

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 10 June 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*, Defence and Prosecution only

**Response to The Prosecutor's Submissions concerning the Applicability of Article
101 of the Rome Statute to the Proceedings against Dominic Ongwen**

Source: Defence for Dominic Ongwen

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

The Office of the Prosecutor
Fatou Bensouda, Prosecutor
Benjamin Gumpert, QC

Counsel for the Defence
Krispus Ayena Odongo

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for the Victims The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') commences its submission in response to The Prosecutor's submissions concerning the applicability of Article 101 of the Rome Statute to the proceedings against Dominic Ongwen by stating that, the issue to be resolved is, "*whether Dominic Ongwen voluntarily surrendered to the ICC by his own volition or was surrendered by the Central Africa Republic to ICC*"?
2. With profound respect, the Defence submits that the assertion that "*Dominic Ongwen appeared before the Court voluntarily*" and that "[h]e was not surrendered or delivered up by a State, within the meaning of article 101 (as elucidated by article 102)",¹ is totally misplaced. It is the firm view of the Defence that the rule of speciality applies in the Dominic Ongwen situation. Therefore, the waiver requirement of Article 101 is a necessity.

II. CONFIDENTIALITY LEVEL

3. The Defence files this document as confidential *ex parte*, Defence and Prosecution only as it responds to a document classified as such. The Defence agrees with the Prosecution's submission that neither those documents referred to in its submissions, nor these submissions, merit such a high degree of confidentiality, or any at all, and that these submissions should be reclassified as public by the Single Judge, His Honour Judge Tarfusser.

III. PROCEDURAL HISTORY

4. On 21 March 2007, the Central African Republic ('CAR') received a request from the Chamber to arrest and surrender Dominic Ongwen to the Court.²

¹ ICC-02/04-01/15-237-Conf-Exp, para. 3(c).

² ICC-02/04-01/05-227-Conf-Exp.

5. On or about 6 January 2015, Mr Dominic Ongwen surrendered to United States soldiers. He remained under arrest of the US soldiers at its Obo, CAR location for eight days.
6. On or about 14 January 2015, Mr Ongwen was transferred from the detention of the US soldiers to the custody of UPDF/AU soldiers located in Obo, CAR. Mr Ongwen remained under arrest at this base for the next two days.
7. On 16 January 2015, Mr Ongwen was transferred from the custody of the UPDF/AU, with technical assistance from the USA soldiers, "to the Central African Authorities, namely the Procureur-général près du Cour d'Appel de Bangui and the Procureur de la République".³ Mr Ongwen remained under the arrest of the authorities of the CAR for approximately 58 minutes before being surrendered to the Court.
8. On 21 January 2015, Mr Ongwen was moved from Bangui, CAR to The Hague, Netherlands.
9. On 22 May 2015, the Defence received the official notification of "The Prosecutor's submissions concerning the applicability of article 101 of the Rome Statute to the proceedings against Dominic Ongwen".⁴
10. On 27 May 2015, the Single Judge granted the Defence a time extension to file its response owing to the Defence's difficulties with securing documentation from the Government of the Republic of Uganda.⁵

IV. SUBMISSIONS

Legal Issues

11. The Defence submits that to "increase the factual scope of the case" does not include bringing of new charges. The contextual meaning of that phrase is that '*the facts*' constituting the charges may be added to support the charges as

³ ICC-02/04-01/15-189-Conf-Exp, para. 1.

⁴ ICC-02/04-01/15-237-Conf-Exp.

⁵ Email from Silvestro Stazzone on behalf of His Honour, Judge Tarfusser, dated 27 May 2015 and received at 16h58 GMT+2.

proffered against the person already surrendered to the Court under this Statute. It is clear from the wording of the Statute that such person *"shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered"*.⁶

12. The Defence is aware of the Single Judge's comment in the footnote in respect to the rule of speciality. The Defence believes that there might be some common ground in that Dominic Ongwen *"consented to appear voluntarily before the Court"*, but he did not come into the Court's custody of his own volition, rather through the actions of the CAR authorities as suggested by the Prosecution, which are patently two different things.

13. 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 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.*

14. Article 102 states, in relevant part, *[f]or the purposes of this Statute: (a) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute.*

15. 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 of arrest.

16. The Defence submits that the correct interpretation of Article 101 is that in a case where a state is used in any capacity to deliver a person to the Court, that state commits to surrendering the person only in the belief that the person shall only

⁶ Article 101 of the Rome Statute.

be tried for the offences contained in the charges proffered against him at the time of the transfer of custody to the Court. In case any new charges emerge, as a matter of respect for the hospitality and cooperation accorded by the surrendering state, the law requires that the surrendering state shall be apprised, consulted and consent to the levying additional charges.

17. The Defence submits that the framers of Article 101 were mindful of the rights of the surrendering state to withhold its cooperation in surrendering the person to the Court if it thought some of the charges were, for instance, malicious or an affront to international justice. That is why it is necessary to get its waiver before any new charges can be filed.

Mr Ongwen's "Voluntary Surrender" to the Court

18. The thrust of argument of the Prosecution that Dominic Ongwen came into the Court's custody of his own volition rather than through the actions of the CAR authorities; that Dominic Ongwen was not surrendered to the Court; and he was not delivered up to the Court by a state pursuant to the Statute. This cannot be sustained.
19. The Defence wishes to retrace the movements of Dominic Ongwen from the time he was able to defect to the time he ended up in the custody of the Court. This will demonstrate that Mr Ongwen did not voluntarily surrender to the Court.⁷
20. After his defection, Mr Ongwen 'surrendered' to a rebel group called Aboro with the clear intention of going back to his home country, Uganda. He asked to be taken to UPDF soldiers. The Aboro, not knowing where the UPDF was located, delivered him up to the Janjaweed.
21. The Janjaweed recognised Mr Ongwen. The Janjaweed wanted to avoid soldiers, so he was delivered up to Séléka rebels to facilitate the achievement of Mr

⁷ Unfortunately, the documents sought by the Defence over the past two weeks to further demonstrate Mr Ongwen's detention/arrest by every group were not secured.

Ongwen's intentions of returning to Uganda. While in the custody of the Séléka, Mr Ongwen's movements were confined.

22. When he was handed over to US soldiers, his intentions to return to Uganda were still in focus. It is no secret that at that point, the government of Uganda, which referred the situation to the ICC, was keenly interested to receive Dominic Ongwen from the American soldiers. It was only after consideration of the intricacies of the requirements of international law that the US soldiers delivered him up to AU forces, which in turn transferred custody to the CAR.
23. It was only after the ICC reproduced a copy of the warrant of arrest against Mr Ongwen that CAR handed him over to the ICC instead of handing him over to the government of Uganda. It is therefore clear that there is no way it can be stated that Dominic Ongwen came into the Court's custody of his own volition rather than through the actions of the CAR authorities. The CAR authorities, after holding Mr Ongwen under arrest, ensuring his identity, ensuring he was held properly, and ensuring his human rights were being respected, delivered up Mr Ongwen as soon as possible to the custody of the Court pursuant to the arrest warrant.

V. RELIEF

24. The Defence respectfully requests the Single Judge to deny the Prosecution's motion and require the Prosecution to attain a waiver from the Central African Republic pursuant to Article 101 if it wishes to add additional charges against Mr Ongwen.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 10th day of June, 2015

At Kampala, Uganda