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**International
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Court**

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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*

Confidential

**Victims' response the Defence's request for immediate release of the Accused
pending judgement**

Source: Legal Representatives of 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 Legal Representatives of Victims ("LRVs") hereby submit their response to the Defence's request for immediate release of the Accused pending trial ("the Request"),¹ as well as their views on the regime of contact restrictions currently applied to Mr. Ongwen. These submissions are made pursuant to the email sent by Trial Chamber IX ("the Chamber") to the parties and participants on 26 February 2020 at 18:09 p.m.
2. The LRVs request the Chamber to dismiss the Request *in limine*, given that the Defence failed to present any legal or factual grounds to justify Mr. Ongwen's immediate release pending judgment.
3. In the event the Chamber decides to consider the Request, the LRVs ask the Chamber to reject it, given that the Defence did not present any novel information or arguments that would justify Mr. Ongwen's immediate release at this stage of proceedings. Indeed, the conditions for detention provided for in article 58(1)(a) and (b)(i) and (ii) of the Statute continue and there have been no change of circumstances that would warrant the immediate conditional release of the Accused.
4. Further, the LRVs submit that the evidence presented by the Prosecutor, the LRVs and the OPCV, prove beyond a reasonable doubt that the Accused has committed crimes with which he is charged. Therefore, the risk that Mr. Ongwen absconds possible conviction and subsequent imprisonment sentence; the risk that the Accused's release may pose to the safety and security of victims and witnesses who participated and/or testified in the proceedings and whose identities are known to him; and the risk that he will attempt to obstruct or endanger the court proceedings are even greater than previously. Victims

¹ Corrected version of "Defence Closing Brief", filed on 24 February 2020, ICC-02/04-01/15-1722-Conf-Corr, 6 March 2020 ("Defence Closing Brief"), para. 731; Public Redacted Version of 'Corrected Version of "Defence Closing Brief", filed on 24 February 2020', ICC-02/04-01/15-1722-Corr-Red, 13 March 2020 ("Public Redacted Defence Closing Brief"), para. 731.

participating in this case have also expressed severe reservations and cited security concerns at the prospect of the potential release of Mr. Ongwen.

5. Additionally, the LRVs submit that the Defence has failed to propose adequate conditions for possible conditional release of the Accused that would mitigate or negate any possible risks that such release poses to proceedings before the Court at this juncture.
6. Lastly, the LRVs submit that *status quo* regarding the current regime of contact restrictions currently applicable to Mr. Ongwen should be maintained.

II. PROCEDURAL HISTORY

7. On 27 November 2015, the Single Judge of the Pre-Trial Chamber ('PTC Single Judge') issued the 'Decision on the "Defence Request for the Interim Release of Dominic Ongwen"' ('Interim Release Decision').² In that decision the PTC Single Judge rejected the Defence request for the release of the Accused on the basis, among other things, that the conditions of Article 58 (1)(b)(i) and (ii) of the Statute had been met.³
8. On 23 March 2016, the PTC Single Judge issued the first decision reviewing Mr. Ongwen's detention ('First Review Decision')⁴ in which he determined that the Defence had failed to provide sufficient justification to warrant the review of the Interim Release Decision.⁵
9. On 21 July 2016, the Trial Chamber issued the second decision reviewing Mr. Ongwen's detention ('Second Review Decision')⁶ in which it considered, *inter alia*, that mitigating the risks justifying detention, the changed circumstances identified by the Defence – namely the conclusion of the Prosecution

² Decision on 'Defence Request for the Interim Release of Dominic Ongwen', ICC-02/04-01/15-349, 27 November 2015.

³ *Ibid*, para. 24.

⁴ Decision on the Review of Dominic Ongwen's Detention pursuant to Article 60(3) of the Statute, ICC-02/04-01/15-421, 23 March 2016.

⁵ *Ibid*, paras 6-7.

⁶ Decision on the Review of Dominic Ongwen's Detention and on the Restriction on Communication, ICC-02/04-01/15-503, 21 July 2016.

investigations and the confirmation of charges – may actually increase Mr. Ongwen's incentive to abscond or obstruct and endanger the integrity of the proceedings, if released.⁷

10. On 18 November 2016, the Trial Chamber issued the third decision on the review of Dominic Ongwen's detention (Third Review Decision),⁸ in which the Chamber found that on the basis of the submissions and the available information, there has been no change in the circumstances which would warrant a modification of its prior ruling on detention.⁹

11. On 24 February 2020, the Defence submitted its Closing Brief, in which it requested the immediate release of the Accused pending judgment, noting Mr. Ongwen's status as a victim and his forced separation from his family as reasons justifying immediate release of the Accused pending judgment.¹⁰ The Defence purports that the release should take place on terms and conditions deemed fit by the Court, including placement under the supervision of the Acholi Cultural Institution.¹¹

12. On 26 February 2020, through an e-mail communication, the Chamber requested the parties and participants to submit their responses to the Request by 20 March 2020.¹² In the same e-mail communication, the Chamber requested the parties and participants to include in their responses to the Request, any views on the upholding of the regime of contact restrictions currently applicable to Mr. Ongwen.¹³

⁷ *Ibid*, para. 14.

⁸ Third Decision on the Review of Dominic Ongwen's Detention, ICC-02/04-01/15-595, 18 November 2016.

⁹ *Ibid*, para. 6.

¹⁰ Defence Closing Brief, para. 731; Public Redacted Defence Closing Brief, para. 731.

¹¹ *Ibid*.

¹² E-mail from the Chamber to parties and participants, dated 26 February 2020, 18:09 p.m.

¹³ *Ibid*.

III. CONFIDENTIALITY

13. Pursuant to regulation 23bis(2) of the Regulations of the Court this filing is submitted as confidential as it responds to a document which is classified as confidential. The LRVs note that the public redacted version of the Defence Closing Brief was filed on 13 March 2020, in which the Request is un-redacted.¹⁴ The LRVs submit that the present response does not contain or refer to any confidential information, and therefore, can be reclassified as public. This would be in the best interests of victims, who have particular interest in the Chamber's resolution of the Request and who would be directly affected by a possible conditional release of the Accused.

IV. SUBMISSIONS

14. The Defence submits that "given Mr Ongwen's status as a victim and his forced separation from his family – that he be 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".¹⁵
15. The LRVs note that the core legal texts of the Court, similarly to other courts and tribunals, do not provide explicit grounds for the immediate release of an accused upon conclusion of the trial, pending judgement. At the same time, the Defence failed to raise any legal or factual basis to substantiate its request, except for "Mr. Ongwen's status as a victim" and "his forced separation from his family". However, neither an accused's victimisation nor his/her forced separation from family – which *nota bene* is a usual characteristic of any form of detention, constitute a basis for release of an accused. There exist no exceptional circumstances that would warrant Mr. Ongwen's release at this point in time.

¹⁴ Public Redacted Defence Closing Brief, para. 731.

¹⁵ Defence Closing Brief, para. 731; Public Redacted Defence Closing Brief, para. 731.

16. Should the Chamber decide not to dismiss the Request *in limine* but to consider it, the LRVs submit that the Defence has failed to indicated any legal and factual basis for their Request. In light of the Court's legal framework and jurisprudence concerning detention on remand and interim release,¹⁶ the LRVs consider the Defence's request as a request for review and for conditional release of Mr. Ongwen pursuant to article 58(1) *a contrario*, article 60(2) and (3) of the Statute and rule 119 of the Rules.
17. Article 60(3) of the Statute states that in the course of review conducted at the request of the Prosecutor or the person concerned, the Chamber may modify its decision on detention, release or conditions of release, if it is satisfied that changed circumstances so require.
18. As noted by the Appeals Chamber in the Gbagbo case, "the term 'changed circumstances' has been defined as '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'. What is crucial is that the Chamber is satisfied, at the time of the review decision, that grounds remain to detain."¹⁷
19. The LRVs submit that as the Appeals Chamber held in the Bemba case, the commencement of deliberations, although a changed circumstance, as such does not justify modification of previous findings that the accused's detention is necessary to ensure that he does not abscond.¹⁸

¹⁶ Decision on Mr. Bemba's Application of Release, ICC-01/05-01/13-2291, 12 June 2018, paras 7, 10-11.

¹⁷ Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled "Decision on Mr Gbagbo's Detention", ICC-02/11-01/15-992-Red, 19 July 2017, para. 39; 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", 2 December 2009, ICC-01/05-01/08-631-Red, para. 60.

¹⁸ Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 23 December 2014 entitled "Decision on 'Defence Urgent Motion for Provisional Release'", ICC-01/05-01/08-3249-Red, 20 May 2015, paras 46-47.

20. The LRVs submit that the conditions for detention provided for in article 58(1)(a) and (b)(i) and (ii) of the Statute continue. After conclusion of the trial there have been no change of circumstances that would justify immediate conditional release of the Accused. To the opposite, the evidence presented by the Office of the Prosecutor, by the LRVs and by the OPCV substantiate that the Accused has committed crimes with which he was charged. Therefore, the need to secure uninterrupted continuation of proceedings, and in particular Mr. Ongwen's availability for judgement and sentencing, is essential.
21. The warrant of arrest for Dominic Ongwen was issued on 8 July 2005.¹⁹ Prior to his surrender on 6 January 2015 to the Seleka rebels in Central African Republic and his subsequent surrender to the ICC custody, the Accused remained at large. Mr. Ongwen, who at trial claimed to be not guilty of the crimes for which he is tried, in the past successfully avoided the Court for almost a decade. The Chamber has previously recognized that Mr. Ongwen demonstrated his willingness and readiness to skirt the Court's authority.²⁰
22. Following conclusion of the trial, the identities of victims and witnesses who testified in these proceedings against Mr. Ongwen, and whose depositions will form factual basis of the Chamber's judgement, are known to the Accused. If released, the Accused may attempt to contact these victims and witnesses. Furthermore, if released, the Accused will be able to contact and attempt to influence victims and witnesses who may be called to testify at the possible sentencing hearing.
23. Given the above circumstances, conclusion of the trial, possible conviction and subsequent imprisonment sentence which Mr. Ongwen faces, the risks that he will attempt to abscond while awaiting the judgement are even higher than they were previously.

¹⁹ Warrant of Arrest for Dominic Ongwen, ICC-02/04-01/05-10, 29 January 2015.

²⁰ Decision on the Review of Dominic Ongwen's Detention and on the Restriction on Communication, ICC-02/04-01/15-503, 21 July 2016, para. 12.

24. As noted by the Appeals Chamber “the question of the determination of whether detention appears necessary revolves around the possibility, not the inevitability, of a future occurrence”.²¹ Therefore, although, these risks are not proven the very possibility of their occurrence is sufficient to determine that Mr. Ongwen’s release may obstruct and endanger the Court’s proceedings, specifically, with regard to judgement and the possible sentencing proceedings.
25. Importantly, Victims represented by the LRVs have repeatedly told their representative that they fear Dominic Ongwen’s release and his return to Uganda. They have no trust in the Accused’s declarations regarding his conditional release. Many victims would see it as a threat to their safety physical and psychological wellbeing.
26. The LRVs note that pursuant to rule 119 of the Rules, the Chamber has the power to conditionally release the Accused, even if requirements for arrest provided for in article 58(1) of the Statute are met. Nevertheless, such release is possible only on the basis of “specific and enforceable conditions, provided these are available and negate or sufficiently mitigate any risks identified”.²² Furthermore, such conditional release is possible upon identification of a state willing to accept the Accused and to enforce these conditions.²³
27. The Defence Request simply refers to one condition of placing Mr. Ongwen under the supervision of the Acholi Cultural Institute. This does not provide sufficient guarantee to ensure the Accused’s availability for judgement or

²¹ 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’”, ICC-01/05-01/13-558, 11 July 2014, para. 117.

²² Decision on Mr Gbagbo’s Detention, ICC-02/11-01/15-846, 10 March 2017, para. 21; 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”, 2 December 2009, ICC-01/05-01/08-631-Red, para. 105.

²³ 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”, 2 December 2009, ICC-01/05-01/08-631-Red, para. 106.

sentencing. Neither does this condition ensure he will not attempt to obstruct or endanger the court proceedings.

28. The Defence failed to provide any information about specific conditions and arrangements necessary for such supervision to be real, effective and not illusory. What is more, the Defence failed to provide information about the capacity and capability of this Institute to undertake such supervision and responsibility. Therefore, the only condition explicitly suggested by the Defence, cannot be considered as sufficiently mitigating or negating the risks pertaining to Mr. Ongwen's conditional release. The Defence failed to indicate any other conditions that could provide such a guarantee. What is more, the Defence have also failed to illustrate, how the proposed release would safeguard the physical and mental integrity of the Accused, whom they described as "mentally disabled" throughout their closing brief.²⁴

29. Furthermore, the Defence in its Request did not indicate to which state the Accused ought to be released. In this regard the LRVs note that the government of Uganda on previous occasions have refused to guarantee that Mr. Ongwen would appear before the Court after his conditional release.²⁵

30. In conclusion the LRVs submit that the conditions of the Accused's detention under article 58(1) of the Statute continue to be met and the Defence failed to indicate any change of circumstances that would justify Mr. Ongwen's release. Furthermore, the Defence failed to propose adequate conditions that would mitigate or negate risks posed by Mr. Ongwen's requested release.

The contact regime currently applied to Mr. Ongwen should be upheld

31. The LRVs are of the view that the current regime of restriction on Mr. Ongwen's contacts should be maintained. This is justified by the need to ensure the safety and security of dual status victims, despite conclusion of the trial.

²⁴ Public Redacted Defence Closing Brief, paras 7, 33, 79, 81, 119, 122, 123, 132, 146, 157, 481.

²⁵ Decision on the Review of Dominic Ongwen's Detention and on the Restriction on Communication, ICC-02/04-01/15-503, 21 July 2016, para. 15.

32. In this respect the LRVs support the OPCV's position that the restrictions on communication must be maintained. This is especially important, taking into consideration the 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) who testified about sexual and gender-based crimes directly committed by Mr. Ongwen.²⁶

V. CONCLUSION AND RELIEF SOUGHT

33. The LRVs therefore request that:

- (a) the Chamber dismisses the Request *in limine* as lacking any legal or factual basis, alternatively, in case the Chamber entertains the Request, to reject it as unjustified;
- (b) the Chamber upholds the current communication regime applicable to Mr. Ongwen.

Respectfully submitted,



Joseph A. Manoba



Francisco Cox

Dated this 20th day of March 2020
At Kampala, Uganda and at Santiago, Chile

²⁶ ICC-02/04-01/15-1728-Conf, para. 16.