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No.: ICC-02/04-01/15
Date: 1 September 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 “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’”

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 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 “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’” dated 13 July 2015 (ICC-02/04-01/15-266, “Application”).

1. On 7 July 2015, following submissions by the Prosecutor (ICC-02/04-01/15-237) and the Defence (ICC-02/04-01/15-243), the Single Judge issued the “Decision on the applicability of article 101 of the Rome Statute in the proceedings against Dominic Ongwen” (ICC-02/04-01/15-260, “Decision”), whereby he determined that, rather than voluntary appearing before the Court, as argued by the Prosecutor, Dominic Ongwen was surrendered to the Court by the Central African Republic. The Single Judge reached this conclusion on the ground that the Court obtained custody over Dominic Ongwen through the actions of the competent authorities of the Central African Republic, which delivered him up to the Court and produced a “*Procès-verbal de remise*”. Moreover, the Single Judge considered that, contrary to the Prosecutor’s assertion, Dominic Ongwen did not voluntarily appear before the Court given that, irrespective of what his personal attitude towards his surrender may have been, at no point after the transfer of his custody to the Central African authorities, at the very least, did he reattain his personal freedom to be able to freely travel to the seat of the Court.

2. On 13 July 2015, the Prosecutor filed the Application, to which the Defence responded on 20 July 2015 (ICC-02/04-01/15-274).

3. The Single Judge notes article 82(1)(d) of the Statute, rule 155 of the Rules of Procedure and Evidence, and regulation 65 of the Regulations of the Court, as well as the established case law of the Court in the matter of interlocutory appeals pursuant to article 82(1)(d) of the Statute. In particular,

the Single Judge recalls that an appealable issue is not any issue or matter over which there exists a disagreement, but a subject the resolution of which is essential for the determination of the particular matter under consideration.

4. In the Application, the Prosecutor requests leave to bring before the Appeals Chamber the following questions: (i) whether, as a matter of law, the surrender of a person by a State to the Court requires the surrendering State to first follow arrest proceedings under article 59, and if so, whether in handing custody over Dominic Ongwen to the Court the procedure under article 59 of the Statute was properly followed (first issue); and (ii) in case surrender may be triggered by lesser procedures falling short of article 59, whether the proceedings undertaken by the Central African authorities in relation to Dominic Ongwen meet the requirements of any such alternative procedures (second issue). Thus, the subject-matter proposed for appeal essentially concerns the propriety of the surrender proceedings in the Central African Republic.

5. However, the matter determined in the Decision is binary: was Dominic Ongwen surrendered to the Court by the Central African authorities or did he voluntarily appear before the Court? Even if it is assumed, for the sake of argument, that the Single Judge erred in the Decision in addressing the particularities of the proceedings by which custody over Dominic Ongwen was handed over to the Court by the Central African authorities (which is the core of both issues raised by the Prosecutor in the Application), this would have no discernible impact on the final determination reached in the Decision.

6. It is true that the Decision, in response to the Prosecutor's arguments, noted as a matter of fact that Dominic Ongwen was brought before the competent authorities of the Central African Republic, was identified as the person to whom the warrant of arrest issued by the Court applied, was

notified of the warrant of arrest and handed over to officials of the Court. However, the conclusion that Dominic Ongwen did not voluntarily appear to the Court but was surrendered to the Court was founded on the grounds that custody over him had been transferred by the Central African authorities to the Court and that the Central African authorities had produced a “*Procès-verbal de remise*”. In the present factual circumstances, it is not apparent to the Single Judge – and, importantly, no argument was brought by the Prosecutor in this regard neither in her original submissions nor in the Application – which flaws exist in the delivering up of Dominic Ongwen by the Central African authorities to the Court (fact which is not contested) that are suitable to transform this process into a “voluntary appearance”. In particular, no submission has been put forward by the Prosecutor in substantiating her argument (on which the Application fundamentally rests) that the particularities of the proceedings by which custody over Dominic Ongwen was handed over to the Court by the Central African authorities have an essential bearing on the determination of whether a surrender or a voluntary appearance had taken place.

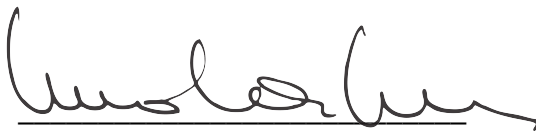
7. Indeed, the Single Judge considers that, assuming that the Prosecutor were to succeed in arguing before the Appeals Chamber that Dominic Ongwen’s surrender from the Central African authorities was somehow flawed, no such finding would render the procedure a voluntary appearance before the Court. In conclusion, irrespective of the importance of the questions raised by the Prosecutor, the final outcome of the Decision would not have been different even if the issues raised by the Prosecutor in the Application had been decided differently by the Single Judge.

8. Thus, the issues raised by the Prosecutor in the Application are not essential for the ultimate determination made in the Decision, and the Application must fail.

FOR THESE REASONS, THE SINGLE JUDGE

REJECTS the Application.

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

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

Judge Cuno Tarfusser
Single Judge

Dated this 1 September 2015

At The Hague, The Netherlands