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Date: **04 January 2016**

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN UGANDA

IN THE CASE OF

THE PROSECUTOR v. DOMINIC ONGWEN

Public

Victims' response to the Public Redacted Version of "Defence Request for Postponement of the Confirmation of Charges Hearing"

Source: Victims' Legal Representatives

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

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I. LEGAL BASIS

1. This filing is a response by the Victim's Legal Representatives ("Legal Representatives") to the public redacted version of the Defence Request for Postponement of the Confirmation of Charges Hearing (the "Defence Request").¹ It is filed pursuant to regulation 24(2) of the Regulations of the Court and paragraph 33 of the Single Judge's Decision on contested victims' applications for participation, legal representation of victims and their procedural rights.²

II. OVERVIEW

2. The Legal Representatives support the Defence Request for two reasons: First, the Legal Representatives consider that the reasons given by the Defence justify the postponement requested. Secondly, in the circumstances a postponement of the confirmation hearing is necessary to enable meaningful victims' participation.

III. PROCEDURAL HISTORY

3. On 26 January 2015 the first appearance in the present case was held. A date for the confirmation of charges was set for 24 August 2015.³ On 6 March 2015, following a request by the Prosecutor, the then Single Judge postponed the confirmation of charges hearing to 21 January 2016.⁴
4. On 6 November 2015 the Defence requested a further postponement of the confirmation of charges hearing.⁵ On 26 November 2015 the Single Judge rejected the Defence request.⁶

¹ *Prosecutor v. Dominic Ongwen*, Public Redacted Version of "Defence Request for Postponement of the Confirmation of Charges Hearing", ICC-02/04-01/15-385-Red, 30 December 2015.

² *Prosecutor v. Dominic Ongwen*, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15-350, 27 November 2015, para.33.

³ *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Transcript 26 January 2015, ICC-02/04-01/05-T-10-ENG, p14.

⁴ *Prosecutor v. Dominic Ongwen*, Decision Postponing the Date of the Confirmation of Charges Hearing, ICC-02/04-01/15-206, 6 March 2015.

⁵ *Prosecutor v. Dominic Ongwen*, Public Redacted Version of "Request to Postpone Confirmation of Charges Hearing", filed on 6 November 2015, ICC-02/04-01/15-336-Red, 13 November 2015.

⁶ *Prosecutor v. Dominic Ongwen*, Decision on the Defence "Request to Postpone Confirmation of Charges Hearing", ICC-02/04-01/15-348-Red, 26 November 2015.

5. On 27 November 2015 the Single Judge issued the Decision on contested victims' applications for participation, legal representation of victims and their procedural rights.⁷ He ordered that the Legal Representatives would have access to evidence communicated to the Chamber as well as the confidential record in the case, but requested submissions from the parties and the Registry regarding any specific documents which should not be accessed by the Legal Representatives. On 15 December 2015, having received submissions from the parties and the Registry the Single Judge ordered the Registrar to notify the Legal Representatives of all confidential documents in the case (other than those marked *ex parte*) and to provide the Legal Representatives with access to all evidence communicated to the Chamber.⁸
6. On 30 December 2015 the Defence requested that the confirmation of charges hearing be postponed to mid-March, citing the volume and timing of Prosecution disclosure, as well as difficulties accessing court records and evidence.⁹

IV. SUBMISSIONS ON MATTERS RAISED IN THE DEFENCE FILING

7. On behalf of their clients the Legal Representatives express their concern regarding the matters raised in the Defence Request. While the participating victims seek the confirmation of the charges brought by the Prosecutor, they wish for this to occur through a fair process. Should any procedural irregularities prevent a fair hearing for the Defence, further and much more significant delays than those presently requested could be occasioned through a successful appeal from any confirmation of charges in the case.

V. SUBMISSIONS ON VICTIMS' PARTICIPATION

(1) Factual background

8. As elaborated below, at the time of this filing the Legal Representatives remain without access to the evidence in the case, the confidential case file, and the application forms submitted by their clients. Even once such access is eventually granted, logistical challenges and shortages of time and funding will severely limit the ability of the Legal

⁷ *Prosecutor v. Dominic Ongwen*, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02-04-01/15-350, 27 November 2015.

⁸ *Prosecutor v. Dominic Ongwen*, Decision on issues concerning victims' participation, ICC-02/04-01/15-369, 15 December 2015, p7.

⁹ *Prosecutor v. Dominic Ongwen*, Public Redacted Version of "Defence Request for Postponement of the Confirmation of Charges Hearing", ICC-02/04-01/15-385-Red, 30 December 2015.

Representatives to obtain the views and concerns of their clients on key issues relevant to the confirmation of charges.

Access to relevant documentation

9. On 27 November 2015 the Single Judge recognized the appointment of the Legal Representatives and granted them in-principle access to the evidence and confidential record in this case (subject to exceptions to be identified). It might have been expected from that date that preparations would be made by the Registry for secure access by the Legal Representatives to confidential documents.¹⁰ On 15 December such access was formally ordered by the Single Judge.¹¹

10. However at the date of this filing the Legal Representatives remain without secure electronic access. This matter has been repeatedly raised with the Registry. The Legal Representatives have been informally told that technical problems are preventing secure email addresses to be provided. On 28 December 2015 the Legal Representatives requested the Registry to make the Single Judge aware of this problem.¹²

11. The consequences of this lack of electronic access include the following:

- (a) Despite the Single Judge's ruling recognizing the victims' fundamental rights,¹³ the Legal Representatives have not been able to access *any* evidence disclosed in the case. Defence filings reveal that the Prosecution has disclosed over 58,000 pages of material.¹⁴ The Legal Representatives respectfully agree with the Single Judge that disclosed material should not be reviewed "robotically and uncritically" and that a selective focus on relevant material is appropriate.¹⁵ However in the time remaining

¹⁰ *Prosecutor v. Dominic Ongwen*, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02-04-01/15-350, 27 November 2015.

¹¹ *Prosecutor v. Dominic Ongwen*, Decision on issues concerning victims' participation, ICC-02/04-01/15-369, 15 December 2015, p7.

¹² Email of 28 December 2015 from Joseph Manoba to the Counsel Support Section.

¹³ *Prosecutor v. Dominic Ongwen*, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02-04-01/15-350, 27 November 2015, paras 28-29.

¹⁴ *Prosecutor v. Dominic Ongwen*, Public Redacted Version of "Request to Postpone Confirmation of Charges Hearing", filed on 6 November 2015, ICC-02/04-01/15-336-Red, 13 November 2015, para.10 (referring to 42,101 pages disclosed by that date); *Prosecutor v. Dominic Ongwen*, Public Redacted Version of "Defence Request for Postponement of the Confirmation of Charges Hearing", ICC-02/04-01/15-385-Red, 30 December 2015, para.1 (referring to a further 16,000 pages disclosed during December).

¹⁵ *Prosecutor v. Dominic Ongwen*, Decision on the Defence "Request to Postpone Confirmation of Charges Hearing", ICC-02/04-01/15-348-Red, 26 November 2015, para.7.

before the scheduled confirmation hearing it is difficult to envisage that from among the volume of disclosed documents such relevant material can even be identified, let alone reviewed, analyzed and responded to.

(b) The Legal Representatives have not been able to review the great majority of the confidential case file. No confidential materials in the case have been electronically disclosed to the Legal Representatives. In the past week, as it became evident that the Registry would not effect electronic access, the Legal Representatives requested hard copies of key documents to be provided at the Kampala field office. As a result, one of the Legal Representatives has been able, since 30 December 2015, to review the Document Containing the Charges and its annexes, the Prosecution Pre-Confirmation Brief and the Prosecution List of Evidence. No other confidential documents have been accessed. In the absence of such access it is extremely difficult for the Legal Representatives to accurately identify the legal and factual issues on which the confirmation process is likely to focus.

(c) The Legal Representatives have been unable to review the more than 1400 applications forms submitted by their clients. The Legal Representatives are grateful for the assistance extended by the Victims Participation and Reparations Section which on 29 December 2015 provided a table setting out certain non-confidential information for each of the Legal Representatives' clients. However without access to the application forms themselves the Legal Representatives are not able to identify any views and concerns contained in those applications which should appropriately be the source of submissions at the confirmation hearing.

Ability of the Legal Representatives to consult with their clients

12. Ideally, the Legal Representatives would have first sought to review the key confidential filings in the case, the most relevant parts of the disclosed material, and any issues raised in their clients application forms, and would then have proceeded to conduct targeted consultations with victims on the matters thereby identified as relevant. For the reasons set out above, it has proved extremely difficult for the Legal Representatives to reliably identify such relevant matters for consultation. However even to the extent that the Legal Representatives are able to identify some relevant issues, meaningful consultations have been significantly limited by other factors.

13. First, a reasonable amount of time is necessary to conduct consultations. The 1434 participating victims represented by the Legal Representatives live in 3 different districts

in areas which are five to six hours drive from Kampala and at least up to three hours from each other given the unpaved roads and difficulty in accessing the districts. Consultations by mobile telephone are sometimes possible, but in any event usually require interpretation into a local dialect.

14. Ideally, ongoing consultations would be facilitated by the involvement of field assistants working with the Legal Representatives. However to date the Legal Representatives have been unable to obtain independent funding for their work and in the absence of legal aid from the Court have therefore not been in a position to retain field assistants. Travel by the Legal Representatives themselves throughout Northern Uganda has likewise been restricted by funding limitations.
15. The Legal Representatives are making concerted efforts to obtain independent funding to cover costs, as well as *pro-bono* assistance where possible. However it is unlikely that sufficient funding will be received in time to enable representative consultations before 21 January 2016.

(2) The objective of the confirmation hearing and victims' participation therein

16. Article 61(7) makes clear that a confirmation of charges hearing has the purpose of enabling the Pre-Trial Chamber to determine whether the evidence is sufficient to establish substantial grounds to believe that a suspect committed the crimes alleged. The hearing has a limited scope and purpose and is not a “mini-trial.”¹⁶ This may mean that the level of preparation expected by all participants is not equivalent to that required at the trial itself. However, despite this, a minimum level of preparedness is required. This is clear from the significant number of instances in which confirmation hearings have been postponed at the request of a participant which, through factors beyond its control, was unable to adequately prepare for the scheduled hearing.¹⁷

¹⁶ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Defence Request for Postponement of the Confirmation Hearing, ICC-01/04-01/07-446, 25 April 2008, p7.

¹⁷ *Prosecutor v. Callixte Mbarushimana*, Decision on “Defence request to deny the use of certain incriminating evidence at the confirmation hearing” and postponement of confirmation hearing, ICC-01/04-01/10-378, 16 August 2011; *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Postponement of the Confirmation Hearing, ICC-01/05-01/08-170-tENG, 17 October 2008; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Defence Request for Postponement of the Confirmation Hearing, ICC-01/04-01/07-446, 25 April 2008; *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the postponement of the confirmation hearing, ICC-01/04-01/06-454-tEN, 20 September 2006; *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable Set in the Decision on the Final System of Disclosure, ICC-01/04-01/06-126, 24 May 2006

17. The role of the Legal Representatives in the confirmation of charges hearing is to present the victims' views and concerns on matters which affect the victim's personal interests.¹⁸ For participating victims, the opportunity to have their views and concerns heard at this stage of proceedings is crucial. Although the confirmation hearing has a specific and limited purpose in the context of the overall proceedings, for victims it is among the most important stage of a case: it will determine which charges will be tried. This in turn determines not only which of the victims in a situation may participate at trial, but also on which issues they may present their views and concerns, and in respect of which crimes they may ultimately be able to request reparations. The importance of this hearing for the victims cannot be overstated.
18. It is therefore of great importance to the victims that their participation at this stage is real and effective. Indeed, the Single Judge has recognized the importance of *meaningful* victims' participation, and it was to this end that access to the evidence and confidential record in the case were granted.¹⁹ In the absence of access to the appropriate information and an opportunity to consult with their clients, there is a risk that the Legal Representatives will not be in a position at the confirmation of charges hearing to adequately provide representative views and concerns of their clients, and that victims' participation will become merely token or symbolic. This form of participation would not only lack meaning for the victims, but would almost certainly fail to assist the Chamber.
19. Given the principle of victims' participation enshrined in article 68(3) of the Rome Statute, and the fact that international human rights law also guarantees a fair trial to victims who participate in criminal proceedings,²⁰ the Legal Representatives submit that the above procedural failures should be sufficient of themselves to justify a minor postponement of the confirmation of charges hearing. However in any event they should

¹⁸ Rome Statute, art.68(3).

¹⁹ *Prosecutor v. Dominic Ongwen*, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02-04-01/15-350, 27 November 2015, paras 28-29.

²⁰ For example: European Court of Human Rights, *Perez v. France*, App. No. 47287/99, Judgment, 12 February 2004; Inter-American Court of Human Rights, *Case of the "Street Children" (Villagran-Morales et al. v Guatemala)*, Merits Judgment, 19 November 1999, esp. at para. 227. See also *Case of J vs. Perú*, Preliminary Objections, Merits, Reparation and Costs Judgment, 29 November 2013, para. 250; *Case of Palamara vs Chile*, Preliminary Objections, Merits, Reparation and Costs Judgment, 22 November 2005, para. 170. Even though these latter cases of the Inter American Court refer to the right of the defendant to have the times and means to prepare his or her defence. A recent case *Espinoza v Perú*, Judgment of 20 November 2014, Preliminary exceptions, merits, reparations and costs, in paragraph 237, recognizes the right to access court for victims in similar conditions using the same Article 8.1 of the American Convention on Human Rights, i.e. due process.

be taken together with the obstacles to Defence preparation set out in the Defence Request. Cumulatively the difficulties identified mean that only one of the three participants in these proceedings will be adequately prepared for the confirmation hearing on 21 January 2016. The principle of timely and efficient proceedings, which is a cornerstone of any judicial system, when in conflict must be balanced with the right to effective participation in those proceedings

VI. SUBMISSIONS ON THE REQUESTED PERIOD OF POSTPONEMENT

20. The Court's legal texts prescribe no fixed time within which a confirmation of charges hearing must occur. The hearing must only take place within a "reasonable time" after a person has been surrendered to the Court.²¹ (Art.61(1) Rome Statute).
21. It is submitted that, when determining what constitutes a reasonable time in this case, the Chamber should have regard to the very large number (67) and range of charges now sought to be confirmed, which makes the present case by far the largest to proceed before the Court to date. Similarly, the number of victims participating at the confirmation stage in this case is unprecedented. Finally, any delay in the confirmation of charges hearing must also be seen in the context of the substantial time lapse between the issue of the arrest warrant and the current proceedings which has contributed to delays in the collection and disclosure of prosecution evidence.
22. Even despite all of these factors, if the confirmation of charges hearing were postponed to mid-March, the pre-trial proceedings in this case would still be of a comparable length to other cases before the Court. Moreover, those participants with the potential to suffer harm through delays (Mr Ongwen, who is in custody; and the victims, who have already waited more than 10 years for this case to proceed) have indicated their view that a two month delay would be acceptable.
23. It is therefore submitted that a two month delay would be reasonable and proportionate to the benefits thereby achieved in securing a fair hearing for the Defence and the participating victims.

VII. CONCLUSION AND RELIEF SOUGHT

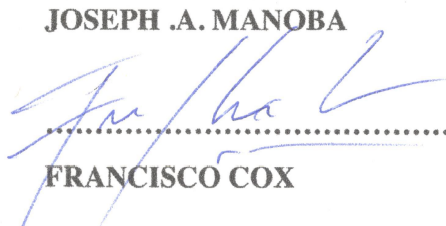
24. For the above reasons the Legal Representatives respectfully request that the Single Judge grant the Defence Request and postpone the confirmation of charges hearing to mid-March.

²¹ Rome Statute, art. 61(1).

25. It is further requested that the Single Judge order the Registry to immediately provide the Legal Representatives and their team with electronic access to confidential documents in the case, in compliance with the Single Judge's decision of 15 December 2015, or in the alternative provide an explanation for the continued failure to do so.



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JOSEPH .A. MANOBA



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FRANCISCO COX

Dated this 04th day of January 2016

At Kampala, Uganda