

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: **English**

No.: ICC-02/04-01/15  
Date: **21 October 2016**

**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**

**Observations on the periodic review of the Accused'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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**Amicus Curiae**

**REGISTRY**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. The Common Legal Representative notes that the Defence did not file its observations on Mr Ongwen's continued detention or release with or without conditions, including the existence of any changed circumstances, within the deadline prescribed by the Single Judge, and filed instead a request for a hearing pursuant to rule 118(3) of the Rules and Procedure and Evidence (the "Rules").<sup>1</sup>

2. In these circumstances, the Common Legal Representative submits that the Defence has advanced no grounds which could justify the modification of the current ruling regarding Mr Ongwen's detention.

3. However, in compliance with the Order issued by the Single Judge, the Common Legal Representative representing 594 victims authorised to participate in the present case,<sup>2</sup> submits her observations on the periodic review of the Accused's detention.

4. In particular, the Common Legal Representative submits that Mr Ongwen must continue to be detained because the conditions set forth in article 58(1) of the Rome Statute (the "Statute") continue to be met, and there has been no change of circumstances in the sense of article 60(3) of the Statute.

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<sup>1</sup> See the "Defence Request for a Hearing Pursuant to Rule 118(3) of the Rules of Procedure and Evidence", No. ICC-02/04-01/15-560, 7 October 2016.

<sup>2</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-02/04-01/15-384, 24 December 2015, pp. 20-22, and "Decision concerning 300 Victim Applications and the Deadline for Submitting Further Applications", (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-543, 26 September 2016, para. 8 and p. 5.

5. As previously submitted,<sup>3</sup> any modification to the current arrangements regarding Mr Ongwen's detention can only be justified if there has been a material change in circumstances *requiring* such a modification. Although the Defence alluded in its Request for a hearing pursuant to rule 118(3) of the Rules to issues such as the Registrar renewing his search for a nation which would guarantee Mr Ongwen's appearance at trial, Mr Ongwen's current restrictions whilst detained, or Mr Ongwen's medical needs, no change in circumstances have so far been demonstrated.

## II. PROCEDURAL HISTORY

6. On 21 July 2016, Trial Chamber IX (the "Chamber") issued its decision on the periodic review of Mr Ongwen's detention, and declined to order his conditional release (the "Review Decision").<sup>4</sup>

7. On 10 August 2016, the Single Judge of the Chamber issued its "Decision on Prosecution 'Request for an order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen'",<sup>5</sup> and further rejected the Defence's request to appeal said Decision.<sup>6</sup>

8. On 26 September 2016, the Single Judge ordered the Defence to submit its observations on the Accused's continued detention or release, with or without conditions, including the existence of any changed circumstances, by 7 October 2016;

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<sup>3</sup> See 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.

<sup>4</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 (the "Review Decision").

<sup>5</sup> See the "Decision on Prosecution 'Request for an order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen'" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-521, 10 August 2016 (the "10 August Decision").

<sup>6</sup> See the "Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-529, 2 September 2016.

and the Prosecution and the Legal Representatives of Victims to submit their observations by 21 October 2016.<sup>7</sup>

9. On 4 October 2016, the Single Judge issued its “Decision on Mr Ongwen’s Request to Add New Persons to his Non-Privileged Telephone Contact List”.<sup>8</sup>

10. On 7 October 2016, the Defence filed a “Request for a hearing pursuant to rule 118 (3) of the Rules”,<sup>9</sup> which was rejected by the Single Judge on 11 October 2016.<sup>10</sup>

### III. SUBMISSIONS

11. Pursuant to article 60(3) of the Statute, the Chamber shall periodically review its ruling on release or detention of the Accused and, upon such review, it may 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”.<sup>11</sup>

12. 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

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<sup>7</sup> See the “Order Requesting Observations on Dominic Ongwen’s Detention” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-541, 26 September 2016.

<sup>8</sup> See 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.

<sup>9</sup> See the “Defence Request for a Hearing Pursuant to Rule 118(3) of the Rules of Procedure and Evidence”, *supra* note 1.

<sup>10</sup> See the “Decision on Defence Request for a Hearing Pursuant to Rule 118(3) of the Rules of Procedure and Evidence” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-568, 17 October 2016.

<sup>11</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 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, para. 26.

*circumstances already decided upon in the ruling on detention*”,<sup>12</sup> and that it is not necessary to address each factor underpinning detention in a *de novo* manner to determine whether any of these have changed.<sup>13</sup> Consequently, there is no requirement to give reasoning or engage in a *de novo* review of detention where no changed circumstances are established.<sup>14</sup>

13. In the absence of any submission by the Defence as to any changed circumstances requiring the modification of the previous rulings on the Accused’s detention, the Common Legal Representative 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”.<sup>15</sup> Therefore, the Chambers are fully authorised to make a prediction as to the likelihood of future events.<sup>16</sup>

14. 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. The current stage of the

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<sup>12</sup> 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), para. 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, para. 112.

<sup>13</sup> 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’”, *supra* note 12, paras. 1 and 53.

<sup>14</sup> *Idem*, para. 94.

<sup>15</sup> 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 OA4, 9 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 on the ‘Demande de mise en liberte provisoire de Maitre Aime Kilolo Musamba’” (Appeals Chamber), No. ICC-01/05-01/13-558 OA2, 11 July 2014, para. 117.

<sup>16</sup> 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 15, para. 117.

proceedings further elevates Mr Ongwen's incentives to flee; indeed, the risk of non-appearance increases as the proceedings advance.<sup>17</sup> Furthermore, as underlined by the Chamber in its Review Decision, "*the conclusion of Prosecution investigations and the confirmation of charges – may actually increase Mr Ongwen's incentives to abscond or obstruct and endanger the integrity of the proceedings, if released*".<sup>18</sup> This finding is particularly relevant now that the commencement date of trial has been set at 6 of December 2016.

15. The Chamber also underlined that "*even if the Prosecution's investigation are concluded, Mr Ongwen's demonstrated willingness and readiness to skirt the Court's authority compounds the Chamber's concerns about whether he may obstruct and endanger the integrity of the present proceedings and its consideration that continued detention is also necessary to ensure his appearance during proceedings*".<sup>19</sup>

16. In addition, absent new information from the Defence, the Chamber has already ruled that it "*is not satisfied that there are any conditions on Mr Ongwen's proposed release to Uganda that would adequately mitigate the risks that he may abscond, or obstruct or endanger the investigation or court proceedings*".<sup>20</sup>

17. Therefore, the Common Legal Representative concludes that absent further arguments raised by the Defence, there is no basis under article 60(2) of the Rome Statue for the Chamber to change its previous ruling in the matter.

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<sup>17</sup> 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, para. 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, para. 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 11, para. 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, para. 42.

<sup>18</sup> See the Review Decision, *supra* note 4, para. 14.

<sup>19</sup> *Idem*, para. 14.

<sup>20</sup> *Ibidem*, para. 15.

18. Furthermore, in his 10 August Decision, the Single Judge ordered the parties to consult with the Victims and Witnesses Unit in order to reach an agreement as to how Mr Ongwen can contribute to the welfare of his children while mitigating the risk of witness interference.<sup>21</sup> In the same decision, having noted the importance of maintaining the integrity of the upcoming testimony at trial, the Single Judge could not but order Mr Ongwen to cease direct payments to persons identified as potential witnesses in the case and to disclose all financial or in-kind payments or promises of money made.<sup>22</sup> Furthermore, the Single Judge underlined that the Defence's practices in this regard at the very least violates the spirit of the existing protocol and was concerned about the possible impact Mr Ongwen's payments may have on the testimony of potential witnesses.<sup>23</sup> In this regard, the Single Judge also indicated that restrictions on communication were necessary and proportionate in the circumstances existing at present and remain warranted.<sup>24</sup> More recently, on 4 October 2016, the Single Judge reiterated that "[i]ncluding the four persons on Mr Ongwen's telephone contact list would create an impermissible threat to the integrity of the present proceedings".<sup>25</sup> The Single Judge also reminded the Accused that his telephone conversations will be actively monitored, and that "*the Registry shall terminate any conversation where there is suspicion of an attempt to coerce or interfere with witnesses or victims through the children*".<sup>26</sup>

19. The Common Legal Representative submits that these recent conclusions reaffirms once again the finding of the Chamber in its Review Decision according to which: "*information contained in the Registry Report bolsters [the Chamber's] concern about Mr Ongwen's ability and willingness to interfere with witnesses and [...] reasonable*

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<sup>21</sup> See the 10 August Decision, *supra* note 5, para. 18.

<sup>22</sup> *Idem*, paras. 16-17.

<sup>23</sup> *Ibidem*, paras. 14-15.

<sup>24</sup> 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, para. 4.

<sup>25</sup> See the "Decision on Mr Ongwen's Request to Add New Persons to his Non-Privileged Telephone Contact List", *supra* note 8, para. 9.

<sup>26</sup> *Idem*, para. 11.



*suspicion that there had been attempts to exercise some form of influence on persons who possess information relevant to the case”*.<sup>27</sup>

20. Consequently, Mr Ongwen’s detention remains necessary to protect the integrity of the proceedings.

21. The Common Legal Representative wishes finally to note that the Chamber, in its periodic review of the Accused’s detention, ought to take into consideration the position of victims and witnesses and the impact and prejudicial effect upon them that the release of persons facing charges of international crimes might have.<sup>28</sup> The Common Legal Representative submits that the victims she represents will be prejudiced if Mr Ongwen is released. In this regard, she reiterates that in the course of consultations with the victims in preparation for trial, 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.<sup>29</sup> Finally, victims are impatiently waiting for the Trial to start in a few weeks from now, in the presence of the Accused, as prescribed by article 63(1) of the Statute.

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<sup>27</sup> See the Review Decision, *supra* note 4, para. 18.

<sup>28</sup> 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 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>29</sup> See the “Decision on Prosecution ‘Request for an order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen’”, *supra* note 5; and the “the “Decision on Mr Ongwen’s Request to Add New Persons to his Non-Privileged Telephone Contact List”, *supra* note 8.

#### IV. CONCLUSION

For the foregoing reasons, the Common Legal Representative respectfully requests the Chamber to order Mr Ongwen's continued detention.

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line drawn underneath the name.

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

Dated this 21<sup>st</sup> day of October 2016

At Genoa, Italy