

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 5 January 2016

**PRE-TRIAL CHAMBER II**

**Before: Judge Cuno Tarfusser, Single Judge**

**SITUATION IN UGANDA**

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

**CONFIDENTIAL**

**Corrected Version of "Defence Request for Postponement of the Confirmation of Charges Hearing", ICC-02/04-01/15-385-Conf, filed on 30 December 2015**

**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**

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Benjamin Gumpert, QC

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**Legal Representatives of the Victims**

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Joseph Akwenyu Manoba  
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**Legal Representatives of the Applicants**

**Unrepresented Applicants**  
(Participation/Reparation)

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

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

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**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Herman Von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

Nigel Verrill

**Detention Section**

**Victims Participation and Reparations Section**    **Other**

## I. INTRODUCTION

1. The Defence for Mr. Ongwen ('Defence') requests that the Confirmation of Charges Hearing ('Confirmation Hearing') be postponed until mid-March due to: (i) the untimely disclosure by the Prosecution of over an additional 20,000 pages of evidence, which includes over 40 witnesses not previously disclosed, on 9 and 21 December 2015; and (ii) challenges accessing Court records and Ringtail in combination with the move. The Defence further reiterates its position stated in previously filings on this matter. It is respectfully submitted that the factors presented by the Defence *cumulatively* provide a reasonable basis to postpone the Confirmation Hearing.

## II. PROCEDURAL HISTORY

2. The provisional date for the Confirmation Hearing had originally been set for 24 August 2015<sup>1</sup> but was later postponed to 21 January 2016.<sup>2</sup>
3. On 6 November 2015, the Defence filed its request to postpone the Confirmation Hearing by at least two months.<sup>3</sup> The Prosecutor opposed the Request.<sup>4</sup>
4. On 26 November 2015 the Single Judge rejected the Request.<sup>5</sup>
5. On 2 December 2015, the Defence requested leave to appeal pursuant to Article 82(1)(d).<sup>6</sup> The Prosecution opposed the request,<sup>7</sup> and it was subsequently denied by the Single Judge.<sup>8</sup>

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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> ICC-02/04-01/15-336-Conf.

<sup>4</sup> ICC-02/04-01/15-341-Conf.

<sup>5</sup> ICC-02/04-01/15-348-Conf.

<sup>6</sup> ICC-02/04-01/15-360-Conf.

<sup>7</sup> ICC-02/04-01/15-363-Conf.

<sup>8</sup> ICC-02/04-01/15-373-Conf.

### III. CONFIDENTIALITY and URGENCY

6. Pursuant to Regulation 23bis(2) of the Regulations of the Court, the Defence files this request as confidential because it discusses an issue classified by the Single Judge as confidential. A public redacted version is filed concurrently. The Defence files this as urgent because of the proximity to the Confirmation Hearing and the closure of CMS from 25 December 2015 until 4 January 2016.

### IV. SUBMISSIONS

7. At the outset, the Defence recalls that it has informed the Single Judge in the abovementioned filings of the challenges it faces in properly responding to the Prosecutor's intended charges as a result of, *inter alia*, the Article 56 proceedings,<sup>9</sup> the abundance of evidence, much of which is either unsearchable or only partly unsearchable, as well as the number of victims' applications. The Defence reiterates its position, noting that these challenges are now compounded by:
  - (i) the untimely disclosure of additional evidence by the Prosecutor;
  - (ii) additional evidence to be disclosed by the Prosecutor in January 2016; and
  - (iii) challenges in accessing Court records as a result of the move and the holiday season.
8. It is submitted that the interests of justice require the postponement of the Confirmation Hearing in order to ensure the fair conduct of the proceedings and the ability of the Defence to adequately prepare its case.

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<sup>9</sup> 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. In total, the Defence spent sixteen (16) days preparing for the first Article 56 proceedings, the hearing itself and travel. For the second Article 56 proceedings, the Parties were barred from speaking to some of its witnesses, which resulted in the cancellation of three (3) days of investigations; nine (9) days for the status conference, travel, and meeting with the witnesses to ascertain whether they would testify in the second Article 56 proceeding.

9. First, since the beginning of December, the Prosecutor has disclosed 2,229 items, consisting of 20,686 pages of evidence as follows:

Disclosure Table for the Prosecution for the Month of December 2015

Date	Disclosure	Items	Pages
09/12/2015	Incrim – Pack 15	195	3594
14/12/2015	Rule 77 – Pack 9	377	4560
21/12/2015	Incrim – Pack 16	469	3582
21/12/2015	Rule 77 – Pack 10	1186	8945
21/12/2015	PEXO – Pack 5	2	5
Total		2,229	20,686

10. At the time of receiving this disclosure, our case manager was notified that the Prosecution intends to have further disclosures in January 2016. We recall in this regard that the Confirmation Hearing is scheduled for *21 January 2015*. The Defence cannot be reasonably expected to review this evidence on the heels of the Confirmation Hearing and be adequately prepared to defend Mr Ongwen.
11. Further, the Defence submits that this matter is compounded by the difficulties with metadata. The Defence notes in this regard that the evidence disclosed in December 2015 does not include the re-issuance 18 items of metadata, thereby confirming the Defence's position in previous filings that it has been unable to properly search and therefore ascertain the relevancy of the abundance of evidence disclosed by the Prosecutor. The Defence also draws the Single Judge's attention to UGA-OTP-0241-0565 and UGA-OTP-0241-0566. These documents are titled as annexes, but that are not attached to a source document. Furthermore, all of the photographs received from OTP-0009 in this disclosure have the same main date. There are hundreds of photographs. This is merely one of many issues

which the Defence consistently deals with *inter partes* with the Prosecution dealing with incorrect or missing metadata.

12. In relation to the most recent disclosure of December 2015,<sup>10</sup> 112 documents are unsearchable because they are handwritten or contained combined data, 98 documents are searchable and 2 documents are partly searchable. If the Defence cannot properly search through the evidence, it is unreasonable to suggest that it can ascertain its relevancy. Given the experiences faced with disclosure, the Defence further fears that it will face similar challenges with the additional evidence to be disclosed by the Prosecutor on the heels of the Confirmation Hearing.

13. As the Single Judge is acutely aware, the Defence has reviewed 2,048 victims' applications. The sheer number of applications has resulted in a detrimental diversion of staffing resources which were to be dedicated to reviewing evidence. The Defence notes that the number of applications is significant since it has had to carefully review each and every application, all of which are handwritten.

14. Finally, the Defence notes that many of its team members could not access Court records or ringtail during the move and the holiday season,<sup>11</sup> including Mr Ongwen's connection, which will not be fixed until 4 January 2016.<sup>12</sup> This matter was compounded by the fact that the Registry was closed during the holidays. This matter could not, therefore, be resolved in a timely manner. The Defence has

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<sup>10</sup> Prosecution Pre-Confirmation Incrim Pack 16 of 21 December 2015. Also with the package are 257 photographs and audio/video material, almost all of which are missing material metadata.

<sup>11</sup> As of today, Ms Abigail Bridgman does not have access to her ICC virtual desktop through Citrix and has not since the move. Her and Ms Anzovino have had issues with access to the ICC server both in and out of the office during the month of December. Mr Obhof backs everything up on a protected external hard drive because he is in Uganda and internet access is not guaranteed, but was not able to access much of the material disclosed on 21 December 2015 from the 26<sup>th</sup> to the 28<sup>th</sup> of December. His drive only contains material disclosed before 27 November 2015 though.

<sup>12</sup> The Defence would like to thank Mr Tjonk and Mr Craig of the ICC-DC for looking into this matter during the Holiday Season. The Defence was informed that it was a technical error directly caused by the move.

lost significant time as a result in conjunction with the move which severely hampered the functioning of the Court and therefore our team.

#### IV. RELIEF

15. In light of the foregoing, the Defence requests that the Single Judge grant the Defence's request to postpone the Confirmation Hearing until mid-March in order to ensure and protect Mr Ongwen's right to a fair trial.

Respectfully submitted,



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Hon. Krispus Ayena Odongo  
On behalf of Dominic Ongwen

Dated this 5<sup>th</sup> day of January 2016

At Kampala, Uganda