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Court

Original: **English**

No.: **ICC-02/04-01/15**
Date: **27 November 2015**

PRE-TRIAL CHAMBER II

Before: **Judge Cuno Tarfusser, Single Judge**

SITUATION IN UGANDA

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

Public redacted

Decision on the "Defence Request for the Interim Release of Dominic Ongwen"

To be notified, in accordance with regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor
Fatou Bensouda
James Stewart
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Counsel for the Defence
Krispus Ayena Odongo

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

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REGISTRY

Registrar
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Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Judge Cuno Tarfusser, Single Judge exercising the functions of the Chamber in the present case, issues this decision on the "Defence Request for the Interim Release of Dominic Ongwen" (ICC-02/04-01/15-332-Conf-Exp, -Conf-Red and –Red2, "Request"), filed on 29 October 2015.

1. On 8 July 2005, the Chamber issued a warrant of arrest against Dominic Ongwen (ICC-02/04-01/15-6), pursuant to which he was surrendered to the Court by the Central African Republic on 16 January 2015. On 26 January 2015, he made his first appearance before the Chamber (ICC-02/04-01/15-T-4-ENG). The date for the commencement of the confirmation of charges hearing is set at 21 January 2016 (ICC-02/04-01/15-206).

2. The Defence requests that Dominic Ongwen be granted interim release to the Kingdom of Belgium, "at least until the start of the Confirmation of Charges Hearing" (Request, para. 20). The Single Judge notes that the Defence has filed the Request *ex parte*, redacting vis-à-vis the Prosecutor one passage as referring to "matters pertaining to the Defence strategy". However, proceedings following a request for interim release must be held *inter partes* (cf. rule 118(1) of the Rules of Procedure and Evidence). The Chamber can only permit redactions vis-à-vis the other party in specific circumstances falling within article 57(3)(c) of the Statute, which do not include "defence strategy". While there is no obligation for the Defence to disclose the main lines of its strategy at this time, if it chooses to divulge such information to the Chamber in support of a request for interim release, it must also accept that the information will be shared with the Prosecutor. The Single Judge considers that the redaction to this limited information has not impaired the Prosecutor's ability to respond to the Request. The Request shall, however, be reclassified as "confidential".

3. The Prosecutor opposes the Request, arguing that Dominic Ongwen's continued detention is necessary to ensure his appearance at trial and to ensure that he does not obstruct or endanger the investigation or the court proceedings (ICC-02/04-01/15-333-Conf and Red). The Single Judge notes that the Prosecutor, in order to support allegations of fact, has referred to documents without registering them in the record of the case, only providing, in footnotes to her submissions, hyperlinks to open source material, and reminds the Prosecutor that material relied on in support of allegations of fact must be properly registered in the record of the case.

4. The Request is validly submitted pursuant to article 60(2) of the Statute. This obliges the Single Judge to determine whether grounds justifying detention exist at the present time: if so, Dominic Ongwen must continue to be detained; if not, he must be released pending proceedings. The Single Judge also has the discretion to examine the possibility of release with conditions.[1]

5. Article 58(1)(b) of the Statute in turn specifies that for a warrant of arrest to be issued, and *mutatis mutandis* for a person to be kept in detention, the Pre-Trial Chamber must be satisfied that "[t]he arrest of the person appears necessary" to ensure the person's appearance at trial, to ensure that he or she does not obstruct or endanger the investigation or the court proceedings, or to prevent the person from continuing the commission of the crime, or a related crime within the jurisdiction of the Court. The Appeals Chamber has held that

[1] See *The Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled 'Decision on Applications for Provisional Release'", 12 September 2011, ICC-01/05-01/08-1626-Red, para. 55.

whether detention appears necessary is a question revolving around the possibility, not the inevitability, of a future occurrence.[2]

6. In addition, the Appeals Chamber has stated that a decision under article 60(2) of the Statute involves also the examination of whether the condition under article 58(1)(a) is met, namely that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.[3] While the Appeals Chamber did not elaborate on the reasons in support of this holding, it appears that it is based on a literal interpretation of article 60(2) of the Statute, which requires the Chamber to maintain the person in detention when it is satisfied of the continued presence of "the conditions set forth in article 58, paragraph 1".

7. The Single Judge acknowledges the position expressed by the Appeals Chamber, which may be applied in the present case as a subsidiary source of law under article 21(2) of the Statute, but is of the view that the reference by article 60(2) of the Statute to article 58(1) cannot be understood to require, for the disposal of an application for interim release, an examination of the merits of the case with a view to determining whether there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.

8. In this regard, the Single Judge observes that, within the procedural system of the Court, judicial proceedings against a person can only be instituted following a positive determination by the Pre-Trial Chamber under

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[2] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "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", 9 June 2008, ICC-01/04-01/07-572, para. 21.
[3] See, for example, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "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", 9 June 2008, ICC-01/04-01/07-572, para. 18.

article 58 of the Statute that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court. Such finding is indeed a pre-requisite for the issuance not only of a warrant of arrest (cf. article 58(1)(a)), but also of a summons to appear (cf. article 58(7)), which, in turn, are the only two mechanisms which may trigger judicial proceedings before the Court. What distinguishes the two scenarios (warrant of arrest as opposed to summons to appear) is whether there exist grounds justifying detention: when the arrest of the person appears necessary for any reason for detention as listed in article 58(1)(b) of the Statute, a warrant of arrest shall be issued; if no such reason exists, the Chamber issues a summons to appear, with or without conditions restricting liberty other than detention. As stated above, the existence of reasonable grounds to believe that the person committed a crime within the jurisdiction of the Court is a common pre-condition to both a warrant of arrest and a summons to appear.

9. A decision under article 60(2) of the Statute is aimed at determining whether, after the person's arrest pursuant to a warrant under article 58(1), his or her continued detention remains justified. This is an *ex novo* determination of whether the grounds that originally justified that the person be arrested, rather than summoned to appear before the Court, exist. Such grounds are only those under article 58(1)(b) of the Statute. Indeed, if the Pre-Trial Chamber were to determine that there are no reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court, the warranted remedy could not be merely to continue the proceedings and release the person *ad interim*, effectively replacing the warrant of arrest with a summons to appear – which equally requires the existence of reasonable grounds to believe. Precisely like judicial proceedings could not have been instituted *ab initio* in the absence of reasonable grounds to believe,

no such judicial proceeding could continue unfolding if reasonable grounds to believe were at some point found to be absent.

10. If article 60(2) of the Statute were interpreted to require an examination of the merits of the case this would also produce a paradoxical situation where the Pre-Trial Chamber would have to consider all relevant evidence, and submissions of the parties, in order to determine whether the case is strong enough to justify keeping the person in detention until the confirmation of charges hearing, which involves essentially the same determination on a higher evidentiary standard. This would introduce another layer of examination within the context of an evidentiary adversarial proceeding during the time required for the preparation of the confirmation of charges hearing, the outcome of which would in any case supersede any determination of the merits of the case that the Pre-Trial Chamber may attempt to conduct in the context of a decision under article 60(2). Indeed, if the charges were not confirmed, the person would be released (and not *ad interim*) and the proceedings before the Court concluded; if any charge is confirmed, the determination of the absence of "reasonable grounds to believe" would be overthrown by the finding that there exist "substantial grounds to believe" and the person would logically have to be placed again in state of detention.

11. The unreasonable consequences of extending a determination under article 60(2) of the Statute to a further assessment of whether there are reasonable grounds to believe that the person committed a crime within the jurisdiction of the Court are further compounded by the fact that article 60(2) of the Statute has been interpreted as requiring the Pre-Trial Chamber to "inquire anew into the facts justifying detention".[4] Such *ex novo* examination

[4] *Ibid.*, para. 10.

would compel the Chamber to analyse the evidence brought by the Prosecutor – on whom the burden of proof lies – to demonstrate the existence of the reasonable grounds to believe even when no challenge is made in this regard by the Defence, which would be procedurally entitled to apply for, and obtain if warranted, the person's interim release without any formal requirement to substantiate its request. This means that, in the present decision, the Single Judge would need to determine anew whether the condition under article 58(1)(a) of the Statute is met with respect to Dominic Ongwen despite the fact that the Defence, in its Request, does not raise any argument concerning this condition. It is worth noting in this regard that, in any case, it has been the established practice of Pre-Trial Chambers in decisions pursuant to article 60(2) of the Statute either to conduct no assessment of the condition under article 58(1)(a) (nor to even mention that any such condition would anyhow be part of a determination under article 60(2) of the Statute)[5] or merely to recall the findings made in the warrants of arrest with respect to the reasonable grounds analysis, on some occasions observing that the Defence had not raised any argument contradicting such findings,[6] and that this approach, at best negating the *ex novo* character of the

[5] See, for example, *The Prosecutor v. Callixte Mbarushimana*, "Decision on the 'Defence Request for Interim Release'", 19 May 2011, ICC-01/04-01/10-163.

[6] See *The Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the Application for the interim release of Thomas Lubanga Dyilo, 18 October 2006, ICC-01/04-01/06-586-tEN, p. 5 ("CONSIDERING that the conditions set forth in article 58(1) of the Statute continue to be fulfilled in so far as there are still reasonable grounds to believe that Thomas Lubanga Dyilo has committed crimes within the jurisdiction of the Court […]"); *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the Application for Interim Release of Mathieu Ngudjolo Chui", 27 March 2008, ICC-01/04-01/07-345, p. 6 ("CONSIDERING, therefore, that the condition set forth in article 58(1)(a) of the Statute continues to be fulfilled in so far as there are still reasonable grounds to believe that Mathieu Ngudjolo Chui has committed crimes within the jurisdiction of the Court"); *The Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on application for interim release", 20 August 2009, ICC-01/05-01/08-73, para. 52 ("[t]he grounds for believing that Mr Jean-Pierre Bemba has committed crimes under the jurisdiction of the Court are explained exhaustively in the [decision on the application for a warrant of arrest]. The Single Judge notes that the defence has not put forward any material fact or argument to rebut these grounds and considers that they still stand"); *The Prosecutor v.*

determination under article 60(2) of the Statute with respect to the conditions under article 58(1)(a) of the Statute, has nonetheless been validated by the Appeals Chamber, including in cases in which this precise issue was raised as a ground of appeal.[7]

12. The Single Judge also considers that the reading of article 60(2) of the Statute as not involving consideration of the merits of the case is not prejudicial to the rights of the suspect. The pre-trial procedural context in which the Defence may challenge the evidence of the Prosecutor and present its own evidence is the confirmation of charges hearing – the holding of which, within a reasonable time after the person's initial appearance (cf. article 61(1) of the Statute), is justified by having found reasonable grounds to believe at the time of the Chamber's determination under article 58(1) or (7) of the Statute. Furthermore, the Court's procedural system would allow the Chamber to respond to exceptional circumstances with a manifest impact on the merits of the case, such as the appearance of very clear indicators that the crucial evidence against the person is manifestly unreliable for any evident reason which patently contradicts the findings under article 58(1)(a) of the Statute made in the warrant of arrest. In these exceptional circumstances, in

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Laurent Gbagbo, "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", 13 July 2012, ICC-02/11-01/11-180-Red, para. 53 ("[i]n relation to the requirement under article 58(1)(a) of the Statute, the Single Judge recalls the findings of the Decision on the Article 58 Application"); *The Prosecutor v. Bosco Ntaganda*, "Decision on the Defence's Application for Interim Release", 18 November 2015, ICC-01/04-02/06-147, para. 38 ("[t]he Defence does not challenge the relevant Chambers' findings under article 58(1)(a) of the Statute. Nor does the Defence present any argument or evidence which requires the Chamber to look anew into the requirement of article 58(1)(a) of the Statute. […] In light of this and given the findings in the two warrants of arrest, the Single Judge considers that the requirement of article 58(1)(a) of the Statute continues to be satisfied").

[7] See, for example, the case of *The Prosecutor v. Laurent Gbagbo*, in which the Appeals Chamber, by majority, held that the Pre-Trial Chamber did not err in limiting its analysis, in a decision under article 60(2) of the Statute, merely to recalling the findings made in the decision on the Prosecutor's application for a warrant of arrest ("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'', 26 October 2012, ICC-02/11-01/11-278-Red).

which a general overview of the merits of the case would be warranted, the remedy, rather than releasing the person *ad interim* while continuing with the judicial proceedings before the Court and pending the Chamber's assessment under article 61(7) of the Statute, would be to terminate the proceedings, whether by an anticipated summary confirmation of charges hearing or otherwise. Any such remedy would necessarily be available also to a person subject to a summons to appear under article 58(7) of the Statute, as it would respond to the absence of any reasonable basis to proceed with the pre-trial judicial proceedings, regardless of whether the person is in detention or not.

13. In conclusion, the Single Judge considers that, while the text of article 60(2) of the Statute refers, in general, to an assessment of "the conditions set forth in article 58, paragraph 1", this provision must be understood as referring exclusively to the grounds for detention under article 58(1)(b) of the Statute, as the consequences of extending an examination of the condition under article 58(1)(a) to a determination of the appropriateness of an interim release would be unreasonable and would seriously conflict with the Court's overall procedural system.

14. Accordingly, the Single Judge limits his analysis in the present decision to the examination as to the existence of grounds justifying detention under article 58(1)(b) of the Statute. Also, the Single Judge does not make an assessment of the condition under article 58(1)(b)(iii) given that the Prosecutor – who bears the burden of proof despite a decision under article 60(2) being triggered by a request of the Defence – does not argue that this condition is met. Hereunder, the Single Judge specifies the reasoning underlining his conclusion that the circumstances at hand necessitate that Dominic Ongwen remains in detention on the grounds of article 58(1)(b)(i) and (ii) of the Statute.

15. First, the Single Judge considers that Dominic Ongwen's continued detention is necessary to ensure his appearance at trial.

16. The Single Judge observes that Dominic Ongwen evaded arrest for more than nine years after the Court's warrant for his arrest, of which he appears to have been aware,[8] was made public on 13 October 2005. This demonstrates both his ability and willingness to abscond and manifestly contradicts the Defence statement that he "appeared before the Court when so required" (para. 11).

17. This is not negated by the circumstances of Dominic Ongwen's arrest and surrender to the Court in January 2015. In this regard, the Single Judge notes the Defence argument that "Mr. Ongwen's surrender is demonstrative of his willingness to cooperate with the Court and to face the charges for which he is *suspected*" (para. 11), and can only observe in this respect that the Defence view on the matter appears flexible, to say the least, depending on the purpose for which submissions are being made. Indeed, in June 2015, the Defence argued strongly that "Mr Ongwen did not voluntarily surrender to the Court" (ICC-02/04-01/15-243, para. 19) and that "there is no way it can be stated that Dominic Ongwen came into the Court's custody of his own volition rather than through the actions of the CAR authorities". On that occasion, it was the Defence, purporting to retrace Dominic Ongwen's movements, to state on the record that, after his defection, Dominic Ongwen's "clear intention" was "of going back to his home country, Uganda" (para. 20). These facts alone prevent the Single Judge from placing trust in Dominic Ongwen's respect for the authority of the Court in case he was released.

[8] See UGA-OTP-0219-0036 at 0049-0050.

18. The Single Judge also considers that the risk of Dominic Ongwen again attempting to evade the proceedings before the Court is compounded by the gravity of the intended charges, comprising 67 different counts of war crimes and crimes against humanity (see ICC-02/04-01/15-305-Conf and –Red, and ICC-02/04-01/15-311-Conf). The 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.

19. The Single Judge considers that the continued detention of Dominic Ongwen is also necessary to ensure that he does not obstruct or endanger the investigation or the court proceedings.

20. In this regard, the Single Judge recalls that, on 5 June 2015, the Single Judge ordered the Registrar to "prohibit all communication from Dominic Ongwen to the outside world, expect for communication with his lead counsel" (see ICC-02/04-01/15-242). The restrictions on Dominic Ongwen's communications, which have been modified several times, latest pursuant to the decision of 3 August 2015 (ICC-02/04-01/15-283), were based on the following factual circumstances as described in the decision of 24 June 2015 (ICC-02/04-01/15-254):

> 4. […] It is sufficiently established, and indeed agreed by the parties, that in early June 2015 a meeting was held in Uganda under the auspices of a Ugandan non-governmental organisation which included a group of individuals described as "potential Prosecution witnesses" by the Prosecutor. Proceedings in the present case were discussed at the meeting, including opinions as to the guilt or innocence of Dominic Ongwen and the collaboration of participants with the Court. During the meeting, Dominic Ongwen spoke by telephone individually to five attendees of the meeting, all of whom are referred to by the Prosecutor to be "potential witnesses".
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> […]
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> 6. Based on the information available, the Single Judge considers that there is reasonable suspicion that the meeting in question was not innocuous but was held with a view to exercising some form of influence on persons who possess information relevant to the case. The Single Judge agrees with the Prosecutor that "[s]imply gathering a number of potential witnesses in a single location with

> a view to discussing matters which are *sub* judice may lead to the pollution of those witnesses' accounts and thus interfere with the collection (and later presentation) of accurate evidence". The information that the organisers of the meeting attempted to impress upon the attendees the importance of Dominic Ongwen's return to Uganda, and Dominic Ongwen's personal intervention, by telephone, in the meeting are factors of particular concern. The fact that the attendees were told to tell the "truth" cannot be taken as negating these concerns. It is also significant that Dominic Ongwen's intervention at the meeting appears to have occurred without the involvement or even prior knowledge of his Defence, making it at least questionable that it took place "for the lawful purpose of [the Defence] investigation".

21. These findings were made following submissions of both parties, and on the basis of the relevant information and material available in the record of the case. The Single Judge has also remained actively seized of the issue (see ICC-02/04-01/15-T-12-CONF-ENG, pp. 24-25) and considers that the risks of exercising pressure over witnesses which have justified the restriction of Dominic Ongwen's communications continue to exist.

22. For related reasons, the Single Judge has also [redacted]. The Single Judge emphasises that the fact that [redacted] does not mean that the exercise of pressure on them, related to their being witnesses before the Court, does not constitute unlawful interference and/or is not to be seen as "obstruct[ing] […] the investigation" within the meaning of article 58(1)(b)(ii) of the Statute. [redacted], the Single Judge sees a risk that Dominic Ongwen would again seek contact with them if released, which could amount to pressure on them or, through them, on other possible witnesses.

23. Furthermore, the fact that Dominic Ongwen managed to exercise pressure on some witnesses even from within the Court's Detention Centre

renders concrete and identifiable the risk that, if released, he may exercise a similar form of pressure over other witnesses, some of whom appear also to have had a personal relationship with Dominic Ongwen or to have been subordinate to him within the Lord Resistance Army's hierarchy.

24. As the Single Judge considers that the conditions of article 58(1)(b)(i) and (ii) of the Statute are met, Dominic Ongwen shall continue to be detained, as mandated by article 60(2) of the Statute. Considering that the risks identified above can only effectively be managed in the Court's Detention Centre, the Single Judge also does not find suitable the possibility of release with conditions.

25. Finally, the Single Judge clarifies that he has not sought the observations of the Kingdom of Belgium for the present decision given that the identified risks exist independently of the question which State Dominic Ongwen is requested to be released to and irrespective of any possible observations from such State. In light of the conclusions reached with respect to the conditions of article 58(1) of the Statute it was also not necessary to seek the observations of the Host State. Indeed, while interim or conditional release cannot be granted before observations are requested from the State to which the person seeks to be released and the Host State, and while recognising that, in certain circumstances, observations from such States would be relevant to the question of whether any risk may be mitigated by certain measures short of detention, the Single Judge considers that regulation 51 of the Regulations of the Court cannot be understood to require that observations must be requested even in the absence of any reasonable prospect that an application for interim release (with or without conditions) may be granted.

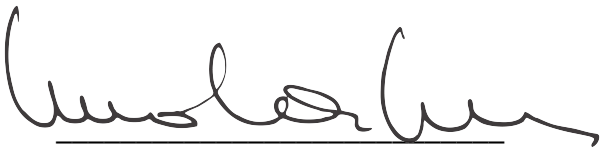
FOR THESE REASONS, THE SINGLE JUDGE

REJECTS the Request;

DECIDES that Dominic Ongwen shall remain in detention; and

ORDERS the Registrar to reclassify document ICC-02/04-01/15-332-Conf-Exp as "confidential".

Done in both English and French, the English version being authoritative.



Judge Cuno Tarfusser
Single Judge

Dated this 27 November 2015

At The Hague, The Netherlands