

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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N°: ICC-02/04-01/15
Date: 26 January 2016

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN UGANDA

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

Confidential

Order to redact the transcript and audio visual broadcast of a public hearing

The Office of the Prosecutor
Ms. Fatou Bensouda

Counsel for Dominic Ongwen
Mr. Kripus Ayena Odongo

Legal Representatives of the Victims
Mr. Joseph Manoba
Mr. Francisco Cox

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants
(Participation/Reparation)

The Office of Public Counsel for
Victims
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States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations
Section

Other

I, Judge Cuno Tarfusser, judge at the International Criminal Court (the “Court”);

CONSIDERING that during the public hearing held on 26 January 2016 (the “Hearing”) confidential information has inadvertently been mentioned;

NOTING Article 68 of the Rome Statute, Rules 87 and 88 of the Rules of Procedure and Evidence, Regulation 21 of the Regulations of the Court and Regulation 43 of the Regulations of the Registry;

ORDER the Registry that the following highlighted text be omitted from the transcript of this hearing and that the following extracted portion be removed from the public audiovisual recording/ broadcast of this hearing:

10:03:31 Article 25(3)(a), as your Honours are very well aware, provides
 10:03:37 for criminal responsibility when an individual: Commits such a
 10:03:43 crime, whether as an individual, jointly with another or through
 10:03:48 another person, regardless of whether that other person is
 10:03:55 criminally responsible.
 10:03:57 The very fact that the notion of inTKR-BGT coperpetration cannot
 10:04:06 be found in the statute should not go unnoticed in light of
 10:04:12 Article 22 which incorporates the principle of nullum crimen sin
 10:04:20 AEU ledge AEU. No crime without law. It is argued, therefore,
 10:04:27 that Article 25(3)(a) is to be strictly construed and not
 10:04:35 extended by analogy.
 10:04:42 The Defence puts forward Judge Van den Wingaert -- opined in
 10:04:59 relation to this mode of liability. That it is a radical
 10:05:02 expansion of Article 25(3)(a) of the Statute.
 10:05:10 In this regard, the Defence also would like to point to the
 10:05:16 similarities between inTKR-BGT coperpetration and the mode of
 10:05:24 liability known as joint criminal enterprise or common purpose
 10:05:29 liability or theory. There is some similarities which cannot go

10:05:36 unnoticed. These similarities have indeed been recognized by
 10:05:40 the Lubanga Pre-Trial Chamber on his decision of confirmation of
 10:05:46 charges. It noted that the subjective approach is indeed
 10:05:49 adopted by the approach taken at the International Criminal
 10:05:53 Tribunal for the Former Yugoslavia in relation to JCE or the
 10:06:00 common purpose doctrine. This can be found at paragraphs 326
 10:06:06 and 329 of that decision.
 10:06:11 It is important to construe the intent of Article 25(3)(a) and
 10:06:19 when we do so what we learn is that any semblance of joint
 10:06:26 criminal enterprise cannot be read into the statute. The
 10:06:31 Defence notes that the drafters of the Rome Statute expressly
 10:06:35 considered this type of mode of liability. It was rejected. As
 10:06:45 such, when looking to the intention of the drafters, it is clear
 10:06:51 that absent express enumeration as it is now formed as a mode of
 10:07:03 liability, it goes beyond the terms of the Statute. As such, it
 10:07:09 is the Defence's request that the Chamber refrain from entering
 10:07:17 -- that refrain from entering indirect coperpetration as a mode
 10:07:23 of liability in this hearing.
 10:07:27 Further submissions in relation to indirect coperpetration will
 10:07:31 however be addressed by my colleague, Thomas Obhof, during the
 10:07:37 Defence's fourth and final submissions.
 10:07:44 That is it for my submissions. May it please the Court, I will
 10:07:49 hand over the podium to my learned colleague, Abigail Bridgman.
 10:07:56 PRESIDING JUDGE TARFUSSER: Thank you very much.
 10:07:58 MS OLIEL: Thank you.

10:08:01 PRESIDING JUDGE TARFUSSER: Yours is the floor.
 10:08:20 MS BRIDGMAN: Thank you. I'm Abigail Bridgman and I will be
 10:08:25 speaking about forced marriage, forced pregnancy, sexual and
 10:08:29 gender-based crimes in general and I will later request the

10:08:33 Chamber to go into private session for me to address counts 50
10:08:39 to 60 of the DCC.
10:08:43 In order for the Prosecution to meet its evidentiary burden,
10:08:50 under Article 617 of the Statute it must -- which demonstrates a
10:08:58 clear line of reasoning underpinning its specific delegations.
10:09:04 This is one of the pronouncement of the Trial Chamber in the
10:09:08 Katanga judgment.
10:09:11 And with that in the background I would like to speak about
10:09:14 forced marriage.
10:09:16 The Defence submits that this crime does not exist under the
10:09:20 Rome Statute and it is subsumed into sexual slavery.
10:09:26 THE ENGLISH INTERPRETER: Message from the booth, could counsel
10:09:29 please be requested to slow down, please.
10:09:32 PRESIDING JUDGE TARFUSSE: Excuse me, the booth requests you to
10:09:34 slow down.
10:09:37 MS BRIDGMAN: My apologies to the booth.
10:09:40 PRESIDING JUDGE TARFUSSE: Thank you.
10:09:44 I was saying that the Prosecution seeks to say that there is a
10:09:47 crime of forced marriage under the Rome Statute. And they rely
10:09:53 on jurisprudence from the special court for the Sierra Leone.
10:10:03 However, this is erroneous on several points:

10:10:06 One, there has been jurisprudence from this Court itself on this
10:10:12 matter. In the case of Katanga and Mathew TPB*PBLG, at
10:10:23 paragraphs 431 the Chamber held that sexual slavery encompasses
10:10:29 situations where girls and women are forced into marriage,
10:10:33 domestic servitude or other forced labour involving compulsory
10:10:38 sexual activity including rape by their captors. The Chamber
10:10:44 specifically included forced temporary marriages to soldiers in
10:10:48 addition to other circumstances, for instance comfort stations
10:10:52 and rape camps as held by other ad hoc tribunals.
10:11:00 This thought process was also confirmed in the Trial Chamber
10:11:04 decision at paragraph 978, where the Chamber stated that the
10:11:07 second element in the crime of sexual enslavement concerns the
10:11:11 victim's ability to decide the conditions in which he or she
10:11:15 engages in sexual activity. The Chamber pointed out that the
10:11:20 notion of sexual slavery may also encompass situations where
10:11:28 girls and women are forced to share the existence of a person
10:11:32 with whom they have to engage in acts of a sexual nature.
10:11:35 THE ENGLISH INTERPRETER: Message from the booth, can counsel
10:11:39 please be requested to slow down again. Thank you.
10:11:42 PRESIDING JUDGE TARFUSSE: We are requested from the booth to
10:11:44 tell you to slow down.
10:11:57 Now she can hear you directly. Thank you.
10:12:01 MS BRIDGMAN: Yes.
10:12:02 Even if this Chamber would want to consider the jurisprudence
10:12:06 from the special court for Sierra Leone it was erroneous on

10:12:13 several points. The Prosecution says that the elements in the
10:12:18 alleged crime are different because forced marriage is not
10:12:23 predominantly a sexual crime.
10:12:28 In the special court for Sierra Leone the Defence associated
10:12:32 itself with the rationale adopted by SKWRAO*US -S Julia
10:12:38 sebutcind AEU in her separate concurring opinion in the case of
10:12:41 the Prosecutorverses Brima, Kamara and canoe also known as the
10:12:48 AFRC case. She observed that the fen nomTPH-PB of forced
10:12:55 marriages in the Sierra loween had all the hallmarks of the
10:13:01 crime of sexual slavery. The allegation that these
10:13:05 relationships in the bush were exclusive, at least as far as the
10:13:09 women were concerned logically serves to identify a particular
10:13:14 form of enslavement and not a marriage. Being called a wife was
10:13:21 just a label, nothing more. It is important to note at this
10:13:27 point that nowhere does the Prosecution or any of its witnesses
10:13:33 indicate that any of the women referred to their captors as
10:13:39 husband. I will not go into the arguments raised by scholars on
10:13:48 this point, on the point of conjugal duties, but I will briefly
10:13:56 say that they have KRAOE teaked the Appeals Chamber in the AFRC
10:14:03 case. Saying that the Appeals Chamber exaggerated the
10:14:07 significance of so-called conjugal duties such as cooking and
10:14:12 cleaning to support its conclusion that forced marriage is not
10:14:16 predominantly a sexual crime, the scholars have insisted that
10:14:22 this holding effectively incorporates centuryhole old
10:14:27 stereotypes of women work in oa household of international

10:14:34 humanitarian law. The Defence submits that these other duties
10:14:38 carried out are captured in the crime of enslavement under
10:14:42 sexual crimes are subsumed in the crime of sexual slavery.
10:14:49 I would like to briefly speak about another point that the
10:14:55 Prosecution raised about the women being burdened with the whole
10:15:02 concept of marriage and not getting its benefits.
10:15:05 And since this situation is about Uganda, I'll give an example
10:15:09 coming from there. Where these women live the jurisprudence
10:15:17 does not recognize common law marriages. Cohabiting and holding
10:15:22 one out as a married person or even a good faith belief that one
10:15:27 is married does not receive legal recognition. Paragraph 437 of
10:15:35 the Prosecution preconfirmation brief talks about the denial of
10:15:41 performing the traditional rituals of the marriage ceremony, but
10:15:45 having to carry out the burdens and not receive the benefits of
10:15:50 the institution of marriage. The Defence would also like to
10:15:55 bring it to the attention of the Court that under Ugandan law
10:16:02 there is nothing like an ill ledgetimate child, whether you are
10:16:08 born in wedlike or not. The maretle status of your parents does
10:16:13 not matter in terms of protecting the children's interests.
10:16:19 The Prosecution admits that indeed words like husband, wife and
10:16:25 marriage in these bush relationships is repugnant. Yet they
10:16:30 seek to make a special accommodation just to support these

10:16:35 charges. The Defence contends that the goal to redress the
10:16:43 particular harm suffered by these women who carried the label of
10:16:48 a wife is not the problem. We believe it is the right thing to

10:16:55 do. The problem is the Prosecution's approach to finding a
10:16:58 solution by arguing for a flawed application for the law. We
10:17:04 ask this Court not to follow this argument because to do so
10:17:09 would be legally endorsing and perpetuating a fallacy and the
10:17:15 stigma that is associated with these bush relations. The best
10:17:20 way to help these women is not to put a legal stamp on something
10:17:25 that is -- that does not carry any legal weight in Uganda where
10:17:31 they live. It is the Defence's submission that there were never
10:17:36 any marriages to begin with, and to hold otherwise would be to
10:17:42 continue to hold the women involved in invisible chains where
10:17:47 they and others in the community perceive them as married. And
10:17:51 as such, we request this Court humbly not to confirm this
10:17:58 charge.

10:18:01 I will now go to forced pregnancy.
10:18:06 Forced pregnancy is a specific intent crime. And the Defence
10:18:12 submits that the Prosecution has not met the burden of proving
10:18:16 the required intent for the crime to be confirmed by this
10:18:20 Chamber.
10:18:23 The Prosecution argues that these women were made pregnant so
10:18:30 that the IRA could continue to rape them, but this does not make
10:18:37 sense. It is a convoluted argument. By the very existence of a
10:18:43 pregnancy, it can be assumed that the woman has already been
10:18:47 raped. Further, the crime of rape is completed in a single act.
10:18:57 It need not be performed over and over again for it to be
10:19:06 consumed under the law. Indeed the Prosecution has charged some

10:19:10 of the counts in the DCC to include rape and not necessarily
10:19:15 forced marriage -- sorry, forced pregnancy, which indeed
10:19:20 supports the argument that one need not get pregnant for them --
10:19:27 for the crime of rape to be complete or to be proffered for that
10:19:33 matter.
10:19:35 My colleague, Michelle briefly mentioned something about the
10:19:41 ting tings and I think it is important in this regard to point
10:19:45 out that some women were made ting tings and the Defence does
10:19:50 not dispute the presence of these domestic servants within that
10:19:56 IRA.
10:19:58 The IRA knew that it was not necessary to make the abducted
10:20:04 women pregnant for them to continue the enslavement. So for us
10:20:10 to use that as an excuse to proffer the charge of enforced
10:20:17 pregnancy is not enough because the specific intent required for
10:20:22 the crime has not been fulfilled and as such the Defence will
10:20:26 request this Chamber not to confirm the charges -- the counts
10:20:32 relating to forced pregnancy.
10:20:37 I will now speak to sexual and gender-based crimes.
10:20:43 As the Prosecution stated in their brief and as reiterated in

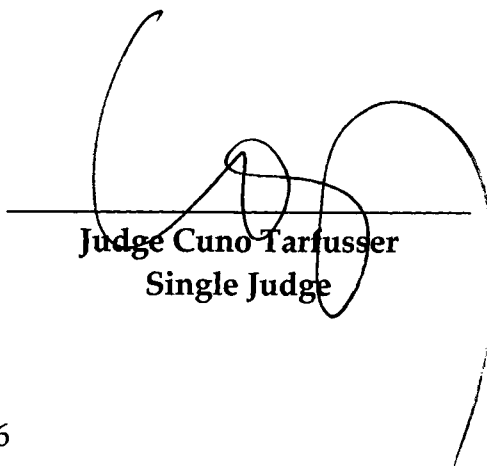
10:20:49 their submissions last week, rules within the rebel ranks had to
10:20:55 be followed and any departure was punished severely. The rules
10:21:03 relating to sexual relations were particularly patrolled and
10:21:07 their breaches were severely punished.
10:21:11 The Defence has already submitted on the circumstances that
10:21:14 Dominic Ongwen lived and how they affected his choices. When we

10:21:21 talk about distribution of wives or anything to do with sexual
10:21:28 and gender-based crimes, the Defence wishes to draw the Chambers
10:21:39 attention -- for now.
10:21:41 P-240 a senior LRA commander who is now a Prosecution witness
10:21:48 told the Prosecution that a man could not refuse to take the
10:21:51 woman who was distributed to them. We are speaking of a
10:21:56 commander himself. And he knew this to be fact. Refusal could
10:22:01 be misinterpreted and lead to death. This statement can be
10:22:07 found at UGA-OTP-0244-0094, at 98.
10:22:18 D-26 at August-D26-0010-0521, admits to have been given wives
10:22:34 but clarifies that refusing would have amounted to refusing
10:22:37 orders.
10:22:39 And we have already spoken about what refusing orders meant.
10:22:45 D-26, at August-D26-0486 says that he were given a wife and you
10:22:58 could not say no. So many of the Prosecution witnesses have
10:23:06 testified about seeing wives being distributed. Most of them
10:23:12 have admitted to having had wives themselves. The Prosecution
10:23:17 has not in their statements at least as far as we have been able
10:23:23 to review, they have not gone into the details of whether the
10:23:28 men could have said no to any of the women that were distributed
10:23:33 to them. And I will leave it at that.
10:23:41 At this point, Mr President, I request that we go into private
10:23:48 session so that I can address the Chamber on certain matters.
10:23:54 PRESIDING JUDGE TARFUSSER: Yes please, court officer, could you
10:23:56 provide for the private session, thank you.

10:24:00 (Private session at 10.23 a.m.)
10:24:14 THE COURT OFFICER: We are in private session, Mr President.
10:24:16 PRESIDING JUDGE TARFUSSER: Thank you.

Page 18 line 3 and page 22 line 14 to page 23 line 17 of the English Real Time transcript;

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



Judge Cuno Tarfusser
Single Judge

Dated this 26 January 2016

At The Hague, The Netherlands

INTERNAL REGISTRY	
Name of technician: <i>Claire Hynes</i>	<i>Claire Hynes</i>
Redacted: <i>Y/N</i>	
Time: From <i>10:03:31</i> To <i>10:24:16</i>	