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PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Chang-ho Chung

SITUATION IN UGANDA

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

Public

Prosecution's application for leave to appeal the "Decision on the applicability of article 101 of the Rome Statute in the proceedings against Dominic Ongwen"

Source: The Office of the Prosecutor

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Introduction

1. In his decision of 7 July 2015,¹ the Single Judge of Pre-Trial Chamber II held that the Central African Republic² “surrendered” Dominic Ongwen to the Court, and as a result, article 101 of the Statute (the rule of speciality), in principle, applies to the proceedings against Dominic Ongwen.³

2. The Office of the Prosecutor (“Prosecution”) seeks leave to appeal the Decision on the following two discrete issues:⁴

a) Whether, as a matter of law, the “surrender” of a person by a State to the Court under articles 101 and 102(a) requires the surrendering State to first follow arrest proceedings under article 59, and if so, whether, as a matter of fact, the proceedings undertaken by the CAR authorities in relation to Dominic Ongwen meet the requirements under article 59 (“First Issue”)?

b) Whether, as a matter of law, a person can be “surrendered” by a State to the Court under articles 101 and 102(a) by a lesser procedure falling short of proceedings under article 59, and if so, whether, as a matter of fact, the proceedings undertaken by the CAR authorities in relation to Dominic Ongwen meet the requirements for surrender (“Second Issue”)?

3. Both Issues are appealable because they are essential to determine the correctness of the Decision that article 101 applies in this case, and they arise from the Decision. Moreover, both Issues meet the criteria for leave to appeal under article 82(1)(d). The Issues significantly affect the fair and expeditious conduct of the proceedings, and the outcome of the trial. They directly impact on the Prosecution’s ability to bring additional charges against Dominic

¹ ICC-02/04-01/15-260 (“Decision”).

² Referred to as “the CAR”.

³ Decision, disposition, p.7.

⁴ Collectively: “Issues”.

Ongwen. Not only does the Decision introduce a further procedural and bureaucratic hurdle that the Prosecution must overcome before it can consider certain charges, it allows the CAR to decide if the Prosecution can even bring such charges and creates an uncertain outcome. As the Single Judge recognised, leaving the Issues relating to article 101's applicability unresolved "could cause delay at later stages."⁵ Further, the Appeals Chamber's immediate resolution of the two Issues would materially advance the proceedings. Echoing the words of the Single Judge, a final decision on whether article 101 applies to these proceedings would provide "an authoritative resolution to an important matter."⁶

Submissions

4. The Issues arise from the Decision and qualify as an "issue" under article 82(1)(d). In addition, they individually meet the criteria for leave to appeal under that provision.

(i) The Issues arise from the Decision

5. Both Issues arise from the Decision. Although the Decision's conclusion that article 101 applies to the present proceedings is unambiguous, the reasoning leaves sufficient room to allow for different procedures (article 59 or otherwise) to give effect to article 101. Indeed, the Decision considers that the "surrender" of a person to the Court by the CAR authorities may take place—as a matter of law and fact—by both article 59 procedures and by procedures less than and different from those under article 59. Further, although the Decision states that the determination is a "question of fact",⁷ the Single Judge made several legal findings on the relevant statutory framework on "arrest" and

⁵ Decision, para.2.

⁶ Decision, para.2.

⁷ Decision, para.3.

“surrender” that could trigger the rule of speciality.⁸ Both Issues therefore raise legal and factual matters.

6. In particular, the First Issue – whether a State can trigger article 101 only by surrendering a person to the Court under article 59 procedures – is addressed in paragraphs 3-14 of the Decision. First, the Single Judge found that any “surrender” under article 102(a) requires, at the least, the Court to transmit a request for arrest and surrender and for the State authorities and the Registrar to agree upon the relevant arrangements for the surrender of the person.⁹ The Single Judge then considered and rejected the Prosecution’s argument that the CAR authorities had declined to exercise their article 59 competence.¹⁰ The Decision acknowledges that “[a]rticle 59 of the Statute regulates arrest proceedings in the custodial State.”¹¹ However, while designating article 59(2) as the “crucial component” of this statutory provision, the Single Judge limited its scope to merely “the competence of national authorities in the execution of warrants of arrest issued by the Court.” He also found that “this provision does not, in itself, create a duty for the surrendering State to undertake any

⁸ See e.g., Decision, para.4, stating “ [t]he 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 that person to the Court are those agreed upon between the authorities of the requested State and the Registrar.”; Decision, para.10, stating that “[a]rticle 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, and “does not, in itself, create a duty for the surrendering State to undertake any particular proceeding[...]””; Decision, para.7, stating that “[...]Ongwen was indeed surrendered to the Court by the CAR, and that the latter State therefore benefits from the right accorded to it by the Statute in article 101”; Decision, para.14 and disposition, stating that [a]rticle 101 of the Statute is, in principle, applicable to the present proceedings.”

⁹ Decision, para.4.

¹⁰ Decision, paras.8, 9. Accordingly, the *Procès-verbal de remise* states, “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.”

¹¹ Decision, para.10.

particular proceeding” to transfer custody of a person to the Court pending an arrest warrant.¹²

7. On the facts of the case, the Single Judge found that the CAR authorities had taken certain steps – minimal as they may have been – to “surrender” Dominic Ongwen to the Court. He held that the CAR authorities (i) identified Dominic Ongwen as the person to whom the arrest warrant applied; (ii) notified to him the arrest warrant; and (iii) proceeded to transfer him to the Court’s custody. These steps, according to the Single Judge, constituted “the relevant proceedings following which Dominic Ongwen was surrendered to the Court.”¹³ Because the Single Judge considered and made distinct legal findings on whether “surrender” to the Court under article 101 requires the CAR to follow article 59 procedures and then suggested that such procedures were followed in fact, according to article 59, the First Issue arises from the Decision.

8. Likewise, the Second Issue arises from the Decision. The Decision addresses the Second Issue (whether surrender under article 101 can be triggered by lesser procedures falling short of article 59) in paragraphs 3–14. It envisages alternative procedures to the ones in article 59. The Single Judge first considered that article 89 (surrender of persons to the Court) and rule 184 (arrangements for surrender) did not mandate any particular procedure to qualify how a person may be “delivered up” to the Court for the purposes of article 102(a). The Decision then suggests that following the Court’s request to a State for arrest and surrender, such surrender could be accomplished by “relevant arrangements [...] agreed upon between the authorities of the requested State and the Registrar”.¹⁴ On the facts, the Single Judge then noted that the “*Procès-verbal de remise*” – signed by the *Procureur général près de la Cour*

¹² Decision, para.10.

¹³ Decision, para.11.

¹⁴ Decision, para.4.

*d'appel de Bangui and the Court's representative – stated 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.”*¹⁵ According to the Single Judge, this was sufficient to conclude that the CAR had surrendered Dominic Ongwen to the Court.¹⁶

9. Similar to his factual determination with respect to article 59 procedures, the Single Judge suggested that the CAR authorities conducted the minimum steps required for Dominic Ongwen's surrender to the Court.¹⁷ Equally, however, the Decision appears to leave it open that such steps may be taken pursuant to a “formal procedure”,¹⁸ but does not identify it as an article 59 procedure. Because the Decision finds that – as a matter of law and fact – the CAR's surrender of Dominic Ongwen to the Court can be, and was, effected by lesser procedures falling short of the ones under article 59, the Second Issue arises from the Decision.

10. Moreover, both Issues arise from this Decision. Even if the Prosecution has not yet brought additional charges in the case, the Decision assumes that the Prosecution will do so.¹⁹ The Single Judge provided – by way of this Decision - “an authoritative resolution” that the rule of speciality under article 101 applies, in principle, in this case. His Decision, therefore, that the rule of speciality applies in principle to these proceedings governs the entire proceedings. It is the Single Judge's determinative ruling on the matter. As a result no matter when the Prosecution brings additional charges against Dominic Ongwen, it will be bound to consider the requirements of article 101 pursuant to the Decision.

¹⁵ Decision, para.6.

¹⁶ Decision, para.7.

¹⁷ Decision, para.11.

¹⁸ Decision, para.12.

¹⁹ Decision, paras.1,2.

(ii) *The Issues are appealable and fall within the scope of article 82(1)(d)*

11. Both Issues are appealable issues within the terms of article 82(1)(d). Their resolution is essential to determine the correctness of the Single Judge's conclusion that article 101 applies to the proceedings against Dominic Ongwen.²⁰ Indeed, the manner in which a State can effect the surrender of a person to the Court – whether by article 59 procedures or by lesser procedures falling short of article 59 – is critical to determining if, as a matter of law, the rule of speciality applies to these proceedings. And if either article 59 procedures or some lesser version of them were found to be required, the fundamental question would be a factual determination: do the minimal actions of the CAR authorities satisfy these procedures?

12. Moreover, the Issues are not hypothetical or speculative. The Single Judge appears to have accepted as a necessary pre-condition of his Decision, that the Prosecution will bring additional charges in these proceedings.²¹ Although the exact nature of the Prosecution's charges is unknown at this stage, the Single Judge considered it appropriate to find that article 101 applied to the proceedings, "pending the formal notification of the intended charges to be filed by the Prosecutor on 21 September 2015".²² Therefore, the Single Judge accepted that "the important matter" of article 101's applicability to the proceedings would govern the rest of the proceedings, particularly when additional charges are brought.

13. Nor do the Issues merely disagree with the Decision. As shown above,²³ the Decision leaves several interpretations open as to which procedure the CAR

²⁰ ICC-01/04-168 OA3, para.9. ICC-02/04-01/05-367, para.22; ICC-02/05-02/09-267, p.6; ICC-01/04-01/06-2463, para.8; ICC-01/09-02/11-27, para.7. *See also* ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para.4, specifying that "[a] decision "involves" an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made."

²¹ Decision, para.1.

²² Decision, para.2.

²³ *See* paras.5-10.

was found to have utilised to effect Dominic Ongwen's surrender to the Court. Given the ambiguity in aspects of the Decision that must be resolved, the Decision raises Issues that are both warranted as appealable.

(iii) *Both Issues meet the criteria for leave to appeal under article 82(1)(d)*

a) The Issues significantly affect the fairness of the proceedings

14. Both Issues significantly affect the fairness of the proceedings. Whether the rule of speciality applies to these proceedings directly impacts the charges that the Prosecution can bring against Dominic Ongwen. This is a fundamental issue of fairness to the Prosecution, and consequently to the proceedings.²⁴ At the very least, the Decision introduces an additional procedural hurdle that the Prosecution must overcome before it can consider the full range of charges against Dominic Ongwen. The Prosecution is obliged to first secure the CAR authorities' waiver before it can charge Dominic Ongwen. Moreover, the Prosecution is not guaranteed such a waiver. Therefore, the Decision makes the Prosecution's potential charges against Dominic Ongwen contingent on the CAR authorities' consideration and approval of them. As such, the Prosecution may be hampered from bringing a full range of charges against Dominic Ongwen because article 101 was misapplied to these proceedings.

15. Further, by declaring that it would not exercise its article 59 jurisdiction and by taking only the bare minimum steps possible to transfer Dominic Ongwen into the Court's custody, the CAR did not invest its sovereignty into the process. Because the rule of speciality essentially protects States' sovereignty,²⁵ it is unfair to give the CAR an opportunity to dictate the terms of

²⁴ In their joint dissenting opinion to the recent Appeals Judgment in the *Ngudjolo* case, Judges Tarfusser and Trendafilova found that the notion of fairness extends to the Prosecution. They concluded that the Trial Chamber violated article 64(2), as it is their "firm conviction that not only did the Trial Chamber prevent the Prosecutor from presenting her case on a par with the defence and from fulfilling her statutory obligations pursuant to article 54(1) of the Statute" (see ICC-01/04-02/12-271-AnxA A, para.5).

²⁵ ICC-01/09-02/11-315, para.16.

the Prosecution's charges, without the CAR having any real stake in Dominic Ongwen's case before this Court.

b) The Issues significantly affect the expeditious conduct of the proceedings

16. Both Issues also significantly affect the expedition of the proceedings. Not only does the Decision circumscribe the full range of charges available to the Prosecution, it compels the Prosecution to seek a waiver from the CAR. This could unduly delay the process. The Prosecution must first contend with any bureaucratic requirements that the CAR may have before it can proceed to settle its charges. At this juncture, there is simply no indication how long this process will take, nor if it can be successfully undertaken within the necessary deadlines. This could unnecessarily delay the confirmation process, and the trial. Indeed, the impact on expedition is apparent: the Single Judge emphasised that failing to resolve the application of article 101 in these proceedings at this stage would "cause delay at later stages."²⁶

c) The Issues significantly affect the outcome of the trial

17. Both Issues significantly affect the outcome of the trial. As shown above,²⁷ the Decision adversely affects the nature of the Prosecution's intended charges. What the Prosecution can or cannot charge depends on the CAR authorities' assessment. That assessment will also directly impact on "the amount and type of evidence that the Chamber will have to consider when making its final determination in accordance with Article 74."²⁸ The outcome of Dominic Ongwen's case is therefore affected.

²⁶ Decision, para.2.

²⁷ See paras.14-16.

²⁸ ICC-01/05-01/08-1169, para.35.

d) Immediate resolution of the Issues may materially advance the proceedings

18. The Appeals Chamber's immediate resolution of the two Issues would materially advance the proceedings. As the Appeals Chamber itself has stated, the "prompt reference of the issue to the court of appeal" and its "authoritative determination" will help the proceedings "'move forward' by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings."²⁹ Echoing these findings, the Single Judge held that providing "an authoritative resolution to the important matter [of the applicability of article 101]" was necessary. Leaving it unresolved "could cause delay at later stages".³⁰

19. Only the Appeals Chamber can provide the most authoritative and final resolution of the matter in this case. With an appellate determination, the Parties would know for certain whether the rule of speciality applies in these proceedings or not.

20. Indeed, if the Issues are not immediately resolved by the Appeals Chamber, the Prosecution may be unfairly asked to seek a waiver from the CAR authorities for its charges, and may even be prevented from bringing certain charges. This could potentially shrink the scope of the Prosecution's case against Dominic Ongwen, cause consequences that cannot be remedied at a later stage and thereby irreparably taint the entire proceedings.

21. The Appeals Chamber's timely intervention will avert the danger that subsequent proceedings in this case are later nullified, in whole or in part, by challenges brought by the Parties. Indeed, under article 82(1)(d), the Appeals

²⁹ ICC-01/04-168 OA3, paras.14-15, 18.

³⁰ Decision, para.2.

Chamber's role is to "rid [...] the judicial process of possible mistakes that might taint [...] the fairness of the proceedings".³¹

22. Furthermore, the core function of the Appeals Chamber is to ensure that the law of the Court evolves in a coherent and standardised manner, and to provide guidance to Pre-Trial and Trial Chambers as to the correct interpretation of the law,³² thereby enhancing clarity and predictability in the Court's proceedings. Because the Single Judge found that the rule of speciality applies to these proceedings, the Appeals Chamber will not be limited to only an advisory role. Instead, the Appeals Chamber will be asked to determine very tangible principles affecting the scope and breadth of the Prosecution's case against Dominic Ongwen.

23. Finally, although the rule of speciality is currently limited to Dominic Ongwen's case, it is a novel issue at this Court and could have a potential wide ranging effect on other cases as well. Granting leave to appeal would also materially advance other proceedings,³³ because the Appeals Chamber could confirm the situations in which the rule of speciality applies. No doubt, an appellate determination at this stage would significantly reduce the amount of litigation on the Issues and allow future pre-trial proceedings to be dealt with promptly and in a streamlined fashion.

³¹ ICC-01/04-168 OA3, para.14. The Prosecution notes that the Appeals Chamber refers to "possible mistakes that might taint" (emphasis added).

³² See e.g. *Prosecutor v. Krnojelac*, IT-97-25-A, Judgement, 17 September 2003, para. 7: one concern of the Appeals Chamber "is to ensure the development of the Tribunal's case-law and the standardisation of the applicable law"; <http://www.icty.org/x/cases/krnjelac/acjug/en/krn-aj030917e.pdf>. See also *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000, para. 113(ii): "[t]he fundamental mandate of the Tribunal to prosecute persons responsible for serious violations of international humanitarian law cannot be achieved if the accused and the Prosecution do not have the assurance of certainty and predictability in the application of the applicable law"; <http://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf>.

³³ In certain circumstances, the potential impact on other proceedings may be "invoked as an additional argument in support of the alleged significant impact on the current proceedings": see ICC-02/04-01/05-20-US-Exp, para.54 (unsealed pursuant to ICC-02/04-01/05-52).

Conclusion

24. For the above reasons, the Prosecution requests the Pre-Trial Chamber to grant it leave to appeal the Decision on the two Issues. Both Issues arise from the Decision and are appealable. Both Issues also meet the criteria for leave to appeal under article 82(1)(d).



Fatou Bensouda,
Prosecutor

Dated this 13th day of July 2015
At The Hague, The Netherlands