

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **21 May 2015**

**PRE-TRIAL CHAMBER II**

**Before: Judge Cuno Tarfusser, Single Judge**

**SITUATION IN UGANDA**

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

**Confidential *EX PARTE* only available to the Prosecution and the Defence**

**The Prosecutor's submissions concerning the applicability of article 101 of the  
Rome Statute to the proceedings against Dominic Ongwen**

**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. In the course of the Status Conference held on 19 May 2015 the Single Judge observed that<sup>1</sup> "...the Prosecutor intends to bring charges, it seems, against Dominic Ongwen for a conduct committed before the surrender other than the conduct or course of conduct for which he was surrendered, the Court must request the competent authorities of Central African Republic to provide a waiver of the rule of speciality article 101 of the Statute."<sup>2</sup>
2. Following remarks from the Office of the Prosecutor ("Prosecution") concerning the desirability of written submissions from the Parties on this issue, the Single Judge indicated that he was "happy to receive a submission on this." A little earlier in the hearing the Single Judge had also noted that, on this subject, the Parties were "free to submit any request or make any submissions...and then we will take a decision on these submissions..."<sup>3</sup>
3. The Prosecution hereby sets out its submissions, as follows:
  - a) The law permits the Prosecution, providing adequate notice is given, to include charges in the Document Containing the Charges ("DCC") irrespective of whether the Warrant of Arrest ("Warrant") contained corresponding offences.<sup>4</sup> The Single Judge in this case has already noted that "The Prosecutor is free, in principle, to increase the factual scope of the case up until the confirmation hearing...."<sup>5</sup>

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<sup>1</sup> ICC-02/04-01/15-T-6-ENG, p.10, lns.2-6.

<sup>2</sup> The Prosecution has not yet decided on whether to bring such charges or, if so, what they should be. Depending on the scope of any such additional charges, the conduct covered by these charges may well fall within the course of conduct set out in the Warrant of Arrest and therefore the rule of speciality may not be applicable. The term "course of conduct" has been interpreted broadly in the Court's jurisprudence. See ICC-02/11-02/11-151, at para.10, and ICC-01/04-01/10-465-Red, para.91.

<sup>3</sup> ICC-02/04-01/15-T-6-ENG, p.11, lns.17-20.

<sup>4</sup> *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-568, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", para.53.

<sup>5</sup> ICC-02/04-01/15-206, para.32.

- b) The only potential obstacle to including charges based on conduct which has “not been described in any way in the warrant of arrest”<sup>6</sup> is (as noted by the Single Judge in a footnote to the passage quoted in the preceding paragraph<sup>7</sup>) the rule of speciality as set out in article 101 of the Rome Statute (“Statute”), which applies when a person was surrendered to the Court by a State.
- c) Dominic Ongwen appeared before the Court voluntarily. He was not surrendered or delivered up by a State, within the meaning of article 101 (as elucidated by article 102). Thus the rule of speciality does not apply. No waiver of the requirements of that article is required.

### **Request for confidentiality**

4. Pursuant to regulation 23*bis* of the Regulations of the Court, the Prosecution files these submissions as “confidential *ex parte*, only available to the Prosecution and the Defence” because they contain detailed reference to documents which are similarly marked. The Prosecution submits that neither those documents, nor these submissions, merit such a high degree of confidentiality, or any at all, and would be happy for those documents and these submissions to be reclassified as public.

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<sup>6</sup> *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, para. 88. The latter decision was confirmed on appeal (ICC-01/04-01/10-514 OA4) but the rule of speciality was not discussed.

<sup>7</sup> ICC-02/04-01/15-206, fn.64, which reads: “This entitlement is subject to the rule of specialty as enshrined in article 101 of the Statute. The Single Judge will refrain from pronouncing on whether this article is applicable in this case where the suspect has consented to appear voluntarily before the Court.”

## The Law

5. Article 101 lies in Part 9 of the Statute governing international cooperation and judicial assistance. Article 102 is an important guide to the correct construction of article 101.
6. Article 101 states:
  1. *A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct<sup>8</sup> which forms the basis of the crimes for which that person has been surrendered.*
  2. *The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court, and if necessary, the Court shall provide additional information in accordance with article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.*
7. Article 102 states, in relevant part:

*For the purposes of this Statute:*

  - (a) *“surrender” means the delivering up of a person by a State to the Court, pursuant to this Statute.*
  - (b) ...
8. Thus, where a person has been delivered up to the Court by a State, *that* State's permission is required if he or she is to be tried for any conduct other than the course of conduct which underlies the crimes specified in the Warrant.

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<sup>8</sup> The term “course of conduct” has been interpreted broadly in the Court's jurisprudence. See ICC-02/11-02/11-151, at para.10, and ICC-01/04-01/10-465-Red, para.91.

### **Dominic Ongwen's appearance before the Court is voluntary**

9. Dominic Ongwen was not surrendered to the Court. He was not delivered up to the Court by a State pursuant to the Statute. Although he was in Bangui, the capital of the Central African Republic ("CAR"), at the relevant time, he came into the Court's custody of his own volition rather than through the actions of the CAR authorities. This is plain from the "Report of the Registry on the voluntary surrender of Dominic Ongwen and his transfer to the Court" ("Registry Report").<sup>9</sup>
10. Annex 1 to the Registry Report<sup>10</sup> is a statement by the CAR authorities, in the shape of the *Procureur Général Près la Cour d'Appel de Bangui*. It records how Dominic Ongwen had been presented to him by elements of the African Union Task force and American forces and how he proceeded to ascertain Dominic Ongwen's identity. ICC Registry officials were present and provided the interpreter through whom the *Procureur Général* and Dominic Ongwen communicated.
11. The Registry Report describes how "[b]efore proceeding further and exercising their jurisdiction under *inter alia* article 59 of the Rome Statute in relation to Dominic Ongwen, the Central African Authorities questioned Mr Ongwen as to his intention to voluntary surrender [*sic*] to the Court, Mr Ongwen confirmed clearly that it indeed was his intention to voluntary surrender to the Court (see annex 2 to this present document)."<sup>11</sup>

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<sup>9</sup> ICC-02/04-01/05-419-Conf-Exp.

<sup>10</sup> ICC-02/04-01/05-419-Conf-Exp-Anx1.

<sup>11</sup> ICC-02/04-01/05-419-Conf-Exp, p.4, para. 3.

12. Annex 2 to the Registry Report<sup>12</sup> records that indeed, on being questioned by the *Procureur Général*, Dominic Ongwen “*consent à sa remise volontaire à la Cour Pénale Internationale*.”<sup>13</sup> It is signed by both the *Procureur Général* and Dominic Ongwen, who also authenticated the document by means of his fingerprint.
13. The Registry Report goes on to record<sup>14</sup> that, in these circumstances the *Procureur Général* “decided not to exercise his jurisdiction and to immediately proceed with the transfer of custody of Dominic Ongwen to the representatives of the Court.”
14. These were the last dealings between the CAR authorities and Dominic Ongwen. Those authorities were no longer present when the Registry representatives formally notified him of the contents of the Warrant. It was the representatives of the Registry who provided Dominic Ongwen with the assistance of duty counsel, before reconfirming his identity, his language preference and his voluntary surrender to the Court.<sup>15</sup>
15. Thus, the CAR authorities did not give effect to the Warrant for Dominic Ongwen’s arrest which the Court had issued on 8 July 2005. Those authorities did not apply any of the procedures required of a “custodial State” under article 59 nor was he delivered to the Court by the CAR authorities in accordance with article 59(7).

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<sup>12</sup> ICC-02/04-01/05-419-Conf-Exp-Anx2.

<sup>13</sup> Suggested translation into English: “consents to his voluntary transfer to the International Criminal Court.”

<sup>14</sup> ICC-02/04-01/05-419-Conf-Exp, p.4, para.3.

<sup>15</sup> Registry Report, paras.4-7.

16. On the contrary, the *Procureur Général* specified<sup>16</sup> that “*il n’y a pas lieu de procéder à la procédure visée par l’article 59 du statut de Rome. Du fait que les autorités centrafricaines n’exercent pas leur compétence.*”<sup>17</sup> The *Procureur Général* was making it clear that the “transfer of custody” referred to in the Registry Report<sup>18</sup> did not involve the CAR in “delivering up” Dominic Ongwen to the Court.
17. Similarly, although Dominic Ongwen is a Ugandan national and the alleged crimes took place on Ugandan territory, Uganda cannot be considered the State that “surrendered” Dominic Ongwen to the Court for the purposes of article 10, any more than CAR can.
18. It is right to observe that the Registry Report records that the Ugandan People’s Defence Force (“UPDF”) provided “technical assistance”<sup>19</sup> in transferring Dominic Ongwen to Bangui, the capital of CAR, but so did other entities named in that document. No State or other entity has ever purported to proceed in accordance with article 59 to arrest or surrender Dominic Ongwen to the seat of the Court.
19. Finally, the Pre-Trial Chamber has itself noted on several occasions Dominic Ongwen’s voluntary appearance before the Court.<sup>20</sup>

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<sup>16</sup> ICC-02/04-01/05-419-Conf-Exp-Anx3.

<sup>17</sup> Suggested translation into English: “it is not appropriate to proceed with the procedure set out in Article 59 of the Rome Statute, because the Central African authorities are not exercising their jurisdiction.”

<sup>18</sup> See paragraph 11 above.

<sup>19</sup> Registry Report, para.1.

<sup>20</sup> See ICC-02/04-01/15-T-4-ENG (initial appearance on 26 January 2015), p.10, lns.4-15; p.11 lns.3-4. See also ICC-02/04-01/15-206 (“Ongwen Decision”), para.2 (noting that Mr Ongwen consented to appear voluntarily before the ICC [...]); *Ongwen Decision*, para.32, fn.64. See also ICC-02/04-01/05-424, para.2.



**In the absence of arrest and surrender by a State, the rule of speciality has no application**

20. The rule of speciality, as set out in article 101, is derived from the law of extradition. Within that context, it is closely interconnected with other principles such as double criminality and reciprocity. The purpose of the rule is to preserve the sovereignty of a State which has been requested to arrest and extradite an individual resident on its territory. The proposition is that, if the requested State is entitled to refuse to extradite an individual who is accused of criminal offences in another jurisdiction which are not recognised or are objectionable in some other way to the requested State, then that State must also have the right to oppose the addition of such offences to proceedings in the requesting State after extradition has taken place on other charges.<sup>21</sup> On the other hand, when the State has not arrested and extradited an individual, then no such obligation can exist, because the State's sovereignty has not been affected in any way.

21. Confirmation that the rationale of article 101 of the Statute is to protect State sovereignty can be found in decisions of two Pre-Trial Chambers at this Court. It is only the State surrendering the arrested person to the Court that has a role to play under article 101. The role of the surrendered person is limited to providing his or her views.

22. In the *Decision on the "Preliminary Motion Alleging Defects in the Documents Containing the Charges etc."*, delivered on 12 September 2011 in the case of *The*

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<sup>21</sup> Wilkitzki, P., "Article 101: Rule of speciality", in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, 2<sup>nd</sup> edn. (C.H.Beck, Hart, Nomos: Munchen, 2008), p. 1636. See also Swart, B., "Arrest and Surrender" in Cassese (ed.), *Rome Statute of the International Criminal Court: A Commentary (Volume II)* (Oxford University Press: Oxford, 2002), pp. 1639-1703, at p. 1699.

*Prosecutor v. Muthaura et al.*,<sup>22</sup> the Single Judge of Pre-Trial Chamber II found that the application of the rule of speciality “is limited to the scenarios in which the person is *arrested and is surrendered* as a result of a request submitted by the Court to a State (emphasis added).” The Single Judge was dealing here with persons who were appearing before the Court in answer to a summons, but the findings made are of more general application. The Single Judge grounded the distinction between “a person who is surrendered” and “a person who voluntarily appears before the Court” in statutory provisions, such as articles 58(5) and 61(1). In particular, the Single Judge noted that article 61(1) distinguishes between the person’s “surrender” and his “voluntary appearance” before the Court for the procedure to confirm charges. The Single Judge found that article 101 applied *only* to persons “arrested and surrendered as a result of a request submitted by the Court to the State”, and not to persons who voluntarily surrendered to the Court.

23. In *The Prosecutor v. Charles Blé Goudé*, the Single Judge of the Pre-Trial Chamber ruled that:

“article 101(2) of the Statute provides that a person can be proceeded against even for conduct other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered *if the State which has surrendered the person provides a waiver to the Court* [original emphasis]. This provision makes clear that only the State which has surrendered the person may allow the Court to proceed against that person even in the requirements described in article 101(1) of the Statute would not

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<sup>22</sup> ICC-01/09-02/11-315, para.16.

be met, while the surrendered person is only entitled to provide views, in accordance with rule 196 of the Rules.”<sup>23</sup>

24. It is submitted that the effect of article 101 is predicated upon there being in existence “A person surrendered to the Court under this Statute...” Dominic Ongwen is not such a person. Thus, article 101 has no application to his case.

### **Conclusion**

25. In the light of the submissions set out above, the Prosecution invites the Single Judge to decide that article 101 does not apply to the case of Dominic Ongwen and that no waiver is required.
26. The evidence establishes that Dominic Ongwen is not “[a] person surrendered to the Court under this Statute” and thus there is no requirement on the part of the Prosecution, or the Court more generally, to seek a waiver under article 101 from the CAR authorities or any other State.
27. The Prosecution is at liberty to include in the DCC any offences which can properly be supported by evidence sufficient to establish that there are substantial grounds to believe that Dominic Ongwen committed those offences.
28. This liberty is subject to the requirement of fair notice to the Defence. This requirement has been satisfied by the order of the Single Judge<sup>24</sup> that the Prosecutor give notice of any new charges and accusations of fact, with the

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<sup>23</sup> ICC-02/11-02/11-151, para. 8.

<sup>24</sup> ICC-02/04-01/15-T-6-ENG p.17, lns. 19-21.

same specificity as would be contained in a Warrant, no later than Monday 21 September 2015.



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Fatou Bensouda,  
Prosecutor

Dated this 21<sup>st</sup> day of May 2015  
At The Hague, The Netherlands