

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-RoR220-01/21**  
Date: **18 October 2022**  
Date original: **15 July 2021**

**THE PRESIDENCY**

**Before:** Judge Piotr Hofmański, President  
Judge Luz del Carmen Ibáñez Carranza, First Vice-President  
Judge Antoine Kesia-Mbe Mindua, Second Vice-President

**SITUATION IN UGANDA**

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

**Public**

**Public redacted version of “Decision on the ‘Defence Request for Review Pursuant to Regulation 220 of the Regulations of the Registry’ dated 13 April 2021 (ICC-RoR220-01/21-1-Conf-Exp)” dated 15 July 2021 (ICC-RoR220-01/21-6-Conf-Exp)**

**Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:****The Office of the Prosecutor****Counsel for Mr Ongwen**

Mr Krispus Ayena Odongo

Mr Chief Charles Achaleke Taku

Ms Beth Lyons

**Legal Representatives of the Victims****Legal Representatives of Applicants****Unrepresented Victims****Unrepresented Applicants  
(Participation/Reparation)****The Office of Public Counsel for Victims****The Office of Public Counsel for the  
Defence****States' Representatives***Amicus Curiae***REGISTRY****Registrar**

Mr Peter Lewis

**Detention Section**Mr Harry Tjonk, Acting Chief Custody  
Officer**Division of Court Services**

The Presidency of the International Criminal Court (the ‘Court’) has before it the application filed by Mr Dominic Ongwen on 13 April 2021, seeking judicial review pursuant to regulation 220 of the Regulations of the Registry (the ‘Regulations’) of a decision of the Registrar dated 7 April 2021 and requesting a 90-minute video family visit each month (the ‘Application’).<sup>1</sup>

## I. PROCEDURAL HISTORY

1. On 26 January 2021, Mr Ongwen submitted a complaint to the Chief Custody Officer (the ‘CCO’) pursuant to regulation 106 of the Regulations of the Court and regulation 217(1) of the Regulations (the ‘Complaint’).<sup>2</sup> He requested the CCO to immediately authorise video communications to his family at least once, preferably twice per month, as his right to in-person family visits has been cancelled since 13 March 2020 due to the worldwide pandemic.<sup>3</sup> He argued that the practice of not allowing such communications violated Mr Ongwen’s right to family life and was discriminating against him.<sup>4</sup>
2. On 10 February 2021, the Acting CCO issued a decision pursuant to regulation 218 of the Regulations, rejecting the request for video communication as moot given that a policy on video communications was forthcoming and dismissing the allegations of discrimination as baseless and without merit.<sup>5</sup>

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<sup>1</sup> Defence for Mr Ongwen, Defence Request for Review Pursuant to Regulation 220 of the Regulations of the Registry, 13 April 2021, ICC-RoR220-01/21-1-Conf-Exp, paras 1-2, 51.

<sup>2</sup> Complaint, ICC-RoR220-01/21-1-Conf-Exp-AnxD, pp. 2-8 *annexed to* the Application.

<sup>3</sup> Complaint, ICC-RoR220-01/21-1-Conf-Exp-AnxD, paras 3, 30.

<sup>4</sup> Complaint, ICC-RoR220-01/21-1-Conf-Exp-AnxD, paras 23-29. To support his Complaint, Mr Ongwen relied on a policy on video visits issued by the Kosovo Specialist Chambers (the ‘KSC’), a decision on video communications issued by the President of International Residual Mechanism for Criminal Tribunals (the ‘IRMCT’), affirmations of the Court’s Registry that it was ‘contemplating the feasibility of videoconferencing communications, not only for Mr Al Hassan but for all detained persons’, the Nelson Mandela Rules, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights. Complaint, ICC-RoR220-01/21-1-Conf-Exp-AnxD, paras 6-22 *referring to* KSC, Registry Instruction on Video Visits, 13 September 2020, KSC-BD-34 (the ‘KSC Registry Instruction’); IRMCT, *The Prosecutor v. Radovan Karadžić*, Decision on Request for Review of Registrar’s Decision on Video Communications, 16 April 2020, MICT-13-55-ES (the ‘IRMCT Decision’); Registrar, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Public Redacted Version of the Registry’s Observations on the “Urgent Defence Request for Interim Release” (ICC-01/12-01/18-680-Conf-Exp), 12 May 2020, ICC-01/12-01/18-698-Red3, para. 18; United Nations General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), 8 January 2016, A/RES/70/175 (the ‘Nelson Mandela Rules’); United Nations General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations Treaty Series, vol. 999, p. 171 (the ‘ICCPR’); Council of Europe, European Convention on Human Rights, 4 November 1950, ETS 5 (the ‘ECvHR’).

<sup>5</sup> Acting CCO Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxD, pp. 9-14, paras 19-20.

3. On 18 February 2021, Mr Ongwen submitted a request for review to the Registrar pursuant to regulation 219(1) of the Regulations, requesting that he receive one video communication with family members (hereinafter ‘family video communication’) per month for 90 minutes because of the prolonged nature of the pandemic (the ‘Request for Review by the Registrar’).<sup>6</sup> To support this request, he reiterated that the Registry had a positive obligation to facilitate family visits and that the practice of the Court’s Detention Centre on video communication causes discrimination, referring *inter alia* to a decision issued by Trial Chamber V in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* (the ‘*Yekatom and Ngaïssona* case’) which granted more frequent family video communications to the accused.<sup>7</sup>
4. On 5 March 2021, the Registrar issued a decision pursuant to regulation 219(3) of the Regulations (the ‘Initial Decision’), deciding to: (i) request a feasibility assessment in order to evaluate if, when and possibly how the request for family video communications may be accommodated; (ii) defer his final decision on the actual organisation of the requested video communications pending receipt of the outcome of this assessment within 15 days of his Initial Decision; and (iii) reject the remainder of the Request for Review.<sup>8</sup>
5. On 7 April 2021, the Registrar issued his final decision on Mr Ongwen’s Request for Review to the Registrar, pursuant to regulation 219(3) of the Regulations (the ‘Impugned Decision’), granting Mr Ongwen one family video communication approximately every three to four months for about two hours.<sup>9</sup> On 8 April 2021, a family video communication took place with the assistance of the Registry.<sup>10</sup>

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<sup>6</sup> Request for Review by the Registrar, ICC-RoR220-01/21-1-Conf-Exp-AnxC, paras 2, 21, 28 *annexed to* the Application.

<sup>7</sup> Request for Review by the Registrar, ICC-RoR220-01/21-1-Conf-Exp-AnxC, paras 13-25 *referring to* Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on Non-Privileged Video-Conferencing at the Detention Centre, 3 February 2021, ICC-01/14-01/18-869-Red (the ‘*Yekatom and Ngaïssona* Decision’), paras 10-11, 13-15. The Presidency notes Mr Ongwen’s submission that, on 3 February 2021, the *Yekatom and Ngaïssona* Decision was sent by email to the Acting Chief Commanding Officer for his ‘perusal’ in relation to the Complaint. Application, ICC-RoR220-01/21-1-Conf-Exp, para. 13.

<sup>8</sup> Initial Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxB, para. 23 *annexed to* the Application.

<sup>9</sup> Impugned Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxA, paras 8, 10 *annexed to* the Application. Mr Ongwen indicates that the Impugned Decision was notified to him on 8 April 2021. Application, ICC-RoR220-01/21-1-Conf-Exp, para. 23.

<sup>10</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, para. 22.

6. On 13 April 2021, Mr Ongwen filed his Application for review of the Impugned Decision by the Presidency.<sup>11</sup>
7. On 20 April 2021, the Registrar requested a two-day time extension to file his observations pursuant to regulation 220(4) of the Regulations.<sup>12</sup> On 21 April 2021, the Presidency granted an extension until 23 April 2021.<sup>13</sup> The Registrar filed his observations on the latter date (the ‘Registrar’s Observations’).<sup>14</sup>
8. On 11 June 2021, the Registrar transmitted a letter dated 8 June 2021, which he sent to all Counsel informing them, *inter alia*, that he expects that in-person visits of ‘counsel, family and friends will resume on 15 July 2021’ (the ‘Letter’).<sup>15</sup>

## II. IMPUGNED DECISION

9. In his Initial Decision the Registrar noted, at the outset, that the request for family video communications had not been denied.<sup>16</sup> Instead, it had been explained to Mr Ongwen that this possibility was being considered for all detained persons.<sup>17</sup> He further clarified that, although fundamental in a prison environment, the right to family visits needs to be regulated and is not absolute in nature.<sup>18</sup>
10. As regards maintaining family links, the Registrar noted that the temporary suspension of family visits due to the pandemic applied equally to all detained persons but that telephone calls were maintained.<sup>19</sup> He also emphasised that he closely monitored the implementation of the restrictions in place, under the oversight of the Presidency and upon regular consultation and advice from the Detention Centre’s medical officer, but to this date the conditions allowing in-person visits were not met.<sup>20</sup> Nevertheless this did

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<sup>11</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, para. 1.

<sup>12</sup> Registrar, Request for Extension of Time-limit to file Registry Observations pursuant to Regulation 220(4) of the Regulations of the Registry, 20 April 2021, ICC-RoR220-01/21-2-Conf-Exp, para. 7.

<sup>13</sup> Presidency, Decision on the Request for Extension of Time-limit to file Registry Observations pursuant to Regulation 220(4) of the Regulations of the Registry, 21 April 2021, ICC-RoR220-01/21-3-Conf-Exp, p. 4.

<sup>14</sup> Registrar, Registry Observations on [“]Defence Request for Review Pursuant to Regulation 220 of the Regulations of the Registry” (ICC-RoR220-01921-1-Conf-Exp), 23 April 2021, ICC-RoR220-01/21-4-Conf-Exp.

<sup>15</sup> Letter to Counsel, ICC-RoR220-01/21-5-Conf-Exp-Anx, p. 1 *annexed to* Registrar, Registry Transmission of a Letter to Counsel dated 8 June 2021, 11 June 2021, ICC-RoR220-01/21-5-Conf-Exp.

<sup>16</sup> Initial Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxB, para. 8.

<sup>17</sup> Initial Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxB, para. 8.

<sup>18</sup> Initial Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxB, para. 9.

<sup>19</sup> Initial Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxB, para. 10.

<sup>20</sup> Initial Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxB, para. 11.

not prevent him from considering facilitating alternative measures, in the specific context of the pandemic, such as remote family visits via video communication.<sup>21</sup> However, he stressed that facilitating video communications was resource intensive, requiring financial, logistical and staff resources, advance planning, as well as ensuring that the mandatory security and confidentiality constraints are respected, in the same manner as if the family visit would occur at the Detention Centre, and hence needed further regulation.<sup>22</sup> Considering the specific and personal circumstances of Mr Ongwen and noting, *inter alia*, the recent judicial developments relating to his case and [REDACTED], the Registrar decided to conduct a feasibility assessment to evaluate if, when and possibly how the specific request for family video communications may be accommodated.<sup>23</sup>

11. In response to the allegations of discrimination, the Registrar observed first that the restrictions have been dealt with taking a balanced approach between his duty to protect the health of all detained persons in accordance with regulation 103 of the Regulations of the Court and respect for the entitlements and rights of detained persons.<sup>24</sup> The comparison with other tribunals he considered inapposite and rejected the claim in this respect, emphasising that each tribunal was a separate judicial and legal institution operating under its own geographical, security and budgetary constraints and observing that it was not even clear whether video communications effectively occurred for persons detained by the two other tribunals.<sup>25</sup> He further stressed that the concept of discrimination, which is intertwined with the one of equality, is not violated when differential treatment is based on an objective and reasonable justification, or when the factual circumstances are different.<sup>26</sup> As regards the *Yekatom and Ngaïssona* Decision, the Registrar considered that it was case specific and, given the different factual circumstances, not applicable to Mr Ongwen.<sup>27</sup> He held that, although informative, court-ordered video communications in another case cannot reasonably be interpreted as

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<sup>21</sup> Initial Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxB, para. 11.

<sup>22</sup> Initial Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxB, para. 12.

<sup>23</sup> Initial Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxB, para. 13. The aim of this assessment was also to determine the conditions under which video-conferences can be implemented, their frequency, potential start date and the costs incurred. Initial Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxB, para. 14.

<sup>24</sup> Initial Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxB, para. 16.

<sup>25</sup> Initial Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxB, para. 17.

<sup>26</sup> Initial Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxB, para. 17.

<sup>27</sup> Initial Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxB, para. 18.

the applicable policy for the conduct of family video communications for all detained persons and that the discrimination claim in this respect appears misplaced.<sup>28</sup>

12. In the Impugned Decision, the Registrar granted the Request for Review in part, allowing Mr Ongwen to have one family video communication approximately every three to four months for about two hours.<sup>29</sup> Noting that all detained persons will have the right to receive an equal number of family video communications and that the resources of the Registry will only allow for such communications to take place approximately once every three to four months, for each detained person, the Registrar determined that he could not grant monthly video family visits to Mr Ongwen.<sup>30</sup> He further advised that the Registry is working on a policy document allowing for the possibility of family video communications for all detained persons and that the Impugned Decision may be adjusted to accord with those terms.<sup>31</sup>

### III. SUBMISSIONS

#### A. The Application

13. The Application seeks review of the Impugned Decision and requests that the Presidency order the Registrar to respect the right to family visits and equal treatment by granting Mr Ongwen a 90-minute family video communication each month.<sup>32</sup> Mr Ongwen considers that the Registrar erred in law, failed to act with procedural fairness, has acted in a disproportionate manner, and reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached.<sup>33</sup> He submits that the Impugned Decision: (i) creates unequal treatment between persons detained at the Detention Centre and in comparison to persons detained under the authority of other international tribunals;<sup>34</sup> (ii) constitutes an unreasonable restriction of his fundamental right to family life;<sup>35</sup> (iii) takes into account irrelevant factors and fails to take into

<sup>28</sup> Initial Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxB, para. 18.

<sup>29</sup> Impugned Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxA, paras 8, 10.

<sup>30</sup> Impugned Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxA, para. 8.

<sup>31</sup> Impugned Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxA, para. 9.

<sup>32</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, paras 1-2, 31, 37, 51.

<sup>33</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, paras 26, 30, 32, 36.

<sup>34</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, paras 26-31.

<sup>35</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, paras 32-37 *referring to* rule 58(1) of the Nelson Mandela Rules (prisoners should be allowed to communicate with family and friends in regular intervals, including by using 'where

account relevant factors regarding the costs of family video communication;<sup>36</sup> and, (iv) while not appearing to be the intent, causes racial discrimination.<sup>37</sup>

14. To substantiate his arguments, Mr Ongwen observes that due to the pandemic detained persons have not been able to receive in-person visits since 13 March 2020.<sup>38</sup> While he does not question the necessity of this measure, he considers it unreasonable that the Registrar took over a year to enact a policy on family video communications and that such communications are foreseen only every three to four months.<sup>39</sup> In this respect he refers to the *Yekatom and Ngaïssona* Decision which, in imposing a higher frequency of family video communications for the two accused, held that the Court had a positive obligation to provide for an effective right to family visits.<sup>40</sup> Mr Ongwen argues that the Registrar failed to explain how the situation of Mr Ongwen is different.<sup>41</sup> He further submits that the Assembly of State Parties decided that indigent detained persons must receive equal treatment for family visits and the Registrar erred in law by failing to apply the same standards to all indigent detained persons at the Detention Centre.<sup>42</sup> As regards the frequency of visits, Mr Ongwen submits that he has the right to receive regular in-person visits not occasional ones<sup>43</sup> and that the Detention Centre Policy on Family Visits pursuant to Regulation 179(1) of the Regulations of the Registry (the ‘Policy on Family Visits’), foresees an entitlement to a minimum of one visit in each two-week period of a duration of no less than an hour.<sup>44</sup>

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available, telecommunication, electronic, digital and other means’); United Nations General Assembly, article 16(3) of the Universal Declaration on Human Rights, 10 December 1948, 217 A (III) (the ‘UDHR’).

<sup>36</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, paras 38-47.

<sup>37</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, paras 48-50. In this regard, Mr Ongwen observes that all but one of the non-European and non-white persons detained at the international facility of the prison are at the Court’s Detention Centre and that the two other international tribunals instituted policies on video family visits at a much higher frequency. Application, ICC-RoR220-01/21-1-Conf-Exp, para. 49.

<sup>38</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, para. 34. *See also* Application, ICC-RoR220-01/21-1-Conf-Exp, paras 6-10.

<sup>39</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, para. 34.

<sup>40</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, paras 27, 29, 33, 36 *referring to* Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on Non-Privileged Video-Conferencing at the Detention Centre, 3 February 2021, ICC-01/14-01/18-869-Red (the ‘*Yekatom and Ngaïssona* Decision’), paras 10-11, p. 2.

<sup>41</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, para. 27.

<sup>42</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, paras 28, 30.

<sup>43</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, para. 36.

<sup>44</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, para. 35 *referring to* Policy on Family Visits, ICC-RoR220-01/21-1-Conf-Exp-AnxF, para. 17. In this regard, he submits that Trial Chamber V considered the policy of bi-weekly in-person visits to be instructive of the length and frequency of video family visits, as well as the actions taken by other international tribunals in The Hague. Application, ICC-RoR220-01/21-1-Conf-Exp, para. 35 *referring to* *Yekatom and Ngaïssona* Decision, ICC-01/14-01/18-869-Red, paras 13-14.



15. In response to the Registrar’s claim that family video communications require significant staff, logistical and financial resources, Mr Ongwen indicates that in his case no additional funds will be required but, if need be, the Registrar has the Trust Fund for Family Visits at his disposal.<sup>45</sup> He points out that: (i) there is a mechanism in place for the monthly phone calls with his children and that the applicable protocol is the same;<sup>46</sup> (ii) the use of free video-conferencing software would save costs;<sup>47</sup> (iii) quarantine restrictions are not as stringent in [REDACTED], which facilitates any necessary travel of Registry representatives;<sup>48</sup> (iv) funds of the Trust Fund for Family Visits were available for an in-person visit which was to take place in March 2020 and could be used for family video communications;<sup>49</sup> (v) some of his calling restrictions have been lifted;<sup>50</sup> (vi) to ensure the supervision foreseen in regulations 183 and 184 of the Regulations, the Registry can easily record the conversation;<sup>51</sup> (vii) security concerns such as a third person joining the conversation could be solved by immediately interrupting the call;<sup>52</sup> and (viii) the Defence has offered to send a representative to the relevant location.<sup>53</sup>

## **B. Registrar’s Observations**

16. The Registrar submits, as a preliminary matter, that the arguments of unequal treatment and discrimination are irreceivable because they were addressed and rejected in his Initial Decision and Mr Ongwen failed to seek review of said decision within the 7-day time limit.<sup>54</sup> Alternatively, the argument on racial discrimination is irreceivable because it was newly raised before the Presidency or ought to be rejected as unsubstantiated.<sup>55</sup>

<sup>45</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, paras 38, 42, 46 *referring to* Impugned Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxA, para. 8. In this context, Mr Ongwen submits that he is concerned about the available funds in the Trust Fund for Family Visits and that the Registry has been warned to ensure availability of sufficient funds, most recently by the Presidency in 2019. Application, ICC-RoR220-01/21-1-Conf-Exp, para. 43 *referring to* Presidency, Public redacted version of “Decision on Defence ‘Request for review of the Registrar’s decision of 21 June 2019’ dated 5 July 2019 (ICC-RoR220-01/19-1-Conf-Exp)”, 17 September 2019, ICC-RoR220-01/19-2-Conf-Exp, 10 December 2019, ICC-RoR220-01/19-2-Red (the ‘Presidency Decision of 17 September 2019’), paras 22-29.

<sup>46</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, paras 39-40.

<sup>47</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, para. 39.

<sup>48</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, para. 41.

<sup>49</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, paras 42-43.

<sup>50</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, para. 44.

<sup>51</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, para. 44.

<sup>52</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, para. 45.

<sup>53</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, para. 45.

<sup>54</sup> Registrar’s Observations, ICC-RoR220-01/21-4-Conf-Exp, paras 13-14. *See* regulation 219(1) of the Regulations.

<sup>55</sup> Registrar’s Observations, ICC-RoR220-01/21-4-Conf-Exp, para. 14.

17. On the merits, the Registrar submits that there has been no unreasonable restriction of Mr Ongwen's right to family life, nor has there been inequality or discrimination in his treatment.<sup>56</sup> As acknowledged by Mr Ongwen, the restrictions due to the pandemic, approved by the Presidency, remain reasonable.<sup>57</sup> In addition, it is foreseen that family video communication will exceptionally and temporarily replace in-person visits and the upcoming policy document will guarantee a higher number of family video communications than in-person visits.<sup>58</sup> While the time taken to issue a policy on family video communication may appear long, the Registrar emphasises that it requires an in-depth analysis of all possible scenarios the Registry may face in the future, and technical, logistical, as well as security constraints must be taken into account.<sup>59</sup> He further submits that he had to address the complaint in the more general context of the upcoming policy document to regulate family video communication for all detained persons in the most equitable manner, taking into account the diversity of circumstances.<sup>60</sup> In the attempt to strike a balance between the specific and personal circumstance of Mr Ongwen and the upcoming policy document, the Registrar granted family video communication with the same frequency as foreseen for all other detained persons.<sup>61</sup>
18. Furthermore, the Registrar submits that he based the Initial Decision and the Impugned Decision on well-established international jurisprudence that there is no discrimination when differential treatment is based on an objective and reasonable justification or when the factual circumstances are different.<sup>62</sup> The family video communications in the *Yekatom and Ngaïssona* case were court-ordered and Trial Chamber V took a measure specific to Mr Yekatom and Mr Ngaïssona which is inapplicable *per se* to Mr Ongwen given the different factual circumstances.<sup>63</sup> As regards Mr Ongwen's reference to a

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<sup>56</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, para. 36. *See also* Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, para. 21 *referring to* Initial Decision, paras 15-22.

<sup>57</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, para. 34.

<sup>58</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, para. 34.

<sup>59</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, para. 35. The Registrar observes that video family visits are a novel issue and while they may be considered as an alternative measure to in-person visits during the pandemic, he expects that this modality may be continued thereafter in addition to the usual modality of in-person visits. Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, para. 38.

<sup>60</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, paras 27-28.

<sup>61</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, para. 28.

<sup>62</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, para. 26 *referring to* Council of Europe, part V, article E of the Appendix to the European Social Charter (revised), 3 May 1996, ETS 163; European Court of Human Rights, Grand Chamber, *Kafkaris v. Cyprus*, Judgement, 12 February 2008, no. 21906/04, para. 161.

<sup>63</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, paras 24, 28.

resolution of the Assembly of States Parties and his interpretation that it was decided that indigent detained persons must receive equal treatment for family visits, the Registrar submits *inter alia* that the resolution was adopted in the context of the creation of the Trust Fund for Family Visits, which is not the right avenue to fund newly envisaged family video communications.<sup>64</sup>

19. With respect to persons detained by other international tribunals, the Registrar submits that Mr Ongwen does not substantiate how their situation would be comparable to the one faced by the Court to justify the exact same frequency of family video communications.<sup>65</sup> In this regard, the Registrar highlights several potential differences with respect to the number of detained persons, the locations of family members, measures taken in response to the pandemic, access to a network and technology, and the resources required to facilitate such communications, including court-ordered monitoring measures.<sup>66</sup>

20. Finally, the Registrar submits that all relevant factors were taken into account to evaluate the costs of family video communications for Mr Ongwen.<sup>67</sup> In addition to cost, his assessment focused on the staff resources and logistical equipment required to organise family video communications for all persons detained by the Court.<sup>68</sup> He submits that the general assertion that family video communications do not cost additional funds is incorrect<sup>69</sup> and provides further details of the feasibility assessment he conducted considering Mr Ongwen's specific circumstances.<sup>70</sup> This includes the fact that [REDACTED]<sup>71</sup> and, as a result, a specific calling regime and protocol applies.<sup>72</sup>

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<sup>64</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, para. 30.

<sup>65</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, para. 33.

<sup>66</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, para. 33.

<sup>67</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, paras 37-44.

<sup>68</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, para. 42.

<sup>69</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, paras 39-40.

<sup>70</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, paras 15-18, 41.

<sup>71</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, para. 15.

<sup>72</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, paras 16-18.

## IV. DETERMINATION OF THE PRESIDENCY

### A. Preliminary matters

21. It is unclear whether Mr Ongwen merely seeks review of the Impugned Decision or also of the Registrar's Initial Decision, which were labelled Impugned Decisions 1 and 2 in the Application.<sup>73</sup> In this respect, the Registrar observed that Mr Ongwen failed to seek judicial review of the Initial Decision within the prescribed time limit.<sup>74</sup>
22. The Presidency notes that references in the Application to the Initial Decision are very limited<sup>75</sup> and Mr Ongwen's submissions predominantly pertain to the Impugned Decision. It further observes that, in the Initial Decision, the Registrar deferred his decision on the actual organisation of the requested family video communications,<sup>76</sup> the frequency of which is the primary issue under review before the Presidency. Accordingly, the Presidency considers it appropriate that the Application was filed in response to the Impugned Decision which granted Mr Ongwen a limited amount of such communications. In as far as the Registrar submits that certain arguments are no longer receivable because they have been addressed by the Registrar in his Initial Decision and Mr Ongwen failed to seek review of said decision,<sup>77</sup> the Presidency considers that, in the present circumstances, Mr Ongwen was only fully apprised of the Registrar's final determination of the matter on the date he issued the Impugned Decision. Further, the Presidency notes that the arguments raised are inter-connected and that it is of little practical value, presently, to reject arguments made in the Application as untimely in as far as they seek to challenge the Impugned Decision. The Presidency therefore decides to consider the merits of all arguments made in this respect.

### B. Standard for judicial review and applicable law

23. The Presidency recalls that the judicial review of decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that decision. It involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness,

<sup>73</sup> See Application, ICC-RoR220-01/21-1-Conf-Exp, paras 1, 3.

<sup>74</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, para. 13.

<sup>75</sup> See Application, ICC-RoR220-01/21-1-Conf-Exp, paras 26-27.

<sup>76</sup> Initial Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxB, para. 23.

<sup>77</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, paras 12-14.

acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no reasonable person who has properly applied his or her mind to the issue could have reached.<sup>78</sup>

24. In respect of applicable law, the Presidency recalls that regulation 99(1)(i) of the Regulations of the Court provides that detained person shall be entitled to communicate by letter or telephone with family and other persons and, in accordance with regulations 100(1) of the Regulations of the Court and 179(1) of the Regulations, detained persons have the right to receive visits, including family visits.<sup>79</sup>

### C. Merits

25. In examining the merits of the Application, the Presidency will first address the arguments pertaining to the right to family life, then the Registrar's determination of the frequency of family video communications, and finally the allegations of discrimination.

#### *1. Allegation of an unreasonable restriction of the right to family life*

26. In so far as Mr Ongwen recalls the importance of the right to family visits, the Presidency notes that this aspect is not in dispute. Detained persons are entitled to receive visits under regulation 100(1) of the Regulations of the Court and regulation 179(1) of the Regulations which provides, in relevant parts, that 'the Registrar shall give specific attention to visits by family of the detained persons with a view to maintain such links'.

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<sup>78</sup> The standard of judicial review was defined by the Presidency in its Decision on the Application to Review the Registrar's Decision Denying the Admission of Mr Ernest Midagu Bahati to the list of Counsel, 20 December 2005, ICC-RoC72-02/05, para. 16; and supplemented in its Decision on the application to review the decision of the Registrar denying [REDACTED] privileged visits with Mr Lubanga Dyilo, under regulation 221 of the Regulations of the Registry, 27 November 2006, ICC-01/04-01/06-731-Conf, para. 24. *See also* Presidency, Reasons for the 'Decision on the "Application for Review of Decision of the Registrar's Division of Victims and Counsel dated 2 January 2008 not to Admit Prof. Dr. Sluiter to the List of Counsel"', 10 July 2008, ICC-RoC72-01/08-10, para. 20; Presidency, Decision on the application to review the decision of the Registrar denying the admission of Ms Magdalena Ayoade to the list of experts, 6 August 2009, ICC-RoR56-01/09-2, para. 11.

<sup>79</sup> Presidency, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on "Mr Mathieu Ngudjolo's Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar's Decision of 18 November 2008", 10 March 2009, ICC-RoR217-02/08-8 (the 'Presidency Decision of 10 March 2009'), para. 26.

As previously recognised by the Presidency a detained person's right to receive family visits is clearly acknowledged by international human rights law.<sup>80</sup>

27. The Presidency notes, however, that the ongoing global pandemic has led to the temporary suspension of the entitlement of detained persons under regulation 100(1) of the Regulations of the Court to receive visits, including family visits, since March 2020 ('temporary suspension'). Such temporary suspension has been duly approved and authorised under regulation 96 of the Regulations of the Court and all detained persons have been fully informed of such suspension. The Application does not contest this temporary suspension.<sup>81</sup> Moreover, the Presidency notes that the Registrar has advised that he expects to lift the temporary suspension as of 15 July 2021.<sup>82</sup>
28. The Application does contest, however, that the Impugned Decision's granting of one family video communication of approximately two hours every three to four months is consistent with his right to family life.
29. The Court's legal framework does not foresee video communications by detained persons.<sup>83</sup> However, some relevant international instruments encourage the use of modern means of telecommunication. For instance, the Mandela Rules provide that in addition to receiving visits, prisoners shall be allowed, under necessary supervision, to communicate with their family at regular intervals by corresponding 'and using, *where available*, telecommunication, electronic, digital and other means' (emphasis added).<sup>84</sup> The commentary to the European Prison Rules notes that while contacts have traditionally been maintained by way of letters, telephone calls and visits, 'prison

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<sup>80</sup> See e.g. rule 58 of the Nelson Mandela Rules; Council of Europe: Committee of Ministers, paragraphs 24.1, 24.2, 24.4, 99 of the Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules, 11 January 2006, Rec(2006)2 (the 'European Prison Rules'); Council of Europe: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, paragraph 51 of the CPT Standards, 11 March 2011, CPT/Inf/E (2002) 1- Rev 2010; United Nations General Assembly, principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 9 December 1988, A/RES/43/173.

<sup>81</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, para. 34.

<sup>82</sup> Letter to Counsel, ICC-RoR220-01/21-5-Conf-Exp-Anx, p. 1.

<sup>83</sup> In addition to in-person family visits under regulation 100(1) of the Regulations of the Court and regulation 179(1) of the Regulations, as well as the Policy on Family Visits, regulation 99(1)(i) of the Regulations of the Court merely provides for communications by letter or telephone.

<sup>84</sup> Rule 58(1) of the Mandela Rules. See also International Committee of the Red Cross, COVID-19: Authorities must protect health of detainees, staff and ultimately surrounding communities, 7 April 2020, available at: <https://www.icrc.org/en/document/covid-19-places-detention-must-protect-health-detainees-staff-and-ultimately-surrounding> ('The ICRC is encouraging and when necessary supporting detaining authorities to put in place alternative ways for detainees and family to communicate, including phone and video calls').

authorities should be alert to the fact that modern technology offers new ways of communicating electronically’, adding that ‘[a]s these develop, new techniques of controlling them are emerging too and it may be possible to use them in ways that do not threaten safety or security.’<sup>85</sup> In this context, the Presidency also takes note of the KSC Registry Instruction on ‘Video Visits’, which provides for regular family video communications,<sup>86</sup> as well as that video communications have been granted to persons detained by the IRMCT.<sup>87</sup> In so doing, the President of the IRMCT held that there is no right to video communications and that the right to family life can be respected through access to other means of communication, while acknowledging, of course, that the availability of video communications may constitute an enhancement of the ability to exercise the right to family life.<sup>88</sup> In addition, the Presidency observes that the European Court of Human Rights has held that the right to respect for family life, ‘cannot be interpreted as imposing a general obligation to ensure access to online communication with family members’.<sup>89</sup>

30. The Presidency by majority, Judge Ibáñez Carranza dissenting, considers that neither the Court’s legal framework nor emergent legal practice currently support the existence of an *entitlement* to family video communications in the context of the right to family life. Nevertheless, such family video communications could still make a vital contribution to ensuring that a detained person’s right to family life is properly respected. The Presidency acknowledges that access to family video communications may be particularly desirable in the context in which the Court operates, where persons are detained far from their countries of origin and at a considerable distance from their family, which has an impact on the costs and frequency of in-person family visits. The current context, of the

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<sup>85</sup> Council of Europe, Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, June 2006, available at: <https://rm.coe.int/european-prison-rules-978-92-871-5982-3/16806ab9ae>, p. 52 (rule 24).

<sup>86</sup> Section 7(8) of the KSC Registry Instruction (detainees ‘shall be given the opportunity for a minimum of one video visit with Close Relatives per week’ for no longer than 45 minutes).

<sup>87</sup> IRMCT Decision, para. 50. *See also* IRMCT, *The Prosecutor v. Radovan Karadžić*, Registrar’s Submission in Compliance with “Decision on Request for Review of Registrar’s Decision on Video Communications” of 16 April 2020, 15 June 2020, MICT-13-55-ES, para. 2; IRMCT, *The Prosecutor v. Radovan Karadžić*, Registrar’s Submission Pursuant to the President’s “Decision on Request for Review of Registrar’s Decision on Video Communications” of 16 April 2020, 14 May 2020, MICT-13-55-ES, para. 6 (‘The Registry will nevertheless continue its best efforts to implement the interim solution for video communications in the UNDU in accordance with the President’s Decision. Subject to any major technical or operational issues, the Registry expects to have the interim solution in place by the end of May 2020.’)

<sup>88</sup> IRMCT Decision, para. 44.

<sup>89</sup> European Court of Human Rights, *Ciupercescu v. Romania (No. 3)*, Judgment, 7 January 2020, nos. 41995/14 and 50276/15, para. 108.

pandemic and the temporary suspension, only heightens such desirability. The Presidency therefore welcomes the Registrar's indication that a policy on video communications for detained persons is being developed, taking into account future usage beyond the circumstances of the current pandemic.<sup>90</sup>

31. Turning to the present matter, the Presidency notes that, although there is no general entitlement to family video communications, the Impugned Decision has granted such communications to Mr Ongwen, in light of the present circumstances and intends to allow him to continue such communications on a regular basis, in accordance with a policy to be established shortly.<sup>91</sup> Most recently, a family video communication took place on 8 April 2021.<sup>92</sup> In addition, other means to maintain family ties such as telephone calls and letters remain available to Mr Ongwen.<sup>93</sup> In these circumstances, the Presidency by majority, Judge Ibáñez Carranza dissenting, considers that the Application fails to demonstrate that the Impugned Decision contains a legal error in that the right to family life has been infringed.

*2. The Registrar's determination of the frequency of family video communications*

32. The Application submits that, in determining the frequency of family video communications, the Registrar erred in law, failed to act with procedural fairness, has acted in a disproportionate manner, and reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached.<sup>94</sup> Moreover, he avers that the Registrar took into account irrelevant factors and failed to take into account relevant factors regarding the costs of video family communications.<sup>95</sup>

33. Notwithstanding that there is no entitlement to family video communications as such, the Presidency must still consider whether, in the specific circumstances of the pandemic, the Registrar's discretionary decision to grant such communication at a frequency of every three to four months was tainted by any legal error. The Presidency recalls that it

<sup>90</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, para. 38.

<sup>91</sup> Impugned Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxA, paras 8-10.

<sup>92</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, para. 22.

<sup>93</sup> See Initial Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxB, para. 10; Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, para. 18.

<sup>94</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, paras 26, 30, 32, 36.

<sup>95</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, paras 38-47.



is not the role of the Presidency to substitute itself for the original administrative decision-maker.<sup>96</sup> Nor, in the absence of legal or factual error, will the Presidency interfere with decisions of the Registrar simply because the Presidency considers that it would have been equally reasonable, or even preferable, for a matter to have determined differently in the circumstances.<sup>97</sup>

34. In explaining why the Registrar decided to grant family video communications to the Applicant only every three to four months, the Impugned Decision referred on the one hand to limited resources and on the other hand to the aim of providing an equal amount of family video communications to each person detained by the Court.<sup>98</sup> Starting with the former, the Presidency recalls that it is consistent with international standards for the Registrar to consider resource constraints when determining appropriate visiting conditions.<sup>99</sup> In the Initial Decision, the Registrar explained that facilitating video communications for Mr Ongwen was resource intensive, requiring financial, logistical and staff resources, advance planning, as well as ensuring that the mandatory security and confidentiality constraints are respected, in the same manner as if a family visit would occur at the Detention Centre.<sup>100</sup> In the Registrar's Observations, he adds that the feasibility assessment has shown that family video communications require the mobilisation of Registry staff, preparatory work and taking into account evolving personal circumstances, such as the location of family members or persons authorised to contact a detained person.<sup>101</sup> He also highlights circumstances which are specific to Mr Ongwen, who has been under a special calling regime and protocol [REDACTED]<sup>102</sup> [REDACTED].<sup>103</sup> Mr Ongwen disputes some of these assessments and points to alternative measures that could be taken by the Registrar (recording of conversations, immediate interruption of conversations, presence of a Defence representative) and

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<sup>96</sup> Presidency, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the 'Application for Judicial Review of the "Decision on Mr Ngaïssona's Complaint to the Registrar dated 29 July 2020"' dated 20 August 2020 (ICC-RoR220-03/20-1-Conf), 30 September 2020, ICC-RoR220-03/20-6-Conf (the 'Presidency Decision of 30 September 2020'), para. 17.

<sup>97</sup> Presidency Decision of 30 September 2020, para. 17.

<sup>98</sup> Impugned Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxA, para. 8.

<sup>99</sup> Presidency Decision of 10 March 2009, ICC-RoR217-02/08-8, para. 49. *See also* Presidency Decision of 10 March 2009, ICC-RoR217-02/08-8, para. 42.

<sup>100</sup> Initial Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxB, para. 12.

<sup>101</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, para. 40.

<sup>102</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, paras 15-18, 41.

<sup>103</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, paras 15-16, 41.

points out that some calling restrictions have been lifted.<sup>104</sup> However, such disagreement neither demonstrates irrelevance of the factors considered by the Registrar nor does it show that the Registrar has failed to consider alternative modalities for video communications. Rather, the majority of the Presidency is convinced that the range of factors considered by the Registrar were appropriate and relevant.

35. In respect of the Impugned Decision’s stated objective of providing an equal amount of family video communications to each person detained by the Court, the majority of the Presidency, Judge Ibáñez Carranza dissenting, while acknowledging the desirability of such equal treatment as a starting point, notes that various detained persons have vastly different personal circumstances, with issues such as the size, age and location of their family having a significant impact on the complexity and resource intensiveness of arranging family video communications. Factors such as the existence of any judicially-imposed controls or restrictions on communications may also be highly relevant. Accordingly, while, in principle, all detained persons should be treated equally by the policy document being developed by the Registrar, particularly in so far as any minimum access to family video communications is established, this should not preclude the possibility of additional access in the event that making arrangements for family video communication is significantly less complex for a given detained person or that there is a particular pressing need for such communication. In this regard, the Presidency, by majority, observes that it is not unequal treatment to treat detained persons in different situations differently.<sup>105</sup>

36. While the Presidency considers, by majority, that the Impugned Decision gives excessive weight to the principle of equal treatment, it is nevertheless not convinced that in weighing relevant factors and the specific circumstances of Mr Ongwen, the Registrar reached an unreasonable conclusion. In this regard, the majority of the Presidency observes that in the Initial Decision, the Registrar considered the specific and personal circumstances of Mr Ongwen, noting *inter alia* the recent judicial developments relating

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<sup>104</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, para. 44. *See also* Application, ICC-RoR220-01/21-1-Conf-Exp, paras 39-41.

<sup>105</sup> For a similar reasoning, *see* Presidency, Decision on the ‘Application for judicial review of the “Decision on Mr Ngaïssona’s Complaint to the Registrar received 2 July 2019”’ dated 25 July 2019 (ICC-RoR220-02/09-1-Conf-Exp), 17 September 2019, ICC-RoR220-02/19-5-Conf-Exp, para. 50 (‘The Presidency observes that regulation 202(2) clearly mandates treatment ‘on an equal basis *to the extent possible*’ (emphasis added). The Presidency considers that such equal treatment evidently does not require *identical* treatment.’).

to his case and [REDACTED].<sup>106</sup> It is in light of these specific circumstances that the Registrar decided to conduct of a feasibility assessment to evaluate if, when and possibly how the specific request for family video communications may be accommodated.<sup>107</sup> In the Registrar's Observations, he explains that it was in an attempt to strike a balance between the specific and personal circumstance of Mr Ongwen and the upcoming policy document, that he granted family video communication with the same frequency as foreseen for all other detained persons.<sup>108</sup> As outlined above, circumstances specific to Mr Ongwen make the organisation of video communications for him particularly resource-intensive for the Registry.<sup>109</sup> While Mr Ongwen may disagree with this outcome, the Presidency, Judge Ibáñez Carranza dissenting, is not convinced that the Registrar reached a conclusion which is so unreasonable or unbalanced as to warrant the Presidency's intervention.

37. Finally and for the sake of completeness, the majority of the Presidency notes that video communications cannot replace in-person family visits and, as such, the arguments which seek to equate these two measures are inapt to demonstrate a legal error.<sup>110</sup> Furthermore, the Presidency finds no fault in the Registrar's assessment that the Trust Fund for Family Visits is not the appropriate avenue to fund family video communications, given the limited resources available in the fund and that such funds have been earmarked to enable in-person visits, including to Mr Ongwen, as soon as feasible.<sup>111</sup>

38. For the reasons set out above, the Presidency finds that Mr Ongwen fails to demonstrate that the Registrar took into account irrelevant factors or failed to take into account relevant factors in reaching his conclusion on the frequency of family video communications granted to Mr Ongwen. Further, the Presidency finds by majority, Judge Ibáñez Carranza dissenting, that Mr Ongwen fails to demonstrate unreasonableness or

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<sup>106</sup> Initial Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxB, para. 13.

<sup>107</sup> Initial Decision, ICC-RoR220-01/21-1-Conf-Exp-AnxB, para. 13.

<sup>108</sup> Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, para. 28.

<sup>109</sup> See Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, paras 15-18, 41.

<sup>110</sup> Mr Ongwen's argument based on an Assembly of States Parties' resolution on family visits for indigent detainees, is particularly inapt to demonstrate an error of law, as it is inapplicable to the circumstances at hand. See Application, ICC-RoR220-01/21-1-Conf-Exp, paras 28, 30 referring to Assembly of State Parties, Family visits for indigent detainees, 26 November 2009, ICC-ASP/8/Res.4, para. 5.

<sup>111</sup> See Registrar's Observations, ICC-RoR220-01/21-4-Conf-Exp, paras 30, 43-44.

disproportionality of the Impugned Decision, any lack of procedural fairness or that the Registrar erred in law.<sup>112</sup>

### 3. *Allegation of unequal treatment and discrimination*

39. Turning to the alleged discrimination of Mr Ongwen, the Presidency is not convinced that the Impugned Decision was discriminatory. His argument that the difference of treatment between persons detained by the Court and persons detained under the authority of the IRMCT or the KSC causes racial discrimination<sup>113</sup> fails to properly take into account that these institutions operate under different legal regimes and in different factual contexts. Moreover, as Mr Ongwen recognises, he has not provided the Presidency with information as to whether and how often such video communications are effectively taking place in such other institutions.<sup>114</sup>

40. In relation to other persons detained by the Court, Mr Ongwen emphasises that the accused in the *Yekatom and Ngaïssona* case were granted more frequent video family communications. In the decision in question, the Single Judge of Trial Chamber V took into account case-specific considerations such as the accused's grievances and their impact on the well-being of said accused or observations of the Registrar to the effect that, in the case at hand, the use of video communication would not entail any additional resources in terms of staff, technology and family costs.<sup>115</sup> In sum, the Presidency, by majority, notes that the difference in treatment is based on an objective and reasonable justification, i.e. the case-specific determination of a trial chamber, and a legitimate purpose, i.e. a trial chamber's prerogative to take measures to ensure the fairness and integrity of the proceedings in the case before it. Contrary to Mr Ongwen's claim, any

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<sup>112</sup> The Presidency observes that Mr Ongwen has not substantiated his generic claims that the Registrar failed to act with procedural fairness and acted in a disproportionate manner. *See* Application, ICC-RoR220-01/21-1-Conf-Exp, paras 26, 30.

<sup>113</sup> Application, ICC-RoR220-01/21-1-Conf-Exp, paras 48-49.

<sup>114</sup> *See* Complaint, ICC-RoR220-01/21-1-Conf-Exp-AnxD, paras 9, 27.

<sup>115</sup> *Yekatom and Ngaïssona* Decision, ICC-01/14-01/18-869-Red, paras 12, 15.

difference in treatment was thus due to factual and legal differences and therefore does not amount to discrimination.

#### 4. Conclusion

41. The Presidency concludes by majority, Judge Ibáñez Carranza dissenting, that there was no undue restriction of the right to family life, nor has Mr Ongwen demonstrated discrimination. Moreover, the Application fails to demonstrate that the Registrar erred in law or reached an unreasonable conclusion. Finally, the Presidency, by majority, rejects Mr Ongwen's claim that the Registrar took into account irrelevant factors or failed to take into account relevant factors.

42. In light of the above reasons, the Presidency finds by majority, Judge Ibáñez Carranza dissenting, that the Application fails to demonstrate an error in the Impugned Decision.

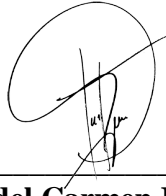
#### V. CLASSIFICATION

43. In light of the classification of the Application, the present decision is classified as confidential and *ex parte*. The Presidency takes the view, however, that it would be beneficial to make this decision publicly available, including for the benefit of other detained persons. As such the Presidency hereby indicates its intention to issue a public version of the present decision redacting any references to [REDACTED]. If there is any factual or legal basis for retaining the confidential classification of this decision or if there is any other information requiring redaction prior to publication, Mr Ongwen may inform the Presidency thereof no later than by 4pm on 4 August 2021.

In light of the above, the Presidency by majority, Judge Ibáñez Carranza dissenting, hereby **CONFIRMS** the Impugned Decision.

Judge Ibáñez Carranza's dissenting opinion is contained below.

Done in both English and French, the English version being authoritative.



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**Judge Luz del Carmen Ibáñez Carranza**  
**Acting President**

Dated this 15 July 2021

At The Hague, The Netherlands

## DISSENTING OPINION OF JUDGE LUZ DEL CARMEN IBÁÑEZ CARRANZA

1. I am respectfully unable to concur with the decision of the majority of the Presidency on the ‘Defence Request for Review Pursuant to Regulation 220 of the Regulations of the Registry’, filed confidentially and *ex parte* by Mr Dominic Ongwen on 13 April 2021.<sup>116</sup> My disagreement pertains to the majority’s views on the practical and legal consequences arising out of the right to equal treatment and the right to family life.
  
2. First, I note that a detained person’s right to family life is a fundamental human right which is well-established and articulated in international human rights law. While family visits pursuant to regulations 100(1) of the Regulations of the Court and 179(1) of the Regulations of the Registry normally take place in person, the pandemic and the restrictions of travel and physical contact have made this impossible and almost all activities that took place in person are now virtual. As a consequence of these unique circumstances, the administration of the Court has faced new challenges regarding the way in which the right to family life is exercised in the context of the ICC Detention Centre. The majority’s reasoning is based on the observation that the legal framework does not provide for a right to video communication. In my view, this argument confuses the right to family visits and family contact with the format in which it is exercised. The human right to family life is thereby emptied of its essential content and infringed upon. Neither the administration of the Court nor the Presidency can require a detained person to demonstrate that there is a right to video communication with family. Rather, it is incumbent upon the Court to ensure full respect for the right to family life. In my view, the Impugned Decision does not do this adequately.
  
3. Second, I come to a different conclusion than the majority regarding the appropriate frequency of video communications. The Impugned Decision granted Mr Ongwen family video communications approximately every three to four months whereas Trial Chamber V in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* granted monthly family video communications to the accused.<sup>117</sup> The principle of equality in treatment of all detained persons is one that this Court should always uphold. All detained persons should receive the same benefits and individual circumstances

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<sup>116</sup> Application, ICC-RoR220-01/21-1-Conf-Exp.

<sup>117</sup> Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on Non-Privileged Video-Conferencing at the Detention Centre, 3 February 2021, ICC-01/14-01/18-869-Red.

should only have a limited impact in this regard. It is thus my position that Mr Ongwen should be granted family video communications at the same frequency as Messrs Yekatom and Ngaïssona who already enjoy this right upon judicial order. While the determination of Trial Chamber V does evidently not apply to other detained persons, I would have considered it appropriate for the Presidency to revisit the Impugned Decision and, based on equity and reasonableness, ensure that all detained persons benefit from the same frequency of family video communications. The fact that the Registrar has yet to issue a policy on family video communication should not serve as a justification to limit Mr Ongwen's rights in this regard. Turning to Mr Ongwen's specific situation and notably [REDACTED], I would have instructed the Registrar to enable video communication [REDACTED].

4. In light of the above, I respectfully consider that the Presidency should have overturned the Impugned Decision and granted Mr Ongwen's request for monthly family video communications.

Done in both English and French, the English version being authoritative.



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**Judge Luz del Carmen Ibáñez Carranza**  
**First Vice-President**

Dated this 15 July 2021

At The Hague, The Netherlands