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

Date: 7 July 2015

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN UGANDA

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

Public

**Decision on the applicability of article 101 of the Rome Statute in the
proceedings against Dominic Ongwen**

To be notified, in accordance with regulation 31 of the Regulations of the Court, to:

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Unrepresented Victims

**Unrepresented Applicants for
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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Cuno Tarfusser, Single Judge exercising the functions of the Chamber, issues this decision on the applicability, in principle, of article 101 of the Rome Statute in the proceedings against Dominic Ongwen, following the Prosecutor's submissions dated 21 May 2015 (ICC-02/04-01/15-237-Conf-Exp), to which the Defence responded on 10 June 2015 (ICC-02/04-01/15-243-Conf-Exp).

1. During a status conference held on 19 May 2015 (ICC-02/04-01/15-T-6-ENG), the Prosecutor informed the Chamber that the charges she intends to bring against Dominic Ongwen could have a factual basis going beyond that on the basis of which the warrant of arrest against him was issued by the Chamber in 2005. The parties disagree as to the applicability of article 101 of the Statute in the present proceedings. In particular, while the Prosecutor maintains that Dominic Ongwen was not "surrendered" by the Central African Republic, but "voluntarily appeared" before the Court, the Defence states that a surrender took place and that, therefore, article 101 of the Statute is applicable.

2. Pending a formal notification of the intended charges to be filed by the Prosecutor on 21 September 2015, it remains to be seen whether the Prosecutor will in fact bring charges going beyond the factual basis of the warrant of arrest, and, if so, to what extent the facts and circumstances described in the charges would in fact differ from the facts on the basis of which the warrant of arrest was issued. Nevertheless, the Single Judge considers it appropriate to rule at the present time as to the applicability of article 101 of the Statute in principle, as this will provide an authoritative resolution to an important matter which, if left unresolved, could cause delay at later stages.

3. Article 101 of the Statute is applicable when a person was surrendered by a State to the Court. The question before the Single Judge, which is a question of fact, is therefore whether Dominic Ongwen was “surrendered” to the Court. In the view of the Single Judge, the question must be answered in the affirmative, for the following reasons.

4. Article 102(a) of the Statute defines “surrender” as the “delivering up of a person by a State to the Court, pursuant to th[e] Statute”. The relevant provisions (first and foremost, article 89 of the Statute and rule 184 of the Rules of Procedure and Evidence) do not mandate any particular procedure that would qualify the “delivering up” by a State to the Court of a person sought by the Court in order for it to be considered a “surrender”, other than the fact that this takes place in compliance with a request for arrest and surrender transmitted by the Court and that the relevant arrangements for the surrender of the person to the Court are those agreed upon between the authorities of the requested State and the Registrar.

5. As explained by the Registrar (ICC-02/04-01/15-189-Conf-Exp), on 16 January 2015 at approximately 17.55 hours, upon agreement with the African Union and with the technical assistance of the United States special forces and the Uganda People’s Defence Force, “Dominic Ongwen arrived in Bangui and was immediately handed over to the Central African Authorities, namely the Procureur-général près du Cour d’Appel de Bangui and the Procureur de la République”. At 18.53 hours, the Central African authorities handed custody of Dominic Ongwen to officials of the Court.

6. The record of the case contains a document entitled “*Procès-verbal de remise*”, signed by the *Procureur général près de la Cour d’appel de Bangui* and by a representative of the Court attesting that “*la garde de Mr Dominique Ongwen qui fait l’objet d’un mandat d’arrêt délivré par la Cour Pénale Internationale [...] a*

été remis aux représentant de la CPI aux fins de sa comparution devant la Cour, et que la remise a eu lieu le 16/01/2015 à 18 heures 53 min” (ICC-02/04-01/15-189-Conf-Exp-Anx3).

7. In the view of the Single Judge, this is sufficient to conclude that Dominic Ongwen was indeed surrendered to the Court by the Central African Republic, and that the latter State therefore benefits from the right accorded to it by the Statute in article 101.

8. The Prosecutor’s arguments to the effect that the receipt of Dominic Ongwen into custody of the Court on 16 January 2015 was deficient and did not meet the statutory definition of “surrender”, because the Central African authorities “did not apply any of the procedures required of a ‘custodial State’ under article 59” or because Dominic Ongwen allegedly consented to his surrender to the Court, are unpersuasive.

9. The Prosecutor’s argument is based on the following passage of the *Procès-verbal de remise*:

L’intéressé ayant déclaré de se rendre volontairement à la Cour Pénale Internationale, 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.

10. Article 59 of the Statute regulates arrest proceedings in the custodial State. Its crucial component, paragraph 2, states, and thus also limits, the competence of national authorities in the execution of warrants of arrest issued by the Court. In this sense, this provision does not, in itself, create a duty for the surrendering State to undertake any particular proceeding, upon obtaining custody over a person subject to a warrant of arrest issued by the Court, in order for the competent national authorities to transfer custody to the Court.

11. In the present case, the Central African authorities identified Dominic Ongwen as being the person to whom the warrant of arrest applies (ICC-02/04-01/15-189-Conf-Exp-Anx1), notified to him the warrant of arrest (ICC-02/04-01/15-189-Conf-Exp-Anx2) and proceeded to the transfer of custody to the Court. In the view of the Single Judge, these actions, as further confirmed by the *Procès-verbal de remise*, constitute the relevant proceedings following which Dominic Ongwen was surrendered to the Court. The fact that this procedure was relatively short having taken place in slightly less than one hour and with comparatively less procedural obstacles than on other occasions does not change the nature of this process.

12. From the viewpoint of the question at hand, the fact that Dominic Ongwen consented to being surrendered to the Court is irrelevant. It was indeed open to the Central African Republic to take into account the fact that Dominic Ongwen expressed his consent to be surrendered to the Court (cf. article 92(3) of the Statute in the context of provisional arrest), which might have indeed simplified the procedure. However, this does not negate, and is not incompatible with, the fact that the Court obtained custody over Dominic Ongwen through the actions of the competent authorities of the Central African Republic, which, following a formal procedure, delivered him up to the Court within the meaning of article 102 of the Statute.

13. Contrary to the Prosecutor's assertion, Dominic Ongwen did not voluntarily appear before the Court. At no point after the transfer of his custody to the Central African authorities, at the very least, did he regain his personal freedom to be able to freely travel to the seat of the Court. He was brought to the seat of the Court as an arrestee, regardless of what his personal attitude towards his surrender may have been.

14. In sum, the Single Judge concludes that in the present case, the Central African Republic duly executed its obligations under the Rome Statute by surrendering Dominic Ongwen to the Court. Article 101 of the Statute is, in principle, applicable in the present proceedings. On the side, the Single Judge also emphasises that arguing, as the Prosecutor does, that the comparatively simpler procedure leading to Dominic Ongwen's surrender to the Court deprives the Central African Republic of its statutory rights (in particular that provided in article 101 of the Statute) ultimately constitutes a disincentive to constructive cooperation between the Court and the State to the detriment of the interests of the Court itself.

15. Finally, the Single Judge notes that the parties suggest the reclassification of documents in the record of the case relating to the matter as "public". The Single Judge recalls that, previously, the Registrar submitted that his report on the surrender of Dominic Ongwen should remain confidential because it contains "sensitive and confidential information in relation to the Court's operation and working methods regarding the implementation of Arrest and Surrender operations" (ICC-02/04-01/15-233-Conf-Exp-AnxB), but is of the view that, with the exception of document ICC-02/04-01/15-189-Conf-Exp-Anx10, the information contained in the report and its annexes is not particularly specific and can be made public without prejudice to the Court's ability to secure cooperation.

FOR THESE REASONS, THE SINGLE JUDGE

FINDS that, since Dominic Ongwen was surrendered to the Court by the Central African Republic, article 101 of the Statute is, in principle, applicable in the present proceedings;

ORDERS the Registrar to reclassify as “public” the following documents:

- ICC-02/04-01/15-189-Conf-Exp and annexes 1-9, as well as ICC-02/04-01/05-419-Conf-Exp and annexes 1-9;
- ICC-02/04-01/15-237-Conf-Exp; and
- ICC-02/04-01/15-243-Conf-Exp.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'Cuno Tarfusser', is written over a horizontal line.

Judge Cuno Tarfusser
Single Judge

Dated this 7 July 2015

At The Hague, The Netherlands