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Pénale
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**International
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Court**

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No.: ICC-02/04-01/15
Date: 3 November 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

Prosecution opposition to the Defence request for interim release

Source: The Office of the Prosecutor

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

1. The Chamber should reject the Defence's request to release Dominic Ongwen from detention¹ because two of the conditions listed in article 58(1)(b) of the Rome Statute continue to be met.² Detention is warranted to ensure that Dominic Ongwen attends his trial, after having evaded arrest for over nine years, and does not further obstruct or endanger the investigation or the court proceedings.

Confidentiality

2. This document is filed confidentially in response to a filing so designated.³ A public redacted version will be filed.

Submissions

There are reasonable grounds to believe that Dominic Ongwen committed the crimes alleged in the Prosecution's arrest warrant application

3. The Chamber's findings in the warrant for Dominic Ongwen's arrest remain valid.⁴ They are not challenged in the Request, and they find support in the material disclosed to Dominic Ongwen since his surrender in January 2015.⁵

¹ ICC-02/04-01/15-332-Conf-Red ("Request").

² A person shall continue to be detained if the Chamber is satisfied that the conditions set forth in article 58(1) of the Rome Statute are met: article 60(2) of the Rome Statute. The fulfilment of only one article 58(1)(b) condition is sufficient to justify continued detention: ICC-01/04-01/06-824, para. 139.

³ Regulation 23*bis*(2) of the Regulations of the Court.

⁴ ICC-02/04-01/05-57.

⁵ See *below*, paras. 11, 18.

Dominic Ongwen's continued detention is necessary to ensure his appearance at trial

Dominic Ongwen's conduct does not support the Request

4. Dominic Ongwen's conduct prior to his arrival in The Hague demonstrates his disregard for the Court's procedures and indicates the likely trajectory of his future behaviour.
5. First, Dominic Ongwen consciously evaded arrest for over nine years.⁶ Although it operated in isolated areas, the LRA maintained contact with the outside world and was aware of the existence of ICC warrants. Ugandan military intelligence reports confirm that Joseph Kony discussed the threat of prosecution by the ICC with other commanders including Dominic Ongwen,⁷ in radio communications in 2003 and 2004.⁸ An NGO report describes how Dominic Ongwen contemplated leaving the LRA on multiple occasions, and how he had the freedom and opportunity to do so. He chose not to, on at least one occasion because of the ICC arrest warrant against him.⁹ The Request fails to address this issue.

⁶ The arrest warrant against Dominic Ongwen was made public on 13 October 2005. He arrived in The Hague on 21 January 2015.

⁷ Kony issued radios to active commanders and to those ranked Brigade commander and above. From at least 2003, this included Dominic Ongwen: P-59, UGA-OTP-0027-0244 at 0250; P-3, UGA-OTP-0027-0214 at 0225; P-29, UGA-OTP-0027-0231 at 0239.

⁸ See, e.g., 5 February 2004, UGA-OTP-0016-0022 at 0023 ("Kony – Do not reply such letters they are just going to be used as evidence in the international courts the way Museveni is seeking an arrest warrant for me!"); UGA-OTP-0197-0697 at 0769 (notes of the LRA radio communication that forms the basis of this Ugandan military intelligence report, recorded contemporaneously by the UPDF); see also 20 November 2003, UGA-OTP-0025-0440 at 0441 ("Kony – Yesterday, Museveni said that he has issued an arrest warrant for me."); 30 January 2004, UGA-OTP-0012-0025 at 0028 ("Otti – Museveni has gone to report us to the BRITISH. He is requesting for an international arrest warrant for us."); UGA-OTP-0197-0697 at 0759-0760 (notes of the LRA radio communication that forms the basis of this Ugandan military intelligence report, recorded contemporaneously by the UPDF); UGA-OTP-0061-0002 at 0030-0031 (notes of the same LRA communication, recorded contemporaneously by the Ugandan Internal Security Organisation).

⁹ Justice and Reconciliation Field Note, "Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen", July 2008, UGA-OTP-0219-0036 at 0049 ("It was shortly after the announcement that he was wanted for war crimes, that Ongwen began to contact civilians and local leaders to discuss the

6. Second, the Request's use of Dominic Ongwen's surrender in support of its submission that he would appear at his trial is unpersuasive. According to Dominic Ongwen's own words, and a 10 June 2015 Defence filing,¹⁰ he did not surrender voluntarily.¹¹ Before his surrender, Dominic Ongwen was imprisoned on Joseph Kony's orders and at risk of being killed. He escaped from prison and from the LRA with the assistance of sympathetic fighters to preserve his life. When he first made contact with Seleka forces, he lied about his identity.¹² In a media interview he purportedly gave after his surrender, Dominic Ongwen stated that he surrendered because he was "wasting [his] time in the bush".¹³ These are not the words and actions of a person acting out of contrition or in the interests of cooperation with the Court.
7. In any event, that a suspect decides at some point to surrender himself to the jurisdiction of the Court is not, in itself, sufficient to warrant release. The circumstances of surrender, including the manner, timeliness and

possibilities of return. [...] According to civilian witnesses [...] He asked them about the indictments and whether or not they thought the Government would hand him over to the foreign court. [...] Once the discussion was finished, Ongwen let them go."), 0050 ("At one point he arranged to return with the help of his 'wife' and local officials. On an agreed-upon date, his 'wife', local officials, UPDF and former LRA commanders such as Kenneth Banya met with Ongwen at a meeting point in Gulu District. He changed into civilian clothing and prepared himself, when he suddenly began to beat his wife, asking her if she had forgotten about the ICC. He returned to the bush and she has not seen him since.").

¹⁰ ICC-02/04-01/15-243, paras. 19 ("The Defence wishes to retrace the movements of Dominic Ongwen from the time he was able to defect to the time he ended up in the custody of the Court. This will demonstrate that Mr Ongwen did not voluntarily surrender to the Court."), 20 ("After his defection, Mr Ongwen 'surrendered' to a rebel group called Aboro with the clear intention of going back to his home country, Uganda."); *see also* para. 1.

¹¹ Request, paras. 11, 17.

¹² Daily Monitor, "Ongwen speaks out on why he quit LRA", Moses Akena, 19 January 2015, <http://www.monitor.co.ug/News/National/Ongwen-speaks-out-on-why-he-quit-LRA/-/688334/2593818/-/5ox5ac/-/index.html>; Daily Monitor, "The strange case of LRA's Dominic Ongwen, and what it reveals about Kony", Charles Onyango-Obbo, 11 February 2015, <http://www.monitor.co.ug/OpEd/OpEdColumnists/CharlesOnyangoObbo/Strange-case-LRA-Dominic-Ongwen/-/878504/2619994/-/c57kwp/-/index.html>; NTV, "Dominic Ongwen reveals why he left Joseph Kony", <http://www.ntv.co.ug/news/local/12/jan/2015/dominic-ongwen-reveals-why-he-left-joseph-kony#sthash.NgMq5L1m.OuWR3iXg.dpbs>.

¹³ NTV, "Dominic Ongwen reveals why he left Joseph Kony", <http://www.ntv.co.ug/news/local/12/jan/2015/dominic-ongwen-reveals-why-he-left-joseph-kony#sthash.NgMq5L1m.OuWR3iXg.dpbs>, at 01:23-01:50.

motive, are important to determining the weight to be given this factor.¹⁴

Faced with similar facts in the *Ntaganda* case, the Pre-Trial Chamber found that the information available to it “cast[] serious doubt on the validity of the Defence's claim” and thus “reduce[d] the weight to be given to this major factor which the Defence heavily relie[d] upon”.¹⁵

Dominic Ongwen may have the means to abscond

8. Contrary to the Request, Dominic Ongwen may have the financial means to abscond if released.¹⁶ Although Dominic Ongwen may be indigent, for at least the last decade the LRA maintained a dedicated international support network that provided them with significant financial and political assistance.¹⁷ These networks may still mobilise to support Dominic Ongwen. In its determination, the Chamber need only consider the possibility – not the inevitability – of his access to funds, if that risk is established on the basis of concrete evidence.¹⁸
9. The Request's choice of Belgium as Dominic Ongwen's place of release, even if only for a short period,¹⁹ exacerbates the risk of flight. If in fact

¹⁴ ICC-01/04-02/06-147, para. 42.

¹⁵ ICC-01/04-02/06-147, para. 46; *see also* paras. 40-45.

¹⁶ *Contra* Request, para. 12.

¹⁷ In December 2002, in a phone call with the Ugandan radio station Mega FM, Kony said, “My Movement has many political wings, some of them are in London and some other countries”, UGA-OTP-0023-0011 at 0013 (transcript); UGA-OTP-0023-0002 (tape); *see also* Crisis Group, “Northern Uganda: Seizing the Opportunity for Peace”, Africa Report No. 124, 26 April 2007, <http://www.crisisgroup.org/en/regions/africa/horn-of-africa/uganda/124-northern-uganda-seizing-the-opportunity-for-peace.aspx> (“The UN, through a new panel of experts, and host countries should investigate and impose penalties on those in the diaspora who undermine the peace process by giving the LRA financial and material support.”); Enough Project, “A New Peace Strategy for Northern Uganda and the LRA (Strategy Paper)”, Julia Spiegel and John Prendergast, 8 May 2008, <http://www.enoughproject.org/publications/new-peace-strategy-northern-uganda-and-lra> (“ACTION TWO: The international community must sever support to the LRA by a small number of individuals in the Ugandan Diaspora”); New Vision, “ICC arrest warrants no impediment to peace”, Thadeus Mabasi, 27 August 2008, <http://www.newvision.co.ug/D/8/459/646751> (“Secondly, it is evident that the ICC indictments have generated such pressure that the LRA was left with no other option but to negotiate. [...] This has had the effect of increasing international legitimacy and support for the Uganda People's Defence Forces (UPDF) military campaigns; putting pressure on Sudan to stop supporting the LRA; and inducing states to restrict diaspora funding for the LRA.”).

¹⁸ ICC-02/11-01/11-278-Red, para. 56.

¹⁹ Request, paras. 1, 20.

indigent and unable to access the LRA's international support or the country's social welfare system, Dominic Ongwen will be incapable of supporting himself, and may attempt to flee to somewhere he could. Residing in Belgium also means that Dominic Ongwen would be able to travel without restriction within the Schengen area of the European Union, increasing the difficulty for authorities of apprehending him.²⁰

Dominic Ongwen faces a lengthy sentence if convicted

10. The gravity of the charges and the expectation of a lengthy prison sentence if convicted are relevant factors in decisions on interim release.²¹ In this case, the Chamber has found that reasonable grounds exist to believe that Dominic Ongwen ordered the commission of seven crimes against humanity and war crimes at Lukodi IDP camp.²² This alone would attract a significant sentence.²³

11. On 18 September²⁴ and 5 October 2015,²⁵ the Prosecution notified the Defence that it intended to include in the document containing the charges a further 60 crimes against humanity and war crimes. The charges will include further crimes in relation to Lukodi IDP camp, attacks on Pajule, Odek, and Abok IDP camps, persecution, sexual and gender-based crimes against his forced wives, sexual and gender-based

²⁰ See ICC-01/04-01/10-163, para. 57 ("The Chamber, however, notes that in practice there are no restrictions on movement from one country to another within the Schengen area of the European Union. Mr Mbarushimana can thus move from one country to another each time he suspects that he is at risk of being apprehended. The Chamber is thus of the view that the release of Mr Mbarushimana to France would make it easier for him to flee.").

²¹ ICC-01/04-01/07-572, para. 21.

²² ICC-02/04-01/05-57.

²³ To compare: Thomas Lubanga was sentenced to 14 years' imprisonment for committing the war crime of conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities, ICC-01/04-01/06-3122, paras. 5-6; Germain Katanga was sentenced to 12 years' imprisonment for his role as an accessory to murder as a crime against humanity and a war crime, attacks against a civilian population as such or against individual civilians not taking direct part in hostilities as a war crime, destruction of enemy property as a war crime, and pillaging as a war crime, ICC-01/04-01/07-3484-tENG-Corr, paras. 1, 170.

²⁴ ICC-02/04-01/15-305-Conf.

²⁵ ICC-02/04-01/15-311-Conf (Prosecution's request, granted by the Single Judge on 15 October: ICC-02/04-01/15-318-Conf).

crimes by fighters under his command, and the conscription and use of child soldiers. Their temporal scope will stretch at least three-and-a-half years. In support, the Prosecution intends to rely upon 100 witnesses, and the LRA's own radio communications, which were intercepted and recorded contemporaneously by the Ugandan government. In some radio communications, Dominic Ongwen appears to acknowledge his responsibility for the charged crimes.

12. Even if Dominic Ongwen remains a suspect for the time being, these serious allegations warrant a lengthy sentence if he is convicted. They constitute a strong incentive for him to abscond. The proceedings should not be put at risk by affording him the opportunity.

Dominic Ongwen's continued detention is necessary to ensure that he does not obstruct or endanger the investigation or the court proceedings

13. Interim release would enhance Dominic Ongwen's demonstrated capacity to influence the investigation into his alleged criminal conduct.
14. On 5 June 2015, Dominic Ongwen's communication privileges were restricted pursuant to the Single Judge's "reasonable suspicion that there had been attempts by Dominic Ongwen to exercise via telephone conversations some form of influence on persons who possess information relevant to the case".²⁶ Detained, the Chamber can control Dominic Ongwen's communications; if he were to be released, there are no equally effective means of curtailing his contact with witnesses, many of whom are victims of sexual violence or remain vulnerable to the power he exerted over them during their time in captivity.

²⁶ ICC-02/04-01/15-283, para. 10. Communication restrictions were modified on 7 June and 3 August 2015. See also ICC-02/04-01/15-242.

15. In this respect, it is worth noting that P-235, who gave a statement to the Prosecution indicating her willingness to testify about the commission of sexual or gender-based violence by Dominic Ongwen personally during her period of abduction by the LRA, had reversed her decision two months later.²⁷ P-236 commenced the process of giving a statement to the Prosecution, apparently willing to testify. But by the end of that process three days later, she indicated that she was no longer willing to give evidence, citing pressure from her parents. The Prosecution was not able to contact her after that for one month.²⁸

16. Another witness, P-214, made a statement to the Prosecution containing similar allegations as those of P-235 and P-26. While in her communications with the Prosecution she remains a willing witness, Defence investigation notes suggest that she has told them that she does not wish to give evidence for the Prosecution, but rather for the Defence.²⁹

17. These matters do not implicate any wrongdoing by Dominic Ongwen or his legal team. But they do highlight the extreme sensitivity of the context in which these proceedings are unfolding, and the vulnerability of witnesses who may be subject to Dominic Ongwen's influence. On its own, the announcement that he is at liberty may be enough to have a chilling effect on witnesses similar to those described here.

18. The Prosecution's disclosure to Dominic Ongwen of over 27,000 pages of incriminatory material, including the identities of witnesses it intends to rely on at trial, heightens the risk to the investigation and the

²⁷ ICC-02/04-01/15-T-12-CONF-ENG, pp. 4-8. P-235 confirmed to the Defence and the Prosecution on 1 November 2015 that she was willing again to testify.

²⁸ ICC-02/04-01/15-T-12-CONF-ENG, pp. 10-11.

²⁹ ICC-02/04-01/15-T-12-CONF-ENG, pp. 8-10.

proceedings, if he is released.³⁰ Even in Belgium, Dominic Ongwen can influence the investigation through his family in Northern Uganda or through escaped LRA fighters who may still be loyal to him, *via* telephone and email.³¹

19. The taking of measures under article 56 of the Statute to preserve a handful of particularly vulnerable witnesses' testimony does not "eliminate"³² these concerns. These persons represent only a fragment of the witnesses the Prosecution intends to call at trial, each of whom will contribute important evidence to allow the Chamber to arrive at the truth.

Relief Requested

20. The Prosecution requests the Chamber to dismiss the Request.



Fatou Bensouda,
Prosecutor

Dated this 3rd of November 2015
At The Hague, The Netherlands

³⁰ ICC-02/11-01/11-278-Red, para. 65 ("the Appeals Chamber notes that the Pre-Trial Chamber found that the disclosure of evidence 'amplified' the risk to the investigation and the court proceedings in case of Mr Gbagbo's release. In the view of the Appeals Chamber, this finding cannot be faulted. Disclosure enhances the detainee's knowledge of the Prosecutor's investigation. Therefore under article 58 (1) (b) (ii) of the Statute it may be a relevant factor." (footnote omitted)).

³¹ ICC-01/04-01/10-283, para. 60 ("In the specific context of this case, it is not an unreasonable prediction that phone calls or e-mails may be used to continue to contribute to the commission of crimes.").

³² Request, para. 16.