

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 20 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

**Defence Response to the Prosecution's Request to Appeal the Decision on the
Applicability of Article 101**

Source: Defence for Dominic Ongwen

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

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for the Victims

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REGISTRY

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Detention Section

**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') responds to the Office of the Prosecutor's ('Prosecution') request for leave to appeal the "Decision on the applicability of article 101 of the Rome Statute in the proceedings against Dominic Ongwen"¹ pursuant to Article 82(1)(d) of the Rome Statute ('Request'). The Prosecution's application of Article 82(1)(d) in the Request is without merit and should be denied.

II. PROCEDURAL HISTORY

2. On 6 January 2015, Mr Ongwen was placed under arrest by soldiers of the United States of America operating in the Central African Republic.
3. On 16 January 2015, Mr Ongwen was handed over to the authorities of the Central African Republic from joint AU/UPDF Forces, with the assistance of the US Military. About an hour later, Mr Ongwen was surrendered to the International Criminal Court within the meaning of Article 102(a) of the Statute.²
4. On 26 January 2015, Mr Ongwen appeared before the former Single Judge, Her Honour Judge Ekaterina Tredafilova, pursuant to Article 60(1) of the Statute and Rule 121(1) of the Rules of Procedure and Evidence.
5. On 2 March 2015, the Prosecution stated that it would know what additional counts it would be asking for within the next three months.³
6. On 6 March 2015, the former Single Judge, Her Honour Ekaterina Trendafilova put the Prosecution on notice that Article 101 of the Statute would be at issue in the proceedings.⁴

¹ ICC-02/04-01/15-266.

² ICC-02/04-01/15-189, para. 4.

³ ICC-02/04-01/15-191-Anx-Red, pg 4 (Question 2).

⁴ ICC-02/04-01/15-206, fn 66.

7. On 19 May 2015, the Single Judge, His Honour Judge Cuno Tarfusser ('Single Judge'), reminded the Prosecution that the issue pertaining to Article 101 had not been resolved.⁵
8. On 22 May 2015, the Prosecution filed submissions on the applicability of Article 101 of the Statute to the case, stating that it was not applicable to the case.⁶
9. On 10 June 2015, the Defence filed its response, stating that Article 101 was applicable to Mr Ongwen.⁷
10. On 7 July 2015, the Single Judge issued the "Decision on the applicability of article 101 of the Rome Statute in the proceedings against Dominic Ongwen" ('Decision'), in which he decided that Article 101 was applicable to Mr Ongwen.⁸
11. On 13 July 2015, the Prosecution requested leave to appeal the 7 July 2015 decision pursuant to Article 82(1)(d) of the Statute.⁹

III. SUBMISSIONS

12. Article 82(1)(d) allows for an interlocutory appeal when an appellant demonstrates that the:

Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

A. The Issues which the Prosecution Request Leave to Appeal for are not Issues within the Meaning of Article 82(1)(d)

13. The "issues" described by the Prosecution in the Request are not appealable issues as defined by the Appeals Chamber. The Prosecution's Request consists

⁵ ICC-02/04-01/15-T-6-ENG, pg 10, lns 2-22.

⁶ ICC-02/04-01/15-237.

⁷ ICC-02/04-01/15-243.

⁸ ICC-02/04-01/15-260.

⁹ ICC-02/04-01/15-266.

merely of two questions which the Prosecution has a conflicting opinion on the answer.

B. *The Request does not List an Issue that Affects the Fair and Expeditious Conduct of the Proceeding*

14. The Prosecution claims that the Decision affects the fair conduct of the proceedings, *to wit*, it would require the Prosecution to perform its duties under the Rome Statute and request a waiver of the rule of speciality pursuant to Article 101(2).¹⁰

15. The Prosecution claims that if it is required to seek permission from Central African Republic authorities pursuant to Article 101(2), it could affect the expeditiousness of the proceedings. It stated that:

“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.””¹¹

16. The Prosecution was put on notice on 6 March 2015 that Article 101 would be at issue. This is uncontested.

17. Knowing that Article 101 would be at issue, the proper conduct of the Prosecution *should* have been to begin the “bureaucratic requirements” necessary for the waiver by CAR authorities. This would have been the correct application of due diligence expected of the Prosecution.

18. The Prosecution claims that the Decision affects the fair and expeditious nature of the proceedings because the Prosecution failed to exercise reasonable due

¹⁰ ICC-02/04-01/15-266, para. 14-15.

¹¹ *Ibid*, at para. 16.

diligence, not that the Decision unreasonably affects the fair and expeditious nature of the proceedings. The Prosecution cannot be rewarded for its continued failures to exercise due diligence and asking the Judges to fix its mistakes.¹²

C. The Request does not List an Issue that could Directly Affect the Outcome of the Trial

19. As written above, the Prosecution has failed to exercise proper due diligence in respect to Article 101(2).
20. The Prosecution's failure to request a waiver from CAR authorities is the reason that the Decision *might* affect the outcome of the trial proceedings. The Prosecution has brought this issue upon itself, not the Single Judge.
21. Again, the Prosecution was put on notice on 6 March 2015 that Article 101 was at issue in the proceedings. Four and a half months later, has the Prosecution even started the "bureaucratic requirements" necessary under the Rome Statute and CAR law to secure a waiver pursuant to Article 101(2)?
22. The Prosecution's failure to exercise due diligence has affected the outcome of the trial, not the Decision. The Single Judge's Decision might be moot if the Prosecution exercised due diligence. The Prosecution cannot be rewarded for its failure to exercise due diligence in this case.

D. The Request does not List an Issue that if Resolved by the Appeals Chamber, would Materially Advance the Proceedings

23. The "issues" identified by the Prosecution would not materially advance the proceedings if answered by the Appeals Chamber.
24. The proceedings would be materially advanced if the Prosecution followed the "bureaucratic requirements" under the Rome Statute and CAR law. Only then would the Single Judge and the Appeals Chamber be properly informed as to the advancement of the proceedings. The Prosecution did not and cannot explain to

¹² For examples of the Prosecution's failure of due diligence, see ICC-02/04-01/15-T-6-ENG, pg 6, ln 9 - pg 10, ln 2 and ICC-01/09-02/11-908, paras 45 and 83.

the Single Judge the progress of its request pursuant to Article 101(2) because it has not done so. The Prosecution should be required to pursue all reasonable options, not just one that allows its prosecutors to remain in The Hague and file submissions.

25. The Prosecution has deprived the Single Judge, the Appeals Chamber, and yes, Mr Ongwen, of valuable time and materials by pursuing what it thought to be the option of least resistance. It is by the Prosecution's own fault and error that these "issues" are before the Single Judge. Had the Prosecution requested a waiver pursuant to Article 101(2), and CAR authorities denied the request, a decision on this matter might materially advance the proceedings. From the language used in paragraph 20 of the Request, the Prosecution has not done this.¹³ The Prosecution cannot be rewarded for its lack of due diligence.

IV. RELIEF

26. The Defence respectfully requests the Single Judge to deny the Request in whole. The Prosecution has failed to show how its "issues" meet the criteria for leave to appeal as defined in Article 82(1)(d).

¹³ ICC-02/04-01/15-266, para. 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.")

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 20th day of July 2015
At Kampala, Uganda