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No.: ICC-02/04-01/15
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PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN UGANDA

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

Public

Decision on requests to postpone the hearing on the confirmation of charges

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

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Joseph Akwenyu Manoba and Francisco
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Other

Judge Cuno Tarfusser, Single Judge exercising the functions of the Chamber in the present case, issues this decision on the requests for postponement of the hearing on the confirmation of charges against Dominic Ongwen submitted by the Defence on 30 December 2015, and by Joseph Akwenyu Manoba and Francisco Cox on behalf of some participating victims in the case filed on 4 January 2016.

1. Dominic Ongwen was surrendered to the Court on 16 January 2015. On 26 January 2015, he made his first appearance before the Pre-Trial Chamber, where the date for the commencement of the confirmation of charges hearing was set at 24 August 2015 ([ICC-02/04-01/15-T-4-ENG](#)). This date was subsequently postponed to 21 January 2016 on request of the Prosecutor ([ICC-02/04-01/15-206](#)).
2. On 6 November 2015 (ICC-02/04-01/15-336-Conf and [-Red](#)), the Defence requested the postponement of the confirmation hearing by “at least two months”, on the basis of a combination of factors which were considered and rejected by the Single Judge on 26 November 2015 (ICC-02/04-01/15-348-Conf and [-Red](#)).
3. On 30 December 2015, the Defence filed a second request for postponement of the confirmation hearing “until mid-March” on the basis of: (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 access Court records and Ringtail in combination with the move”. The Defence argues that these factors, cumulatively with those relied upon for its first request for postponement in November 2015, provide a reasonable basis to postpone the confirmation of charges hearing (ICC-02/04-01/15-385-Conf-Corr and [-Red-Corr](#), the “Defence Request”).

4. The Prosecutor responded to the Defence Request on 5 January 2016 (ICC-02/04-01/15-389-Conf). She argues that the factors raised by the Defence, even in combination with those relied upon before, do not justify a postponement of the confirmation hearing, save, potentially, for the alleged challenges regarding access to Court records and Ringtail. In this regard, the Prosecutor submits that she is not in position to assess the existence or extent of the disruption to the Defence's workflow, and that she would not object to a postponement of the confirmation hearing for a period that is proportionate to the time lost "if lack of access to Court records and Ringtail has caused a significant reduction in the preparation time available to the Defence".

5. Paolina Massidda, common legal representative of 592 victims participating in the present case, responded to the Defence Request on 5 January 2016 (ICC-02/04-01/15-388). She requests the Single Judge to dismiss the Defence Request arguing that the Defence does not raise any valid arguments or show any valid reasons which could justify a postponement of the confirmation hearing. She also stresses that victims expect expeditious proceedings and that some of her clients with whom she entered in contact since her appointment indicated their hope that the confirmation of charges hearing proceeds as scheduled since they have expected justice to be done for more than ten years.

6. Joseph Akwenyu Manoba and Francisco Cox, legal representatives of the other participating victims, support the postponement of the confirmation of charges hearing on two distinct grounds (ICC-02/04-01/15-387, 4 January 2016). On the one hand, they argue that the reasons given by the Defence justify that the confirmation hearing be postponed as requested. On the other hand, they submit that the confirmation hearing should be postponed also because, as of 4 January 2016, they have not been provided with access to the evidence in the case, the confidential case file, and the application forms

submitted by their clients. As far as these latter arguments are concerned, the Single Judge considers that the legal representatives of victims' filing is effectively a request on their part for postponement of the confirmation of charges hearing.

The request for postponement by the Defence

7. Rule 121(7) of the Rules of Procedure and Evidence provides for postponement of the confirmation of charges hearing, either on request by either party or *proprio motu* by the Chamber. This allows for the calendar of the proceedings to be adapted to changed circumstances and the legitimate needs of the parties. The Defence Request is therefore, in principle, admissible. Nonetheless, the Single Judge considers that the reasons put forward by the Defence, even in combination with the issues that have previously been raised and considered by the Single Judge in connection to the first request for postponement of the confirmation hearing, do not indicate that the Defence is not in position to properly prepare for the confirmation of charges hearing as currently scheduled and, therefore, do not warrant the requested postponement.

8. First, the Single Judge considers unpersuasive the Defence argument that the confirmation hearing must be postponed due to the "untimely" disclosure of evidence by the Prosecutor. The confirmation of charges hearing has a limited scope and purpose, that is to determine whether a trial on the charges presented by the Prosecutor against the suspect is warranted. Rule 121(3) of the Rules provides that the Prosecutor shall disclose the evidence on which she intends to rely for the purpose of the confirmation hearing at least 30 days before the commencement of the hearing. The concerned disclosure of evidence on the part of the Prosecutor took place within this time limit, which is presumed sufficient for the preparation of the Defence. The Single Judge

sees no abuse or bad faith on the part of the Prosecutor in the disclosure of a large amount of items in December 2015, within the relevant time limit provided for by the Rules. For one, this amount does not appear disproportionate compared to previous disclosures as it is comparable in size with previous batches of disclosure to the Defence made on a rolling basis throughout the months leading to the confirmation hearing. Also, as observed by the Prosecutor in her response to the Defence Request, only 184 items (amounting to 3715 pages) that were disclosed in December 2015 actually appear in the Prosecutor's list of evidence under rule 121(3) of the Rules and these items constitute less than 10% of the items on the list of evidence. While these last disclosures do concern evidence relevant to the case, they do not significantly expand the evidentiary basis on which the Prosecutor relies for the confirmation hearing, and thus do not significantly affect the Defence's ability to prepare for the commencement of the hearing on 21 January 2016. The same must be said of the evidence which may be disclosed in the following weeks pursuant to disclosure obligations independent of the confirmation of charges proceedings, in particular under article 67(2) of the Statute and rule 77 of the Rules.

9. In addition, the Single Judge reiterates that "the mere volume of evidence as such is a poor indicator of the complexity of the case and the work required" and 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" (ICC-02/04-01/15-348-Conf and [-Red](#)). In this context, the Single Judge agrees with the Prosecutor that the filing of the "Pre-confirmation brief" on 21 December 2015 (ICC-02/04-01/15-375-Conf-AnxC) greatly assists the Defence in its work in that it identifies the relevance of individual items of evidence and the precise location of the relevant information within the concerned item of evidence on which the Prosecutor

relies in support of her factual allegations. Irrespective of discrete problems with the metadata of a limited number of items of evidence or isolated instances of technical issues with respect to particular items of evidence, which should be addressed *inter partes*, the Single Judge is therefore of the view that the amount of disclosure of evidence effected by the Prosecutor in December 2015 does not prejudice the Defence ability to properly participate in the confirmation of charges hearing on 21 January 2016.

10. The Single Judge observes the Defence additional argument that “many of its members could not access Court records or ringtail during the move and the holiday season” (para. 14). In particular, the Defence claims that two of its case managers “have had issues with access to the ICC server both in and out of the office during the month of December” and that an assistant to counsel “was not able to access much of the material disclosed on 21 December 2015 from the 26th to the 28th December” (footnote 11). Prompted by these submissions, the Single Judge has sought more information from the Registry in order to determine whether the Defence work has indeed been hampered to an extent that would warrant the postponement of the confirmation hearing.

11. The information provided by the Registry does not, however, support the Defence claim. In particular, the access logs to the relevant software indicate normal activities on the part of some members of the Defence in the period concerned, while, according to the same access logs, other members of the Defence did not make any attempt to access the Court server during the same period. In addition, any general disruptions which occurred within the Court in connection with the move to the permanent premises and affected the entirety of its operations and not only the Defence of Dominic Ongwen, were limited to a total of two or three days in the first half of December 2015. Furthermore, the Single Judge considers it dispositive that as confirmed by

the Registry, the Defence, while now claiming significant prejudice as a result of technical problems affecting its members' ability to access Court records and/or Ringtail, has at no point contacted the competent services of the Registry for any such matters to be looked into and resolved. The fact that at the same time the Defence contacted the Registry services in relation to a different matter, *i.e.* Dominic Ongwen's connection to a PC in the Detention Centre, shows that it had the technical means and knew the proper procedures to do so.

12. Therefore, this argument not only does not justify in itself the postponement of the confirmation hearing, but is not even suitable to be taken into account as a relevant factor compounding the other difficulties raised by the Defence in support of its request for postponement.

13. In light of the above, and recalling the Single Judge's disposal of the other matters in decision ICC-02/04-01/15-348-Conf (and [-Red](#)) of 26 November 2015 (for which leave to appeal was sought by the Defence, and denied, see ICC-02/04-01/15-373-Conf and [-Red](#)), the Single Judge concludes that there exists no valid ground for the postponement of the hearing on the confirmation of charges and that the holding of the hearing as scheduled does not prejudice Dominic Ongwen's right to prepare its defence.

The request for postponement by the legal representatives of victims

14. As recalled above, Joseph Akwenu Manoba and Francisco Cox, on behalf of 1,434 victims participating in the present case, request that the confirmation of charges hearing be postponed on the ground that, as of 4 January 2016, they remained without access to the evidence in the case, the confidential case file and the applications for participation in the proceedings submitted by their clients.

15. While rule 121(7) of the Rules does not explicitly provide the participating victims with a right to request the postponement of the confirmation of charges hearing, the Single Judge considers the request of the legal representatives admissible under the general right of victims to approach the Chamber in writing on issues affecting their interests (see ICC-02/04-01/15-350, para. 33 and p. 21).

16. The Single Judge has inquired with the Registry also about the issues raised by the legal representatives. While the legal representatives should have been provided with electronic access to all relevant material since 11 December 2015 (date of the acknowledgment of their appointment by the Registry), they were indeed unable to access confidential material because they were not sent their RSA cards which would enable them to securely access confidential documents in the record, including evidence. While unfortunate, the Single Judge considers that this fact does not justify the postponement of the confirmation hearing. Given that the problem appears now to have been resolved, and that the legal representatives were in any case provided access in hard copy to the most relevant procedural documents for the confirmation hearing (namely, the document containing the charges against Dominic Ongwen, the pre-confirmation brief and the Prosecutor's list of evidence), the Single Judge concludes that the legal representatives of victims will be fully able to participate meaningfully at the confirmation of charges hearing performing the role attributed to the victims within the Court's procedural system.

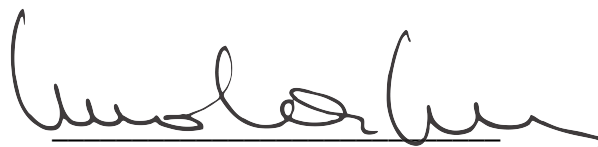
17. Finally, the Single Judge notes the legal representatives' argument concerning their inability, to date, "to obtain independent funding for their work" and that "the absence of legal aid from the Court" have affected their ability to consult with their clients. A remark to the same effect has been made by the legal representatives in filing ICC-02/04-01/15-395 of 8 January 2016.

The Single Judge considers that any such argument is not only misplaced in the context of seeking a postponement of the confirmation hearing, but, more importantly, is concerning as regards the counsel's ability to provide legal representation as per their mandate. The fact that counsel cannot be paid by the Court follows from the plain reading of rule 90(5) of the Rules, and in any case was stated explicitly by the Single Judge as early as 27 November 2015 (ICC-02/04-01/15-350, para. 18). The Single Judge also reminds counsel that, under article 13(2)(b) of the Code of Professional Conduct for counsel, they have a duty to refuse a representation agreement if they are incapable of dealing with the matter diligently. In any case, if counsel are unable to properly represent the victims who have chosen them, the Single Judge expects them to inform him promptly, so that he can take measures in the interests of justice, as provided for in regulation 80 of the Regulations of the Court.

FOR THESE REASONS, THE SINGLE JUDGE

REJECTS the requests for postponement of the hearing on the confirmation of charges against Dominic Ongwen.

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 12 January 2016

At The Hague, The Netherlands