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PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

SITUATION IN UGANDA

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

Public

Public redacted version of “Prosecution’s Application for Postponement of the Confirmation Hearing”, 10 February 2015, ICC-02/04-01/15-196-Conf-Exp

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I. Introduction

1. Dominic Ongwen eluded arrest since the issuance of a warrant for his arrest in 2005. He finally appeared before the International Criminal Court in 2015. As a result, the Office of the Prosecutor ("Prosecution") is now re-animating a case that has lain dormant for almost a decade. In light of the time the case has spent in hibernation, the provisional date set for the confirmation hearing, of 24 August 2015,¹ is too soon. The Prosecution proposes the alternate date of 31 January 2016.²
2. The fact that Dominic Ongwen remained a fugitive for so many years is a key consideration for the purposes of this application. In the *Ntaganda* case, the Single Judge found that the period from April 2008, when the arrest warrant for Bosco Ntaganda was made public, until his initial appearance in March 2013, which amounts to about five years, was a lengthy period of time that might result in the "dormancy" of the case³ and that warranted a postponement of the confirmation hearing.⁴ In the case of Dominic Ongwen, the period elapsed between the public issuance of a warrant and time of surrender is roughly double that in *Ntaganda*. Moreover, as in *Ntaganda*, the Prosecution could not have predicted, and therefore prepared for, the surrender of Dominic Ongwen since he was not captured as part of a pre-planned arrest operation.⁵
3. In these circumstances a postponement is necessary for the Prosecution to fulfil the following statutory duties:

¹ ICC-02/04-01/05-T-10-ENG ET, p. 14, lns. 7-8.

² Pursuant to rule 121(7) of the Rules of Procedure and Evidence which provides that "[t]he Prosecutor [...] may ask the Pre-Trial Chamber to postpone the date of the confirmation hearing."

³ ICC-01/04-02/06-73, para. 20.

⁴ ICC-01/04-02/06-73, para.48.

⁵ See similar observations by the Single Judge in *Ntaganda*, ICC-01/04-02/06-73, para. 28.

4. *Firstly*, the duty under article 67(2) of the Rome Statute (“Statute”) and rule 77 of the Rules of Procedure and Evidence (“Rules”) to adequately review all materials in its collection for the purposes of disclosure to the Defence. Disclosure review in this case will take one year. 17791 items (94620 pages), as well as any evidence collected in the future, will have to be reviewed at the rate of 50 pages per day per person with ten reviewers working full-time. Once items are identified for disclosure, the Prosecution will also have to seek redactions to ensure the security of victims, witnesses and on-going investigations.
5. *Secondly*, the duty under article 68 towards victims and witnesses who were interviewed many years ago and who need to be contacted regarding the disclosure of their statements and to assess their security situation. At a minimum, the Prosecution will have to re-contact and assess 32 core Prosecution witnesses. If any of the other approximately 140 witnesses interviewed by the Prosecution are of article 67(2) or rule 77 relevance, they will also have to be contacted and their security assessed.
6. *Thirdly*, the duty under article 54(1)(a) to seek to establish the truth via a comprehensive investigation and to investigate incriminating and exonerating circumstances equally. Potential witnesses have to be located and interviewed, especially if previously interviewed witnesses are now unavailable. Large tranches of intercept evidence have to be further analysed. [REDACTED].
7. *Fourthly*, the duty under rule 76(3) to provide materials in a language that Mr. Ongwen fully understands and speaks. This will require a significant number of documents to be translated into Acholi, and so will require the vetting and hiring of Acholi language staff.

8. *Fifthly*, the duty under article 54(3)(e), to seek consent from providers for lifting of conditions once materials relevant for disclosure have been identified. The lifting of article 54(3)(e) restrictions has to be negotiated with multiple providers with regard to a significant number of documents.
9. No prejudice arises for the Defence. The fulfilment of these statutory duties are as important for the Defence as they are for the Prosecution, since they are aimed at providing comprehensive, timely disclosure to the Defence. In these circumstances, the postponement requested by the Prosecution is reasonable⁶ and does not constitute undue delay within the meaning of article 67(1)(c).

II. Request for confidentiality

10. Pursuant to regulation 23*bis* of the Regulations of the Court ("RoC"), the Prosecution requests that this filing be received by the Single Judge as "confidential, *ex parte*" because it refers to information that is subject to the same classification. Confidential and Public redacted versions will be filed shortly.

III. Background

11. On 8 July 2005, Pre-Trial Chamber II issued the Decision on the Prosecutor's Application for Warrants of Arrest under article 58⁷ and the

⁶ For example, in the *Ntaganda* case the relevant period for comparison is from the initial appearance on 26 March 2013 to the beginning of the confirmation hearing on 10 February 2014. See ICC-01/04-02/06-73. See further ICC-01/04-01/06-126, ICC-01/04-01/06-454 and 521, ICC-02/11-01/11-152.

⁷ ICC-02/04-01/05-1-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005.

warrant of arrest for Dominic Ongwen.⁸ On 16 January 2015, Dominic Ongwen⁹ was handed over to the International Criminal Court.¹⁰ On 26 January 2015, Dominic Ongwen appeared (“Initial Appearance”) before the Single Judge of Pre-Trial Chamber II Judge Ekaterina Trendafilova (“Single Judge”). At the Initial Appearance, the Single Judge provisionally set the date of the confirmation of charges hearing for 24 August 2015.¹¹

12. [REDACTED]^{12 13 14}

IV. Submissions

13. Given the many years Dominic Ongwen eluded arrest and the resulting dormancy of the case against him, the Prosecution requests a reasonable extension of time to carry out its statutory duties. The Prosecution will discuss each of these duties below.

Disclosure

14. At the time the application for the issuance of warrants against Dominic Ongwen and several others was made, the Prosecution carefully analysed the evidence in its possession. However, this was followed by nearly a decade of dormancy. No litigation that would have triggered a review of the Uganda collection took place. Neither was there a related case that progressed to a stage where disclosure review would be necessary. In any event, the Prosecution could not carry out a disclosure review focussed on

⁸ ICC-02/04-01/05-10, reclassified as public pursuant to Pre-Trial Chamber II’s instruction dated 28 January 2015. See also ICC-02/04-01/05-57.

⁹ ICC-02/04-01/05-419-Conf-Exp, para. 1.

¹⁰ ICC-02/04-01/05-419-Conf-Exp, para. 4.

¹¹ ICC-02/04-01/05-T-10-ENG ET, p. 14, lns. 7-8.

¹² [REDACTED]

¹³ [REDACTED]

¹⁴ [REDACTED]

Dominic Ongwen, of this material, prior to this point since it did not know the precise scope of the case that would eventually move forward.¹⁵

15. Hence it is essential that the evidence be reviewed afresh. The Prosecution has in its possession 17791 items (94620 pages) collected in connection with the situation in Uganda. This material, as well as other material that will be collected in the coming months, must be reviewed as per article 67(2) and rule 77, for the purposes of disclosure to the Defence. Before the review process takes place, the Prosecution will have to update disclosure guidelines and templates so that they are appropriate for the Ongwen case. Within the group of items needing disclosure review, the number of electronically “unsearchable”¹⁶ items (i.e. requiring manual review) amount to 15612 (72490 pages). They constitute the bulk of the items in the Prosecution’s collection. By contrast, the number of electronically searchable documents is only 2179 (22130 pages). The number of documents responsive to key search terms is 8909 documents (54646 pages).¹⁷

16. The current number of Prosecution witnesses within the meaning of rule 76 is 32.¹⁸ About 4831 items (24489 pages) relate to these 32 current Prosecution witnesses. These will be prioritised for disclosure review, and for subsequent requests for redactions. Similarly, the Prosecution will prioritise 167 items (112 documents cited in the Lukodi investigative report¹⁹ and 55 documents cited in the Ongwen Profile.²⁰)

¹⁵ The Single Judge in *Ntaganda* distinguished between conducting an overall review of the evidence related to an entire situation and meticulously reviewing pieces of evidence for a specific case, involving a particular suspect, and with particular underlying circumstances. See ICC-01/04-02/06-73, para.26. A similar logic applies to the difference between prior reviews carried out for all five suspects in the *Kony et al* case and a new review focussed only on Dominic Ongwen.

¹⁶ This includes partly searchable items and documents with searchable metadata.

¹⁷ The equivalent numbers for the [REDACTED] incident are 5737 documents (49711 pages).

¹⁸ [REDACTED].

¹⁹ An in-house analytical product.

17. Disclosure review is a slow and labour-intensive exercise. From experience in previous cases, the average time required to review documents, including “unsearchables”, is 50 pages per person per day. This will mean approximately one year for disclosure review, assuming that the Prosecution deploys 10 disclosure reviewers. The Prosecution will have to recruit or re-assign sufficient staff for this purpose. Re-allocating or hiring these personnel may take several weeks. These are legitimate reasons for seeking a postponement of a confirmation hearing. As noted in an analogous situation in *Ntaganda* by the Single Judge, the “*internal organization of the Office ... should be considered among others when deciding the issue at stake, in light of the particularities and developments in the present case.*”²¹ This is especially so when the issue at stake is the Prosecutor’s statutory duty to make comprehensive disclosure to the Defence.

18. A postponement of the confirmation hearing does not mean that the Defence will be overwhelmed by large disclosure packages weeks before the proposed date of 31 January 2016. Once disclosure review has started the Prosecution will disclose relevant items as soon as possible on a rolling basis.

Protective Measures

19. The Prosecution’s ability to disclose information found to have article 67(2) or rule 77 relevance will hinge on the security status of individuals who provided or are linked to the relevant piece of evidence. This means that witnesses who were interviewed many years ago need to be contacted regarding the disclosure of their statements, and their security situation must be assessed and protected. As argued by the Prosecution, and

²⁰Also an in-house analytical product.

²¹ ICC-01/04-02/06-73, para. 34.

adopted by the Single Judge in the *Ntaganda* case, the process of contacting witnesses "can only realistically be undertaken at the moment the suspect is detained and faces the prospect of trial and conviction".²² While it is true that the protection of witnesses is an on-going duty that operates at all times, "such a duty should be managed and adjusted to the circumstances underlying each particular case."²³

20. Now that Dominic Ongwen is in custody and faces the prospect of further proceedings, contact has to be renewed with current witnesses, and their availability and security circumstances have to be assessed. Only intermittent contact (in 2010 and 2013) has been maintained with witnesses, and that too only with witnesses considered "high priority" at that point. Some witnesses may have moved or changed contact details in the interim period.

21. The Prosecution is currently updating the individual risk assessments for the 32 witnesses that the Prosecutor intends to rely on for the purposes of the confirmation of charges process. [REDACTED]. It will take about 1.5 days to update each risk assessment, assuming total cooperation and no delays in locating witnesses. Based on this figure, the risk assessments for the 32 Prosecution witnesses will take about 48 days. This process was delayed due to a lack of available staff, but should be complete by about 7 April 2015.

22. Additionally, if any of the remaining approximately 140 witnesses that were interviewed by the Prosecution are assessed to be of article 67(2), rule 77 or rule 76 relevance, they too will have to be contacted before disclosure of their statements. These contacts would likely be *after* the 7 April 2015

²² ICC-01/04-02/06-73, para. 39.

²³ ICC-01/04-02/06-73, para. 41.

date mentioned above. Moreover, the above timeline could change depending on witness contactability, availability, and logistical problems in the field. If any charges were added, additional witness security assessments would become necessary.

Redactions

23. The Prosecution will identify documents that need redactions as part of the disclosure review and witness assessments described above. Many of the documents that will be selected for disclosure are likely to require redactions vis-à-vis the Defence. The nature and extent of these redactions depends on the witness security assessments described above.

Redactions to Prosecution evidence

24. Redaction requests are likely to be necessary, at a minimum, for the statements and other material relevant to 32 Prosecution witnesses. This will likely entail standard redactions such as to identities of family members of witnesses, investigators, interpreters, psychosocial experts, “persons at risk on account of the activities of the Court”²⁴ and interview locations. Some statements may also need temporary redactions to the identity of witnesses. The Prosecution may also need to redact certain documents provided under article 54(3) (e).

25. The Prosecution will make requests for redactions regarding its 32 current witnesses (some of whom were interviewed multiple times, generating numerous interview transcripts) on a rolling basis. Some requests will be delayed by the need to assess the current security circumstances of witnesses; the nature and extent of the redactions depend on the current

²⁴ As defined by the Appeals Chamber. See ICC-01/04-01/07-475.

security situation of each witness. Since the individual risk assessments are due to be complete by 7 April 2015, the Prosecution expects to complete its redactions applications for items currently in its possession relating to the 32 Prosecution witnesses by 8 May 2015. These dates are tentative and will change if there are problems in, for example, accessing witnesses.

Redactions to other evidence

26. Redactions to documents currently in the possession of the Prosecution that are *not* statements and other material of the 32 current Prosecution witnesses, but are found to be disclosable during the disclosure review, may have to be filed after 8 May 2015. This is so since each redaction request will necessarily have to be *after* the relevant document is reviewed for disclosure. Such documents may include material relating to the approximately 140 other witnesses interviewed by the Prosecution in the Uganda situation, which may be of article 67(2) or rule 77 relevance, and which will likely require standard redactions. Similarly, the requests for redactions for witness statements and other material collected in the future, as part of the Prosecution's re-investigation, will also likely be filed after 8 May 2015.

27. Since the submission of redaction requests follows disclosure review, and since disclosure review will last approximately one year, the current date for the confirmation hearing is untenable. However, the Prosecution will make redaction requests on a rolling basis and will be complete them in sufficient time to satisfy the requirements of rule 121(3) with regard to a confirmation hearing set for 31 January 2016.

Investigations

28. The investigation into the charges against Dominic Ongwen has been in hibernation for a significant period. The most recent substantive collection missions took place in June/July 2006. [REDACTED]. As the Single Judge noted in *Ntaganda*, "[w]here the suspect is evading justice for many years, it is neither possible nor reasonable to impose on the Prosecutor a permanent stand-by availability of the teams for years".²⁵
29. Such re-investigation is a legitimate reason for seeking postponement of a confirmation hearing. As established by the Appeals Chamber "where the Prosecutor requires more time to complete the investigation, rule 121(7) [...] permits [her] to seek a postponement of the confirmation of charges hearing".²⁶ The bulk of the additional investigations will be completed within the next 12 months.
30. Additional investigations will depend in part on the availability of current Prosecution witnesses. If they are unavailable, this will increase the need for additional investigations. Moreover, several potential witnesses remain to be interviewed. For example, [REDACTED].
31. Analysis and follow-up investigations regarding previously collected evidence will be also be required. Current witnesses who remain available may have to be re-interviewed on discrete topics. Acholi interpreters trained in interpreting at witnesses interviews will have to be selected, security-vetted and hired for this purpose.
32. Moreover, large tranches of intercept evidence will have to be further analysed. This will include analysis of almost 8000 pages of summarised

²⁵ ICC-01/04-02/06-73, para. 35.

²⁶ ICC-01/04-01/10-514, para. 44.

radio intercepts, much of which is handwritten, as well as approximately 770 audio recordings. Transcripts and translations (into English) of these audio recordings will have to be finalised for the purposes of further analysis. [REDACTED].

33. The Prosecution is currently carrying out an internal evidence review, guided by the charges and mode of liability, to assess the sufficiency of incriminatory evidence in its possession. The Prosecution's findings in this review will also have an impact on further investigative steps. As soon as an investigation plan has been prepared, likely in early March 2015, the Prosecution can provide an estimated timeline for investigations to the Chamber. In any case, the Prosecution believes that a 31 January 2016 start date for the confirmation hearing allows sufficient time for the bulk of the re-investigations to be completed.

Language Issues

34. The Single Judge noted in *Ntaganda*, that she, being "duty bound to ensure a proper and fair organisation of the proceedings",²⁷ cannot but take the factor of transcription into account "including any expected delays"²⁸ when deciding on the postponement of the confirmation hearing.²⁹ Similarly, she found, given that translation into the language of Bosco Ntaganda, "in principle, takes more time than translation into the working languages of the Court" she "cannot ignore this factor" in making a decision on postponement of the confirmation hearing.³⁰ The Single Judge should take the same approach in proceedings against Dominic Ongwen.

35. [REDACTED]. The Prosecution is currently seeking more language staff on

²⁷ ICC-01/04-02/06-73, para.45.

²⁸ ICC-01/04-02/06-73, para.45.

²⁹ ICC-01/04-02/06-73, para.45.

³⁰ ICC-01/04-02/06-73, para.47.

an expedited basis. Several factors have delayed this, including the need for security vetting, and the relatively small pool of qualified persons available. [REDACTED].

Rule 76(3) witness statements currently in the possession of the Prosecution

36. Rule 76(3) requires that the statements of Prosecution witnesses are to be made available in a language that Dominic Ongwen fully understands and speaks. According to Dominic Ongwen,³¹ the language he fully understands and speaks is Acholi. Of the Prosecution's current witnesses, the article 55(2) interviews of former LRA soldiers were conducted in Acholi & English.³² Hence, a transcript that includes both Acholi and English text exists for 16 Article 55(2) witnesses within the pool of 32 current Prosecution witnesses. However, none of the statements of victim/overview witnesses (i.e. non-article 55(2) witnesses) within the pool of 32 current Prosecution witnesses have been translated into Acholi. This amounts to 16 witnesses with statements totalling 332 pages. Translation of narrative English text (for example, in a written statement) into Acholi is anticipated to be at the speed of 1500 words per translator per day. Accordingly, once two appropriately qualified and vetted Acholi translators are hired, these documents can be translated within a period of approximately four to five months and disclosed on a rolling basis.

Rule 76(3) witness statements that will be collected during the re-investigation.

37. Of course, the above period of time does *not* include the transcription and translation of *new* rule 76(3) statements that may be obtained in the future

³¹ ICC-02/04-01/05-T-10-ENG ET, p. 5, lns 13-14.

³² Except for a few occasions when the witness's command of English allowed for limited discussion in English alone. For these limited passages, an Acholi translation can be provided.

during the course of the Prosecution's focussed re-investigation. Additional time will be required to transcribe and translate such newly collected material. The precise amount of time required will hinge on the nature and extent of the new evidence collected. As soon as an investigation plan has been prepared in the coming weeks, the Prosecution can provide an estimate to the Chamber, if requested.

38. Newly collected article 55(2) statements will need to have their English and Acholi portions transcribed. Transcription is a time-consuming process. It takes approximately three days to finalise the transcription of one hour of an Acholi interview; two days to finalise the transcription of one hour of an English interview. Hence the transcription of an hour of an English/Acholi article 55(2) interview will take five days. To place this in perspective, generally an article 55(2) interview will comprise several days' worth of interview time. The non-article 55(2) statements, such as those of victim witnesses, will likely be taken in English. If selected as falling under rule 76(3), such statements, or key portions thereof, will have to be translated into Acholi. As per recent practice, the Prosecution expects that this will not extend to complete translation of *all* material relating to Prosecution witnesses.

39. The Prosecution will do all it can to expedite this process. However, the time needed for translation will depend, to an extent, on what aspects of the evidence (i.e. key portions of the evidence) the Defence want translated. The Prosecution will liaise with the Defence to identify these key portions of evidence. The Prosecution also intends to explore with the Defence the possible provision of audio/video materials in lieu of certain translation requirements.

Material not falling within rule 76(3)

40. Even material that ostensibly falls outside the scope of rule 76(3) will add to the transcription burden of the Prosecution. For example, any new interview of an article 55(2) witness will have to be transcribed for the purposes of disclosure review and internal analysis. Similarly, transcripts and translations (into English) of the 770 audio recordings of intercepts mentioned previously will have to be finalised for the purposes of further analysis. Since intercept audio recordings tend to be fragmented and coded nature, translation may proceed at approximately 1200 words per translator per day. The Prosecution will be able to provide more precise timelines for the above once an investigation and analysis plan is finalised. The Prosecution estimates that a 31 January 2016 start date for the confirmation hearing allows sufficient time for all requisite transcription and translation.

Addition of charges

41. The Prosecution is also considering the addition of several charges.
[REDACTED].^{33 34}

42. While the amendment of charges will not be time consuming, the related steps of investigating, reviewing evidence, carrying out security assessments, implementing protective measures, seeking redactions and translating evidence will require more time. The Prosecution will update the Chamber as soon as possible regarding the above steps. While they make the current provisional date of the confirmation hearing untenable, they will be completed in sufficient time to satisfy the requirements of

³³ [REDACTED]

³⁴ [REDACTED]

articles 61(4), 121(4) and rule 121(3), with regard to a confirmation hearing set for 31 January 2016.

Evidence subject to article 54(3)(e)

43. During the *Ex Parte* hearing of 28 January 2015, the Prosecution informed the Single Judge that approximately 47,000 pages³⁵ of material were subject to article 54(3)(e).³⁶ [REDACTED].

44. The Prosecution has sought to obtain lifting of article 54(3)(e) restrictions, making requests for the lifting of restrictions to four main providers. The Prosecution also conducted missions to meet and discuss this issue with providers in April and July 2014. [REDACTED]. Consequently, the Prosecution has secured the lifting of restrictions on 33,283 pages of material. Discussions to lift restrictions from the other two main providers are currently ongoing. The Prosecution will also request the lifting of restrictions from all remaining providers.

45. Items subject to article 54(3)(e) restrictions documents have to be reviewed afresh for the purposes of disclosure to the Defence pursuant to article 67(2) and rules 76, 77 and 121. Pending a disclosure review, the Prosecution cannot assess how many items subject to article 54(3)(e) restrictions have to be disclosed to the Defence. The Prosecution carried out, in part, a review pursuant to article 67(2), and rules 77 and 76 of documents subject to Article 54(3)(e) restrictions. However, this review was done in the context of the original case using review guidelines designed for multiple suspects. Hence, all documents subject to article 54(3)(e) will have to be reviewed anew.

³⁵ Contained in 6343 items.

³⁶ ICC-02/04-01/05-T-11-CONF-EXP-ENG ET, p. 35.

46. As is clear from the above, significant progress has been made in lifting article 54(3)(e) restrictions. The Prosecution is optimistic about eventually lifting all relevant confidentiality restrictions. However, seeking lifting of restrictions is an unpredictable process, the timing of which is in the hands of external partners. Even when restrictions are lifted, some providers impose a requirement of notification and consultation prior to disclosure. Postponing the confirmation hearing to 31 January 2016 will better allow for a confirmation hearing without disclosure problems due to confidentiality restrictions.

V. Conclusion

47. The Single Judge noted in *Ntaganda* that she must ensure that judicial proceedings are conducted in a fair, expeditious manner, “taking into consideration the competing interests at stake”.³⁷ In this context, the reasons for postponement identified in detail in this application are as important for the Defence as they are for the Prosecution, and therefore no prejudice accrues to Mr Ongwen. The main reasons for postponement are to review evidence, carry out security assessments, implement protective measures, seek redactions, translate core evidence into Acholi and seek lifting of article 54(3)(e) material – all of which are aimed at providing comprehensive, timely disclosure to the Defence. Additionally, the focussed re-investigation proposed by the Prosecution is also necessary to fulfil the Prosecution’s objective duties to establish the truth under article 54(1)(a). In sum, a postponement will benefit both parties and provide for a fair and expeditious confirmation hearing.

³⁷ ICC-01/04-02/06-66, para. 9.

48. In light of the above, the Prosecution requests the Single Judge to postpone the confirmation hearing until 31 January 2016.



Fatou Bensouda,
Prosecutor

Dated this 12th day of February 2015
At The Hague, The Netherlands