

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 14 March 2016

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN UGANDA

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

Public Document

**Observations of the Common Legal Representative on the periodic review
of Mr. Ongwen's detention**

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 592 victims authorised to participate in the present case¹ submits 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.

II. Background

2. On 27 November 2015, the Single Judge of Pre-Trial Chamber II (the “Chamber”) rejected the Defence’s request for the interim release of Mr Ongwen pursuant to article 60(2) of the Rome Statute (the “Article 60(2) Decision”).²

3. On 29 February 2016, the Single Judge, by way of an email, instructed the parties and the legal representatives to file by 14 March 2016 any submissions on the periodic review of the detention of Mr Ongwen, pursuant to rule 118(2) of the Rules of Procedure and Evidence (the “Rules”).

4. In accordance with the instructions of the Single Judge, the Common Legal Representative respectfully submits the following observations.

¹ 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.

² 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-Red, 27 November 2015.

III. Submissions

5. The Common Legal Representative recalls that “[t]he Statute provides safeguards against the undue prolongation of the period of detention. Article 60(3) of the Statute binds the Pre-Trial Chamber to review periodically [...] any previous ruling on the release or detention of a person in order to ascertain whether the circumstances bearing on the subject have changed, and if so, whether they warrant the termination of detention.”³ This means that the scope of the review carried out in reaching a decision under article 60(3) is potentially much more limited than that to be carried out in reaching a decision under article 60(2) of the Rome Statute.⁴ Therefore, Pre-Trial Chambers, “in assessing whether the requirements under article 58(1) of the Statute continue to be met may, pursuant to article 60(3) of the Statute, second sentence, modify its ruling if it is satisfied that changed circumstances so require. The 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.”⁵

6. The Common Legal Representative submits, first, that the reasons for issuing the warrant of arrest and the specific conditions in subparagraphs 1(a) and (b) of article 58 of the Rome Statute continue to be met.

³ 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. 14.

⁴ See the “Judgment in 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 OA, 26 October 2012, para. 24.

⁵ 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 OA 2, 2 December 2009, paras. 1 and 60. See also 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’”, (Appeals Chamber), No. ICC-01/05-01/08-1019 OA 4, 19 November 2010, para. 51.

7. In this regard, the Chamber, in its decision on the Prosecutor's Application for Warrant of Arrest, had already found that there are reasonable grounds to believe that Mr Ongwen committed crimes within the jurisdiction of the Court.⁶ Nothing has disturbed this finding up to date.⁷

8. The Common Legal Representative further submits 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".⁸ Therefore, Pre-Trial Chambers are fully authorised to make a prediction as to the likelihood of future events.⁹

9. In the Article 60(2) Decision, the Single Judge 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.¹⁰ This indeed demonstrates Mr Ongwen's both ability and willingness to abscond. The fact that a suspect 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

⁶ See the "Decision on the Prosecutor's application for the warrants of arrest under Article 58", (Pre-Trial Chamber II), No. ICC-02/04-01/05-1, 8 July 2005. See also the "Warrant of Arrest for Dominic Ongwen", (Pre-Trial Chamber II), No. ICC-02/04-01/05-57, 8 July 2005.

⁷ 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. The Appeals Chamber held 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 de novo manner to 'determine whether any of these had changed'".

⁸ 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", *supra* note 3, 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 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.

⁹ 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'", *supra* note 8, para. 117.

¹⁰ See the Article 60(2) Decision, paras. 15 – 16.

her. In such cases, it is not unreasonable to predict or even conclude that the suspect could decide not to return to the Court, if released.¹¹

10. The suspect'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 should the charges be confirmed.¹² 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.¹³

11. In the Article 60(2) Decision, the Single Judge also considered that Mr Ongwen may attempt to evade due to the long prison sentence that he may face in case he will be committed to trial and thus has a strong incentive to abscond.¹⁴ This reasoning is confirmed by the Appeals Chamber which indicated that a person charged with grave crimes facing a possible lengthy prison sentence may be more inclined to abscond.¹⁵

¹¹ 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 libert  provisoire de Thomas Lubanga Dyilo'", (Appeals Chamber), No. ICC-01/04-01/06-824 OA 7, 13 February 2007, para. 137.

¹² See Article 60(2) Decision, para. 17.

¹³ 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 5, 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.

¹⁴ See Article 60(2) Decision, para. 18.

¹⁵ 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 libert  provisoire de Thomas Lubanga Dyilo'", *supra* note 11, par. 136. See also 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", *supra* note 3, para. 21; the "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba 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, paras. 67 and 70.

12. Moreover, the Common Legal Representative observes that the personal circumstances of Mr Ongwen also militate for his continued detention. It is not disputed that, until his arrest, the suspect lived in “*the bushes*” and thus he has no fixed residential or employment address. Therefore, there is no possibility to trace Mr Ongwen, if released. In this regard, the Appeals Chamber held that “*any decision on whether a person is detained pending his or her trial at this Court ought to be made based on the specific circumstances of the case, as relevant to an assessment of whether or not a suspect is likely to appear before the Court. Personal circumstances of the suspect such as the suspect’s education, professional or social status may be relevant to assessing under article 58(1)(b)(i) of the Statute whether or not a suspect will appear before the Court*”.¹⁶

13. A specific finding of the Single Judge in the Article 60(2) Decision is also relevant to the assessment of the need for the suspect’s continued detention. Indeed, the Single Judge recalled that Mr Ongwen, while being detained in The Hague, was able to contact certain potential witnesses and thus there existed further risks on the part of the suspect of exercising pressure over witnesses, if released.¹⁷ The fact that the detainee contacted witnesses or potential witnesses puts into doubt his reliability in respecting relevant legal regimes governing provisional release and thus a Chamber must consider the possibility that witnesses or potential witnesses are unduly influenced in such circumstances. In this connection, the Appeals Chamber stressed that “*article 58(1)(b)(ii) of the Statute stipulates that detention must be necessary ‘to ensure that the person does not obstruct or endanger the investigation or the court proceedings’.* This indicates that there must be a link between the detained person and the risk of witness interference.”¹⁸ As found by the Single Judge, this link was duly established.

¹⁶ 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’”, *supra* note 8, paras. 2 and 111, and the “Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled ‘Decision on the ‘Requete de mise en liberte’ submitted by the Defence for Jean-Jacques Mangenda’”, (Appeals Chamber), No. ICC-01/05-01/13-560 OA 4, 11 July 2014, paras. 2 and 119.

¹⁷ See Article 60(2) Decision, paras. 19 – 22.

¹⁸ See the “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled ‘Decision on the accused’s application for provisional

14. Furthermore, the fact that the identities of many witnesses and the whereabouts of some of them have been disclosed to the suspect prior and during the confirmation of charges hearing would lead to the grave endangerment not only of the security of witnesses, but also of the participating victims, if he is released.¹⁹ The disclosure of evidence amplifies the risk to the investigation and the court proceedings as it enhances the suspect's knowledge of the Prosecutor's investigation.²⁰ In similar circumstances, apart from the question of safety and protection of the participating victims, releasing the suspect could particularly result in exerting pressure on the witnesses to change their testimony, because, if released, the suspect could easily locate and reach witnesses and influence them; and his past behaviour indicates that he will do so.²¹

15. The Common Legal Representative also submits that the continued detention of Mr Ongwen is necessary in order to prevent him from committing further crimes within the jurisdiction of the Court and arise out of the same circumstances. On the basis of the charges and the evidence presented by the Prosecution, the Single Judge should not overlook the "*possibility*" of further crimes being committed in light of the "*pattern*" of suspect's criminal conduct lasting years.²²

release in light of the Appeals Chamber's judgment of 19 August 2011", (Appeals Chamber), No. ICC-01/05-01/08-1937-Red2 OA 9, 23 November 2011, par. 67.

¹⁹ See the "Second Review of the 'Decision on the Application for Interim Release of Thomas Lubanga Dyilo'", (Pre-Trial Chamber I), No. ICC-01/04-01/06-924, 11 June 2007, pp. 6-8. See also the "Review of the 'Decision on the Application for Interim Release of Mathieu Ngudjolo Chui'", (Pre-Trial Chamber II), No. ICC-01/04-01/07-694, 23 July 2008, p. 10; the "Review of the 'Decision on the Conditions of the Pre-Trial Detention of Germain Katanga'", (Pre-Trial Chamber II), No. ICC-01/04-01/07-702, 18 August 2008, p. 10-12; and the "Decision on Application for Interim Release", ICC-01/05-01/08-321, (Pre-Trial Chamber III), 16 December 2008, para. 41.

²⁰ 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'", *supra* note 4, 26 October 2012, para. 65.

²¹ See the "Decision on Application for Interim Release", (Pre-Trial Chamber III), No. ICC-01/05-01/08-321, 16 December 2008, paras. 38 and 41.

²² 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'", *supra* note 8, para. 117.

16. In determining the necessity of detention, “[t]he question revolves around the possibility, not the inevitability, of a future occurrence” and thus “it is precisely the task of the Pre-Trial Chamber, on the basis of the available evidence, to weigh such evidence and to make a prediction as to the likelihood of future events.”²³ All that is required at this juncture is a risk that further crimes may be committed, and “therefore the issue is future crimes, which by their nature cannot be specified in detail.”²⁴ On basis of the available evidence presented, the Common Legal Representative contends that Mr Ongwen may commit further crimes, if he is released.

17. Secondly the Common Legal Representative contends that there has been no change of circumstances in the sense of article 60(3) of the Rome Statute. The only different circumstance since the last decision on the matter is the holding of the confirmation of charges hearing against the suspect. However, the Common Legal Representative submits that the confirmation of charges hearing does not amount to a “changed circumstance” in the sense of article 60(3) of the Statute. On the contrary, said event tends to favour the suspect’s continued detention rather than to militate in favour of his release.

18. On the obligation upon the Chamber to review the overall period of the detention of the suspect under article 60(4) of the Rome Statute, the Common Legal Representative submits that Mr Ongwen is not detained for an unreasonable period of time.

19. The provision of article 60(4) of the Statute involves two main components, the first is to determine whether the overall period of pre-trial detention has been

²³ See the “Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled ‘Decision on the ‘Defence Request for Interim Release’”, (Appeals Chamber), No. ICC-01/04-01/10-283 OA, 14 July 2011, para. 60.

²⁴ 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’”, *supra* note 4, para. 70.

"unreasonable", and, if this is the case, whether this was caused by an "*inexcusable delay*" attributed to the Prosecutor.

20. In assessing the reasonableness of the period of pre-trial detention, Pre-Trial Chambers may take into consideration the complexity of the case²⁵, the potential penalty for the offence charged²⁶ and the requirements of public interest, in particular in relation to the need to ensure the appearance of the person in the proceedings and the security and protection of victims and witnesses.²⁷

21. Assessed against these requirements, the Common Legal Representative concludes that the length of the pre-trial detention of Mr Ongwen is not unreasonable. This is especially true in light of the gravity and the complexity of the crimes with which he is charged and the potential long sentence he might eventually receive, if convicted.

22. The wording of article 60(4) of the Rome Statute addresses situations in which detention prior to trial has been for an unreasonable period of time "*due to inexcusable delay by the Prosecutor*".²⁸ If the period of detention is not unreasonable, the question of the inexcusable delay becomes moot. Thus, there is no need to further address the matter.

²⁵ See the "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'", *supra* note 11, par. 123

²⁶ See the "Judgment on the appeals against Pre-Trial Chamber II's decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification, (Appeals Chamber), No. ICC-01/05-01/13-969 OA 5, OA 6, OA 7, OA 8, OA 9, 29 May 2015, paras. 4 and 45.

²⁷ See, *inter alia*, the "Second Review of the 'Decision on the Application for Interim Release of Thomas Lubanga Dyilo', (Pre-Trial Chamber I), No. ICC-01/04-01/06-924, 11 June 2007, pp. 6-8; the "Review of the 'Decision on the Application for Interim Release of Mathieu Ngudjolo Chui'", (Pre-Trial Chamber II), No. ICC-01/04-01/07-694, 23 July 2008, p. 11; the "Review of the 'Decision on the Conditions of the Pre-Trial Detention of Germain Katanga'", (Pre-Trial Chamber II), No. ICC-01/04-01/07-702, 18 August 2008, p. 10-12, and the "Decision on Application for Interim Release, (Pre-Trial Chamber III), No. ICC-01/05-01/08-321, 16 December 2008, para. 47.

²⁸ See the "Judgment on the appeals against Pre-Trial Chamber II's decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification, *supra* note 26, paras. 1 and 42.

23. Finally, the Common Legal Representative underlines that, in its periodic review, a 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.²⁹ The Common Legal Representative submits that the victims she represents will be prejudiced if Mr Ongwen is released.

24. The victims with whom the Common Legal Representative has consulted insist on the need to maintain Mr Ongwen in detention. They have expressed fears about their safety and the possible increase of violence in the neighbourhoods where they live if the suspect is released. Moreover, victims have reiterated their views according to which they are living in places where members of the family of the suspect still reside and this proximity could put them in danger if Mr Ongwen is released, particularly because they live in relatively small communities where individuals can easily be identified.

²⁹ 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.

IV. Conclusion

25. For the foregoing reasons, the Common Legal Representative respectfully requests the Single Judge to rule that Mr Ongwen must remain in detention.

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style with a horizontal line underneath the name.

Paolina Massidda

Principal Counsel

Dated this 14th day of March 2016

At The Hague, The Netherlands