

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: **ICC-02/04-01/15**  
Date: **18 January 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 for Orders to the Prosecution in  
Relation to Information Concerning Mr Ongwen’s Family’, filed 18 January 2019**

**Source: Defence for Dominic Ongwen**

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

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## I. INTRODUCTION

1. In light of a delayed disclosure by the Prosecution of a note which documents the suffering of the family members of Mr Ongwen,<sup>1</sup> the Defence requests remedies to prevent future harm and prejudice to Mr Ongwen and his family.
2. The remedies requested include (a) an order for production of further information in relation to Mr Ongwen's family and (b) an order for the Prosecution and OPCV – who are *de facto* gatekeepers of information – to promptly provide information about the well-being of Mr Ongwen's family as soon as it comes into their possession or control.
3. Three areas of law support the present request:
  - a. The Convention on the Rights of the Child;
  - b. The internationally recognised human rights to family life and health which have been elaborated in the jurisprudence of international bodies; and
  - c. The application of international human rights to detained individuals as expressed in the *United Nations Standard Minimum Rules for the Treatment of Prisoners* ('the Mandela Rules').<sup>2</sup>
4. Additionally, the request should be granted because, notwithstanding its basis in international human rights law, it has separate merit on the basis of humanitarian and compassionate concerns. Mr Ongwen has shown his concern for his children and has acted to improve their lives.<sup>3</sup> In that context, as discussed below, the omission of bringing the information concerning an unwell member of Mr Ongwen's family to the attention of the Defence months after help could be provided was harmful, prejudicial and improper and an order is required to guard against future failures.

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<sup>1</sup> UGA-OTP-0282-0522-R01 ('Investigative Note'). Disclosed [REDACTED], ICC-02/04-01/15-1320-Conf-AnxA, line 23.

<sup>2</sup> United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955, available at: <http://www.refworld.org/docid/3ae6b36e8.html> [accessed 31 October 2018].

<sup>3</sup> See for example paras 11 to 12 below and also UGA-D26-0018-3455.

## II. CONFIDENTIALITY

5. Pursuant to Regulations 23bis(1) of the Regulations of the Court ('RoC'), this request is submitted as confidential as it refers to information that if made public might lead to the identification of a protected witness and also members of Mr Ongwen's family with its accompanying unwelcome media attention. A public redacted version will be filed contemporaneously.

## III. BACKGROUND

6. Following an initial order to restrict Mr Ongwen's communications on 25 June 2015,<sup>4</sup> the Single Judge of Pre-Trial Chamber II granted two Prosecution requests to institute Article 56 proceedings in relation to several Prosecution witnesses on 27 July 2015<sup>5</sup> and 15 August 2015<sup>6</sup> respectively. Unlike the 15 August 2015 Article 56 proceedings decision,<sup>7</sup> the 27 July 2015 decision does not contain a prohibition on contact. The Defence contested the legality of those proceedings.<sup>8</sup>
7. On 15 August 2015 the Single Judge partially relaxed the restrictions on Mr Ongwen's communications. The Single Judge required limits on the duration of calls<sup>9</sup> and ordered exclusion of two not-fully-identified individuals from Mr Ongwen's phone list.<sup>10</sup>
8. Pursuant to the Article 56 order, the Single Judge of the Pre-Trial Chamber II heard from P-226<sup>11</sup> and P-227<sup>12</sup> between 15 and 19 September 2015 and<sup>13</sup> from P-101,<sup>14</sup> P-99,<sup>15</sup> P-214,<sup>16</sup> P-236,<sup>17</sup> P-235<sup>18</sup> and P-198<sup>19</sup> between 9 and 18 November 2018.

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<sup>4</sup> ICC-02/04-01/15-254, para. 2.

<sup>5</sup> ICC-02/04-01/15-277-Conf.

<sup>6</sup> ICC-02/04-01/15-316-Conf.

<sup>7</sup> *Ibid.*, p. 11.

<sup>8</sup> ICC-02/04-01/15-492, paras 1(a) and (b), 5-19, and 28-42; ICC-02/04-01/15-522.

<sup>9</sup> ICC-02/04-01/15-283, para. 15.

<sup>10</sup> *Ibid.* (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"); 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.

<sup>11</sup> ICC-02/04-01/15-T-8-CONF-ENG; ICC-02/04-01/15-T-9-CONF-ENG.

<sup>12</sup> ICC-02/04-01/15-T-10-CONF-ENG; ICC-02/04-01/15-T-11-CONF-ENG.

<sup>13</sup> ICC-02/04-01/15-316-Conf.

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

<sup>15</sup> ICC-02/04-01/15-T-14-CONF-ENG.

<sup>16</sup> ICC-02/04-01/15-T-15-CONF-ENG.

<sup>17</sup> ICC-02/04-01/15-T-16-CONF-ENG.

9. On 31 May 2016, the Single Judge of Trial Chamber IX set forth the procedure for the addition of names to the list of persons Mr Ongwen is permitted to telephone.<sup>20</sup> The restrictions on Mr Ongwen's communication rights were not lifted but rather slightly modified.
10. On 24 November 2016, the Defence notified<sup>21</sup> the Trial Chamber as per order,<sup>22</sup> that on 16 August 2016 it had reached an agreement with the Prosecution in relation to support payments from Mr Ongwen. The Prosecution and Defence agreed that: (a) the Defence would attempt to identify persons who would likely request support payments from Mr Ongwen, (b) if a witness asked for help from Mr Ongwen's family, and Mr Ongwen wished to send a support payment, the Defence would disclose any such request, including the amount sought, to the Prosecution, and (c) a neutral third party would facilitate requested support payments and would keep a record of such disbursement including the dates and time.
11. On [REDACTED] 2017, the Prosecution notified the Defence that [REDACTED] was "very ill suffering from severe malaria" and suffering convulsions and noted:  
  
[REDACTED]  
  
[REDACTED]  
  
[REDACTED].<sup>23</sup>
12. On [REDACTED] 2017, [REDACTED] confirmed to the Prosecution that Mr Ongwen wished to transfer money.<sup>24</sup> On [REDACTED] 2017, the Prosecution conveyed a further message from [REDACTED], that she also needed money for food.<sup>25</sup> That same day [REDACTED] indicated that he would transfer the money for the treatment and food.<sup>26</sup>
13. On [REDACTED] 2018, the Defence disclosed<sup>27</sup> a series of emails<sup>28</sup> concerning letters which had been sent to the International Criminal Court Detention Center ('ICC-DC') that allegedly were written by [REDACTED].

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<sup>18</sup> ICC-02/04-01/15-T-17-CONF-ENG.

<sup>19</sup> ICC-02/04-01/15-T-18-CONF-ENG.

<sup>20</sup> ICC-02/04-01/15-450-Red.

<sup>21</sup> ICC-02/04-01/15-606-Conf-Exp.

<sup>22</sup> ICC-02/04-01/15-521, para. 18.

<sup>23</sup> UGA-D26-0018-3428 at 3435.

<sup>24</sup> *Ibid.* at 3432.

<sup>25</sup> *Ibid.* at 3429.

<sup>26</sup> UGA-D26-0018-3428 at 3428.

<sup>27</sup> ICC-02/04-01/15-1311.

<sup>28</sup> UGA-D26-0018-3440, UGA-D26-0018-3441, UGA-D26-0018-3442, UGA-D26-0018-3444, UGA-D26-0018-3445, and UGA-D26-0018-3446.

14. On [REDACTED] 2018, the Prosecution disclosed a meeting note from [REDACTED] 2018 which explained that a member of Mr Ongwen's family had suffered an injury.<sup>29</sup> The note explains that "P-0227 called PO and wanted to report that [REDACTED]." Given that [REDACTED] lacked the hospital funds, P-227 was asking the Prosecution whether it could provide money for medical assistance. The note explains "P-0227 informed that [REDACTED] had not received any medical attention as neither she P-0227 nor [REDACTED] has money to take [REDACTED] to hospital" and "P-0227 informed that [REDACTED]". Finally "P-227 inquired if it were possible for the Court to provide funds for [REDACTED]. P-227 was informed that a report would be sent to the relevant units in the Court and she should await a response."
15. On 17 September 2018, the Defence commenced litigation that *inter alia* sought remedies for late disclosure by the Prosecution.<sup>30</sup> The Defence noted the burden placed upon thinly stretched staff in relation to analysing and responding to these materials at this stage in the trial.<sup>31</sup>
16. On 1 November 2018, the Defence initiated an *inter partes* discussion with the Prosecution and Office of Public Counsel for Victims ('OPCV') asking for the

disclosure of any [REDACTED] prior incident reports / meeting notes / documents in the possession of the Prosecution or OPCV that describe any form of hard-ship experienced by Mr Ongwen's children or alleged children following his detention.<sup>32</sup>

The Defence also made two additional and related requests. Specifically it noted that:

(a) Although covered by the [disclosure] request, the Defence wants to know whether there was any follow-up by the Prosecution or OPCV in relation to [REDACTED]? If so could you please describe and disclose any documentary indication thereof.

(b) Does the Prosecution or OPCV now have in place a mechanism to assist [REDACTED] in the future should [REDACTED] harm? Again, could you please describe the process and disclose any documentary indication thereof.<sup>33</sup>

17. Finally, the Defence requested the Prosecution and OPCV for a commitment "to [bring] to the attention of the Defence any future information concerning the well-being or health of [REDACTED]".

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<sup>29</sup> Investigative Note.

<sup>30</sup> ICC-02/04-01/15-1329-Conf-Corr.

<sup>31</sup> *Ibid.*, para. 78.

<sup>32</sup> See Annex A, p. 3.

<sup>33</sup> Annex A, p. 3.

18. On 8 November 2018, the OPCV and Prosecution responded.<sup>34</sup>

- a. The OPCV noted that “we were not informed of the incident and we had knowledge about it when the report was disclosed. [REDACTED] communicated with P-0227 and she indicated that [REDACTED]”.<sup>35</sup>
- b. The Prosecution would not commit to bringing to the attention of the Defence future information. Additionally it stated that:

This document was disclosed because it was a request to the prosecution from a trial witness for financial assistance. The Prosecution took the view that such a request, whatever the reason, was material to the preparation of the defence.

However “...documents in the possession of the Prosecution...that describe any form of hard-ship experienced by Mr Ongwen’s children or alleged children following his detention” are not, in my opinion, material to the preparation of the defence simply because of their reference to Mr Ongwen’s children.

[REDACTED] generate information which we consider to be disclosable, we disclose it and will continue to do so. I give no undertaking beyond that.

19. On 24 December 2018, the Defence wrote<sup>36</sup> to the OPCV to inquire<sup>37</sup> about [REDACTED]. The Defence wished to know the [REDACTED] and how the OPCV intended to address [REDACTED]. The OPCV responded on 15 January 2019<sup>38</sup> indicating that [REDACTED] the OPCV will follow-up with her and revert to the Defence if appropriate.

#### IV. APPLICABLE LAW

##### A. International Criminal Court (‘ICC’) legal sources

20. Article 21 sets out the sources of law applicable before the ICC. This includes the “Statute, Elements of Crimes and its Rules of Procedure and Evidence” pursuant to (1)(a), “where appropriate, applicable treaties and the principles and rules of international law” pursuant to (1)(b), and “general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute

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<sup>34</sup> *Ibid.*, p. 2.

<sup>35</sup> *Ibid.*

<sup>36</sup> Email, subject: ‘[REDACTED]’, sent 24 December 2019 at 15h43.

<sup>37</sup> [REDACTED], accessed 15 January 2019.

<sup>38</sup> Email, subject ‘[REDACTED]’, sent 15 January 2019 at 16h15.

and with international law and internationally recognized norms and standards” pursuant to (1)(c).

21. Pursuant to Article 21(3), “[t]he application and interpretation of law pursuant to [Article 21] must be consistent with internationally recognized human rights”.
22. Article 68(1) obliges the Court to take appropriate measures for the protection of, *inter alia*, the psychological and physical well-being of witnesses and victims.
23. The Trial Chamber IX (‘Trial Chamber’) has several general powers to order the production of material.
  - a. Pursuant to Article 64(3)(c), “Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.”;
  - b. Pursuant to Article 64(6)(d): “(6) [...] the Trial Chamber may, as necessary: [...] (d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties”; and
  - c. Pursuant to Article 64(6)(f), the Trial Chamber may “[r]ule on any other relevant matters.”
24. Article 67(2) requires that the Prosecution
 

shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.
25. Rule 77 of the Rules of Procedure and Evidence (‘RPE’) states that the Prosecution must permit the Defence to:
 

inspect any books, documents, photographs or other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the Defence or are intended for use by the Prosecution as evidence for the purposes of the confirmation hearing or at trial.
26. Pursuant to Rule 84:

In order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64,



paragraphs 3 (c) and 6 (d), and article 67, paragraph (2), and subject to article 68, paragraph 5, make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence.”

27. Rule 87(1) of the RPE empowers a Trial Chamber to “order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2.”

28. Pursuant to Regulation 163(3) RoR

3. A detained person who chooses to work shall be paid for his or her work at rates to be established by the Chief Custody Officer in consultation with the Registrar and may use his or her earnings to purchase items for his or her own use in accordance with regulation 166, sub-regulations 8 and 10, or may transfer such earnings in whole or in part to his or her family or to the Trust Fund for Victims. The balance of any monies earned shall be held in an account to be opened for him or her in accordance with regulation 166, sub-regulation 8.

#### **B. The Convention on the Rights of the Child (‘CRC’)**

29. The CRC is the most rapidly and widely ratified international human rights treaty in history.<sup>39</sup> All eligible states – 196 – save for the United States of America, are parties to the CRC.<sup>40</sup> Witness P-227 and her child live in Uganda which is a signatory.<sup>41</sup> The Defence submits, without prejudice to future submissions on its status prior to today, that the CRC has attained customary status at the time of this request. It follows that the CRC is an “applicable treat[y]” and also must be considered as applicable “rules of international law” pursuant to Article 21(1)(b).

30. A further basis for consideration of the CRC is Article 21(3) which provides that the interpretation and application of the courts legal instruments must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

<sup>39</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html> [accessed 23 November 2018].

<sup>40</sup> UN Treaty Database, Convention on the Rights of the Child, New York, 20 November 1989, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) [accessed 23 November 2018].

<sup>41</sup> *Ibid.*, ratification 17 Aug 1990.

## V. SUBMISSIONS

31. The present request concerns ensuring a means for safeguarding the well-being of Mr Ongwen's children. Mr Ongwen's well-being is also improved through knowing his children are safe. The [REDACTED] meeting note indicates that Mr Ongwen's [REDACTED] appear to have limited means to provide for their children. The orders requested are necessary so that Mr Ongwen can provide for his children to the best that his circumstances permit.
32. Despite his detention, and even where his contribution is not known by his family, Mr Ongwen has demonstrated a consistent concern<sup>42</sup> for the well-being of his children and family along with a willingness to send assistance from what he earns working at the Detention Centre.<sup>43</sup> However, the present legal conditions placed upon Mr Ongwen impede his ability to have access to pertinent information in a timely manner. Although no explicit order has been given, the reasoning in paragraph 9 of Decision 553<sup>44</sup> indicates that Mr Ongwen and his Defence are not presently permitted to contact P-227. There is no way or guarantee that information relating to the welfare of Mr Ongwen's family will reach him under the current regime.
33. The 20 July 2018 letter delivered to the ICC-DC<sup>45</sup> provides a further indication that Mr Ongwen's family may be suffering as a consequence of the present restrictions on communications regime and provides a further indication that the present request has merit.
34. Trial Chamber intervention is necessary to comprehensively set matters addressed in this request on a clear path.<sup>46</sup> Significant legal disputes between the parties will hinder finding a solution *inter partes*. For example, the Prosecution response to the Defence *inter partes* request characterises P-227 is "a trial witness".<sup>47</sup> The Defence contests this characterization, the witness was never called at trial and in fact answered questions before all charges were formally filed.

### A. The general necessity of granting the requests

35. Granting the request is necessary to ensure that (1) the right to health of Mr Ongwen's children is secured and (2) the right to family life is not interfered with.

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<sup>42</sup> UGA-D26-0018-3410.

<sup>43</sup> UGA-D26-0018-3428.

<sup>44</sup> ICC-02/04-01/15-553; *see particularly* ICC-02/04-01/15-553, footnote 28.

<sup>45</sup> *See* para 113 above. *See also* ICC-02/04-01/15-1411-Conf.

<sup>46</sup> The issues are unsettled and issues of first impression.

<sup>47</sup> *See* Annex A., p. 2.

36. Mr Ongwen's children require protection as they are individuals put in harm's way through contact with the Court. The Appeals Chamber has noted rules that were "aimed at ensuring that persons are not put at risk through the activities of the Court"<sup>48</sup> and extended protective redactions through analogy to these provisions.<sup>49</sup> Trial Chambers may take action if required.<sup>50</sup>
37. The Prosecution has argued that the mothers of Mr Ongwen's children are witnesses. The children are persons "at risk through the activities of the Court".<sup>51</sup> The harm that the mothers may experience on account of their children lacking support from Mr Ongwen will cause harm to them and this brings the well-being of the children within the obligation that the Trial Chamber has to alleged victims and witnesses pursuant to Article 68(1).<sup>52</sup>

### 1. *The right to health of Mr Ongwen's children*

38. The *International Covenant on Economic, Social and Cultural Rights* ('ICESCR')<sup>53</sup> provides for a right to health.<sup>54</sup> Mr Ongwen's children also have a right to health under Article 24(1) of the CRC which recognises the international human right of the "child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health".
39. Article 27(2) of the CRC states that: "The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development."<sup>55</sup> The Committee on the Rights of the Child has elaborated on this in *General comment No. 15*, stating:

Parents should fulfil their responsibilities always acting in the best interests of the child, if necessary with the support of the State. Taking the child's evolving capacity into

<sup>48</sup> ICC-01/01-01/07-475 (0A), para. 43.

<sup>49</sup> *Ibid.*, para. 59.

<sup>50</sup> *Ibid.*, para. 66.

<sup>51</sup> *Ibid.*, para. 43.

<sup>52</sup> See para. 22 above.

<sup>53</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <https://www.refworld.org/docid/3ae6b36c0.html> [accessed 23 November 2018].

<sup>54</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> [accessed 31 October 2018], Article 12(1): "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

<sup>55</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> [accessed 17 October 2018]. (emphasis added)

account, parents and caregivers should nurture, protect and support children to grow and develop in a healthy manner.<sup>56</sup>

40. Following the accident [REDACTED] and needing medical treatment according to the note. The Prosecution *inter partes* response provided no information that any medical treatment was given or that any similar future occurrence would be reported to Mr Ongwen [REDACTED].
41. Because of the prohibition on direct contact, Mr Ongwen is unable to fulfil this responsibility. By denying Mr Ongwen the opportunity to provide for his child by withholding information, the Prosecution has interfered with the human rights of [REDACTED]. If the Prosecution considers that it has no responsibility for the well-being of the children, then it should make this clear in any response to the present filing.
42. As there is no assigned advocate for the children in the present, the Defence notes on their behalf that consistent with other international human rights, any assessment should not be undermined as a result of discrimination.<sup>57</sup> One of the enumerated basis upon which discrimination in respect to realising the right to health of children is prohibited is “other status”.<sup>58</sup> The Defence submits that in light of, *inter alia*, the right to family life, the Mandela Rules, Article 21(3) of the Statute, and Article 10(2) of the CRC, “other status” includes *children whose parents are incarcerated or in detention*. Thus, Mr Ongwen’s status as a person in detention should not pre-determine the outcome of this request.

## 2. The right to family life

43. The recognition of the right to family life appears in many international treaties<sup>59</sup> or the treaties are arguably an expression or elaboration of this right.<sup>60</sup> This right is an “internationally

<sup>56</sup>UN Committee on the Rights of the Child (CRC), General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, CRC/C/GC/15, available at: <https://www.refworld.org/docid/51ef9e134.html> [accessed 23 November 2018] (‘General Comment No 15’), para. 78 at p. 16.

<sup>57</sup> General Comment No 15, para. 8, p. 4: “In order to fully realize the right to health for all children, States parties have an obligation to ensure that children’s health is not undermined as a result of discrimination, which is an important factor in creating vulnerability. A number of grounds on which discrimination is proscribed are outlined in Article 2 of the Convention, including the child’s, parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or *other status*” (emphasis added).

<sup>58</sup> Article 2(1) CRC.

<sup>59</sup> See *inter alia*: UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 23 November 2018], Article 16(3); UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html> [accessed 23 November 2018], Article 17(1) and Article 23(1); ICECSR, Article 10(1); Organization of African Unity

recognized human right” pursuant to Article 21(3). The jurisprudence under the European Convention of Human Rights (‘ECHR’)<sup>61</sup> is the most extensive on this right. In general terms, the right to respect for family life entails that a public authority cannot arbitrarily interfere with family life of an individual otherwise than in accordance with strict conditions including accordance with law<sup>62</sup> and pursuit of a legitimate aim.<sup>63</sup> The definition of the family has been extended to include “illegitimate”<sup>64</sup> children and “includes at least the ties between near relatives, for instance, those between grandparents and grandchildren, since such relatives play a considerable part in family life.”<sup>65</sup> There are positive obligations for authorities inherent in an effective respect for family life.<sup>66</sup> Respect for a family life implies an obligation for an authority to act in a manner calculated to allow family ties to develop normally.<sup>67</sup>

44. Within the jurisprudence of the ECtHR, interference with the right to family life requires a legitimate goal to justify any interference. Legitimate goals include: national security, public safety, the prevention of crime, and protection of health, morality, and the rights of others.<sup>68</sup> The Prosecution has not raised any justification for withholding the information requested by the Defence. That said, the Defence submits that a legitimate aim would need to be pressing to justify jeopardising the health of a child by denying a source of money for medical care and improvement of their life.
45. “Family life” does not include only social, moral or cultural relations but also comprises interests of a material kind such as maintenance obligations.<sup>69</sup> The ECtHR has held that a State

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(OAU), African Charter on Human and Peoples' Rights (“Banjul Charter”), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <https://www.refworld.org/docid/3ae6b3630.html> [accessed 23 November 2018], Article 18(1); ECHR, Article 8; and Organization of American States (OAS), American Convention on Human Rights, “Pact of San Jose”, Costa Rica, 22 November 1969, available at: <https://www.refworld.org/docid/3ae6b36510.html> [accessed 23 November 2018], Article 17(1).

<sup>60</sup> See for example the provisions of the Convention on the Rights of the Child cited above.

<sup>61</sup> European Court of Human Rights (‘ECtHR’)

<sup>62</sup> *Marckx v Belgium*, Application no. 6833/74, 13 June 1979, available at: <http://hudoc.echr.coe.int/eng?i=001-57534>, para. 31 (‘*Marckx v Belgium*’).

<sup>63</sup> See for example Article 8(2).

<sup>64</sup> *Marckx v Belgium*, para. 31.

<sup>65</sup> *Ibid.*, para. 45.

<sup>66</sup> *Ibid.*, para. 31.

<sup>67</sup> *Ibid.*, para. 45.

<sup>68</sup> ECHR, Article 8(2).

<sup>69</sup> See for example: ECtHR, *Oliari and Others v. Italy*, Applications nos. 18766/11 and 36030/11, Council of Europe: European Court of Human Rights, 21 July 2015, available at: <http://www.refworld.org/cases,ECHR,55af917a4.html> [accessed 21 November 2018].

granting of family allowance enables States to “demonstrate their respect for family life” within the meaning of Article 8.<sup>70</sup>

46. The Mandela Rules constitute the universally acknowledged minimum standards for the treatment of prisoners. The rules provide guidelines for international and domestic law for citizens held in prisons and other forms of custody. Though the formal status is that of non-binding, many of the rules are a condensed expression of international human rights law. In the context of the right to family life, the rules provide elaborations and extrapolations of the child’s and father’s human rights in a context involving incarceration of a member of a family. The Regulations of the Registry appear to have in sections been modelled<sup>71</sup> upon the Mandela Rules and thus the Mandela Rules themselves should provide a helpful interpretive aid for ensuring protection of the right to family life.

47. Those rules provide for a system of equitable remuneration of the work of prisoners and require that prisoners be allowed to send at least a part of their earnings to their family.<sup>72</sup> Under the heading of “Social relations and after-care”, paragraphs 79 and 80 state:

79. Special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his family as are desirable in the best interests of both.

80. From the beginning of a prisoner’s sentence consideration shall be given to his future after release and he shall be encouraged and assisted to maintain or establish such relations with persons or agencies outside the institution as may promote the best interests of his family and his own social rehabilitation.

48. A branch of the right to family includes ‘informational rights’.<sup>73</sup> In other words, the failure to provide information about a member of the family may entail interference with the right.

49. Therefore, a request for provision of information which facilitates payments to children comes within the scope of ensuring that the right to family life is effectively protected. In the context of the present request, communication and information rights are two sides of the same coin. Both will enable the maintenance of family relations and guard against harm to Mr Ongwen’s children. The informational rights are necessary not only for the maintenance of family ties but so that Mr Ongwen can fulfil his responsibilities to his children and ensure their health.

<sup>70</sup> ECtHR, *Fawsie v Greece*, Application 40080/07, Judgment, 28 October 2010, available at: <http://hudoc.echr.coe.int/eng?i=001-101365>, para. 28.

<sup>71</sup> Compare, for example, Regulation 163(3) RoR and Mandela Rules, para. 76.

<sup>72</sup> Mandela Rules, para. 76.

<sup>73</sup> ECHR, *Fröhlich v. Germany*, Judgment (Merits and Just Satisfaction), 26 July 2017, Application no. 16112/15, available at: <http://hudoc.echr.coe.int/eng?i=001-185320>, para. 57.

50. Below,<sup>74</sup> the Defence requests information received concerning the family members whose lives may impact upon Mr Ongwen's children's welfare. The reason for this request is that numerous factors can impact upon the health of Mr Ongwen's children. Examples of this include, a mother's alcoholism or an abusive partner to the mother of Mr Ongwen's children.
51. It is submitted, that at the very least, information concerning the health of his child upon which Mr Ongwen may be able to act should be provided both as concerns retroactive meeting notes and promptly going forward.
52. Mr Ongwen and his children's right to family life have been interfered with by the failure of the Prosecution to communicate the information and greater fulfilment of these rights can be realised through granting the orders sought from the Trial Chamber.

#### **B. Requests for directions to the Prosecution**

53. The requests for directions to the Prosecution are required because the Prosecution has been on notice of the necessity to communicate information essential to protect the rights discussed above [REDACTED]. Moreover, the Prosecution response suggests that it takes a narrow view of its obligations to provide the information which is the subject of this request.
54. The individuals at the heart of the Article 56 hearings have been registered as victims and granted protective measures. Under those conditions, seen through the lens of Article 21(3), the measures requested below could, in relation to the children, also separately constitute a request for Rule 87(1) measures to protect a person at risk on account of testimony given by a witness pursuant to Article 68, paragraphs 1 and 2. The Defence notes this without conceding its rights to make further arguments on the status of the Article 56 individuals and the procedures used.
55. The Defence position is that Mr Ongwen should always be notified of matters touching upon his responsibility to his children. If the Trial Chamber disagrees and Prosecution is unwilling to provide this information, then the Prosecution must provide for the well-being of Mr Ongwen's children and an order should be provided stating this.

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<sup>74</sup> See para. 82(c)(ii).

### 1. *Late disclosure*

56. The Prosecution explained that the note was disclosed because “it was a request to the prosecution from a trial witness for financial assistance. The Prosecution took the view that such a request, whatever the reason, was material to the preparation of the defence”. Such an explanation does not illuminate, however, why, if the item was material to Defence preparation, it was disclosed almost seven months later.<sup>75</sup> The Defence therefore requests the Trial Chamber to find that the disclosure was late.

### 2. *Disclosure request for prior material*

57. The Defence submits that the Prosecution should be required to disclose any:
- a. record describing further follow-up, actions taken, or responses provided in relation to the investigative note;<sup>76</sup>
  - b. information received concerning the well-being of Mr Ongwen’s children and family members whose lives may impact upon Mr Ongwen’s children’s welfare; and
  - c. other communications from the mothers or family of Mr Ongwen’s children that relate to their well-being.
58. The Defence *inter partes* request was not stated as an Article 67(2) or Rule 77 request; however, it cannot be excluded that the information contained in the materials for which disclosure is requested may relate to, *inter alia*, sexual and gender based crimes. As with the items added to the Defence list of evidence,<sup>77</sup> the requested materials may clarify the nature of the conjugal relations between Mr Ongwen and the Article 56 individuals.
59. The Prosecution response also hints that the request from P-227 may not have been in response to an accident. If other non-monetary requests have been made then this is also relevant or exculpatory as it impacts upon the motives or credibility of the Article 56 individuals.
60. Material that could mitigate sentence must be disclosed pursuant to Article 67(2). If the Trial Chamber may consider that Mr Ongwen helping his children is a mitigating factor in the event

<sup>75</sup> UGA-OTP-0282-0522-R01 was prepared on [REDACTED] 2018 and describes events reportedly occurring on [REDACTED] 2018. It was disclosed on 15 August 2018 in Rule 77 package 94 (ICC-02/04-01/15-1320).

<sup>76</sup> Investigative Note.

<sup>77</sup> ICC-02/04-01/15-1358-Conf, para. 35.



of a conviction for the individual gender crimes, then denial of information necessary for sentence mitigation at this time is effectively a denial of an opportunity to mitigate sentence.

61. Thus the requested items may be either exculpatory pursuant to Article 67(2) or relevant to the preparation of the Defence pursuant to or Rule 77.
62. The rules of disclosure and the powers of the Trial Chamber must be interpreted pursuant to international human rights law as required by Article 21(3) of the Statute. Where the right to family is implicated, as in this situation, then Article 64(3)(c), Article 64(6)(d), and Rule 84 must be interpreted in a way that respects the internationally protected right to family life.
63. Pursuant to Article 64(3)(c) and Article 64(6)(d) the Trial Chamber is empowered to generally provide for the disclosure or production of documents. Pursuant to Rule 84, to facilitate the fair and expeditious conduct of the proceedings,<sup>78</sup> the Trial Chamber may order disclosure.
64. Though the Defence considers the material disclosable pursuant to Article 67(2) and Rule 77, it submits that disclosure pursuant to Rule 84 is also merited – whether interpreted through the lens of Article 21(3) or not. Granting the disclosure and orders will streamline the unfolding of the rest of the trial because it will reduce the *ad-hoc* manner in which these issues come to the attention of the Defence. This will in turn reduce litigation.
65. The disclosure and orders will also improve the fairness of the trial as its impact on Mr Ongwen, and his family rights. Mr Ongwen may avoid periodic distressing news such as the report at the heart of this request. As outlined in this filing, the lack of flow of information has impacted upon the well-being of [REDACTED] and P-227. The obstruction of fatherly support of the children should not be a collateral impact of the trial against Mr Ongwen and it would be perverse that charges brought to vindicate the alleged sustained harm to the Article 56 individuals may have harmed them through a deliberate blocking of parental support by the Prosecution.

*3. An order to the Prosecution in respect to prospective information is necessary to ensure that information is reliably provided in a timely manner*

66. The Prosecution brought charges against Mr Ongwen and sought restrictions on his communications and interactions.<sup>79</sup> To the knowledge of the Defence neither P-227

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<sup>78</sup> ICC-02/04-01/15-691-Conf, para. 23; ICC-02/04-01/15-902, para. 9.

[REDACTED] was sought in this regard. If Mr Ongwen is not able to have contact, then it is submitted that the Prosecution have assumed responsibility for the child and mother's well-being. If the Prosecution is not going to provide for Mr Ongwen's children's well-being, then as a gatekeeper of information, the Prosecution must provide all information relevant to their well-being to Mr Ongwen so that he can fulfil his moral and/or parental responsibilities.

67. Though the OPCV response<sup>80</sup> provides some assurances concerning [REDACTED], in response to the Defence *inter partes* request, albeit equivocal, the Prosecution has not made any similar gesture to disclose any information concerning Mr Ongwen's children and thus this request.
68. The Prosecution response rejected the Defence request on the basis that the material was not relevant "simply because of their reference to Mr Ongwen's children". The context of the Defence request was the well-being of Mr Ongwen's children. This brushing aside of a Defence request suggests that information will only be provided under a narrow set of conditions and not where it is in the best interests of the children.
69. At the time of the present request, the Prosecution has been given extensive notice of the importance of provision of the information concerned by this request.
70. The Prosecution has previously stated that "[i] principle, [it] does not object to the Accused communicating with his children in Uganda"<sup>81</sup> and has concluded an agreement in relation to their well-being.<sup>82</sup> If that were not sufficiently clear, a joint Defence and Prosecution filing shows that the Prosecution is on notice that Mr Ongwen is willing to provide for his children.<sup>83</sup>
71. The 24 November 2016 joint filing<sup>84</sup> concerns the sharing of information with the Prosecution about the well-being of "persons who would likely request support payments from Mr Ongwen"<sup>85</sup> and the agreement relates to "fair and even handed"<sup>86</sup> disbursements. The disclosure of the [REDACTED] meeting note in August 2018 is not keeping with the spirit of the agreement, especially considering that Mr Ongwen does not have contact with P-227.

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<sup>79</sup> ICC-02/04-01/15-241; ICC-02/04-01/15-254, para. 2; ICC-02/04-01/15-267; and ICC-02/04-01/15-283.

<sup>80</sup> See Annex A, p. 2.

<sup>81</sup> ICC-02/04-01/15-542-Conf, para. 23.

<sup>82</sup> ICC-02/04-01/15-490-Red, para. 43 noted by the Trial Chamber in ICC-02/04-01/15-521, para. 18.

<sup>83</sup> ICC-02/04-01/15-606-Conf-Exp.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*, para. 9(a).

<sup>86</sup> *Ibid.*, para. 9(b).

72. The Defence also notes that based upon the *inter partes* communications it appears that the Prosecution did not notify the OPCV that an OPCV client had contacted their office which could be in breach of the Code of Conduct for the Office of the Prosecutor<sup>87</sup> and/or two protocols adopted by the Trial Chamber in this case.<sup>88</sup> This is due to the fact that the OPCV only became aware of the incident on 15 August 2018<sup>89</sup> yet the meeting note indicates a communication between what appears to be a member of the Prosecution and an individual represented by a participant.<sup>90</sup> As the Prosecution is not sharing information with the individuals appointed to safeguard P-227's interests in the proceedings, this also suggests that an order is necessary to ensure that information is made available.

### C. Request for a directive to the OPCV

73. The OPCV's communication to the Defence noted the its "ongoing commitment – known to the Defence – to assist as far as possible in matters related to Mr Ongwen's children". The prior *inter partes* provision of information and prospective assistance is noted and the Defence is grateful for it; however, the OPCV has not committed to bringing to the attention of the Defence all future information concerning the well-being or health of Mr Ongwen's children.
74. Though the OPCV's answer clarifies that it was not aware of the incident in relation to its client and that it has confirmed that [REDACTED] "is fine", the OPCV has also not provided an answer to the second question posed *inter partes*.
75. Thus the present request is still necessary. Notwithstanding, the OPCV's assistance, the Defence urges the Trial Chamber to grant the requested orders below.<sup>91</sup> Whether framed as matter of "adequate preparation for trial",<sup>92</sup> "production of evidence",<sup>93</sup> "other relevant matters",<sup>94</sup> or ensuring the "fairness or expeditiousness"<sup>95</sup> of the trial, the requested orders to the OPCV will protect trial fairness and expeditiousness.

<sup>87</sup> Code of Conduct for the Office of the Prosecutor, Section 5, paragraph 70 (c), available at: <https://www.icc-cpi.int/iccdocs/PIDS/docs/Code%20of%20Conduct%20for%20the%20office%20of%20the%20Prosecutor.pdf>. See also Article 28 of the *Code of Professional Conduct for counsel*.

<sup>88</sup> ICC-02/04-01/15-504-Anx2, p. 3, number 5(d); ICC-02/04-01/15-339-Anx, para. 26.

<sup>89</sup> See Annex A, OPCV email of 8 November 2018 14h53, subject: '[REDACTED]', p. 2.

<sup>90</sup> Investigative Note.

<sup>91</sup> See para. 82(c) below.

<sup>92</sup> Article 64(3)(c).

<sup>93</sup> Article 64(6)(d).

<sup>94</sup> Article 64(6)(f).

<sup>95</sup> Rule 84 RPE.

#### **D. The best interests of Mr Ongwen's child**

76. The Defence submits that, in deliberating on the Defence request, the Trial Chamber should keep as a primary consideration the best interests of the child. According to the Committee of the Rights of the Child, Article 3(1) of the CRC:

places an obligation on public and private social welfare institutions, courts of law, administrative authorities and legislative bodies to ensure that the best interests of the child are assessed and taken as a primary consideration in all actions affecting children. This principle must be observed in all health-related decisions concerning individual children or children as a group.<sup>96</sup>

77. This assessment involves an individual factual assessment of the circumstances of the child.<sup>97</sup>
78. The Defence submits that the request is manifestly in the best interests of the concerned children. The mother does not have enough money to pay the medical expenses. Mr Ongwen has expressed concern for the well-being of his children. The best interest of this child is to receive the best medical care available. As far as the Defence is aware, the Prosecution has not been assisting the mother in health expenses for the child. Thus granting the Defence request will open the way for Mr Ongwen to contribute more effectively to their well-being.
79. In light of the existing interference with Mr Ongwen's right to family life caused by his pre-judgment detention, granting the Defence request will result in a more proportionate balance of interference with the children and Mr Ongwen's rights.

#### **E. Moral obligation and humanitarian concerns**

80. Even if the Trial Chamber considers that none of the above legal submissions are applicable, the Defence submits that it is within the Trial Chamber's power to make the order requested below as it is in the interests of justice.
81. Stated from a compassionate humanitarian perspective: it is not appropriate for the Prosecution to intervene in the relationship between parent and child through seeking restrictions, not

<sup>96</sup>General Comment No 15, paragraph 12 on p. 5.

<sup>97</sup> UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, available at: <https://www.refworld.org/docid/51a84b5e4.html> [accessed 23 November 2018] ('General comment No 14'), para. 48 on p. 12: "Assessing the child's best interests is a unique activity that should be undertaken in each individual case, in the light of the specific circumstances of each child or group of children or children in general. These circumstances relate to the individual characteristics of the child or children concerned, such as, inter alia, age, sex, level of maturity, experience, belonging to a minority group, having a physical, sensory or intellectual disability, as well as the social and cultural context in which the child or children find themselves."

provide for the well-being of that child, and then prevent Mr Ongwen from providing for the well-being of his children by refusing to provide all the required information.

## VI. RELIEF

82. In light of the above, the Defence hereby requests Trial Chamber IX ('Trial Chamber') to:

- a. FIND that the disclosure of UGA-OTP-0282-0522-R01 was late and untimely.<sup>98</sup>
- b. ORDER the Prosecution to disclose the materials described in paragraph 57 above.
- c. ORDER the Prosecution and OPCV to:
  - i. PROMPTLY communicate all information concerning the well-being of Mr Ongwen's family upon receiving it;
  - ii. DISCLOSE [REDACTED] received concerning negative impacts upon the well-being of Mr Ongwen's children and information concerning family members whose lives may impact upon Mr Ongwen's children's welfare.
- d. If either of remedy (b) or (c) are rejected, then ALTERNATIVELY ORDER the Prosecution to provide for all costs associated with the health, well-being, and education of Mr Ongwen's children.

Respectfully submitted,



.....  
 Hon. Krispus Ayena Odongo  
 On behalf of Dominic Ongwen

Dated this 18<sup>th</sup> day of January, 2019

At London, England

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<sup>98</sup> See para. 56 above.