

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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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  
With Confidential Annex A**

**Prosecution's response to the Defence Request for Postponement of the  
Confirmation of Charges Hearing**

**Source: The Office of the Prosecutor**

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

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Section**

## Introduction

1. The Prosecution hereby responds to the Defence Request for Postponement of the Confirmation of Charges Hearing submitted on 30 December 2015<sup>1</sup> ("Second Defence Request for Postponement"). The Defence requests a postponement until mid-March 2016 on the basis of:
  - a) the allegedly untimely disclosure of Prosecution evidence in December 2015;<sup>2</sup>
  - b) additional evidence scheduled to be disclosed by the Prosecution in January 2016;<sup>3</sup>
  - c) challenges regarding access to Court records and Ringtail;<sup>4</sup>
  - d) other factors already cited in the Defence's prior request for postponement.<sup>5</sup>
2. Points a), b) and d) above do not justify a postponement of the confirmation hearing.
3. Regarding point c) above, the Prosecution is not in a position to assess the existence or extent of the disruption to the Defence's workflow. If lack of access has caused a significant reduction in the preparation time available to the Defence, the Prosecution does not object to a postponement of the confirmation hearing for a period that is proportionate to the time lost.

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<sup>1</sup> ICC-02/04-01/15-385-Conf.

<sup>2</sup> Second Defence Request for Postponement, para.1.

<sup>3</sup> *id.*, para.7.

<sup>4</sup> *id.*, paras.1, 14.

<sup>5</sup> *id.*, para.7.

### Confidentiality

4. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, this document is designated as “confidential” since it responds to a document bearing the same classification. A redacted version will be filed shortly.

### Procedural history

5. During Dominic Ongwen’s initial appearance on 26 January 2015, the date for the confirmation hearing was set for 24 August 2015.<sup>6</sup> On 6 March 2015, the hearing was postponed to 21 January 2016.<sup>7</sup> On 18 September 2015, the Prosecution provided notice of the charges it intended to bring against Dominic Ongwen (“Notice of Charges”).<sup>8</sup>
6. On 6 November 2015, the Defence filed its request to postpone the confirmation hearing by at least two months (“First Defence Request for Postponement”).<sup>9</sup> On 26 November 2015 the Single Judge rejected the First Defence Request for Postponement (“Decision Rejecting the First Request”).<sup>10</sup> On 2 December 2015, the Defence requested leave to appeal the Decision Rejecting the First Request.<sup>11</sup> Leave to appeal was denied by the Single Judge on 18 December 2015.<sup>12</sup>
7. On 21 December 2015, the Prosecution submitted the document containing the charges against Dominic Ongwen (“DCC”), the pre-confirmation brief (“PCB”) and the list of evidence (“LoE”).<sup>13</sup>

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<sup>6</sup> ICC-02/04-01/05-T-10-ENG ET, p. 14, lns. 7-8.

<sup>7</sup> ICC-02/04-01/15-206.

<sup>8</sup> ICC-02/04-01/15-305-Conf.

<sup>9</sup> ICC-02/04-01/15-336-Conf.

<sup>10</sup> ICC-02/04-01/15-348-Conf.

<sup>11</sup> ICC-02/04-01/15-360-Conf.

<sup>12</sup> ICC-02/04-01/15-373-Conf.

<sup>13</sup> ICC-02/04-01/15-375.

8. On 30 December 2015, the Defence submitted the Second Defence Request for Postponement.<sup>14</sup>

### Submissions

9. The Prosecution addresses the Defence arguments regarding allegedly untimely disclosure in December 2015, additional disclosure scheduled for January 2016, challenges regarding access to Court records and Ringtail and other factors already cited in the Defence's prior request for postponement, in turn, below.

#### I. The alleged untimely disclosure in December 2015

##### *Volume of disclosure*

10. The Defence refers to the Prosecution's "untimely" disclosure of evidence in December 2015. Even taking this argument at its highest, it does not constitute a valid ground for postponement. While the Prosecution disclosed a large number of items in December, it is unclear how this could have taken the Defence by surprise. The Defence has been aware of the general scope of material earmarked for disclosure since at least March 2015.<sup>15</sup> The Defence adds that the Prosecution disclosed over 40 witnesses "*not previously disclosed*" in December.<sup>16</sup> This is incorrect. Material relating to 20<sup>17</sup> of these 40 witnesses had already been disclosed before December, some as far back as 15 May 2015.<sup>18</sup>
11. In any case, the Prosecution does not intend to rely on the majority of the material disclosed in December 2015 for the purposes of the confirmation hearing.

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<sup>14</sup> ICC-02/04-01/15-385-Conf.

<sup>15</sup> ICC-02/04-01/15-336-Conf, fn 11.

<sup>16</sup> Second Defence Request for Postponement, para.1. Emphasis added.

<sup>17</sup> UGA-OTP-P-0003, UGA-OTP-P-0008, UGA-OTP-P-0009, UGA-OTP-P-0027, UGA-OTP-P-0032, UGA-OTP-P-0036, UGA-OTP-P-0038, UGA-OTP-P-0052, UGA-OTP-P-0054, UGA-OTP-P-0059, UGA-OTP-P-0060, UGA-OTP-P-0084, UGA-OTP-P-0126, UGA-OTP-P-0142, UGA-OTP-P-0200, UGA-OTP-P-0205, UGA-OTP-P-0224, UGA-OTP-P-0240, UGA-OTP-P-0245, UGA-OTP-P-0274.

<sup>18</sup> See Annex A.

Only 184 items (amounting to 3715 pages) disclosed in December feature on the Prosecution's LoE. This amounts to less than 10% of the items on the LoE.<sup>19</sup> Hence, the volume of disclosure carried out in December 2015 is of little relevance. As noted by the Single Judge in the First Decision on Postponement "the mere volume of evidence as such is a poor indicator of [...] the work required."<sup>20</sup>

12. The Single Judge added in the same decision that "it is the responsibility of counsel to identify and select that evidence and information which needs to be focused on".<sup>21</sup> In this context, in the PCB, the Defence now has an extensively footnoted tool with which to navigate through the disclosed evidence. Indeed, the PCB contains detailed submissions on the evidence: it identifies the relevance of individual items of evidence, and also identifies the precise location of the relevant information. Notably, the Defence has received the PCB almost a month prior to the actual deadline for filing the PCB.<sup>22</sup>

*Metadata and related issues*

13. The Defence refers to the "re-issuance of what appears to be over 700 items of metadata"<sup>23</sup> in December which apparently confirmed the Defence's position that it had been "unable to properly search [...] the abundance of evidence disclosed".<sup>24</sup> This is incorrect. As now conceded by the Defence,<sup>25</sup> further examination shows that metadata was only re-issued for 18 items in December. Additionally, according to the Defence, since 112 of the documents disclosed most recently in December 2015 are unsearchable, and 2 others partly

<sup>19</sup> The LoE is comprised of 1,847 items. See ICC-02/04-01/15-375-Conf-AnxD.

<sup>20</sup> ICC-02/04-01/15-348-Conf, para. 7.

<sup>21</sup> *Ibid.*

<sup>22</sup> Rule 121(3).

<sup>23</sup> Second Defence Request for Postponement, para.11.

<sup>24</sup> *Ibid.*

<sup>25</sup> Email from Mr Obhof to the Single Judge, 04 January 2016 at 15:56.

unsearchable, it “cannot properly search through the evidence”<sup>26</sup> and is unable to “ascertain its relevancy”.<sup>27</sup> This argument too is unsustainable, since each item is disclosed with accompanying metadata and with references to the location (e.g. page number) of relevant information.

14. The Defence also identifies two items titled as annexes with a purportedly missing source document.<sup>28</sup> Such isolated examples do not constitute a valid ground for postponement. The appropriate course of action here is to liaise *inter partes* in order to resolve any pending metadata and other issues related to any particular item of evidence. Indeed, the Prosecution has already provided the Defence with the identity of the relevant source document.<sup>29</sup>

## II. Disclosure due in January 2016

15. The Defence makes reference to disclosure by the Prosecution scheduled for January 2016 and argues that it “cannot be reasonably expected to review this evidence on the heels of the Confirmation Hearing and be adequately prepared to defend Mr Ongwen”.<sup>30</sup> These Defence submissions appear to be based on a misunderstanding of the nature of the disclosure scheduled for January 2016. The Prosecution does not intend to rely on the evidence to be disclosed in January 2016 for the purposes of the confirmation hearing. The disclosure scheduled for January is merely a standard practice in fulfilment of the Prosecution’s continuing disclosure obligations. Such disclosure is unexceptional and will continue for the duration of the proceedings against Dominic Ongwen.

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<sup>26</sup> Second Defence Request for Postponement, para. 12.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Id.*, para. 11.

<sup>29</sup> Email from Ms Adesola Adeboyejo to Mr Obhof, on 4 January 2016 at 13:32.

<sup>30</sup> Second Defence Request for Postponement, para.10.

16. The only materials to be disclosed in January 2016 that will feature at the confirmation hearing are visual aids such as PowerPoint presentations, annotated structure charts, timelines etc. These visual aids will only be used for illustrative purposes, and the Prosecution does not intend to rely on them as evidence for the purposes of the confirmation hearing.

### III. Challenges accessing Court records and Ringtail

17. The Defence refers to alleged challenges regarding accessing Court records and Ringtail during the month of December 2015.<sup>31</sup> The Prosecution is not in a position to assess the existence or extent of the disruption to the Defence's workflow. This is a matter for the Registry. The Prosecution accepts, however, that if the access issues have significantly disrupted the preparation of the Defence, then additional time should be allocated to compensate for the disruption.

### IV. Reiteration of issues raised in the First Defence Request for Postponement

18. The Defence "reiterates its position"<sup>32</sup> regarding the impact of the article 56 proceedings, the abundance of evidence, and the number of victims' applications. These factors do not constitute valid grounds for postponement. They have been considered and rejected by the Single Judge in the Decision Rejecting the First Request<sup>33</sup>. The Defence has already sought and failed to obtain leave to appeal this decision. The Defence cannot use the Second Defence Request for Postponement as a vessel to re-litigate these issues.

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<sup>31</sup> Second Defence Request for Postponement, paras.1,14.

<sup>32</sup> First Defence Request for Postponement, para 7.

<sup>33</sup> ICC-02/04-01/15-348-Conf.

### Conclusion

19. In light of the foregoing, the Prosecution submits that points a), b) and d) cited in paragraph 1 above do not justify a postponement of the confirmation hearing.
20. However, regarding point c) in the same paragraph, if lack of access to Court records and Ringtail has caused a significant reduction in the preparation time available to the Defence, the Prosecution does not object to a postponement of the confirmation hearing for a period that is proportionate to the time lost.



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Fatou Bensouda,  
Prosecutor

Dated this 5<sup>th</sup> day of January 2016  
At The Hague, The Netherlands