. 20.

⁴⁵ Compare the stages discussed in ICC-01/04-02/06-1883, paras 6-8 with ICC-02/04-01/15-T-245-Conf, p. 20, line 23 to 21 line 5.

⁴⁶ ICC-01/04-02/06-2236-Red, para. 9.

⁴⁷ ICC-02/04-01/15-1593.

37. Thirdly, it is not clear what was said when the Victims and Witness Unit ('VWU') staff member spoke with the six individuals and how much can be read into it to justify the CLRV request. In response to a request by the Defence to contact the witnesses and to put some questions to them relating to contact with Mr Ongwen and care for their shared children⁴⁸ the Single Judge instructed the VWU to:

contact the Witnesses in order to seek their informed consent on whether they wish to have any contact with the Defence or the accused. The Witnesses should be informed that the Defence does not wish to question them about their testimonies, but enquire about matters unrelated to the case, including their personal ties and potential contacts with the accused.

38. Though their consent is crucial, what was specifically said to the VWU was not reported to the Defence and the result in any case does not address the restriction regime which is the subject of this submission. It is not fully clear that the individuals declined any contact with Mr Ongwen on every subject. The VWU follow-up email to the order states that the women were asked "whether they wished to have contact with the Defence and or Ongwen"⁴⁹ and yet the response indicates that the five "declined to have any contact with the Defence"⁵⁰ but notably does not mention contact with Mr Ongwen. Therefore, the Defence submits that, the rejection of contact should not be used to justify the CLRV requested order.

39. Fourthly, the series of emails and conduct of the women generally point to the fact that the women favour communicating with Mr Ongwen on matters concerning their children. Examples include facilitating the visits of Mr Ongwen's children or providing for the well-being of their shared children.⁵¹ Although Mr Ongwen can send money to his children through a protocol,⁵² he has limited resources and may want to direct what he can to the greatest need. Thus there could be a need for a means of contact for the purposes of the care of children. Although not immediately an issue, granting the CLRV request would potentially prevent Mr Ongwen focusing his limited resources in respect to the needs of his children.

⁴⁸ ICC-02/04-01/15-1574-Conf-Corr, para. 2.

⁴⁹ Email, sent 11 October 2019 11h09, subject 'Gulu Victims'.

⁵⁰ *Ibid.*

⁵¹ ICC-02/04-01/15-1574-Conf-AnxC; ICC-02/04-01/15-1574-Conf-AnxD.

⁵² ICC-02/04-01/15-606-Conf.

40. Finally, if the Trial Chamber considers that some measure is required, then the Defence submits that less heavy-handed and proportionate mechanisms exist to remove the CLRV concerns. To date, matters relating to the wellbeing of the children have been addressed in an *ad-hoc* manner *inter partes*. The women are represented by Counsel and the VWU can also be involved if needed. Should for some reason a communication originating from Mr Ongwen to them is needed or desired, then this can be raised with the CLRV who can make suggestions and, if required, justify them before the Court on a case-by-case basis. This would enable the Defence to have a right to provide submissions and then the resolution of contentious matters can be tailored to the specificities of the issue and the specificities of the individual involved.

V. CONCLUSION

41. The Defence respectfully provides the response above as permitted by the Trial Chamber. In sum, the Defence urges the Trial Chamber to reject the submissions of the Prosecution and Participants and remove all communication restrictions on Mr Ongwen.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 1st day of April, 2020

At Kampala, Uganda