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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

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

Public Document

Victims' Joint Response to the "Defence Request for Conditional Release, or in the Alternative, the Restoration of Mr Ongwen's Communication Privileges"

Source: Office of Public Counsel for Victims
Legal Representatives of Victims

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr Benjamin Gumpert

Counsel for the Defence

Mr Krispus Ayena Odongo
Mr Charles Achaleke Taku

Legal Representatives of the Victims

Mr Joseph Akwenyu Manoba and
Mr Francisco Cox
Ms Paolina Massidda and
Ms Jane Adong

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Mr Orchlon Narantsetseg
Ms Caroline Walter

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The present submissions respond to the “Defence Request for Conditional Release, or in the Alternative, the Restoration of Mr Ongwen’s Communication Privileges” (the “Defence Request”)¹. They are filed jointly by all legal representatives appointed or designated in the case² (collectively referred to as “Counsel”) on behalf of the victims authorised to participate in the proceedings, and in accordance with Trial Chamber IX’s (the “Chamber”) oral instruction issued on 23 May 2016.³

2. Counsel submit that the Defence has shown no grounds on which to modify the current orders regarding Mr Ongwen’s detention or regime of communications.

3. In particular, Counsel submit that Mr Ongwen must continue to be detained because the conditions set forth in article 58(1) of the Rome Statute continue to be met, and there has been no change of circumstances in the sense of article 60(3) of the Statute; and that the communications restrictions imposed on the Accused continue to be justified, proportionate and necessary to grant the integrity of the proceedings.

II. PROCEDURAL HISTORY

4. On 8 July 2005, a warrant of arrest against Mr Ongwen was issued under seal which was reclassified as a public on 28 January 2015.⁴ On 16 January 2015 Mr

¹ See the “Defence Request for Conditional Release, or in the Alternative, the Restoration of Mr Ongwen’s Communication Privileges”, No. ICC-02/04-01/15-416, 13 June 2016.

² See the “Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, p. 19; the “Decision on issues concerning victims’ participation” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; and the “Second decision on contested victims’ applications for participation and legal representation of victims” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 24 December 2015, pp. 20-22.

³ See the Transcript of Status Conference held on 23 May 2016, No. ICC-02/04-01/15-T-25-ENG ET WT, page 6, lines 14-16.

⁴ See the “Warrant of Arrest for Dominic Ongwen (Pre-Trial Chamber II), No. ICC-02/04-01/05-10-US-Exp, 8 July 2005 (Pursuant to Pre-Trial Chamber II’s instruction dated 28 January 2015, this document is reclassified as Public).

Ongwen was surrendered to the custody of the Court, and a first appearance was held in the case on 26 January 2015.⁵

5. On 5 June 2015 the Prosecutor made an *ex parte* request for restrictions to be imposed on Mr Ongwen's use of the phone communications⁶, which was granted on an interim basis pending receipt of the relevant material relating to the request and submissions from the parties.⁷ On 3 August 2015, having received submissions from the parties,⁸ then the Single Judge of the Pre-Trial Chamber issued his Decision concerning the restriction of communications of Mr Ongwen (the "Decision Restricting Communications").⁹ On 31 May 2016, the Single Judge of Trial Chamber IX also issued his Decision on issues related to the restriction of communications of Mr. Ongwen.¹⁰

6. On 29 October 2015 the Defence requested Mr Ongwen's interim release.¹¹ On 27 November 2015, having received submissions from the Prosecution opposing said

⁵ See the "Decision on Setting the Date for the Initial Appearance of Dominic Ongwen and the Date for a Status Conference, with confidential *ex parte* annex, Prosecutor only (Pre-Trial Chamber III), No. ICC-02/04-01/05-418, 21 January 2015.

⁶ See the "Prosecution's application for the Pre-Trial Chamber to make orders under article 57 of the Rome Statute and regulation 101 of the Regulation of the Court to restrict Dominic Ongwen's access to the telephone and to direct that there be a public hearing", No. ICC-02/04-01/15-241, 5 June 2015 (reclassified as public on 8 June 2015).

⁷ See the "Order concerning a request by the Prosecutor under regulation 101(2) of the Regulations of the Court" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-242, 8 June 2015.

⁸ See the Public redacted version of "Prosecution's further submissions pursuant to filing ICC-02/04-01/15-267", 20 July 2015, No., ICC-02/04-01/15-276-Red, 29 September 2015; and the Public Redacted Version of "Defence Response to the Prosecution's Request to Maintain Dominic Ongwen's Isolation from the Outside World", No. ICC-02/04-01/15-278-Red, 27 July 2015.

⁹ See the "Decision concerning the restriction of communications of Dominic Ongwen" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-283, 3 August 2015 (reclassified as public on 29 September 2015).

¹⁰ See the "Decision on issues related to the restriction of communications of Dominic Ongwen", (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-450-Red, 31 May 2016.

¹¹ See the "Defence Request for the Interim Release of Dominic Ongwen", No. ICC-02/04-01/15-332, 29 October 2015 (reclassified as public on 23 March 2016).

request,¹² the then Single Judge rejected the request (the “First Decision on Interim Release”).¹³

7. On 23 March 2016, the then Single Judge undertook the first review of Mr Ongwen’s detention, having received submissions from the participants,¹⁴ and declined to order Mr Ongwen’s conditional release (the “Second Decision on Interim Release”).¹⁵

8. On 13 June 2016 the Defence filed its Request¹⁶.

III. SUBMISSIONS

9. As Counsel have previously submitted,¹⁷ any change to the current arrangements regarding Mr Ongwen’s detention may only be made if there has been a material change in circumstances *requiring* such a change. The Defence Request patently fails to demonstrate any material change in circumstances, either in respect of Mr Ongwen’s detention or about the restrictions imposed on his communications.

1. *Submissions concerning the request for interim release*

10. Pursuant to article 60(3) of the Rome Statute, the Chamber shall periodically review its ruling on release or detention of the person and, upon such review, it may

¹² See the “Prosecution opposition to the Defence request for interim release”, No. ICC-02/04-01/15-333, 3 November 2015 (reclassified as public on 26 May 2016).

¹³ See the “Decision on the “Defence Request for the Interim Release of Dominic Ongwen” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-349, 27 November 2015 (reclassified as public on 23 March 2016).

¹⁴ See the “Corrected Version of ‘Submissions for Review of the Continued Detention of Mr Dominic Ongwen’ filed on 14 March 2016”, No. ICC-02/04-01/15-416-Corr, 21 March 2016; the “Observations of the Common Legal Representative on the periodic review of Mr. Ongwen’s detention”, No. ICC-02/04-01/15-417, 14 March 2016, the “Victims’ submissions on review of pre-trial detention”, No. ICC-02/04-01/15-418, 14 March 2016, and the “Prosecution Response to ‘Defence Submissions for Review of the Continued Detention of Mr Dominic Ongwen’”, No. ICC-02/04-01/15-419, 14 March 2016.

¹⁵ See the “Decision on the review of Dominic Ongwen’s detention pursuant to article 60(3) of the Statute” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-421, 23 March 2016.

¹⁶ See the Defence Request, *supra* note 1.

¹⁷ See the “Observations of the Common Legal Representative on the periodic review of Mr. Ongwen’s detention”, *supra* note 14; and the “Victims’ submissions on review of pre-trial detention”, *supra* note 14.

modify its ruling *“if it is satisfied that changed circumstances so require”*. In this regard, pursuant to the jurisprudence of the Court, *“[t]he requirement of ‘changed circumstances’ imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary”*.¹⁸

11. Moreover, the Appeals Chamber has ruled that, when reaching a decision under article 60(3) of the Statute, *“[t]he Chamber does not have to enter findings on the circumstances already decided upon in the ruling on detention”*,¹⁹ and that *“[i]t is first for the Pre-Trial Chamber to determine whether changed circumstances exist to warrant the disturbing of a previous ruling on detention, rather than addressing each factor underpinning detention in a de novo manner to determine whether any of these have changed”*.²⁰ Consequently, there is no requirement to give reasoning or engage in a *de novo* review of detention where no changed circumstances are established.²¹

12. Counsel contend that the majority of the arguments in the Defence Request²² do not even attempt to demonstrate a change in circumstances. Rather they relate to

¹⁸ See the “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’” (Appeals Chamber), No. ICC-01/05-01/08-631-Red OA2, 2 December 2009, paras. 1 and 60. See also the “Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence” (Pre-Trial Chamber III), No. ICC-01/05-01/08-743, 1 April 2010, par. 26.

¹⁹ See the “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled ‘Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence of Procedure and Evidence’”, (Appeals Chamber), No. ICC-01/05-01/08-1019 OA4, 23 November 2010 (dated 19 November 2010), par. 53; and the “Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled ‘Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute’” (Appeals Chamber), No. ICC-02/11-01/11-548-Red OA4, 29 October 2013, par. 112.

²⁰ See the “Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled ‘Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute’”, No. ICC-02/11-01/11-548-Red OA4, 9 October 2013, paras. 1 and 53.

²¹ *Idem*, par. 94.

²² See the Defence Request, *supra* note 1, paras. 20 to 30, 32, 35 and 40.

circumstances already existing prior to the First Decision on Interim Release, and simply restate submissions made previously, and unsuccessfully, by the Defence.²³

13. The sole argument on interim release contained in the Defence Request which appears to concern a change in circumstances is that the Prosecution's investigations "*will conclude on 30 June 2016*".²⁴ However, this argument is flawed because:

(a) In citing the Prosecutor's statement that supplementary investigations will be completed on 30 June 2016, the Defence omits to recognise the Prosecutor's express *caveat* that this is subject to specific further investigation needs which are expected to arise;²⁵ and

(b) In any event, the relevant criteria for detention relates not only to investigations. Article 58(1)(b)(ii) of the Rome Statute justifies arrest in order "to ensure that the person does not obstruct or endanger the investigation *or the court proceedings*." Whether and to what extent investigations are ongoing is irrelevant where Mr Ongwen continues to pose a risk of interfering with witnesses who will form a fundamental part of the court proceedings.

14. Counsel further submit that the continued detention of Mr Ongwen appears necessary. In this regard, the Appeals Chamber held that what may justify continued detention must "appear" to be necessary, and that "[t]he question revolves around the possibility, not the inevitability, of a future occurrence".²⁶ Therefore, the Chambers are fully authorised to make a prediction as to the likelihood of future events.²⁷

²³ See the "Defence Request for the Interim Release of Dominic Ongwen" *supra* note 11; and the "Corrected Version of "Submissions for Review of the Continued Detention of Mr Dominic Ongwen", *supra* note 14.

²⁴ See the Defence Request, *supra* note 1, paras. 31, 33-34.

²⁵ See the "Prosecution Submissions in Accordance with the Scheduling Order of 4 May 2016", No. ICC-02/04-01/15-438, 18 May 2016, para. 5 ("*Supplementary investigations continue and are scheduled to cease on 30 June 2016, save where important existing lines of inquiry require a small amount of further time to be completed. These inquiries will continue to create further items for review and potential disclosure.*")

²⁶ See the "Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release", (Appeals Chamber), No. ICC-01/04-01/07-572 OA 4, 09 June 2008, para. 21 See also the "Judgment on the appeal of Mr Aime Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled 'Decision

15. In the First Decision on Interim Release, the Single Judge of the Pre-Trial Chamber had already found that Mr Ongwen's continued detention is necessary to ensure his appearance during the proceedings as he evaded arrest for more than nine years.²⁸ This indeed demonstrates Mr Ongwen's both ability and willingness to abscond. The fact that an accused person has shown his capability of evading arrest for a prolonged period of time substantially weighs against the assumption that there exists no risk of flight with regard to him or her. In such cases, it is not unreasonable to predict that the Accused could decide not to return to the Court, if released.²⁹

16. Mr Ongwen's lack of voluntarily surrender to a court of law, coupled with his proven ability and determination to avoid arrest, must raise significant doubt as to any suggestion that, if released, he will return to the Court.³⁰ The current stage of the proceedings further elevates Mr Ongwen's incentives to flee; indeed, the risk of non-appearance increases as the proceedings advance.³¹

17. Therefore, Counsel conclude that the Defence has failed to demonstrate any basis on which it could be said that circumstances have changed since the Second Decision on Interim Release, let alone that those circumstances *require* Mr Ongwen's

on the 'Demande de mise en liberte provisoire de Maitre Aime Kilolo Musamba'', (Appeals Chamber), No. ICC-01/05-01/13-558 OA 2, 11 July 2014, para. 117.

²⁷ See the "Judgment on the appeal of Mr Aime Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled 'Decision on the 'Demande de mise en liberte provisoire de Maitre Aime Kilolo Musamba'' (Appeals Chamber), No. ICC-01/05-01/13-558 OA 2, 11 July 2014, para. 117.

²⁸ See the First Decision on Interim Release, *supra* note 13, paras. 15-16.

²⁹ See the "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'D cision sur la demande de mise en lib t  provisoire de Thomas Lubanga Dyilo'', (Appeals Chamber), No. ICC-01/04-01/06-824 OA 7, 13 February 2007, para. 137.

³⁰ See the First Decision on Interim Release, *supra* note 13, para. 17.

³¹ See inter alia the "Third Review of the Decision on the Conditions of Detention of Germain Katanga" (Trial Chamber II), No. ICC-01/04-01/07-1043-tENG, 6 April 2009, par. 13; and the "Decision on the review of detention of Mr Jean-Pierre Bemba Gombo pursuant to the Appeals Judgment of 19 November 2010" (Trial Chamber III), No. ICC-01/05-01/08-1088, 17 December 2010, par. 40. See also the "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'', *supra* note 18, par. 70; and the "Decision on the 'Defence Request for Interim Release'' (Pre-Trial Chamber I), No. ICC-01/04-01/10-163, 19 May 2011, par. 42.

release. There is no basis under article 60(2) of the Rome Statute for the Chamber to order Mr Ongwen's interim release.

18. Counsel also wishes to reiterate that, in its periodic review, the Trial Chamber should take into consideration the position of victims and witnesses and the impact and prejudicial effect upon victims and witnesses that the release of persons facing charges of international crimes might have.³² Counsel submit that the victims they represents will be prejudiced if Mr Ongwen is released.

19. Counsel further reiterate the concerns previously voiced on behalf of the participating victims in this case. They have explicitly expressed a fear that Mr Ongwen's presence in Uganda would pose a risk to their safety and well-being, as well as to the conduct of the case. Such concerns are well-founded in light of Mr Ongwen's previous attempts to influence potential witnesses in the case.³³ The suggestion made in the Defence Request that Mr Ongwen be permitted to return to Uganda to assist in field investigations is therefore of particular concern to the participating victims³⁴.

2. Submissions concerning restrictions on communication

20. Preliminarily, Counsel indicate that they do not have access to Annexes C and D of the Defence Request.³⁵ However, from the Defence submissions and having read the Prosecution's observations filed on 24 June 2016, they understand that the matter concerns the communication of Mr Ongwen with two alleged children.

³² See ICTY, *The Prosecutor v. Jadranko Prlic, Bruno Stojic, Slobodan Praljak, Milivoj Petkovic, Valentin Coric and Berislav Pusic*, Decision on "Prosecution's Appeal From 'Decision Relative a la demande de mise en liberte provisoire de l'accuse Petkovic'" dated 31 March 2008, (Appeals Chamber), Case No. IT-04-74-AR65.7, 21 April 2008, para. 17. See also ICTY, *The Prosecutor v. Jadranko Prlic et Al.*, Decision on Prosecution Appeal of Decision on Provisional Release of Jadranko Prlic, (Appeals Chamber), Case No. IT-04-74-AR65.26, 15 December 2011, para. 10.

³³ See the Decision Restricting Communications, *supra* note 9, paras. 9 and 12.

³⁴ See the Defence Request, *supra* note 1, para. 38.

³⁵ Counsel have approached the Defence in order to understand whether it has any objection to said Annexes to be shared with them and are waiting for a response.

21. In this regard, Counsel support the Prosecution's observations in the matter³⁶ and they further submit that the Defence fails to show any change in circumstances - since the restrictions on communication were imposed - which might warrant their removal.

22. The Defence Request appears to assume that the burden falls on the Prosecution, or perhaps even the Chamber, to show that existing restrictions may be continued. Indeed, the Defence's assertion according to which the Chamber "*must explain how the limitation of contact is a necessary and proportionate measure*"³⁷ fails to recognize that it is the Defence who seizes the Chamber with a request to modify the *status quo*.

23. In this regard, the decision issued by the then Single Judge of Pre-Trial Chamber II indicated that restrictions on communication were necessary and proportionate in the circumstances existing as at 3 August 2015. These findings were affirmed as recently as on 30 May 2016 by the Single Judge of Trial Chamber IX.³⁸ In requesting those restrictions to be lifted, it falls upon the Defence to demonstrate a change in circumstances which now renders the adopted measures unnecessary or disproportionate.

24. Counsel submit that the Defence Request fails to do so.

25. On 3 August 2015, the then Single Judge also found that "*the information available confirm[ed] the reasonable suspicion*" that Mr Ongwen had attempted to exercise some form of influence on persons who possess information relevant to the case."³⁹ However, he noted that restrictions on Mr Ongwen's communications must be "*necessary and proportionate to the objective sought*."⁴⁰ The restrictions he imposed took

³⁶ See the "Prosecution response to the "Defence Request for Conditional Release, or in the Alternative, the Restoration of Mr Ongwen's Communication Privileges", No. ICC-02/04-01/15-483-Conf, 24 June 2016, paras. 33 to 45.

³⁷ See the Defence Request, *supra* note 1, para.46.

³⁸ See the "Decision on issues related to the restriction of communications of Dominic Ongwen", *supra* note 10, para. 4.

³⁹ See the Decision Restricting Communications, *supra* note 9, paras. 10 and 12.

⁴⁰ *Idem*, para.13.

into account the relevant circumstances and the need to balance Mr Ongwen's rights with the need to prevent interference with evidence.

26. The Defence arguments almost exclusively address the rights of Mr Ongwen and his "alleged children"⁴¹, rights which – in the Counsel's view, are subject to necessary and proportionate limitation, as the Defence itself seems to concede. Nothing in the Defence Request points to any new circumstance which would affect the necessity and proportionality of the communications restrictions as ordered by the then Single Judge in the Decision Restricting Communications.

27. Again, the only issue mentioned in the Defence Request which may constitute a change in the circumstances still justifying the communications restrictions is the statement according to which said restrictions were imposed for the pre-trial detention phase and since then, "*the Prosecution admitted that its investigations were almost complete.*"⁴² For the same reasons set out above in paragraph 13, this argument must fail.

28. Finally, Counsel note that in any event the restrictions on Mr Ongwen's communications are not remotely as oppressive as the Defence Request suggests. As the Defence itself concedes, Mr Ongwen "*has privileges to call several members of his family.*"⁴³ Indeed, despite claims of "*psychological hardship*",⁴⁴ Mr Ongwen is currently only prevented from contacting two individuals. The Defence has plainly failed to demonstrate that this restriction or any other restriction imposed on the Accused is unnecessary or disproportionate to the fundamental need to protect the integrity of the proceedings.

⁴¹ See the Defence Request, *supra* note 1, paras. 42 to 46 and 48 to 72.

⁴² *Idem*, para. 47.

⁴³ *Ibidem*, para. 72.

⁴⁴ *Ibid.*, para. 68.

IV. RELIEF SOUGHT

For the foregoing reasons, Counsel respectfully request the Chamber to reject the Defence Request.



Paolina Massidda



Joseph A Manoba



Francisco Cox

Dated this 27th day of June 2016

At The Hague, The Netherlands, at Kampala, Uganda and at Santiago, Chile