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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Peter Kovacs
Judge Raul C. Pangalangan

SITUATION IN UGANDA

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

Public

**Decision on the Review of Dominic Ongwen's Detention and on the Restriction
on Communication**

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

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Other

Trial Chamber IX ('Chamber') of the International Criminal Court ('Court'), issues the following 'Decision on the Review of Dominic Ongwen's Detention and on the Restriction of Communication', in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 60(3) of the Rome Statute ('Statute'), Rule 118 of the Rules of Procedure and Evidence ('Rules'), and Regulations 23 *bis* and 101 of the Regulations of the Court ('Regulations').

1. On 3 August 2015, the Single Judge of the Pre-Trial Chamber ('PTC Single Judge') issued a decision restricting Mr Ongwen's telephone communications.¹
2. On 27 November 2015, the PTC Single Judge issued the 'Decision on the "Defence Request for the Interim Release of Dominic Ongwen"' ('Interim Release Decision'),² rejecting the Defence request that Mr Ongwen be released, and specifying the reasons why his detention was warranted, pursuant to Article 58(1)(b)(i) and (ii) of the Statute.³
3. Subsequently, on 23 March 2016, the PTC Single Judge issued the 'Decision on the Review of Dominic Ongwen's Detention pursuant to Article 60(3) of the Statute' ('First Review Decision'), finding that there had not been any change in the circumstances requiring Mr Ongwen's detention since the issuance of the Interim Release Decision.⁴ The PTC Single Judge decided that Mr Ongwen must remain in detention.⁵
4. On 20 May 2016, the Registry filed the 'Report on the Active Monitoring of Mr. Ongwen Telephone Communications' ('Registry's Report'), whereby it reported

¹ Decision concerning the restriction of communications of Dominic Ongwen, 3 August 2015, ICC-02/04-01/15-283.

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

³ Decision on Interim Release, ICC-02/04-01/15-349, paras 14-25.

⁴ Decision on the Review of Dominic Ongwen's Detention pursuant to Article 60(3) of the Statute, 23 March 2016, ICC-02/04-01/15-421, paras 4-7.

⁵ First Review Decision, ICC-02/04-01/15-421, page 5.

on two telephone conversations involving Mr Ongwen which were terminated on 11 January 2016 and 30 March 2016.⁶

5. At the 23 May 2016 status conference, the Chamber requested filings from the parties in relation to the Chamber's periodic review of the Interim Release Decision.⁷ For the purpose of the required hearing under Rule 118(3) of the Rules, the Chamber also afforded the parties an opportunity to make preliminary comments on the matter of Mr Ongwen's detention.⁸
6. On 30 May 2016, the Single Judge of the Trial Chamber ('Single Judge') issued a 'Decision on issues related to the restriction of communications of Dominic Ongwen' ('Communication Restriction Decision'),⁹ in which he held that the restrictions of communications ordered by the PTC Single Judge remain warranted at the present stage.¹⁰
7. On 13 June 2016, the Defence filed its request, seeking conditional release, or in the alternative, the restoration of Mr Ongwen's communication privileges ('Defence Request').¹¹ The Defence also requested that the Chamber reclassify as confidential a 9 July 2015 report from the Registrar ('ICC-02/04-01/15-261-Conf-Exp') summarizing certain recorded telephone conversations of Mr Ongwen's.¹² The Prosecution filed its observations on 24 June 2016, requesting that the Chamber deny the Defence Request and reclassify ICC-02/04-01/15-261-Conf-

⁶ Report on the Active Monitoring of Mr. Ongwen Telephone Communications ('Registry Report'), 20 May 2016, ICC-02/04-01/15-443-Conf-Exp, only available to the Prosecution, Defence and Registry (with confidential *ex parte* Annexes I-III). To the extent that this Decision makes reference to confidential or confidential *ex parte* filings, the Chamber is of the view that its reference to these documents does not undermine the confidentiality of the filings.

⁷ Transcript of hearing on 23 May 2016, ICC-02/04-01/15-T-25-ENG, page 6, lines 5 to 18.

⁸ ICC-02/04-01/15-T-25-ENG, page 6, line 19 to page 7, line 10. *See* ICC-02/04-01/15-489-Red2, para. 24.

⁹ Decision on issues related to the restriction of communications of Dominic Ongwen, 31 May 2016, ICC-02/04-01/15-450-Red.

¹⁰ Communication Restriction Decision, ICC-02/04-01/15-450-Red, para. 3.

¹¹ Defence Request for Conditional Release, or in the Alternative, the Restoration of Mr Ongwen's Communication Privileges, 13 June 2016, ICC-02/04-01/15-461. The Chamber, upon the Defence's request, granted the Defence a ten page extension of the page limits. Email from the Chamber on 23 May 2016 at 13.18.

¹² ICC-02/04-01/15-461, para. 10 (referring to ICC-02/04-01/15-261-Conf-Exp and its confidential *ex parte* Annex A).

Exp.¹³ The legal representatives of victims filed their joint observations on 27 June 2016, asking that that the Chamber reject the Defence Request.¹⁴ On 4 July 2016, the Defence filed its reply to the other participants' responses.¹⁵

8. On 12 July 2016, pursuant to an order from the Single Judge that the Kingdom of the Netherlands and the Republic of Uganda submit any observations on the interim release of Dominic Ongwen,¹⁶ the Registry transmitted correspondence from these States.¹⁷ The Republic of Uganda indicated that it is not in a position to guarantee that Mr Ongwen will attend Court proceedings whenever he will be required to do so should he be granted interim release.¹⁸

Review of Mr Ongwen's Detention

9. Article 60(3) of the Statute and Rule 118(2) of the Rules require a review of the Interim Release Decision, at least every 120 days. If changed circumstances so require, the ruling on detention may be modified.¹⁹
10. On the basis of the participants' submissions and the available information, the Chamber finds that there has not been any change in the circumstances requiring modification of the Interim Release Decision.

¹³ Prosecution response to the 'Defence Request for Conditional Release, or in the Alternative, the restoration of Mr Ongwen's Communication Privileges', 24 June 2016, ICC-02/04-01/15-483-Conf (a public redacted version was notified on 12 July 2016).

¹⁴ Victim's Joint Response to the 'Defence Request for Conditional Release, or in the Alternative, the Restoration of Mr Ongwen's Communication Privileges', 27 June 2016, ICC-02/04-01/15-484.

¹⁵ Defence Consolidated Reply to Prosecution and Joint LRV Response to the Defence's Request for Conditional Release or Restoration of Phone Rights, 4 July 2016, ICC-02/04-01/15-489-Conf (a confidential *ex parte* version was notified the same day and a public redacted version was notified on 6 July 2016).

¹⁶ Order requesting observations from relevant States on interim release, 15 June 2015, ICC-02/04-01/15-469.

¹⁷ Transmission of the correspondence from relevant States on the interim release, 12 July 2016, ICC-02/04-01/15-494 (with four confidential annexes).

¹⁸ Annex 4 to the Transmission of the correspondence from relevant States on the interim release, 11 July 2016, ICC-02/04-01/15-494-Conf-Anx4.

¹⁹ See also *The Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, Judgement on the Appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 6 January 2012 Entitled 'Decision on the Defence's 28 December 2011 "Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo"', 5 March 2012; ICC-01/05-01/08-2151-Red, para. 31.

11. The Defence Request largely reiterates or reformulates arguments already rejected by the PTC Single Judge in the initial Interim Release Decision and in the First Review Decision.²⁰
12. Regarding the changed circumstances the Defence raises in support of its Request, the Chamber is unconvinced that conclusion of the Prosecution's investigations is a changed circumstance that warrants Mr Ongwen's release from detention. In the Interim Release Decision, the Single Judge considered that the continued detention of Mr Ongwen was 'also necessary to ensure that he does not obstruct or endanger the investigation or the court proceedings'.²¹ The Chamber notes that the Prosecution continues additional investigations.²² However, even if the Prosecution's investigation are concluded, Mr Ongwen's demonstrated willingness and readiness to skirt the Court's authority²³ 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.
13. As to Defence's assertion that the alleged necessity that Mr Ongwen participate actively in his own investigations warrants modification of the existing ruling on his detention,²⁴ the Chamber does not consider this to be a changed circumstance. The Chamber notes that Mr Ongwen was surrendered to the Court on 16 January 2015, and his communications restricted beginning 5 June 2015,²⁵ prior to the 27

²⁰ ICC-02/04-01/15-461, paras 20-29, 32, 35, 36. *See* Decision on Interim Release, ICC-02/04-01/15-349, paras 15-21; and First Review Decision, ICC-02/04-01/15-421, paras 5-7. The Chamber notes that the English translation, referenced by the Defence in ICC-02/04-01/15-461, para. 32, does not in any way undermine the Single Judge's decisions either on interim relief or restriction of communications.

²¹ ICC-02/04-01/15-349-Red, para. 19.

²² *See* Prosecution Submissions in Accordance with the Scheduling Order of 4 May 2016", 18 May 2016, ICC-02/04-01/15-438, para. 5.

²³ *See* ICC-02/04-01/15-283; ICC-02/04-01/15-349; and Registry Report, ICC-02/04-01/15-443-Conf-Exp.

²⁴ Defence Request, ICC-02/04-01/15-461, paras 36-38.

²⁵ Decision on a request by the Prosecutor under Article 57 of the Rome Statute and Regulation 101(2) of the Regulations of the Court, 25 June 2015, ICC-02/04-01/15-254, paras 1-2.

November 2015 Interim Release Decision. The confirmation of the charges against Mr Ongwen on 23 March 2016, the same day the First Review Decision was issued, coupled with the alleged necessity, identified above, is not a changed circumstance. The Chamber further notes that Mr Ongwen currently communicates freely with his Defence team. While he is detained, he is allowed unrestricted access to his counsel. He is also able to apply for additions to his unprivileged phone list and to the Chamber for alterations to the communication restrictions. Mr Ongwen's ability to act as an active, on-the-ground investigator in his defence is not what the Statute envisions when it enshrines the rights of the accused in Article 67 of the Statute.

14. Rather than mitigating the risks justifying detention, the Chamber considers that the changed circumstances identified by the Defence – namely, 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.²⁶ In this regard, the Chamber also notes recent precautions taken by the Registry based on concerns that Mr Ongwen may have infringed the decision restricting his telephone communications.²⁷
15. The Chamber has considered whether the conditions on interim release proposed by the Defence²⁸ sufficiently address the risks justifying his detention. In particular, the Chamber emphasises the Government of Uganda's observation

²⁶ See, similarly, *Prosecutor v. Bemba*, Trial Chamber III, Decision on Applications for Provisional Release, 27 June 2011, ICC-01/05-01/08-1565-Conf, para. 55; *Prosecutor v. Katanga and Ngudjolo Chui*, Trial Chamber II, Fifth Review of the Pre-Trial Chamber's Decision Concerning the Pre-Trial Detention of Germain Katanga pursuant to rule 118(2) of the Rules of Procedure and Evidence, 19 November 2009, ICC-01/04-01/07-1651, paras 25-26; *Prosecutor v. Katanga and Ngudjolo Chui*, Trial Chamber II, Fifth Review of the Decision on the Application for Interim Release of Mathieu Ngudjolo (rule 118(2) of the Rules of Procedure and Evidence), 4 November 2009, ICC-01/04-01/07-1593-Conf-Exp-tENG, para. 12; and *Prosecutor v. Katanga and Ngudjolo Chui*, Trial Chamber II, Second Review of the Decision on the Application for Interim Release of Mathieu Ngudjolo (rule 118(2) of the Rules of Procedure and Evidence), 19 November 2008, ICC-01/04-01/07-750-tENG, para. 13.

²⁷ Registry Report, ICC-02/04-01/15-443-Conf-Exp, paras 4-7.

²⁸ The Defence suggests the following conditions to ensure Mr Ongwen's appearance after release: a weekly reporting requirement; GPS tracking; a guarantee of his appearance from the Republic of Uganda; and no contact with Prosecution witnesses.

that it cannot guarantee that Mr Ongwen will appear before the Court.²⁹ In light of the available information, the Chamber 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.³⁰

Restriction on Communications

16. The Chamber notes the Defence's request for a restoration of Mr Ongwen's communication privileges, and its assertion that the Chamber must give a new reasoned decision explaining how the limitation of contacts is a necessary and proportionate measure.³¹ This issue is wholly distinct from the review of Mr Ongwen's detention, but, as this was also raised in the Defence Request, the Chamber will rule on it in the present decision.
17. The Chamber notes the 30 May 2016 Communication Restriction Decision, in which the Single Judge examined the restrictions of communications ordered by the PTC Single Judge and the available information and determined that the restrictions remain warranted at the present stage.³² Nothing in the Defence's submissions points to new information that justifies a modification or vacation of the Communication Restriction Decision.³³
18. Indeed, the Chamber notes that information contained in the Registry Report bolsters its concern about Mr Ongwen's ability and willingness to interfere with

²⁹ ICC-02/04-01/15-494-Conf-Anx4.

³⁰ The Chamber notes that the Appeals Chamber has indicated that where there are no adequate State guarantees, a Chamber's 'discretion to consider conditional release is unfettered'. *Prosecutor v. Bemba et al.*, 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 'Requête de mise en liberté' submitted by the Defence for Jean-Jacques Mangenda", 11 July 2014, ICC-01/05-01/13-560 OA 4, para. 128 (*quoting Prosecutor v. Gbagbo*, 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-Conf OA, para. 79).

³¹ See Defence Request, ICC-02/04-01/15-461, para. 46.

³² Communication Restriction Decision, ICC-02/04/01/15-450-Red, para. 3. See also ICC-02/04-01/15-283.

³³ See Defence Request, ICC-02/04-01/15-461, paras 32, and 42-72.

witnesses and supports the PTC Single Judge's conclusion that the imposition of restrictions on Mr Ongwen's communications is warranted, because of his finding of a 'reasonable suspicion that there had been attempts to exercise some form of influence on persons who possess information relevant to the case'.³⁴

19. The Chamber again notes that Mr Ongwen has ample communication privileges. He is permitted visitors and telephone communications with persons on his privileged and non-privileged phone lists. Further, he is able to add additional persons to either list, subject to certain conditions. Should he wish to make additions to his lists, Mr Ongwen has previously been instructed that the proposed names should be communicated to the Chamber and the Prosecution.³⁵ The Prosecution is then to have two days to raise objections to the addition of these names. In the absence of any objections on the part of the Prosecution requiring resolution by the Single Judge, the proposed addition(s) shall be considered approved, subject to the ordinary procedure at the Court's detention centre and approval by the Registry.³⁶ Mr Ongwen is encouraged to follow this procedure if he seeks to add additional persons to either list. Since the Defence fails to follow the required procedure in the present case,³⁷ the Chamber will not address the addition of any new persons to Mr Ongwen's privileged or non-privileged telephone list.

Reclassification of ICC-02/04-01/15-261-Conf-Exp

20. As to the parties' request that the Chamber reclassify ICC-02/04-01/15-261-Conf-Exp as confidential, the Chamber notes that the report, which summarizes certain recorded telephone conversations of Mr Ongwen from the detention centre, was prepared solely for the purpose of aiding the PTC Single Judge's determination

³⁴ ICC-02/04-01/15-283, paras 9-10.

³⁵ See ICC-02/04-01/15-450-Red, paras 4-5.

³⁶ See ICC-02/04-01/15-450-Red, paras 4-5.

³⁷ See ICC-02/04-01/15-489-Red, para. 16.

of the conversations relevant to a Prosecution inquiry about possible witness interference.³⁸ The Prosecution and the Defence were given the full transcripts (and translation into English) of the conversations deemed relevant by the PTC Single Judge.³⁹ Further, given that the summaries of Mr Ongwen's private conversations were created solely for the PTC Single Judge's consideration as to which conversation, if any, should be made available to the parties, the Chamber will not grant the parties access to the conversations that were deemed irrelevant to any inquiry on witness interference.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY:

REJECTS the Defence Request;


DECIDES that Dominic Ongwen shall remain in detention; and

DENIES the parties' request to reclassify the ICC-02/04-01/15-261-Conf-Exp and its confidential *ex parte* Annex) as confidential.

³⁸ Decision on a request by the Prosecutor under article 57 of the Rome Statute and regulation 101(2) of the Regulations of the Court, 24 June 2015, ICC-02/04-01/15-254. The Chamber also notes that the PTC Single Judge specifically ordered that the Registry's report, listing and summarising the content of Mr Ongwen's telephone conversations between 25 May and 5 June 2015, be classified as 'confidential, *ex parte*, Chamber only'.

³⁹ Confidential *ex parte* annexes I-VI to filing ICC-02/04-01/15-342; confidential *ex parte* annexes I and II to filing ICC-02/04-01/15-362; and confidential *ex parte* annexes I-IV to filing ICC-02/04-01/15-367.

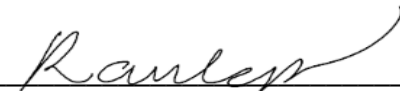
Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge



Judge Peter Kovacs



Judge Raul C. Pangalangan

Dated 21 July 2016

At The Hague, The Netherlands