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Date: 6 March 2015

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

SITUATION IN UGANDA

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

Public

Decision Postponing the Date of the Confirmation of Charges Hearing

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor

Benjamin Gumpert, Senior Trial Lawyer

The Defence

Kripus Ayena Odongo

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court” or “ICC”),¹ renders this decision on the “Prosecution’s Application for Postponement of the Confirmation Hearing” (the “Application”).²

I. PROCEDURAL HISTORY

1. On 8 July 2005, the Chamber, in its previous composition, issued the “Decision on the Prosecutor’s application for the warrants of arrest under Article 58”,³ along with a warrant of arrest for Dominic Ongwen (“Mr. Ongwen”),⁴ for his alleged responsibility for crimes against humanity and war crimes. At the time, Mr. Ongwen was prosecuted together with others forming the case of the *Prosecutor v. Joseph Kony et al.* (the “Kony et al. case”).
2. On 16 January 2015, Mr. Ongwen consented to appear voluntarily before the ICC and was transferred, on the same day, to the custody of the Court.⁵
3. On 21 January 2015, Mr. Ongwen arrived to the ICC detention centre.⁶ The same day, the Chamber designated Judge Ekaterina Trendafilova as Single Judge.⁷
4. On 26 January 2015, Mr. Ongwen made his initial appearance before the Single Judge during which, *inter alia*, the date of the confirmation of charges hearing was set provisionally for 24 August 2015.⁸
5. On 28 January 2015, the Single Judge held an *ex parte* status conference only with the Prosecutor, during which issues “related to disclosure of the Prosecutor’s evidence, protection of witnesses and other related matters” were discussed.⁹

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, 21 January 2015, ICC-02/04-01/15-185.

² ICC-02/04-01/15-196-Conf-Exp. On 12 February 2015, a confidential redacted and a public redacted version of the Application was submitted, see ICC-02/04-01/15-296-Conf-Red and ICC-02/04-01/15-196-Red2.

³ Pre-Trial Chamber II, “Decision on the Prosecutor’s application for the warrants of arrest under Article 58”, 8 July 2005, ICC-02/04-01/15-5.

⁴ Pre-Trial Chamber II, “Warrant of Arrest for Dominic Ongwen”, 8 July 2005, ICC-02/04-01/15-6.

⁵ ICC-02/04-01/05-419-Conf-Exp, para. 4; ICC-02/04-01/05-419-Conf-Exp-Anx2.

⁶ ICC-02/04-01/05-419-Conf-Exp, para. 18.

⁷ Pre-Trial Chamber II, “Decision Designating a Single Judge”, 21 January 2015, ICC-02/04-01/15-185.

⁸ Pre-Trial Chamber II, Transcript of Hearing, 26 January 2015, ICC-02/04-01/15-T-4-ENG, p. 14, lines 7-9.

6. On 6 February 2015, the Single Judge severed the case against Mr. Ongwen from the case of the *Prosecutor v. Joseph Kony et al.*¹⁰
7. On 10 February 2015, the Prosecutor submitted the Application requesting that the date of the confirmation of charges hearing be postponed, for various reasons, to 31 January 2016.¹¹
8. On 12 February 2015, the Chamber, *inter alia*, requested the Defence to respond to the Application no later than 18 February 2015.¹²
9. On 18 February 2015, the Defence submitted the “Réponse de la Défense de Mr Dominic Ongwen à la requête du Procureur sollicitant le report de la date de l’Audience de Confirmation des Charges au 31 Janvier 2016” (the “Response”).¹³
10. On 27 February 2015, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (the “Disclosure Decision”).¹⁴

II. SUBMISSIONS OF THE PARTIES

The Application

11. The Prosecutor considers the provisional date for the confirmation hearing of 24 August 2015 as “too soon” and seeks a postponement to 31 January 2016.¹⁵ In her view, a key consideration for requesting such postponement is the fact that the case against Mr. Ongwen was dormant for almost a decade as Mr. Ongwen “remained a fugitive” since the issuance of the warrant of arrest in 2005.¹⁶ Given this situation, the Prosecutor avers that her Office “could not have predicted, and therefore prepared

⁹ Pre-Trial Chamber II, “Decision on Setting the Date for the Initial Appearance of Dominic Ongwen and the Date for a Status Conference”, 21 January 2015, ICC-02/04-01/15-188, para. 8; Pre-Trial Chamber II, Transcript of Hearing, 28 January 2015, ICC-02/04-01/15-T-5-Conf-Exp-ENG.

¹⁰ Pre-Trial Chamber II, “Decision Severing the Case against Dominic Ongwen”, 6 February 2015, ICC-02/04-01/05-424.

¹¹ ICC-02/04-01/15-196-Red2, para. 1.

¹² Pre-Trial Chamber II, “Decision Requesting Observations from the Defence on the Prosecutor’s Application to Postpone the Confirmation Hearing and on the Choice of Counsel for Dominic Ongwen”, 12 February 2015, ICC-02/04-01/15-197.

¹³ ICC-02/04-01/15-199-Conf with confidential annex.

¹⁴ Pre-Trial Chamber II, ICC-02/04-01/15-203.

¹⁵ ICC-02/04-01/15-196-Red2, paras 1 and 48.

¹⁶ ICC-02/04-01/15-196-Red2, paras 1, 2 and 13.

for, the surrender of Dominic Ongwen since he was not captured as part of a pre-planned arrest operation".¹⁷

12. The Prosecutor further contends that a postponement is necessary to fulfil her statutory obligations to (i) review afresh article 67(2) and rule 77 material in her collection for the purpose of disclosure to the Defence, which will take one year;¹⁸ (ii) seek redactions in the evidence with a view to ensuring the security of victims, witnesses and the ongoing investigation;¹⁹ (iii) contact at a minimum 32 core prosecution witnesses and other witnesses²⁰ as well as victims, who were interviewed many years ago, with respect to disclosing their statements and assessing their security situation;²¹ (iv) re-investigate and conduct additional investigations in light of the dictates of article 54(1)(a) which is likely to be "completed within the next 12 months";²² (v) possibly add charges pursuant to article 61(4) of the Statute;²³ (vi) recruit Acholi language staff and translate evidence so as to provide Mr. Ongwen with material in Acholi, the language he fully understands and speaks (rule 76(3) of the Rules of Procedure and Evidence);²⁴ and (vii) seek the consent of information providers for lifting the condition of confidentiality "with regard to a significant

¹⁷ ICC-02/04-01/15-196-Red2, para. 2.

¹⁸ ICC-02/04-01/15-196-Red2, para. 4. The Prosecutor informs the Chamber that 17,791 items (94,620 pages) collected in connection with the situation in Uganda as well as any evidence collected in the future will have to be reviewed at a rate of 50 pages per day per person. Within the group of items to be reviewed, "the number of electronically 'unsearchable' items (i.e. requiring manual review) amount to 15,612 (72,490 pages)", ICC-02/04-01/15-196-Red2, paras 4, 15 and 17.

¹⁹ ICC-02/04-01/15-196-Red2, paras 4 and 23-27.

²⁰ The Prosecutor informs the Chamber that approximately 140 other witnesses were interviewed by the Prosecutor at the time. She adds that only "intermittent contact (in 2010 and 2013)" has been maintained with some witnesses, ICC-02/04-01/15-196-Red2, para. 20.

²¹ ICC-02/04-01/15-196-Red2, paras 5 and 19. The Prosecutor informed the Chamber that such security assessment for the 32 witnesses may be completed by about 7 April 2015, ICC-02/04-01/15-196-Red2, para. 21.

²² ICC-02/04-01/15-196-Red2, paras 6 and 29. The Prosecutor adds that the anticipated length of the additional investigation "will depend in part on the availability of current prosecution witnesses" and the "analysis and follow-up investigations regarding previously collected evidence", ICC-02/04-01/15-196-Red2, paras 30, 31 and 33. In this context, the Prosecutor argues that large tranches of intercept evidence, including 8,000 pages radio intercepts and 770 audio recordings, must still be analysed, ICC-02/04-01/15-196-Red2, para. 32.

²³ ICC-02/04-01/15-196-Red2, para. 41.

²⁴ ICC-02/04-01/15-196-Red2, paras 7, 31, and 35-39. The Prosecutor adds that transcription of some other material will be required, even if it falls outside the scope of rule 76(3) of the Rules, ICC-02/04-01/15-196-Red2, para. 40.

number documents”, despite recent progress in lifting restrictions under article 54(3)(e) of the Rome Statute (the “Statute”).²⁵

13. As regards the review of evidence, the Prosecutor highlights that “no litigation that would have triggered a review of the Uganda collection” had hitherto taken place, nor “was there a related case that progressed to a stage where disclosure review” would have been necessary.²⁶ She also informs the Chamber that her Office will have to “update disclosure guidelines and templates so that they are appropriate for the Ongwen case”²⁷ and recruit or re-assign staff for disclosure review.²⁸

14. Lastly, the Prosecutor avers that the postponement is “reasonable” and will benefit both parties.²⁹ In particular, the Defence will not suffer any prejudice since the fulfilment of the Prosecutor’s statutory duties “are as important for the Defence as they are for the Prosecutor”;³⁰ moreover, the Prosecutor maintains that a postponement, “does not constitute undue delay within the meaning of article 67(1)(c) [of the Statute]” and will “provide for a fair and expeditious confirmation hearing”.³¹

The Response

15. The Defence purports that a postponement of the date of the confirmation hearing to 31 January 2016 seriously impairs the rights of Mr. Ongwen.³² It argues that the ten-year period between the Prosecutor’s 2005 application for the issuance of a warrant of arrest and Mr Ongwen’s voluntary surrender to the Court in January 2015, does not justify the postponement “à une date aussi lointaine”.³³ It contends that the Prosecutor had ten years to complete, if need be, the investigation³⁴ and that Mr. Ongwen, who is entitled to be tried fairly and without undue delay, should not bear the consequences

²⁵ ICC-02/04-01/15-196-Red2, paras 8 and 43-46. The Prosecutor informs the Chamber that she has requested four main information providers to lift article 54(3)(e) restrictions and has conducted missions in April and July 2014, ICC-02/04-01/15-196-Red2, para. 44.

²⁶ ICC-02/04-01/15-196-Red2, para. 14.

²⁷ ICC-02/04-01/15-196-Red2, para. 15.

²⁸ ICC-02/04-01/15-196-Red2, para. 17.

²⁹ ICC-02/04-01/15-196-Red2, paras 9 and 47.

³⁰ ICC-02/04-01/15-196-Red2, paras 9 and 47.

³¹ ICC-02/04-01/15-196-Red2, paras 9 and 47.

³² ICC-02/04-01/15-199-Conf, para. 23.

³³ ICC-02/04-01/15-199-Conf-, para. 24.

³⁴ ICC-02/04-01/15-199-Conf, para. 25.

of the Prosecutor's inactivity.³⁵ In the view of the Defence it is essential that (i) cases are properly managed from the start to forestall unnecessary delays; (ii) the Chamber ensures that proceedings are conducted fairly and expeditiously; and (iii) the rights of the suspect are interpreted and applied in conformity with article 21(3) of the Statute.³⁶

16. In response to the Prosecutor's argument for additional time to investigate pursuant to article 54(1)(a) of the Statute and to review and disclose article 67(2) evidence or rule 77 material, the Defence alleges that such considerations do not justify postponement for one year. It recalls that the obligation to determine the truth does not halt at the stage of the confirmation of charges; rather, the Prosecutor may continue her investigation post-confirmation, if necessary.³⁷ The Prosecutor's obligation to investigate exonerating circumstances prevails throughout the investigation and is not dependent on prior communication of the suspect's line of defence.³⁸ In this context, the Defence also disputes the necessity to contact all 140 witnesses who have been interviewed in the past.³⁹ Lastly, the Defence observes that the disclosure process may be continued after the confirmation hearing.⁴⁰

17. As regards the Prosecutor's argument for additional time to seek redactions with a view to ensuring the protection of witnesses and victims and to seek the consent of information providers within the meaning of article 54(3)(e) of the Statute, the Defence asserts that protective measures for witnesses and victims are taken before, during and after the taking of their statements. The obligation to protect is continuous in nature and it is incumbent upon the Prosecutor to ensure the efficiency of the investigation and prosecution while protecting her sources.⁴¹ The Defence alleges further that, in any event, the Court's case-law underlines that when submitting an article 58 application, the Prosecutor should alert the Pre-Trial Chamber as to any

³⁵ ICC-02/04-01/15-199-Conf, paras 26 and 28.

³⁶ ICC-02/04-01/15-199-Conf, para. 29.

³⁷ ICC-02/04-01/15-199-Conf, para. 33.

³⁸ ICC-02/04-01/15-199-Conf, paras 34-36.

³⁹ ICC-02/04-01/15-199-Conf, para. 37.

⁴⁰ ICC-02/04-01/15-199-Conf, para. 40.

⁴¹ ICC-02/04-01/15-199-Conf, para. 42.

redactions that she considers might be necessary.⁴² With regard to seeking the consent of information providers, the Defence suggests that the consultation process may continue after the confirmation hearing and reiterates that, in any case, the disclosure process does not terminate at the stage of the confirmation hearing.⁴³

18. In relation to the Prosecutor's argument for additional time to translate chiefly evidence falling under rule 76(3) into Acholi, the Defence recalls the Prosecutor's confirmation that 16 out of 32 witness statements exist already in Acholi.⁴⁴ As regards other documents available in English, the Defence suggests that the language issue could be overcome easily by using an Acholi interpreter.⁴⁵ In this context, the Defence recalls its agreement to receive documents in English without awaiting their translation into Acholi so as to, *inter alia*, indicate the relevant portions which require translation as a matter of priority.⁴⁶

19. With respect to the Prosecutor's expressed intention to re-investigate and amend the charges within the upcoming 12 months, the Defence opines that this remains but a vague and general statement.⁴⁷ In the view of the Defence, such an approach can only engender significant delays in the proceedings at the expense of the suspect's right to be tried without undue delay.⁴⁸ This course of action also impinges on Mr. Ongwen's right to be informed promptly and in detail of the nature, cause and content of the charges,⁴⁹ as the factual allegations underpinning the charges, on the basis of which Mr. Ongwen was arrested, would be called into question.⁵⁰ The Defence also argues that during the last 10 years, the Prosecutor did not explore factual allegations other than those contained in the warrant of arrest even though she had the opportunity to do so.⁵¹ It appears rather that Mr. Ongwen's arrest may have

⁴² ICC-02/04-01/15-199-Conf, para. 44.

⁴³ ICC-02/04-01/15-199-Conf, paras 45-47.

⁴⁴ ICC-02/04-01/15-199-Conf, para. 49.

⁴⁵ ICC-02/04-01/15-199-Conf, para. 50.

⁴⁶ ICC-02/04-01/15-199-Conf, para. 51.

⁴⁷ ICC-02/04-01/15-199-Conf, paras 53 and 56.

⁴⁸ ICC-02/04-01/15-199-Conf, paras 54, 68 and 71.

⁴⁹ ICC-02/04-01/15-199-Conf, paras 55 and 71.

⁵⁰ ICC-02/04-01/15-199-Conf, para. 59.

⁵¹ ICC-02/04-01/15-199-Conf, para. 63.

brought about “*un sentiment de fragilité du dossier de l’Accusation*” prompting the Prosecutor to express her intention to investigate further in the most vague and speculative terms.⁵² A postponement on these grounds is also not warranted, in the view of the Defence, as the Prosecutor may avail herself of the procedure under article 61(9) of the Statute and request an amendment of the charges with permission of the Chamber.⁵³ Finally, the Defence alleges an impairment of Mr. Ongwen’s right to have adequate time and facilities to prepare for the confirmation hearing recalling that until now Mr. Ongwen has not been provided with the document containing the charges or evidentiary material.⁵⁴

20. In conclusion, the Defence opposes the postponement of the date of the confirmation hearing on the grounds advanced by the Prosecutor and requests that the Chamber establish a calendar with a view to preventing any delays in the course of the proceedings.⁵⁵

III. APPLICABLE LAW

21. The Single Judge notes articles 21(1)(a), and (3), 61(1) and 67 of the Statute, rule 121(7) of the Rules of Procedure and Evidence (the “Rules”), and regulation 23*bis* of the Regulations of the Court (the “Regulations”).

IV. DETERMINATION BY THE SINGLE JUDGE

Introductory Remarks

22. The present decision refers to the content of the Response which has been submitted and is currently treated as confidential. For reasons of rendering decisions respecting the principle of publicity, the Single Judge considers that references to this document are necessary and also required by the principle of judicial reasoning. The references have been kept to a minimum and are made in light of the information in the Application which is publically available.

⁵² ICC-02/04-01/15-199-Conf, paras 64 and 67.

⁵³ ICC-02/04-01/15-199-Conf, para. 69.

⁵⁴ ICC-02/04-01/15-199-Conf, para. 73.

⁵⁵ ICC-02/04-01/15-199-Conf, paras 77-79.

23. In this context, the Single Judge observes that, unlike the Prosecutor, the Defence did not submit a redacted version so as to facilitate the drafting of the present decision. As a result, the Defence is hereby ordered to submit a redacted version of its Response by Tuesday, 17 March 2015.

Postponement of the Confirmation Hearing

24. It is recalled that the Single Judge set the date of the confirmation hearing provisionally for 24 August 2015.⁵⁶ Rule 121(7) of the Rules provides that the Chamber may on its own motion or upon request of either party decide to postpone the date of the confirmation hearing.

25. At the outset, the Single Judge clarifies that having postponed the date of the hearing in the case of the *Prosecutor v Bosco Ntaganda* (the “*Ntaganda* case”) does not obligate her to accede to the Application in this case. Rather, a request to postpone the date of the confirmation hearing must be assessed on the basis of the reasons advanced and in the light of the circumstances of each case. Crucially, in her assessment of a rule 121(7) request, the Single Judge must ensure the overall fairness and expeditiousness of proceedings bearing in mind the competing interests at stake.⁵⁷ Having said that and for the reasons stated below, the Single Judge is of the view that the postponement of the date of the confirmation hearing in the circumstances of the present case is warranted.

26. It is a matter of fact that after the issuance of the warrant of arrest in July 2005, Mr. Ongwen remained a fugitive for almost ten years. Despite the existing warrant of arrest, Mr. Ongwen could not be located and arrested for a long time. Further, it seemed unlikely that he would choose to voluntarily appear before to the Court. Given this situation, and mindful of the ever-growing workload at the Court, the Single Judge recognizes the compelling need for the Prosecutor to prioritize and to

⁵⁶ Pre-Trial Chamber II, Transcript of Hearing, 26 January 2015, ICC-02/04-01/15-T-4-ENG, p. 14, lines 7-9.

⁵⁷ Pre-Trial Chamber II, “Decision on the ‘Prosecution’s Urgent Request to Postpone the Date of the Confirmation Hearing’ and Setting a New Calendar for the Disclosure of Evidence Between the Parties”, 17 June 2013, ICC-01/04-02/06-73, para. 13.

direct her efforts and resources to other activities of her Office, more specifically preliminary examinations, investigations and prosecutions. As the Single Judge held in the *Ntaganda* case: “Where the suspect is evading justice for many years, it is neither possible nor reasonable to impose on the Prosecutor a permanent stand-by availability of the teams for years, pending a hypothetical surrender or voluntary appearance of the suspect”.⁵⁸

27. In her Application, the Prosecutor also refers to the upcoming disclosure and redaction process, involving the review, analysis and processing of a significant amount of evidentiary material. While these reasons may be ascribed, in part, to the internal organization of the Office of the Prosecutor regarding its efficient and sustainable evidence management, the Single Judge cannot deny that, in the specific circumstances of this case, it could not have been reasonably expected that the Prosecutor process the evidence and prepare requests for protective measures in the abstract as long as Mr. Ongwen remained a fugitive. Indeed, as the Prosecutor also highlights, since there were no other judicial proceedings pending, be it at the situation or case level, there was no reason to engage in such a time- and resource-consuming task.⁵⁹ In addition, the evidence collected at the time concerned also other three suspects of the *Kony et al.* case.⁶⁰ In light of the severance of the case against Mr. Ongwen and the fact that the case against Mr. Ongwen is different than that pertaining to the other former co-suspects, it is only natural that the Prosecutor requires some time to review and process the evidence in light of the new contours of the present case.

28. The Single Judge sees no merit in the related Defence argument, namely that the disclosure and redaction process may be conducted post-confirmation. To begin with,

⁵⁸ Pre-Trial Chamber II, “Decision on the ‘Prosecution’s Urgent Request to Postpone the Date of the Confirmation Hearing’ and Setting a New Calendar for the Disclosure of Evidence Between the Parties”, 17 June 2013, ICC-01/04-02/06-73, para. 35.

⁵⁹ See also similarly in the *Ntaganda* case, Pre-Trial Chamber II, “Decision on the ‘Prosecution’s Urgent Request to Postpone the Date of the Confirmation Hearing’ and Setting a New Calendar for the Disclosure of Evidence Between the Parties”, 17 June 2013, ICC-01/04-02/06-73, para. 41.

⁶⁰ Proceedings against a fifth suspect, Raska Lukwiya, were terminated due to his death in July 2007, Pre-Trial Chamber II, Decision to terminate the proceedings against Raska Lukwiya, 11 July 2007, ICC-02/04-01/05-248.

the Single Judge does not agree with the manner in which the Defence has built its argumentation insofar as it gives the erroneous impression that the charges against Mr. Ongwen will be confirmed in part or as a whole. That there *will* be post-confirmation proceedings is a premature assumption on the part of the Defence. Its argumentation is also not convincing for the following reasons.

29. Firstly, the Prosecutor bears the burden of proof to establish at the confirmation hearing that there are “substantial grounds to believe” that Mr. Ongwen is criminally responsible for the crimes charged (article 61(7) of the Statute). Hence, the Prosecutor should be given an opportunity to review and disclose, with appropriate redactions, the evidence in order to be in a position to prove the charges to the requisite evidentiary threshold applicable at the confirmation hearing. As previously stated:

As such, and bearing in mind the circumstances of the present case, in order for the Prosecutor to present a “reliable case record” at the confirmation hearing stage as requested by the Defence, it is pertinent that the Single Judge provides the Prosecutor with a reasonable extension of time to carry out her duties during the pre-trial phase up until the confirmation hearing rather than to make a finding on the Prosecutor’s alleged failure to fulfil her investigative duties.⁶¹

30. Secondly, to postpone the review, disclosure and redaction process to *after* the confirmation hearing – provided the charges are confirmed – effectively means to prolong the preparation phase before the commencement of the trial with, in turn, detrimental effects for the accused. The right of Mr. Ongwen to be tried without undue delay (article 67(1)(c) of the Statute) has been emphasized by counsel for the Defence multiple times in the Response; accordingly, no efforts must be spared to render this right effective by reducing to a minimum the time between the end of the pre-trial phase and the commencement of the trial. And thirdly, the fact that the disclosure and redaction process does not come to a halt after the confirmation hearing does not entail that no adequate review and analysis of the evidence currently available and the seeking of redactions must be undertaken *prior* to the confirmation hearing.

⁶¹ Pre-Trial Chamber II, “Decision on the ‘Prosecution’s Urgent Request to Postpone the Date of the Confirmation Hearing’ and Setting a New Calendar for the Disclosure of Evidence Between the Parties”, 17 June 2013, ICC-01/04-02/06-73, para. 32.

31. The Prosecutor also informs the Chamber that she intends to re-investigate and contact witnesses who had been interviewed in the context of the *Kony et al.* case. In the circumstances of the present case, the Single Judge accepts the Prosecutor's expressed intention to enquire into old evidence, in particular to contact "32 core prosecution witnesses" from the *Kony et al.* case. Witnesses were interviewed about ten years ago; they may no longer wish to cooperate with the Court or may have died. It is reasonable and prudent on the part of the Prosecutor to request additional time to contact and re-interview those witnesses and to assess anew their current security situation. It is not for the Single Judge to comment on whether, besides those 32 witnesses, all other 140 witnesses of the *Kony et al.* case must be contacted or re-interviewed. It is for the Prosecutor to collect the evidence she deems best for the purposes of the confirmation hearing, bearing in mind (i) that such investigative activities must take place within the overall time frame set by rule 121 of the Rules and the disclosure calendar to be established by this Chamber; and (ii) the relevance of the evidence for the case against Mr. Ongwen the factual scope of which is reduced compared to that of the *Kony et al.* case.

32. The Prosecutor also requests additional time to investigate so as to enlarge possibly the factual scope of the case. The Single Judge is attentive to this argument and recalls its own holding and that of other chambers in exacting that the investigation "should largely be completed by the stage of the confirmation hearing".⁶² However, "where the Prosecutor requires more time to complete the investigation, rule 121(7) of the Rules of Procedure and Evidence permits [her] to seek a postponement of the confirmation of charges hearing".⁶³ The Single Judge accepts

⁶² Appeals Chamber, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'", 30 May 2012, ICC-01/04-01/10-514, para. 44; similarly Pre-Trial Chamber II, "Corrigendum to 'Decision on the Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute'", 21 March 2013, ICC-01/09-02/11-700-Corr, para. 35; Pre-Trial Chamber I, "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute", 3 June 2013, ICC-02/11-01/11-432, para. 25.

⁶³ Appeals Chamber, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'", 30 May 2012, ICC-01/04-01/10-514, para. 44.

that in the specific circumstances of the case appropriate time should be accorded to the Prosecutor to collect relevant evidence and to prepare the charges which will reflect the criminal responsibility of the suspect, as dictated by article 54(1)(a) of the Statute. The Prosecutor is free, in principle,⁶⁴ to increase the factual scope of a case up until the confirmation hearing, either before the document containing the charges (the “DCC”) is presented to the Chamber or after the DCC has been submitted, in accordance with article 61(4) of the Statute. As Pre-Trial Chamber I explained in the *Mbarushimana* case:

There should be no requirement that the formulation of charges in the DCC strictly follow the factual and legal foundations of the warrant of arrest, especially in view of the fact that, in accordance with article 61(4) of the Statute and as the Appeals Chamber has held, the Prosecution can continue his investigations and amend or withdraw charges without the permission of the Pre-Trial Chamber prior to the confirmation hearing. (footnote omitted)⁶⁵

Indeed, the Prosecutor may be willing to do so in order, for example, to reflect fully the actual extent of victimisation in the face of allegations that the suspect has committed further crimes within the jurisdiction of the Court during the ten years he remained a fugitive.⁶⁶

33. In this context, the Defence’s argument of a “*sentiment de fragilité du dossier de l’Accusation*” is misplaced; any alleged weakness of the case against Mr. Ongwen cannot be inferred from the Prosecutor’s willingness to investigate (further) but is a matter to be decided at the confirmation hearing. The Defence argument that the Prosecutor may still request an amendment of the charges under article 61(9) of the Statute is equally not convincing. From a case management point of view, it is indeed preferable, whenever possible, to prepare properly the charging document or amend the charges prior to the confirmation hearing, and to assess the strength of the charges

⁶⁴ This entitlement is subject to the rule of speciality as enshrined in article 101 of the Statute. The Single Judge will refrain from pronouncing on whether this article is applicable in this case where the suspect has consented to appear voluntarily before the Court.

⁶⁵ Pre-Trial Chamber I, “Decision on the confirmation of charges”, 16 December 2011, ICC-01/04-01/10-465-Red, para. 88.

⁶⁶ See also, Pre-Trial Chamber II, Decision Establishing Principles on the Victims’ Application Process, 4 March 2015, ICC-02/04-01/15-205, paras 11 and 26.

altogether, than to amend charges after the hearing pursuant to article 61(9) of the Statute.⁶⁷

Date of the Confirmation Hearing

34. The Single Judge is of the view that the date of the confirmation hearing must be postponed on the basis of the considerations set out above. In deciding on the appropriate date, the Single Judge must consider also other factors, such as (i) the fact that the Court will move to its new permanent premises between 30 November and 11 December 2015 which will cause a certain degree of interruption in the work of the parties, participants and the Chamber; (ii) the availability of staff during winter Court recess (2015-2016); and (iii) the overall time schedule for the parties with regard to the presentation of evidence to the Chamber under rule 121 of the Rules.

35. The Prosecutor suggests that the commencement of the confirmation of charges hearing be scheduled for 31 January 2016.⁶⁸ Considering all abovementioned factors taken together, the Single Judge believes that the confirmation hearing should commence on Thursday, 21 January 2016.

36. This will provide the Prosecutor with sufficient time to prepare adequately for the confirmation hearing and to comply with her statutory obligations and the Chamber's instructions. In particular, the Single Judge considers this additional time to be sufficient for the Prosecutor to prepare necessary and sufficiently justified redaction proposals, seek the consent of information providers of evidence affected by confidentiality agreements under article 54(3)(e) of the Statute, follow the procedure regarding the translation of core pieces of evidence into Acholi as set by this Chamber

⁶⁷ In addition, the Single Judge is mindful of the temporal constraints emanating from article 61(9) of the Statute, as pronounced by the Appeals Chamber: "[Not] only the request to amend the charge has to be filed before the commencement of the trial, but also that the entire process of amending the charges must be completed by that time, including the granting of permission for the amendment by the Pre-Trial Chamber", Appeals Chamber, Decision on the Prosecutor's appeal against the 'Decision on the Prosecution's Request to Amend the updated Document Containing the Charges Pursuant to Article 61(9) of the Statute', 13 December 2013, ICC-01/09-01/11-1123 (OA6), para. 29.

⁶⁸ 31 January 2016 is a Sunday. The Single Judge assumes that the Prosecutor may have intended to propose the confirmation hearing to begin on Monday, 1 February 2016.

in the Disclosure Decision,⁶⁹ and disclose the evidence. This will also assist the Prosecutor to prepare the in-depth analysis chart, an auxiliary document which aims at assisting and streamlining the disclosure process, and which the Prosecutor has previously described as “helpful”.⁷⁰

37. Finally, the Single Judge cannot identify any prejudice to the rights of the Defence. In particular, due to the necessary work to be conducted by the Prosecutor as described above and the fact that only a 5-month postponement, as of the date provisionally set, is requested, the Single Judge is of the view that the suspect will still benefit from the right to be tried without undue delay, as guaranteed in article 67(1)(c) of the Statute.


FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **decides** to postpone the provisional date set for the commencement of the confirmation hearing;
- b) **decides** that the new date for the commencement of the confirmation of charges hearing is **Thursday, 21 January 2016**; and
- c) **orders** the Defence to submit a public redacted version of its Response by **Tuesday, 17 March 2015**.

⁶⁹ Pre-Trial Chamber II, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 27 February 2015, ICC-02/04-01/15-203, para. 35.

⁷⁰ Pre-Trial Chamber II, Transcript of Hearing, 10 February 2014, ICC-01/04-02/06-T-7-ENG, p. 38, line 18 to p. 39, line 2.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Friday, 6 March 2015

At The Hague, The Netherlands