

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 8 May 2015

APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng
Judge Christine Van den Wyngaert
Judge Howard Morrison
Judge Olga Herrera Carbuccion
Judge Piotr Hofmański

SITUATION IN UGANDA

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

PUBLIC with PUBLIC ANNEX A

**Defence Response to ‘Prosecution’s Appeal against the “Decision Setting the
Regime for Evidence Disclosure and Other Related Material”’**

Source: Defence for Dominic Ongwen

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

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Counsel for the Defence

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Defence for Dominic Ongwen ('Defence') hereby responds to the Office of the Prosecutor's ('Prosecution') appeal entitled 'Prosecution's Appeal against the "Decision Setting the Regime for Evidence Disclosure and Other Related Material."' ¹
2. Whereas the Defence limits the bulk of its substantive response to the Prosecution's second ground of appeal, to wit, "even if the Single Judge had discretion to order the Prosecution to prepare and submit IDACs, she erred in the exercise of her discretion by entering a decision which is so unfair and unreasonable as to constitute an abuse of discretion", it is considered prudent for a minor contribution towards the development of the International Criminal Court (ICC) jurisprudence to make a brief comment on the Prosecution's first ground of Appeal, to wit, "[t]he Single Judge erred in law by exceeding her powers under article 61(3) and rule 121(2), when ordering the Prosecution to prepare and file IDACs before the confirmation hearing." ²

II. Procedural History

3. On or about 6 January 2015, Mr Dominic Ongwen surrendered to joint United States-African Union soldiers.
4. On 21 January 2015, Mr Ongwen arrived in The Hague, Netherlands.
5. On 27 February 2015, former Single Judge Trendafilova issued the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters." ³

¹ ICC-02/04-01/15-225.

² *Ibid*, para. 2.

³ ICC-02/04-01/15-203.

6. On 6 March 2015, the former Single Judge changed the start of the Confirmation of Charges Hearing ('Confirmation Hearing') to 21 January 2016.⁴
7. On 9 March 2015, the Prosecution requested leave to appeal part of the Decision, to wit, the former Single Judge's order for the parties to create In-Depth Analysis Charts ('IDAC') with each disclosure.⁵
8. On 14 April 2015, the Single Judge, His Honour Judge Cuno Tarfusser, granted the Prosecution's leave to appeal.⁶
9. On 28 April 2015, the Prosecution filed its appeal.⁷

III. Submissions

*Requiring the Parties to Submit IDACs would Unreasonably Delay the Trial Proceedings
and Violate Mr Ongwen's Right to an Expeditious Trial*

10. Three hundred and sixty-five days will have passed from Mr Ongwen's arrival in The Hague to the scheduled start date of the Confirmation Hearing. No other suspect hailed before the ICC waited that long for his Confirmation Hearing.⁸ With the Defence arguing the contrary, the former Single Judge determined that detention for one year before the start of the Confirmation Hearing did not violate Article 67(1)(c) of the Statute.⁹
11. The Defence emphasises the principle enshrined in Articles 61(1), 64(2) and 67(1)(c) of the Rome Statute, namely that Mr Ongwen has the right to be tried

⁴ ICC-02/04-01/15-206, para. 35.

⁵ ICC-02/04-01/15-207.

⁶ ICC-02/04-01/15-220.

⁷ ICC-02/04-01/15-225.

⁸ See Annex A. (noting that Mr Laurent Gbagbo's Confirmation Hearing happened 447 days after his arrival in The Hague on account of health issues)

⁹ ICC-02/04-01/15-206, para. 37.

within a reasonable time after his surrender and that he receives from the Trial Chamber a fair and expeditious trial free of unreasonable delay.¹⁰

12. In its appeal, the Prosecution stated it “will not be able to comply with...[the]...duty [to prepare IDACs] within the allocated time by relying on the resources currently available to it in this case.”¹¹ In order to comply with the order, the Prosecution needs to use resources from within this case, from people working on other cases or hire people from outside the ICC.¹² Considering the Defence Team is given to understand that Prosecution has already reallocated personnel to aid in the review of this case, it is not hard to appreciate the difficulty the Prosecution encounter to find extra people to prepare IDACs.
13. The Prosecution stated that it took between eight to nine people working full time approximately three and a half months to prepare the IDAC in the *Kenyatta et al* case,¹³ which totalled 6,644 pages.¹⁴ At the time of the Confirmation Hearing, the Prosecution had disclosed to the defence teams 682 documents containing 9,429 pages, along with 50 A/V files totalling 7 hours, 4 minutes and 32 seconds.¹⁵ Of the total pages, the Prosecution classified 6,059 pages as incriminatory.¹⁶ The size of the IDAC prepared for the *Kenyatta et al* Confirmation Hearing equalled 70% of all the pre-confirmation disclosure. Even more significant is that the *Kenyatta et al* IDAC contained more pages than all of the incriminatory evidence disclosed by the Prosecution.
14. The Prosecution’s most recent figures for this case are much more daunting than the *Kenyatta et al* case. The Prosecution is currently reviewing 18,073 items

¹⁰ See also the European Convention on Human Rights, Article 5(3); American Convention on Human Rights, Article 7(5); and the African Charter on Human and Peoples’ Rights, Article 7(1)(d).

¹¹ ICC-02/04-01/15-225, para. 32.

¹² *Ibid.*

¹³ *Ibid.*, footnote 58.

¹⁴ *Ibid.*, footnote 48.

¹⁵ ICC-01/09-02/11-655-AnxB, page 4.

¹⁶ *Ibid.*, page 2.

containing 95,576 pages of disclosure in its “*Uganda* collection”.¹⁷ The number of **items** being reviewed by the Prosecution in this case is almost twice the amount of total **pages** disclosed pre-confirmation in the *Kenyatta et al* case.

15. Assume, *arguendo*, that the Prosecution discloses 25% of the *Uganda* collection as incriminatory evidence. That is just under 24,000 pages of disclosure.¹⁸ Using the same calculations from the *Kenyatta et al* case, it would take a compliment of eight to nine people 14 months to prepare an IDAC. Again, if the same figures from *Kenyatta et al* are used, the IDAC would be over 26,000 pages.¹⁹ If read at a rate of 50 pages per day, it would take one person *two full business years to read the IDAC*. This document, which is supposed to aid the Pre-Trial Chamber and Defence, would do absolutely nothing except for waste space on the ICC’s server.
16. If the Prosecution started this task today with an extra eight to nine people, it would not finish preparing the IDAC until July 2016. By following the former Single Judge’s order, the Confirmation Hearing would start in August 2016, seriously violating Mr Ongwen’s right provided for under Articles 61(1), 64(2) and 67(1)(c) of the Rome Statute. The Defence Team is of the considered opinion that this would amount to unwarranted delay, especially considering that we support the Prosecution’s contention that IDACs for this case would amount to thousands of pages of analysis in a less useful, non-user-friendly format.²⁰
17. Along a similar line, the Defence finds it unconscionable at its current capacity of Counsel, Assistant to Counsel and Case Manager to review Prosecution disclosure, conduct investigations, prepare for the Confirmation Hearing and create an IDAC in line with the former Single Judge’s Decision. The Defence does not have the ability to reassign personnel “from a different case”, section

¹⁷ ICC-02/04-01/15-225, para. 31. (noting that Senior Trial Attorney Benjamin Gumpert, QC informed the Defence that the Prosecution will attempt to disclose all of the non-Article 54(3)(e) before Confirmation)

¹⁸ IDACs are comprised generally of incriminatory evidence.

¹⁹ The Defence determined this number by multiplying the example number of incriminatory pages by 1.10, which is the ratio of IDAC pages to incriminatory pages from *Kenyatta et al*.

²⁰ ICC-02/04-01/15-225, paras 28 and 35.

or department. Simply reading the Prosecution's disclosure will take the Defence 2.45 business years.²¹ If the size of the Defence increases by a factor of three, and if it only reads disclosure from the Prosecution, it would finish just days before start of the Confirmation Hearing. The Defence, just like the Prosecution, should not be encumbered by an IDAC whilst reviewing its evidence and preparing for the Confirmation Hearing. By keeping the IDAC requirement, the Defence would need to request additional time pursuant to Article 67(1)(b) to prepare for the Confirmation Hearing. In this case, IDACs are a needless burden and easily avoidable evil, which can only cause undue delay in the proceedings.

18. Furthermore, the Prosecution's final disclosure date is currently set for 21 December 2015. Fifteen days later, the Defence must have its evidence, list of evidence and IDAC disclosed to the Prosecution, Pre-Trial Chamber II and the participants. The Defence should be spending these crucial 15 days reviewing the Prosecution's last disclosure batch, uploading its final pieces of evidence into Ringtail and creating its list of evidence. Even more so than the Prosecution, the Defence needs every single day to review, investigate and prepare. The Defence cannot "borrow" a case manager from *Ntaganda* for a month to help load evidence; it cannot use an evidence reviewer from *Ruto and Sang* to help determine if anything disclosed on 21 December 2015 needs to be added to its list of evidence. Whether it has three people or 23 people, the Defence is on its own. A requirement to produce an IDAC will only cause the Defence to request extra time because of an unreasonable burden placed on it by the former Single Judge's Decision.

²¹ The Defence has notified the Registrar of this situation. The Defence will be meeting with CSS on 13 May 2015 to discuss an increase in its budget. Even so, it is highly unlikely that the Defence will receive funding for six more persons.

19. Finally, the Defence draws the attention of the Appeals Chamber to the format of the IDAC.²² As it stands, the IDAC's format presents serious problems for the Defence. Not every piece of evidence presented will fit nicely into this format. The Defence does not have the obligation to prove anything. The Defence, like the Prosecution, should be focused on how to present its evidence, not how to fit it neatly inside of the IDAC, which would draw resources away from the main purpose of the trial.

The Former Single Judge Exceeding her Power when Ordering the Production of IDACs

20. The Prosecution argues that it is its "prerogative to present its case in the manner it deems fit....and that the Prosecution's autonomy in selecting, analysing and presenting its evidence ensures the independent exercise of the functions of both the Pre-Trial Chamber and the Prosecution."²³
21. Prosecution further argues that "Article 61 implicitly empowers the Prosecution to select the evidence upon which it intends to rely and to decide the manner in which the evidence should be analysed and presented to the Chamber. It is within the Prosecution's discretion to determine how best to persuade the Chamber that, based on the evidence, there are substantial grounds to believe that the person committed the crimes charged."²⁴
22. With profound due respect, it is the considered view of the Defence that the argument of the Prosecution in this respect overstretches the issue of the Prosecution's independence vis-a-vis their explicit agreement that "the Chamber may direct the conduct of the proceedings to ensure their fairness and...to protect the suspect's rights" under article 61(3), second sentence, and rule 121(2), first sentence. It is clear under Article 61(3) that the Pre-Trial

²² ICC-02/04-01/15-203-Anx2.

²³ ICC-02/04-01/15-207, para. 13.

²⁴ *Ibid.*

Chamber has a discretionary power to “issue orders regarding the disclosure of information for the purpose of the hearing”. This discretionary power is underpinned by the dictates imposed on the Pre-Trial Chamber under rule 121(2)(b) “to ensure that the disclosure takes place under satisfactory conditions.” The Defence stresses that unlike what the Prosecution alludes, Article 61(3), second sentence, is not restricted to evidence or potential evidence, but to the more general phrase “information for the purpose of the hearing”. An IDAC contains a plethora of *information* specifically tailored to the alleged charges.

23. In the circumstances, it would therefore appear to the Defence that the independence of the Prosecution provided under Articles 42(1) and 61 is fettered by the overriding power of the Pre-Trial Chamber to ensure that the disclosure takes place under satisfactory conditions. The Defence would therefore argue that ordinarily, the Single Judge did not exceed her discretionary powers under the Statute and the Rules by ordering the Prosecution to file IDACs.
24. The Defence believes that the Chamber possesses the power to order the production of IDACs with every disclosure and a final IDAC 30 days before the Confirmation Hearing, but that this case poses unique circumstances never before seen at the ICC. Therefore, in accordance with the requirement that every such discretionary power should be exercised judiciously, in the circumstances of this case, the former Single Judge should not have exercised that power. As described above, Mr Ongwen’s right to an expeditious trial without unreasonable delay supersedes this discretionary power.

IV. Relief

25. The production of IDACs creates an unreasonable burden on the Defence and Prosecution due to the unique circumstances of this case. It is impossible to maintain the IDAC requirement in this case whilst respecting Mr Ongwen's right to an expeditious trial without undue deal. Accordingly, the Defence requests the Appeals Chamber revoke the IDAC requirement in this case as it violates Mr Ongwen's rights under Articles 61(1), 64(2) and 67(1)(c) of the Rome Statute.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 8th day of May 2015

At Kampala, Uganda

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