

**Cour  
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**International  
Criminal  
Court**



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

Date: 16 March 2020

**TRIAL CHAMBER IX**

**Before:** Judge Bertram Schmitt, Presiding Judge  
Judge Péter Kovács  
Judge Raul Cano Pangalangan

**SITUATION IN UGANDA**

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

**Confidential**

**CLRV Observations on the Defence Request seeking  
the release of the Accused and on current restrictions  
on communication and/or contacts**

**Source:** Office of Public Counsel for Victims

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

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## I. INTRODUCTION

1. The Common Legal Representative of the Victims<sup>1</sup> (the “CLRv”) submits that the Defence request seeking the release of Mr Ongwen (the “Defence Request”) should be dismissed *in limine* because it is not substantiated nor supported by any legal argument save for the assertion that the Accused is “*a victim*” and he is forcibly separated from his family.<sup>2</sup>

2. Should the Chamber entertain the Request, the CLRv submits that the Defence has advanced no grounds justifying the modification of the current rulings regarding Mr Ongwen’s detention or his immediate release pending judgment. Thus, the Accused must continue to be detained because the requirements set forth in article 58(1) of the Rome Statute (the “Statute”) continue to be met and there has been no change of circumstances under article 60(3) of the Statute.

3. Moreover, the Defence fails to provide concrete proposals for conditional release pursuant to Rule 119 of the Rules of Procedure and Evidence (the “Rules”). The only *purported condition* on which the Defence requests Mr Ongwen’s release is legally deficient and would not adequately mitigate the risks that he may abscond or obstruct or endanger the Court’s proceedings and/or pose a threat to the safety and well-being of the victims.

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<sup>1</sup> 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; the “Second decision on contested victims’ applications for participation and legal representation of victims” (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-01/05-384](#), 24 December 2015, pp. 20-22; and the “Decision on the ‘Request for a determination concerning legal aid’ submitted by the legal representatives of victims” (Trial Chamber IX, Single Judge), [No. ICC-02/04-01/15-445](#), 26 May 2016, para. 13.

<sup>2</sup> See the request for interim release in the Defence Closing Brief, [No. ICC-02/04-01/15-1722-Conf-Corr](#), 24 February 2020, para. 731 (the “Defence Request”).

4. Additionally, the CLRV submits that the current restrictions on communication/contacts with regard to Mr Ongwen should be maintained. In fact, the Accused enjoys ample communication privileges.

## II. PROCEDURAL HISTORY

5. On 24 February 2020, the Defence filed its "Closing Brief" in which it requested, *inter alia*, that Mr Ongwen is "granted immediate release pending judgment on terms and conditions as the Court may deem fit, including but not limited to, placing him under the supervision of the Acholi Cultural Institution, which shall undertake to monitor him and guarantee his appearance in court".<sup>3</sup>

6. On 26 February 2020, Trial Chamber IX (the "Chamber"), noting that the Defence Request requires a decision before the rendering of the judgment, instructed the parties and participants to file their responses by 20 March 2020. The Chamber also instructed the parties and participants to include in their submissions any view on the upholding of the communication/contacts restrictions currently applying to the Accused.<sup>4</sup>

## III. CONFIDENTIALITY

7. Pursuant to regulation 23*bis* (2) of the Regulations of the Court, the present submission is filed confidential following the classification chosen by the Defence. However, the CLRV indicates that this document does not contain confidential information and thus can be reclassified as public.

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<sup>3</sup> *Ibidem*.

<sup>4</sup> See the email sent by the Chamber on 26 February 2020 at 18:09.

#### IV. SUBMISSIONS

8. The CLRV stresses at the outset that the Defence Request lacks legal basis as there exist no statutory provisions that would automatically allow the immediate release of an accused pending judgment. Indeed, the Defence fails to raise any substantial arguments in relation to the release sought, except simply alleging that Mr Ongwen is a victim who is forcefully separated from his family. In the circumstances, the Defence Request should be dismissed *in limine*.

9. Should the Chamber entertain the Request, the CLRV notes that it may be qualified at best as an application seeking interim release pursuant to article 60(3) of the Statute. According to said provision, the Chamber, in reviewing its previous ruling on the continued detention of the Accused, may modify said ruling “*if it is satisfied that changed circumstances so require*”. In this regard, according 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”.<sup>5</sup> Change in circumstances must be demonstrated on a concrete basis, considering all available information, not only the arguments of the detained person.<sup>6</sup>

10. In the total absence of any submission by the Defence as to any changed circumstances which could justify the modification of the previous rulings, the CLRV submits that the continued detention of Mr Ongwen appears necessary pursuant to article 58(1)(a) and (b) of the Statute. Indeed, Mr Ongwen’s lack of surrender,

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<sup>5</sup> 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](#), 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, para. 26.

<sup>6</sup> See the “Decision on Mr Gbagbo’s Detention” (Trial Chamber I), [No. ICC-02/11-01/15-846](#), 10 March 2017, para. 11.

coupled with his proven ability to avoid arrest, continues to raise significant doubt as to any suggestion that, if released, he will voluntarily return to the Court. The current stage of the proceedings further elevates Mr Ongwen's incentives to flee since the risk of non-appearance increases as the proceedings advance.<sup>7</sup> Indeed, the closing statements have recently been heard by the Chamber,<sup>8</sup> and the next stage in the proceedings is the issuance of the judgement under article 74 of the Statute which may lead to the conviction (and, ultimately, the sentencing) of the Accused.

11. Furthermore, there is no guarantee that Mr Ongwen, if released, would not obstruct or endanger the proceedings now that all the witnesses called by the Prosecution and the Legal Representatives of Victims have completed their testimonies and their identities are known to the Accused. Especially, the witnesses who are also victims of gender-based crimes charged against the Accused remain extremely vulnerable just as before. Finally, the CLRV notes that, in case of conviction, additional witnesses, including those who testified at trial, may (re)-appear before the Chamber for sentencing purposes. Consequently, the CLRV posits that, given that there are no changed circumstances and that there is the possibility that Mr Ongwen may be found guilty for the commission of extremely serious crimes, the Chamber is not required to further review its rulings on the detention of the Accused in accordance with article 60(2) of the Statute.<sup>9</sup>

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<sup>7</sup> See, *mutatis mutandis*, 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, para. 13. See also, 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, para. 40; and 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 5, para. 70.

<sup>8</sup> Closing statements were heard on 10, 11 and 12 March 2020.

<sup>9</sup> See the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled 'Decision on the defence's 28 December 2011 'Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo'" (Appeals Chamber), [No. ICC-01/05-01/08-2151-Red](#), 5 March 2012, para. 31.

12. Pursuant to Rule 119 of the Rules, the Chamber may also grant conditional release, even if the Article 58(1) conditions are satisfied, *on the basis of specific and enforceable conditions*, provided that such conditions are available and negate or sufficiently mitigate any identified risks.<sup>10</sup> The Defence Request seeks the release of Mr Ongwen, on terms and conditions as the Court may deem fit, *"including but not limited to, placing him under the supervision of the Acholi Cultural Institution, which shall undertake to monitor him and guarantee his appearance in court."*<sup>11</sup> However, the Defence does not even attempt to raise further arguments concretely demonstrating the workability or enforceability of said *purported condition*, rendering said proposal unrealistic.<sup>12</sup>

13. Furthermore, the CLRV recalls that the State on the territory of which the person seeks to be released, had to provide its observations in the matter. In this case, the Government of Uganda had declined on a previous occasion to provide a guarantee that Mr Ongwen will re-appear before the Court.<sup>13</sup> It is unlikely that this position would change particularly now that the trial has concluded and Mr Ongwen could be declared guilty. Indeed, the Appeals Chamber held that a Chamber's discretion to consider conditional release is restricted when no State has offered to accept a detained person and enforce conditions.<sup>14</sup>

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<sup>10</sup> See, *mutatis mutandis*, the "Decision on Mr Gbagbo's Detention" (Trial Chamber I), [No. ICC-02/11-01/15-846](#), 10 March 2017, para. 21. 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 5, para. 105.

<sup>11</sup> See the Defence Request, *supra* note 2, para. 731.

<sup>12</sup> See the Decision on Mr Gbagbo's Detention, *supra* note 10, para. 22.

<sup>13</sup> See the "Decision on the Review of Dominic Ongwen's Detention and on the Restriction on Communication" (Trial Chamber IX), [No. ICC-02/04-01/15-503](#), 21 July 2016, para. 15.

<sup>14</sup> See the "Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled 'Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'" (Appeals Chamber), [No. ICC-02/11-01/11-278-Red](#), 26 October 2012, para. 79.

14. Most importantly, the CLRV submits that the Chamber ought to take into account the prejudicial effect the potential release of the Accused might have upon the victims.<sup>15</sup> In this regard, the victims represented by the CLRV will be highly prejudiced if Mr Ongwen is released in Uganda, especially under the *purported condition* suggested by the Defence. She reiterates that, during the course of consultations held with the victims, they have consistently expressed a fear that Mr Ongwen's presence in Uganda would pose a great risk to their physical safety and psychological well-being. Now that the trial has concluded, the victims anxiously await for the Chamber's verdict.

15. In conclusion, the CLRV submits that Mr Ongwen must continue to be detained because the requirements set forth in article 58(1) of the Statute continue to be met and there has been no change of circumstances under article 60(3) of the Statute. Moreover, the Defence fails to provide any concrete proposals for conditional release pursuant to Rule 119 of the Rules. Indeed, the *purported condition*, on which the release of Mr Ongwen is sought, is legally deficient and would not adequately mitigate the risks that he may abscond or obstruct or endanger the proceedings and/or pose a threat to the security and well-being of the victims.

16. As for the regime on the restriction of communication/contacts, the CLRV submits that, as argued previously,<sup>16</sup> said restrictions remain necessary - even if the trial has concluded - to ensure the safety of the witnesses and victims, prevent breaches of confidentiality and ensure the integrity of the proceedings.<sup>17</sup> While, according to the case law of Trial Chamber VI in the *Ntaganda* case, the end of the

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<sup>15</sup> See ICTY, *The Prosecutor v. Jadranko Prlic, et al*, [Decision on "Prosecution's Appeal From 'Decision Relative a la demande de mise en liberté provisoire de l'accusé 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.

<sup>16</sup> See the "CLRV's Response to Defence Request to Lift Communication Restrictions Placed Upon Mr Ongwen", [No. ICC-02/04-01/15-1631-Conf](#), 10 October 2019. The public redacted version of the document was filed on 23 October 2019. See [No. ICC-02/04-01/15-1631-Red](#).

<sup>17</sup> See the "Public redacted version of 'Decision on the present restrictions on Mr Ntaganda's contacts'" (Trial Chamber VI), [No. ICC-01/04-02/06-2236-Red](#), 19 February 2018, para. 15.



presentation of the evidence of parties and participants may be considered in terminating or easing of the restrictions of communication imposed upon an accused,<sup>18</sup> this jurisprudence is not directly applicable to the present case. Indeed, the current restrictions imposed with regard to Mr Ongwen principally concern certain dual status witnesses (P-0099 (a/02101/16); P-0214 (a/02119/16); P-0226 (a/02105/16); P-0227 (a/02112/16); and P-0235 (a/02115/16) represented by the CLRV) who testified about the sexual and gender based violence directly committed by the Accused.<sup>19</sup> This fact is unique to the case and must weigh heavily in favour of maintaining the restrictions placed with regard to Mr Ongwen. Moreover, even Trial Chamber VI acknowledged that some risk of witness's interference resulting in coaching of witnesses or potential retaliation against them *remains* even after the closure of the evidentiary phase.<sup>20</sup>

17. In addition, the CLRV recalls that the Single Judge of the Pre-Trial Chamber, first, as well as the Single Judge of the Chamber, issued a series of rulings on the matter, striking a balance between the necessity to keep the integrity of the proceedings and Mr Ongwen's right to family life.<sup>21</sup> Therefore, the current measures

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<sup>18</sup> *Idem*, paras. 19 – 24.

<sup>19</sup> See the "Decision on Defence Request to Meet with Six Prosecution Witnesses" (Trial Chamber IX, Single Judge), [No. ICC-02/04-01/15-1593](#), 13 September 2019, p. 14. See also the "Decision on Defence Request to Lift Communication Restrictions" (Trial Chamber IX, Single Judge), [No. ICC-02/04-01/15-1642](#), 18 October 2019, p. 7.

<sup>20</sup> See the "Public redacted version of 'Decision on the present restrictions on Mr Ntaganda's contacts'", *supra* note 17, para. 25.

<sup>21</sup> 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](#), 08 June 2015, the "Decision on a request by the Prosecutor under article 57 of the Rome Statute and regulation 101(2) of the Regulations of the Court" (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-01/15-254](#), 25 June 2015, the "Second decision on a request by the Prosecutor under article 57 of the Rome Statute and regulation 101(2) of the Regulations of the Court" (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-01/15-267](#), 13 July 2015, See the "Decision concerning the restriction of communications of Dominic Ongwen" (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-01/15-283-Conf](#), 3 August 2015 (Pursuant to Pre-Trial Chamber II's instruction, this decision has been reclassified as "Public" on 29 September 2015), 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-Conf-Exp](#), 30 May 2016. (Pursuant to Trial Chamber IX's instruction, dated 18 November 2016, this document is reclassified as "Confidential"), the "Decision on Mr Ongwen's Request to Add New Persons to his Non-Privileged Telephone Contact List" (Trial Chamber IX, Single Judge), [No. ICC-02/04-01/15-553](#), 4 October 2016, the "Decision on Request for Disclosure and Related Orders Concerning Mr Ongwen's

appear to be still necessary and proportionate despite the passage of time.<sup>22</sup> Indeed, Mr Ongwen already enjoys ample communication rights.<sup>23</sup>

18. Moreover, the CLRV recalls that the Single Judge had recently instructed the VWU (together with the CLRV or the Prosecution, depending on the status of the witnesses concerned) to contact certain dual status witnesses (with whom Mr Ongwen wishes to establish contact) in order to seek their consent on whether they wish to have any contact with the Defence and/or the Accused.<sup>24</sup> The result of these consultations was that only one of the concerned persons wished to have contact with the Accused. Therefore, modifying the current regime of restrictions will put in danger the well-being of said witnesses who are still very vulnerable and may potentially be contacted against their will.

19. Should the Chamber consider that less restrictive measures are justified at this stage of the proceedings, the CLRV respectfully requests the Chamber to order Mr Ongwen to refrain from contacting in any way witnesses P-0099 (a/02101/16); P-0214 (a/02119/16); P-0226 (a/02105/16); P-0227 (a/02112/16); and P-0235 (a/02115/16) who expressed their wish not to be contacted by the Accused and/or the Defence.

## V. CONCLUSION

20. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Chamber to dismiss *in limine* the Defence Request or to reject it on its merits, if entertained.

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Family" (Trial Chamber IX, Single Judge), [No. ICC-02/04-01/15-1444](#), 12 February 2019 and the "Decision on Defence Request for Production of Correspondence Addressed to Mr Ongwen" (Trial Chamber IX, Single Judge), [No. ICC-02/04-01/15-1445](#), 12 February 2019.

<sup>22</sup> See the "Judgment on Mr Bosco Ntaganda's appeal against the decision reviewing restrictions on contacts of 7 September 2016" (Appeals Chamber), [No. ICC-01/04-02/06-1817-Red](#), 8 March 2017, para. 72.

<sup>23</sup> See the "Decision on the Review of Dominic Ongwen's Detention and on the Restriction on Communication" (Trial Chamber IX), [No. ICC-02/04-01/15-503](#), 21 July 2016, para. 19.

<sup>24</sup> See the "Decision on Defence Request to Meet with Six Prosecution Witnesses" and the "Decision on Defence Request to Lift Communication Restrictions", *supra* note 19.

21. The CLRV respectfully requests the Chamber to maintain the current regime of restriction to contacts and/or communication imposed on the Accused. Should the Chamber consider that less restrictive measures are justified at this stage of the proceedings, the CLRV respectfully requests the Chamber to order Mr Ongwen to refrain from contacting in any way witnesses P-0099 (a/02101/16); P-0214 (a/02119/16); P-0226 (a/02105/16); P-0227 (a/02112/16); and P-0235 (a/02115/16).



**Paolina Massidda**  
**Principal Counsel**

Dated this 16<sup>th</sup> day of March 2020

At The Hague, The Netherlands