

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-02/04-01/15  
Date: 6 November 2015

**PRE-TRIAL CHAMBER II**

**Before: Judge CunoTarfusser, Single Judge**

**SITUATION IN UGANDA**

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

**CONFIDENTIAL**

**Request to Postpone Confirmation of Charges Hearing**

**Source: Defence for Dominic Ongwen**

**Document 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, QC

**Counsel for the Defence**  
Krispus Ayena Odongo

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants**  
(Participation/Reparation)

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the Defence**  
Xavier-Jean Keïta

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**  
Herman Von Hebel

**Counsel Support Section**  
Pieter Vanaverbeke

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

## I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby requests the postponement of the Confirmation of Charges hearing scheduled to commence on 21 January 2015 in The Hague.

## II. CLASSIFICATION

2. Pursuant to Regulation 23*bis* of the Regulations of the Court read together with Regulation 24 of the Regulations of the Registry, the Defence submits this response as Confidential as it refers to a motion that was filed under the same classification.

## III. PROCEDURAL HISTORY

3. The provisional date for the confirmation hearing was originally set by the Single Judge of Pre-Trial Chamber II Judge Ekaterina Trendafilova for 24 August 2015.<sup>1</sup> The hearing was later postponed to 21 January 2016.<sup>2</sup>
4. Both the Defence and the Prosecution expressed their support for the possibility of holding the confirmation of hearing charges in Uganda pursuant to Rule 100(2) of the Rules of Procedure and Evidence ("Rules").<sup>3</sup>
5. After considering the Registry's preliminary assessment and the views of the parties, the Pre-Trial recommended to the Presidency that the confirmation of

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<sup>1</sup> ICC-02/04-01/05-T-10-ENG ET, p. 14, lns. 7-8.

<sup>2</sup> ICC-02/04-01/15-197.

<sup>3</sup> See ICC-02/04-01/15-264; ICC-02/04-01/15-265-Red.

charges hearing be held in Uganda.<sup>4</sup> The Presidency, however, decided that the confirmation of charges hearing is to be held in The Hague.<sup>5</sup>

#### IV. SUBMISSIONS

6. Rule 121(7) of the Rules provides that, *inter alia*, either party may move to postpone the date of the confirmation hearing. A request to postpone the date of the confirmation hearing is to be assessed “on the basis of the reasons advanced and in the light of the circumstances of each case”.<sup>6</sup> In particular, in assessing 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.”<sup>7</sup>
7. The Defence respectfully submits that the Confirmation of Charges hearing should be postponed to allow the Defence to properly prepare its case. As further elucidated below, the Defence submits that the following factors alone or collectively demonstrate good cause for postponing the Confirmation of Charges hearing: (i) the breadth of the intended charges in the indictment including the increased geographical scope; (ii) the volume of materials disclosed by the Prosecution; (iii) the inordinate amount of time spent preparing for the extraordinary proceedings ordered under Article 56 of the Statute; and (iv) the number of victims applications.<sup>8</sup>

##### (i) The Breadth of the Intended Indictment and Increased Geographical Scope

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<sup>4</sup>ICC-02/04-01/15-300.

<sup>5</sup>ICC-02/04-01/15-330, paras 24, 26-27.

<sup>6</sup> ICC-02/04-01/15-206, para. 25.

<sup>7</sup> ICC-02/04-01/15-206, para. 25, referring to ICC-01/04-02/06-73, para. 13 (with emphasis).

<sup>8</sup>See ICC-02/04-01/15-330, with references therein.

8. First, the Defence notes that the number of intended charges against Mr. Ongwen increased significantly from seven (7) to sixty-seven (67) counts.<sup>9</sup> In addition, the geographical scope increased from one (1) IDP Camp to four (4) IDP Camps and so did the modes of liability. Only since 18 September 2015 did it become aware of the additional charges relating to Pajule, Abok and Odek IDP camps and the additional modes of liability. This has placed exceptional demand on Defence and necessitates additional time for it to adequately prepare for the hearing. When the Defence gave the estimate of 4-5 months of investigations needed to prepare for new charges, it was based on the Prosecution's suggestion that it was only investigating crimes alleged at Pajule, child soldiers and SGBV.<sup>10</sup>

(ii) The Volume of Material Disclosed by Prosecution

9. It is further submitted that the single Judge should have due regard to the volume of material disclosed by the Prosecution when deciding the sufficiency of time that the Defence needs to prepare its case.

10. To date, Prosecution has disclosed 3968 items, including statements, intercept audios, videos, and reports among others. Of this are 42,101 pages of disclosure, of which an estimated 5,318 were collected after Mr. Ongwen's surrender. The Defence notes in this regard that it has had difficulty accessing disclosed material as has been communicated to the Prosecution on several occasions. This has resulted in the expense of significant resources to attend to matters concerning, *inter alia*, incorrect or missing metadata. In addition, many of the documents disclosed are handwritten, making the process of review difficult and time-consuming.

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<sup>9</sup> ICC-02/04-01/15-318-Conf.

<sup>10</sup> See ICC-02/04-01/15-T-6-ENG ET WT, pg 14 lns 7-16. See also ICC-02/04-01/15-191-Anx-Red, page 4 (noting the Prosecution stated that it was looking at crimes alleged in Pajule, SGBV and child soldiers.)

11. In addition, there are over 500 hours of audio/video materials, most of which is of poor quality and the record is in Luo. This has placed an exceptional burden on the few Luo speakers in the team.

12. The volume of material disclosed to date far exceeds that of any other case before the Court.<sup>11</sup> Mr. Ongwen has the right to know the case against him. In order to fulfil its professional obligations; the Defence is in the process of reviewing and analysing the materials disclosed and needs additional time to complete the task.

(iii) The Amount of Time Allocated to the Extraordinary Proceedings Ordered under Article 56 of the Statute

13. The Article 56 proceedings which have or are to take place in this case have resulted in the extraordinary diversion of a significant amount of resources required to prepare Mr. Ongwen's defence.

14. For instance, the impending Article 56 proceedings scheduled to take place on 9 November 2015, in which the Single Judge will hear the testimony of six (6) witnesses, has interrupted the investigation of the case and the scheduled work of numerous members of the Defence. As the Single Judge is aware, securing the appearance of some of the witnesses has required that the Defence expend significant time and resources. It follows that the defence has also diverted additional resources to prepare for the cross-examination of witnesses in Article 56 proceedings which is not the usual course of action at Pre-Trial.

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<sup>11</sup> The Defence also notes that Senior Prosecutor Mr Benjamin Gumpert, QC, met with the Defence in late March 2015 and informed Counsel and Assistant to Counsel that as long as his team could review everything in the Ugandan Case File, it would be disclosed to the Defence. At that time, there were 94,620 pages in the Uganda Case File.

15. The Defence additionally notes in this regard that two witnesses were heard by the Single Judge from 15 to 19 September 2015. This also necessitated the mobilisation of significant staffing resources which were earmarked for the investigation of the case and preparation for the confirmation of charges hearing. Additional resources have been mobilized to support the impending Article 56 proceedings to commence on 9 through 27 November 2015.
16. The diversion of staffing resources for this purpose is further compounded by factual realities in investigating a case in Uganda. For instance, the heavy rains have made some roads impassable, causing significant delays to the team and its work. The El Niño rains are expected to worsen as we get further into November. As such, the team is concerned that it will access to locations necessary for investigations. This is of concern to the Defence since investigations have been significantly hampered as a result of the proceedings.
17. While these matters may be ascribed, in part, to the internal organization of the Defence team, the extraordinary circumstances of this case demonstrate that the Defence could not have been reasonably expected to know that it would have to face extraordinary proceedings in relation to eight witnesses during the pre-trial stage of proceedings. The Defence contends that it has lost at least two (2) months of time, if not more. Two months postponement at the very least would therefore compensate for the time utilized for the Article 56 proceedings and is therefore a reasonable request in light of the circumstances.
18. The Defence notes that the postponement will not prejudice the parties. Noting that nearly ten per cent (10%) of all of the witnesses will have been already examined under Article 56 of the Statute prior to the confirmation of charges hearing, the

postponement requested by the Defence is reasonable and does not constitute undue delay within the meaning of article 67(1)(c) of the Statute.<sup>12</sup>

iv. The Number of Victim Applications for Participation

19. The Registrar transmitted to the Chamber and the parties 209 applications by victims to participate in the proceedings in the case on 18 September 2015<sup>13</sup> and further 336 applications on 26 October 2015.<sup>14</sup> It is submitted that the number of victim applications for participation have placed a further strain on the ability of the Defence team to prepare Mr. Ongwen's defence. The Registry has received at least 1,640 victim-participation applications.<sup>15</sup>

20. The Defence team reviewed the first set of 209 applications and provided its observations on 5 October 2015.<sup>16</sup> The Defence is currently undertaking the laborious task of reviewing the additional 336 applications transmitted on 26 October 2015 and reserves the right to raise its objections within time limit for parties' objections. The Defence similarly notes that these applications are handwritten and as a result require careful attention to ascertain contents.

21. Based on the significant number of charges, coupled with the extraordinary proceedings taking place and the number of applications for victim's participation, it is submitted that a postponement of the confirmation of charges hearing is necessary to safeguard Mr. Ongwen's right to prepare his defence.

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<sup>12</sup>The Defence acknowledges its filing of 6 March 2015 in which it opposed the Prosecution's request to postpone the confirmation of charges hearing. However, the circumstances have changed, thereby necessitating this request.

<sup>13</sup>ICC-02/04-01/15-303 and annexes.

<sup>14</sup>ICC-02/04-01/15-327 and annexes.

<sup>15</sup> ICC-02/04-01/15-327, page 4.



## V. REQUESTED RELIEF

22. For the reasons elaborated above, Defence respectfully requests the Single Judge to postpone the hearing for at least two months to allow Mr. Ongwen adequate time to prepare his case.

Respectfully submitted,



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Hon. Krispus Ayena Odongo  
On behalf of Dominic Ongwen

Dated this 6<sup>th</sup> day of November 2015

At Kamdini, Uganda