

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 12 November 2021

THE APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, Judge
Judge Piotr Hofmański, Judge
Judge Solomy Balungi Bossa, Judge
Judge Reine Alapini-Gansou, Judge
Judge Gocha Lordkipanidze, Judge

SITUATION IN UGANDA

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

Public Document

**Request for leave to submit Amicus Curiae pursuant to Rule 103(1) of the Rules of
Procedure and Evidence**

Source: Felicity Gerry QC, Wayne Jordash QC, Ben Douglas-Jones QC and
Anna McNeil, Philippa Southwell, Dr Beatrice Krebs and Jennifer Keene
McCann.

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

The Office of the Prosecutor
Mr Karim A.A. Khan

Counsel for the Defence
Mr Krispus Ayena Odongo

Legal Representatives of the Victims
Mr Joseph Akwenyo Manoba

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants
(Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
M. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. Introduction

- 1.1. We seek leave to submit an *amici curiae* observation pursuant to Rule 103(1) of the *Rules of Procedure and Evidence* ('Rules') on the merits of the legal questions presented in the order dated 25 October 2021.

2. Specific Issues to be Addressed

- 2.1. The Trial Chamber declined to discuss or outline any legal principle applicable to Mr Ongwen's experience as a former child abductee and conscript (including continuing effects) at trial,¹ or at sentencing.² At first sight, the *Rome Statute* eschews the civilian classification of 'bars to responsibility', 'justifications' and 'excuses'. However, on closer inspection it becomes clear that this classification does underlie the system and we suggest a workable taxonomy for interpretation of Art 31(1)(d) and Art 31(3).³
- 2.2. Modern day conflicts are rife with forced criminality.⁴ Victims are 'made'⁵ into perpetrators, with legal and factual complexities.⁶ To-date, the appropriateness of 'non-punishment' models to interpretation of *Rome Statute* remain unexplored, despite the relevance of the 'non-punishment' principle to autonomy⁷ and criminal responsibility.⁸ Currently, there are two principal approaches to 'non punishment': The compulsion-based approach excuses the criminal act to committed under a high degree of pressure.⁹ The causation-based approach recognises the direct result of the trafficking situation¹⁰ thus justifying exoneration of the victim. We suggest ways in which the jurisprudence

¹ *Prosecutor v Ongwen (Judgment)* (International Criminal Court, Trial Chamber IX, ICC-02/04-01/15, 4 February 2021) [2672].

² *Prosecutor v Ongwen (Summary of the verdict)* (International Criminal Court, Trial Chamber IX, ICC-02/04-01/15, 4 February 2021) [6] <<https://www.icc-cpi.int/itemsDocuments/ongwen-verdict/2021.02.03-Ongwen-judgment-Summary.pdf>>.

³ Krebs, B., *Justification and excuse in article 31(1) of the Rome Statute* C.J.I.C.L. 2013, 2(3), 382-410

⁴ United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons 2016* (Report, United Nations, 2016) 64–66 <https://www.unodc.org/documents/data-and-analysis/glotip/2016_Global_Report_on_Trafficking_in_Persons.pdf>.

⁵ *Prosecutor v Ntaganda (Judgment on the Appeal of Mr Bosco Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in Respect of Counts 6 and 9")* (International Criminal Court, Trial Chamber, Case No ICC-01/04-02/06 OA5, 15 June 2017).

⁶ Nadia Grant, 'Duress as a Defence for Former child soldiers?: Dominic Ongwen and the International Criminal Court' (ICD Brief No 21, 2016), 4. Wayne Jordash, *Chapter 18 Modern Slavery and Human Trafficking Law and Practice* (Bloomsbury 2021).

⁷ In English law, for example, this has been defined as 'free, informed and deliberate': See *R v Rebelo (No 1)* [2019] EWCA Crim 633; *R v Rebelo (No 2)* [2021] EWCA Crim 306.

⁸ Julia Maria Muraszkiwicz, *Protecting Victims of Human Trafficking from Liability: The European Approach* (Palgrave Macmillan, 2019). See also UNODC Female Victims of Trafficking for Sexual Exploitation as Defendants (2020).

⁹ UN Working Group of Trafficking in Persons, *Background Paper on Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking*, UN Doc CTOC/COP/WG.4/2010/4 (December 2009) [11].

¹⁰ Bijan Hoshi, 'The Trafficking Defence: A Proposed Model for the Non-Criminalisation of Trafficked Persons in International Law' (2013) 1(2) *Groningen Journal of International Law* 54, 55.

for former child abductees and conscripts should develop in international criminal law at trial and on sentencing.

3. Expertise of the Applicants

3.1 The Applicants are a group of highly qualified scholars and practitioners with specific and extensive expertise in this field.¹¹ This includes cases, research, and publications in multiple jurisdictions.¹² We can assist the Court on suggestions for coherence.

4. Conclusion

4.1. For the above-mentioned reasons, the Applicants respectfully request the Chamber to grant leave to submit observations orally and in writing pursuant to Rule 103(1).



[Philippa Southwell

on behalf of

Felicity Gerry QC, Wayne Jordash QC, Ben Douglas -Jones QC, Anna McNeil, Dr Beatrice Krebs and Jennifer Keene-McCann.

Dated this 12 November 2021 - United Kingdom

At [place, country]

¹¹ Sample publications include *Annotated Leading Cases of International Criminal Tribunals* (Intersentia 2019 and 2021), *Modern Slavery and Human Trafficking Law and Practice* (Bloomsbury, 2nd ed 2021 and 1st ed, 2018); *Research Handbook on The Future of Feminist Engagement with International Law* (Edward Elgar Publishing, 2019), *Human Trafficking: Emerging Legal Issues and Applications* (US Lawyers & Judges Publishing Company, Inc 2017).

¹² This extends to global expertise to PhD level on Modern Slavery law and experience in international, civil and common law systems. We have acted in most of the significant and leading cases (including death penalty cases) involving victims of modern slavery in the last decade, including before the ECtHR. We have consulted and advised UNODC and UNICEF, the Commonwealth Parliamentary Project & Qatar, for the Human Rights Commission of the Philippines, and a range of other bodies. We have provided tertiary level teaching and professional training and contributed to the development of law in this field across the globe, including in Australia and the Asia Pacific. Ms Southwell is MD of a law firm dedicated to modern slavery law and founder and Managing Director of The Human Trafficking & Modern Slavery Expert Directory.