

**Cour
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**International
Criminal
Court**

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

Date: **20 March 2020**

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

**Prosecution's response to Defence's request for immediate release of the Accused
pending judgment**

Source: The Office of the Prosecutor

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

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Introduction

1. The Defence request for immediate release of the Accused, pending judgment, should be rejected. The end of trial hearings does not create a change in circumstances that would warrant a modification of prior rulings on Mr Ongwen's detention. His status has not changed. The Accused remains an alleged perpetrator of several counts of crimes against humanity and war crimes, including sexual and gender-based crimes committed directly against seven victims.
2. The Defence's submission regarding any supervision or undertaking by the Acholi Cultural Institution to "monitor [Mr Ongwen] and guarantee his appearance in court" is not substantiated in any way.¹ In any event, such alleged guarantee cannot supersede the Government of Uganda's position that it cannot guarantee Mr Ongwen's appearance before the Court.²
3. Mr Ongwen has ample communication rights.³ The existing communication regime against him is not predicated on the completion of the trial proceedings. The Prosecution reiterates its previous submissions on this issue.⁴ Several of the witnesses concerned maintain their status of vulnerable witnesses and/or alleged victims, entitled to protection under article 68 of the Rome Statute ("Statute"). The restrictions should be maintained.

Confidentiality

4. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, the Prosecution files this response as confidential because it includes a reference to the CLRV submission classified as such.⁵ The Prosecution notes however that this filing

¹ ICC-02/04-01/15-1722-Corr-Red, para. 731.

² ICC-02/04-01/15-503, para 15.

³ ICC-02/04-01/15-503, para 19.

⁴ ICC-02/04-01/15-1628-Red.

⁵ ICC-02/04-01/15-1728-Conf, para 7.

contains no confidential information, and therefore requests that it be reclassified as public.

Relevant Background

5. On 26 February 2020, Trial Chamber IX ("the Chamber"), noting the Defence's request for immediate release of the Accused pending judgment, included in the Defence's Closing Brief,⁶ instructed the Parties and Participants to file responses. The Chamber also instructed the Parties and Participants to include any views on retaining the current contact restrictions for the Accused.⁷

Submissions

6. There is no provision in the Statute requiring immediate release of the Accused when the trial hearings end. Article 60(3) of the Statute requires a modification of detention only if the Chamber is satisfied that changed circumstances so require.⁸ The Chamber does not have to enter findings on the circumstances already decided upon and does not have to address each factor underpinning detention in a *de novo* manner to determine whether any of the circumstances have changed.⁹
7. When reviewing Mr Ongwen's detention previously, the Chamber has concluded that it remained necessary pursuant to article 58(1)(b)(i) and (ii) of the Statute.¹⁰ In its third decision on the matter, the Chamber noted the prior finding that "there had not been any change in the circumstances requiring modification of the Interim Release Decision and that any conditions on a proposed release to Uganda would not adequately mitigate the risks that Mr

⁶ ICC-02/04-01/15-1722.

⁷ Trial Chamber IX Communications email of 26 February 2020 at 18h08.

⁸ ICC-01/05-01/08-631-Red OA2, para 1 and 60.

⁹ ICC-01/05-01/08-1019 OA4, para 53; ICC-02/11-01/11-548-Red OA4, para 1, 53, 112.

¹⁰ ICC-02/04-01/15-595.

Ongwen may abscond, or obstruct or endanger the investigation or court proceedings.”¹¹

8. In finding that Mr Ongwen’s detention was warranted to ensure his appearance at trial, Pre-Trial Chamber II (“PTC II”) found that he had evaded arrest for more than nine years after the Court’s warrant for his arrest was made public. That demonstrated Mr Ongwen’s ability and willingness to abscond, manifestly contradicting the Defence statement that he “appeared before the Court when so required.”¹² PTC II found, *inter alia*, that it could not place trust in Mr Ongwen’s respect for authority of the Court in case he was released;¹³ that the risk of him attempting to evade the proceedings was compounded by the gravity of the charges; and that “[t]he very long prison sentence that Dominic Ongwen may face in case of conviction constitutes a strong possible incentive to abscond, increasing the risk of flight.”¹⁴
9. The Prosecution submits that the end of trial hearings has no impact on the above findings warranting detention of Mr Ongwen. The conclusion of hearings does not constitute a changed circumstance in the meaning of article 60(3) of the Statute and consequently does not warrant a modification of Mr Ongwen’s detention. The possibility of a conviction and the prison sentence that he may face, if found guilty, not only remain strong incentives for Mr Ongwen to abscond, but are further strengthened as the time of judgment grows nearer.
10. The end of trial hearings also has no impact on the finding that Mr Ongwen’s detention is warranted to ensure that he does not obstruct or endanger the continuation of court proceedings. The case has entered another crucial stage of the proceedings, that of the issuance of the judgment, which may end in the

¹¹ ICC-02/04-01/15-595, para 3.

¹² ICC-02/04-01/15-349, para 16.

¹³ ICC-02/04-01/15-349, para 17.

¹⁴ ICC-02/04-01/15-349, para 18.

conviction of the Accused and lead to a sentencing hearing. The identity of all trial witnesses is known to the Accused. Some of those witnesses may, in case of a conviction, testify at sentencing. The Accused was found to have exercised pressure on some witnesses from within the Court's own Detention Centre.¹⁵ That was also one of the reasons why communication restrictions were imposed on Mr Ongwen.¹⁶

11. Mr Ongwen may still exercise pressure on witnesses in these proceedings, notwithstanding the close of trial evidence. Some of the witnesses are alleged to have been directly victimised by Mr Ongwen through sexual and gender-based crimes. PTC II reached its findings on the existing risks although some of the witnesses had already testified.¹⁷ The Prosecution emphasises that the witnesses concerned maintain their status of vulnerable witnesses and/or alleged victims and are entitled to protection, including from any form of unlawful interference or pressure from the Accused, under article 68 of the Statute, beyond the end of the trial evidence.
12. The one-line reference in the Defence Closing Brief to the possibility of supervision or an undertaking by the Acholi Cultural Institution to "monitor Mr Ongwen and guarantee his appearance in court" is not substantiated in any way.¹⁸ There is no concrete information that the Institution has any adequate capacity to ensure that a) Mr Ongwen will not abscond or that b) the existing restrictions of the contact regime against the Accused could or would be maintained and properly monitored by the Institution. In any event, such submission cannot supplant the position of the Government of Uganda that it cannot guarantee Mr Ongwen's appearance before the Court.¹⁹ Nor can it

¹⁵ ICC-02/04-01/15-349, para 22-23.

¹⁶ ICC-02/04-01/15-349, para 21.

¹⁷ ICC-02/04-01/15-349, para 22.

¹⁸ ICC-02/04-01/15-1722-Corr-Red, para. 731.

¹⁹ ICC-02/04-01/15-503, para 15.

bypass the specific concerns of the victims in this case and the prejudice they may suffer if Mr Ongwen were to be released.²⁰

13. With regard to the existing restrictions of the Accused's communications, they also are not exclusively predicated on protecting the trial hearings themselves. The Prosecution reiterates its previous submissions on this issue.²¹ The Prosecution does not oppose contact between those individuals who have reached an *informed decision* to establish contact with the Accused in accordance with the two respective Chamber's decisions regarding such consent²² and subject to any measures recommended by the Victims and Witnesses Section.
14. The Prosecution submits that the fact that six of the eight contacted individuals refused to have any contact with the Accused and signed a memorandum of understanding to that effect is, in itself, quite telling as to why the existing restrictions on the Accused's communications should be maintained.²³ In addition, the Prosecution notes and supports the most recent CLRV observations on this issue.²⁴
15. Finally, the Prosecution again recalls that, if the Accused is convicted, there will be sentencing proceedings, including possibly the calling of witnesses. The need to prevent interference with the Court's work is therefore ongoing. The existing communication regime appropriately balances the Accused's rights with the need to protect witnesses and the integrity of these proceedings.

Conclusion

16. In short, the Defence have shown no significant change in Mr Ongwen's circumstances. For the reasons stated above, the Prosecution opposes the

²⁰ ICC-02/04-01/15-572, para 21.

²¹ ICC-02/04-01/15-1628-Red.

²² ICC-02/04-01/15-1593 and ICC-02/04-01/15-1642.

²³ ICC-02/04-01/15-1642, para 16, Email to Trial Chamber IX Communications, 29 October 2019.

²⁴ ICC-02/04-01/15-1628-Conf, para 16-17.

Defence request, and requests that the Chamber keep the Accused in detention subject to the existing restrictions on his communications.



Fatou Bensouda, Prosecutor

Dated this 20th day of March 2020
At The Hague, The Netherlands