

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 2 December 2015

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN UGANDA

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

CONFIDENTIAL

Defence Request for Leave to Appeal "Decision on the Defence 'Request to Postpone Confirmation of Charges Hearing'" with Confidential Annex A

Source: Defence for Dominic Ongwen

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

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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 the 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**

I. INTRODUCTION

1. The Defence for Mr. Ongwen ('Defence') hereby seeks leave to appeal the "Decision on the Defence 'Request to Postpone Confirmation of Charges Hearing'" issued by the Single Judge on 26 November 2015 ("Decision").¹
2. It is respectfully submitted that the Single Judge failed to reasonably consider the factors presented by the Defence which *cumulatively* provide a reasonable basis to postpone the Confirmation of Charges Hearing ('Confirmation Hearing'). It is argued that the Single Judge erroneously considered the factors presented by the Defence in isolation, thereby ignoring the compounding issues which significantly affect the fair conduct of the proceedings. The need for immediate resolution is necessary since the issue involved *significantly affects* the fair conduct of proceedings.

II. CONFIDENTIALITY

3. 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 matters classified confidential.

III. PROCEDURAL HISTORY

4. The provisional date for the Confirmation Hearing had originally been set for 24 August 2015² but was later postponed to 21 January 2016.³

¹ ICC-02/04-01/15-348-Conf.

² ICC-02/04-01/05-T-10-ENG ET, p. 14, lns. 7-8.

³ ICC-02/04-01/15-197.

5. On 6 November 2015, the Defence filed its request to postpone the Confirmation Hearing by at least two months.⁴ The Prosecutor opposed the Request.⁵
6. On 26 November 2015 the Single Judge rejected the Request.⁶

IV. SUBMISSIONS

7. Article 82(1)(d) of the Statute provides that either party may appeal:

A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

8. In particular, leave to appeal is to be granted pursuant article 82(1)(d) of the Statute where the issue identified by the party significantly affects, *inter alia*, the fair conduct of the proceedings.⁷ In this regard, the object of this subparagraph (d) “is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.⁸
9. The Defence recalls in this regard that its request pursuant to Rule 121(7) of the Rules is to be assessed in relation to the *circumstances of each case*⁹ in order to ensure, *inter alia*, fairness.¹⁰ The Defence respectfully submits that the Single Judge failed to reasonably consider the cumulative circumstances in this case which do not allow it to prepare properly, and thus fairly, its defence.

⁴ ICC-02/04-01/15-336-Conf.

⁵ ICC-02/04-01/15-341-Conf.

⁶ ICC-02/04-01/15-348-Conf.

⁷ See e.g. ICC-01/11-01/11, para. 15.

⁸ ICC-01/04-168, para. 9.

⁹ ICC-02/04-01/15-206, para. 25.

¹⁰ ICC-02/04-01/15-206, para. 25, referring to ICC-01/04-02/06-73, para. 13 (with emphasis).

10. First, the Single Judge erred in finding that the abundance of disclosure received by the Defence “is a poor indicator of the complexity of the case and the work required.”¹¹ In particular, the Single Judge noted that “it is the responsibility of counsel to identify and select that evidence and information which needs to be focused on in order to advance the preparation of the case.” The Defence agrees with the Single Judge in principle that it is the responsibility of Counsel, and indeed that it is his responsibility to ‘identify and select that evidence’ which he deems necessary in preparation for the Confirmation Hearing. However, ascertaining relevancy is in itself a laborious task in light of the amount and types of evidence in this case. The Defence raises two issues in this regard.
11. The Single Judge noted that the volume of evidence in this case is comparable to other cases. In doing so, the Single Judge has failed to take into account that the present case is indeed the *largest* case before the Court. It is in this regard unreasonable to fail to consider the challenges that volume poses, especially in light of the type of evidence, which includes audio files that are at times inaudible or unclear.¹² One must review evidence in order to ascertain its relevancy.
12. Further, the issue of volume of evidence is compounded by the issue of missing or imprecise metadata. In particular, the metadata which is either at times missing or has been issued without specificity, has created an immense challenge in searching the evidence in Ringtail. This has resulted in delays in comprehensibly ascertaining, for instance, all of the evidence originating from one witness. Consequently, obtaining a complete understanding of the scope of the evidence requires additional work. If the Defence cannot easily search the evidence, it is inapposite to suggest that it can ascertain its relevancy. Poignantly,

¹¹ Decision, para. 7.

¹² The Defence notes that the Prosecutor disclosed 9,429 pages of evidence and 7 hours, 4 minutes and 32 seconds of A/V material pre-confirmation hearing in the Kenya 2 case (*see* ICC-01/09-02/11-655-AnxB, page 4), and the Defence in this case has received approximately 48,000 pages and 575 hours of A/V material.

the Prosecution stated that 72,490 pages were unsearchable or partly searchable.¹³ That is over 70% of the evidence in possession of the Prosecution.¹⁴

13. Second, the Single Judge unreasonably dismissed the Defence's assertion that it "lost at least two (2) months" as a result of the Article 56 proceedings. In particular, the Defence recalls that the Single Judge was aware of the efforts undertaken by the Defence, and the Prosecution, to secure the attendance of the witnesses in question. In relation to these efforts alone, the Defence cancelled 53 days of investigations.¹⁵

14. Moreover, the Single Judge also "noted that these proceedings have been concluded two months before the scheduled start of the confirmation of charges hearing".¹⁶ The Single Judge has further failed to take into account that "two-months" are necessary to address the breadth of the case, including the numerous modes of liability, crimes, and locations which all add to the breadth and complexity of the case. In addition, as one would expect, the passage of time often creates further challenges in investigating a case of this magnitude.

15. The Defence also agrees that the Article 56 proceedings form part of the work in the present case. However, it is unreasonable to suggest that the preparation for these proceedings, which are indeed *extraordinary* in nature, had no impact on the preparation for the Confirmation Hearing, especially in light of the volume of disclosure.

¹³ See ICC-02/04-01/15-191-Anx-Red, page 5.

¹⁴ Even if the Prosecution disclosed every searchable document, there would still be approximately 19,000 pages of unsearchable/partly searchable documents in the Defence's possession.

¹⁵ In total, the Defence spent 16 days for the first Article 56 proceedings for preparation, the hearing and travel. For the second Article 56 proceedings, the Parties were barred from talking to some of its witnesses, which canceled three (3) days of investigations; nine (9) days for the status conference, travel, and meeting with the witnesses to talk to see if they would testify in the second Article 56 proceeding; and 25 days for the second Article 56 proceeding, which includes travel and time scheduled for the hearing.

¹⁶ Decision, para. 8.

16. The Defence further agrees that the review of victims' applications is part of the normal course of its work. However, it is also unreasonable to view this factor in isolation. The abundance of applications compounds the issues already compounded by the magnitude of the case and the Article 56 proceedings.¹⁷ This factor was clearly acknowledged when the Single Judge granted the Defence request to extend the deadline for reviewing the hand-written applications.
17. The Defence notes that these matters are additionally compounded by insufficient staffing resources. The Defence most recently requested additional funds to meet the staffing needs pursuant to Article 83(3) of the Regulations for precisely the same reasons enumerated herein.¹⁸
18. It is submitted that the interests of justice demand the granting of leave to appeal since the issues identified directly relate to the fair conduct of the proceedings and the ability of the Defence to adequately prepare its case. In other words, the Defence is not in a position to adequately respond to the Prosecution's intended charges.
19. An immediate resolution by the Appeals Chamber would materially advance the proceedings because it would ensure that the rights of Mr. Ongwen are preserved thereby ensuring effective proceedings which do not result in needless litigation to protect his rights.

¹⁷ See ICC-01/09-02/11-200 (*noting* that the Kenya 2 case only had 249 Victim Participant Applications submitted before the Confirmation Hearing); *see also* ICC-01/09-01/11-92, ICC-01/09-01/11-142 and ICC-01/09-01/11-171 (*noting* that the Kenya 1 case only had 394 Victim Participant Applications submitted before the Confirmation Hearing). The Defence has received 1,208 Victim Participant Applications, and hundreds more are expected before the Confirmation Hearing. Of the newly disclosed 663, many are the old, long-form application.

¹⁸ See Confidential Annex A.

IV. RELIEF

20. In light of the foregoing, the Defence requests that the Single Judge grant this request for leave to appeal.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 2nd day of December 2015

At Lira, Uganda