

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **29 October 2015**

PRE-TRIAL CHAMBER II

Before:

**Judge Cuno Tarfusser, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Chang-ho Chung**

SITUATION IN UGANDA

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

Confidential *ex parte* Defence Only

Defence Request for the Interim Release of Dominic Ongwen

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

Counsel for the Defence

Krispus Ayena Odongo

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

(Participation/Reparation)

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman Von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Defence requests that Dominic Ongwen be granted interim release to Belgium, at least through the Confirmation of Charges Hearing.

II. CONFIDENTIALITY LEVEL

2. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court read together with Regulation 24 of the Regulations of the Registry, the Defence submits that this request should be confidential *ex parte* defence only insofar as it refers to decisions filed confidentially and matters pertaining to the Defence strategy. Confidential and public redacted versions are filed concurrently.

III. PROCEDURAL HISTORY

3. On 8 July 2005, Pre-Trial Chamber II issued a warrant of arrest against Mr. Ongwen.¹
4. On 16 January 2015, Mr. Ongwen surrendered to the Central African Republic, which surrendered him over to the Court on that same day. On 21 January 2015, Mr. Ongwen arrived at the seat of the Court. His first appearance took place before Pre-Trial Chamber II on 26 January 2015. Mr. Ongwen has effectively remained under detention since his surrender to the Séléka on 6 January 2015. This is the first request for Mr. Ongwen's interim release.

¹ICC-02/04-01/15-6.

IV. APPLICABLE LAW

5. Article 66(1) of the Statute upholds the fundamental principle that “[e]veryone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.” It follows that the fundamental human right to liberty is paramount – especially but not limited in the case of a suspect – until a final determination on guilt has been made.
6. The jurisprudence of the ICC recognizes the fundamental principle that the “deprivation of liberty is the exception and not the rule” and that release may be subject to guarantees to appear for trial.²
7. Pursuant to Article 60(2) of the Statute:

[a] person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial shall release the person, with or without conditions.
8. In this regard, Article 58(1)(b) of the Statute provides that the pre-trial detention of a suspect or accused person is only necessary to: (i) ensure the person’s appearance at trial; (ii) ensure that a suspect or accused person does not obstruct or endanger investigations or proceedings against him or her; and (iii) prevent the person from continuing to commit the crimes or a related crime which is in the jurisdiction of the court, where necessary.³

² See ICC-01/05-01/13-1017, para. 6; ICC-01/04-02/06-147, para. 33; International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI), 16 December 1966 (“ICCPR”), Article 9(3), found at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>; Human Rights Committee, General Comment No. 35 - Article 9 (Liberty and security of person), CCPR/C/GC/35, 28 October 2014 (“General Comment No. 35”), para. 38, found at http://tbiinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fGC%2f35&Lang=en.

³ The Single Judge, Judge Cuno Tarfusser, has previously observed that Chambers have “focussed on the determination as to whether one or more of the risks listed under letter b of article 58(1) still exist”. He further observed that: “[i]t is debatable, however, to what extent a Pre-Trial Chamber (namely, the same Pre-Trial Chamber who has issued the warrant of arrest) can be meaningfully called upon reassessing the existence of reasonable grounds to believe that a crime has been committed in the context of an application for interim

V. SUBMISSIONS

9. The Defence submits that as a *suspect* before the Court, there is a heightened responsibility to avoid Mr. Ongwen's pre-trial detention as required by international human rights standards.⁴ It is argued that there is no possibility of Mr. Ongwen – who is *only a suspect at this time* – absconding from justice, and as such, the deprivation of his liberty is no longer required under the Rome Statute or international human rights law. The Defence further notes in this regard the distress caused to Mr. Ongwen by the deprivation of his liberty.

10. It is argued that Mr. Ongwen's pre-trial detention is neither necessary to ensure his appearance at trial should his charges be confirmed, protect the investigations or proceedings, nor to prevent the continuation of the commission of the crimes for which he is suspected or of any other crimes.

a. Mr. Ongwen's Detention is Unnecessary to Ensure his Appearance before the Court

11. First, Mr. Ongwen surrendered on 16 January 2015.⁵ It is argued that Mr. Ongwen's surrender is demonstrative of his willingness to cooperate with the Court and to face the charges for which he is *suspected*. Furthermore, Mr. Ongwen has appeared before the Court when so required and will continue to do so if provisionally released. It is further argued that Mr. Ongwen's provisional release would be a great incentive to those with outstanding warrants of arrest to follow suit and surrender as they will perceive the Court, not as a bastion for certain deprivation of liberty even before being proven guilty.

release" (ICC-01/05-01/13-259, para. 5). This request for interim release will therefore not address Article 58(1)(a) but will rather focus on the elements set forth in subparagraph (b).

⁴ See ICCPR, Article 9(3); General Comment No. 35, para. 38.

⁵ *Supra*, paragraph 4.

12. The Defence notes that both the availability of financial means as well as “the existence of a network of supporters behind a suspect” are relevant factors in the determination of whether one is a flight risk.⁶ In that regard, it is noted that Mr. Ongwen is indigent and has no financial resources. His financial situation makes it impossible for him to flee. Mr. Ongwen will not seek assistance from third parties to abscond from the Court and, practically speaking, has no contacts who could aid him. Unlike other suspects or accused persons before the Court, Mr. Ongwen has no international or high-level contacts.⁷ To the contrary, whilst these charges are before the Court, Mr. Ongwen cannot return to the normal life in Gulu, Uganda he hoped to attain by leaving the bush. He therefore has every reason to appear before the Court at all stages of the proceedings.

13. In any event, Mr. Ongwen is convinced of the line of Defence available to him and looks forward to vindicating himself; first, as a person originally abducted at a tender age of about ten (10) years old; and second, because of the special circumstances of the command structure of the Lord’s Resistance Army under which he forced to operate.

b. Mr. Ongwen will not Endanger or Obstruct the Investigations or Proceedings

14. Second, Mr. Ongwen’s interim release will not endanger or obstruct the investigations or proceedings. The Defence reiterates its position made in previous filings that Mr. Ongwen has not obstructed investigations or proceedings against him before the Court.⁸ The Defence notes, for instance, that the letter written by Mr. Ongwen to his family was innocuous and that the Single Judge stated that he could not find any hidden message or meaning.⁹ In light of the imminent danger to Mr. Ongwen’s life in Uganda before an elaborate

⁶ See ICC-01/05-01/13-259, para. 26; ICC-01/04-02/06-147, para. 55.

⁷ See for e.g. ICC-01/05-01/13-259, para. 26; ICC-01/04-02/06-147, para. 55.

⁸ See for e.g. ICC-02/04-01/15-278-Conf ; ICC-02/04-01/15-322-Conf-Exp.

⁹ See ICC-02/04-01/15-T-12-Conf-Eng RT 28-10-2015 PT.

arrangement and understanding with all the stakeholders; especially the affected communities and the elders are made; it is not conceivable that Mr. Ongwen would be inclined to escape and return to Coorom.

15. The Defence further notes the impending Article 56 proceedings to take place starting 9 November 2015, wherein six (6) additional witnesses are to testify.¹⁰ In this regard, the Defence reiterates assurances made to the Single Judge at the Status Conference of 28 October 2015 that it will use best efforts to ensure that all of the Witnesses testify.

16. The Defence argues that since eight (8) witnesses will have been examined pursuant to Article 56 of the Statute prior to the Confirmation of Charges Hearing, it removes any "risk" alleged by the Prosecutor in her applications before the Court.¹¹ The alleged ability to influence the Witnesses will have been eliminated. As a result, the chances that Mr. Ongwen will obstruct or influence the Witnesses is negligible.

c. Mr. Ongwen will not Commit any Crimes during his Release

17. Third, the Defence further submits that Mr. Ongwen guarantees that he will not commit any offence for which he is *suspected* of or commit any other offence. The Defence reiterates that Mr. Ongwen left the bush voluntarily and notes that he actively sought the Ugandan People's Defence Force and United States forces to surrender himself. These are not the actions of someone seeking to commit crimes.

¹⁰ ICC-02/04-01/15-323-Conf. The Defence notes that the Single Judge ordered the examination of witnesses P-099, P-101, P-198, P-214, P-235, and P-236 to take place between 9 and 27 November 2015. *See also* ICC-02/04-01/15-277-Conf, whereby the Single Judge, Judge Tarfusser ordered the examination of two witnesses: P-226 and P-227. The testimony of these two witnesses was heard by the Single Judge from 15 to 19 September 2015.

¹¹ *See generally* ICC-02/04-01/15-256-Conf.

d. Location of Interim Release

18. The Defence emphasises the entry into force of an agreement between the Government of Belgium and the Court on the interim release of detainees into Belgian territory. The Defence requests that Mr. Ongwen be provisionally released to Belgium.

19. Based on the foregoing, the Defence contends that Mr. Ongwen satisfies the requirements set forth in the Statute for interim release. Mr. Ongwen's interim release is in line with obligations to protect and uphold his fundamental human rights since he is not a threat to the case or society.

VI. REQUEST FOR RELIEF

20. The Defence requests that the Single Judge grants the request and releases Mr. Ongwen to Belgium, at least until the start of the Confirmation of Charges Hearing.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 29th day of October 2015

At Den Haag, Netherlands