

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/04-01/15
Date: 18 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

**Decision on the Defence request for leave to appeal the "Decision on the
Defence 'Request to Postpone Confirmation of Charges Hearing'"**

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

The Office of the Prosecutor

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Benjamin Gumpert

Counsel for the Defence

Krispus Ayena Odongo

Legal Representatives of the Victims

Joseph Akwenyu Manoba and Francisco
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Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
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**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**

Other

Judge Cuno Tarfusser, Single Judge exercising the functions of the Chamber in the present case, issues this decision on the Defence request filed on 2 December 2015 (ICC-02/04-01/15-360-Conf and -Red, the "Request") seeking leave to appeal the "Decision on the Defence 'Request to Postpone Confirmation of Charges Hearing'" (ICC-02/04-01/15-348-Conf and -Red, the "Decision").

1. The Decision, issued on 26 November 2015, disposed of the "Request to Postpone Confirmation of Charges Hearing" (ICC-02/04-01/15-336-Conf and -Red, "Request"), filed by the Defence on 6 November 2015 and supplemented orally on 23 November 2015 (ICC-02/04-01/15-T-19-CONF-ENG). In the Decision, the Single Judge rejected the request for postponement as he found that "the Defence is in position to properly prepare for the confirmation of charges hearing as currently scheduled and that none of the reasons put forward by the Defence, whether individually or cumulatively, warrant a postponement".

2. The Defence now seeks leave to appeal the Decision, arguing that the Single Judge erred in the disposal of the Defence arguments, in particular as concerns the volume of evidence in the present case, the time of Defence preparation lost as a result of the proceedings under article 56 of the Statute, and the number of victims' applications to which the Defence is entitled to respond.

3. The Prosecutor responded to the Request on 4 December 2015 (ICC-02/04-01/15-363-Conf and -Red). She argues that leave to appeal the Decision should be dismissed as the issues "apparently proposed for certification relate to a quintessential matter of case management – the timing of a hearing – and represent no more than a disagreement with the Decision" and, in any case, none of these issues meets the requirements of article 82(1)(d) of the Statute.

4. On 8 December 2015, Paolina Massidda, common legal representative of some participating victims, filed a response to the Request, in which she argues that the Request should be dismissed in its entirety on the ground that the purported issues as framed by the Defence constitute mere disagreements with the findings of the Single Judge in the Decision (ICC-02/04-01/15-364-Conf and –Red).

5. The Single Judge notes article 82(1)(d) of the Statute, rule 155 of the Rules of Procedure and Evidence, and regulation 65 of the Regulations of the Court, as well as the established case law of the Court in the matter of interlocutory appeals pursuant to article 82(1)(d) of the Statute.

6. At first, the Single Judge observes that the Defence, rather than identifying one or more issue(s) arising from the Decision that would meet the requirements of article 82(1)(d), effectively rehearses the very same arguments advanced in support of its original request to postpone the confirmation of charges hearing. The Defence states 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” (Request, para. 9). Therefore, it appears that the issue within the meaning of article 82(1)(d) of the Statute that the Defence intends to bring before the Appeals Chamber is effectively whether the Single Judge erred in not postponing the confirmation of charges hearing.

7. In proposing for appeal this general issue, the Defence raises a number of alleged errors made by the Single Judge in the Decision. In particular the Defence claims that the Single Judge failed to recognise that the present case is “the largest case before the Court”, that “missing or imprecise metadata” require “additional work”, that the Defence “cancelled 53 days of investigations” because of the article 56 proceedings, and that the

“abundance” of victims’ applications “compounds” the other issues. For the purpose of the present decision, the Single Judge finds it unnecessary to analyse the merits of the individual allegations of error in the Decision in detail, in regard of which the Defence in any case merely proposes rehearsals of previous arguments rejected in the Decision. Rather, it is sufficient to state that none of the errors alleged by the Defence concern the main considerations which led the Single Judge to reject the request for postponement of the confirmation of charges hearing, but rather revolve around peripheral and tangential matters which, even if eventually resolved in favour of the Defence, are not essential for the Single Judge’s ultimate decision, such that they would materially affect the decision not to postpone the confirmation hearing.

8. Notwithstanding the above, the Single Judge considers that the core question posed by article 82(1)(d) of the Statute in the present instance is whether, assuming that the hearing has wrongly not been postponed, the Defence is prejudiced in the exercise of its rights at the confirmation of charges hearing. Indeed, article 82(1)(d) of the Statute requires the Chamber to “ponder the implications of a given issue being wrongly decided” on the fairness and expeditiousness of the proceedings or the outcome of the trial, performing an “exercise [that] involves a forecast of the consequences of such an occurrence”.¹ The fact that, in the present instance, this question under article 82(1)(d) of the Statute is almost identical to the original question whether and for what reason to postpone the confirmation of charges hearing is irrelevant.

¹ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, paras 10 and 13.

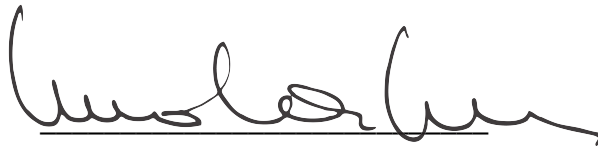
9. In the view of the Single Judge the answer to the above question is in the negative. The Defence has had ample time to prepare. It has been receiving disclosure of evidence for half a year, and it has known the content of the intended charges in quite some detail for three months. While the Defence could be able to perform additional investigative activities if it could dispose of two additional months, this does not mean that not to be able to perform these investigative activities in time for the confirmation of charges hearing amounts to prejudice. The confirmation of charges hearing has a limited object and purpose. In this regard, it is also relevant to note that the 30 day time period between the submission of the document containing the charges and the commencement of the confirmation of charges hearing will be respected. Taking into account all circumstances, the Single Judge is of the view that the Defence is in good position to arrive at the opening of the confirmation of charges hearing on 21 January 2016 fully prepared for this limited procedural step; and that the rejection of the request for two additional months, even if resulting from an erroneous consideration of the Defence arguments, does not hold the potential to affect in a significant way the fairness and expeditiousness of the proceedings or the outcome of the trial.

10. In sum, the proposed appeal does not concern an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The requirements of article 82(1)(d) of the Statute have not been satisfied.

FOR THESE REASONS, THE SINGLE JUDGE

REJECTS the Request.

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

A handwritten signature in black ink, appearing to read 'Cuno Tarfusser', written over a horizontal line.

Judge Cuno Tarfusser
Single Judge

Dated this 18 December 2015

At The Hague, The Netherlands