

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-02/04-01/15A
Date: 15 November 2021

THE APPEALS CHAMBER

Before:

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

SITUATION IN UGANDA

IN THE CASE OF
THE PROSECUTOR *v.* Dominic Ongwen

Confidential

Expression of Interest as amicus curiae in judicial proceedings

Source: Dr Paul Behrens, University of Edinburgh

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

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Unrepresented Victims

Unrepresented Applicants

(Participation/Reparation)

**The Office of Public Counsel for
Victims**

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**The Office of Public Counsel for the
Defence**

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**Victims Participation and Reparations
Section**

Other

Author and Expertise

Dr Paul Behrens is Reader in Law at the University of Edinburgh. He has taught international criminal law for more than 15 years, has designed courses in these fields, supervised PhD students and examined PhDs on the topic. He has published and contributed to several books on international criminal law (including *The Criminal Law of Genocide*, Ashgate 2007) and written numerous articles and book chapters in the field. Dr Behrens is Associate of Stanley Burton Centre for Holocaust and Genocide Studies, University of Leicester.

Main Lines of Argument

1. Grounds for Excluding Criminal Responsibility

1.1 The Burden of Proof Concerning Criminal Responsibility

1. The question whether Art. 66(2) applies to grounds excluding criminal responsibility as well is subject to controversy. In some jurisdictions, the burden is reversed for 'affirmative defences'; the view therefore that the norm applies in these cases,¹ requires reflection.

2. The Defence accepts that it has the duty to raise the relevant ground (but no more than that).² That leaves a considerable burden for the Prosecution: the Defence could simply allege the existence of all grounds, even if the facts do not offer any such indication, and leave the detailed examination to the Prosecution.

3. The intended *amicus curiae* Observations ('Observations') will evaluate the arguments on the burden of proof for affirmative defences and will critically reflect on standards which have been discussed for its discharge (proof beyond reasonable doubt and the preponderance).

1.2 Duress, Article 31(1)(d) ICCSt

4. The Defence notes that the threat for duress has to be assessed from the perspective of its recipient.³ This understanding courts controversy. While a strictly objective assessment may yield unduly narrow results, an entirely subjective approach invites the possibility of a superstitious belief in a threat that no other person but the perpetrator has. The Observations will suggest solutions, *inter alia* through insights from domestic case law. The Defence also refers to the possibility of duress from a 'perpetual hostile and violent environment'.⁴ This

¹ ICC-02/04-01/15, *Prosecutor v Ongwen*, Trial Chamber Judgment, 4 February 2021 ['Ongwen (Trial Chamber)'] para 231.

² ICC-02/04-01/15, *Prosecutor v Ongwen*, Defence Appeal Brief (10 October 2021) ['Ongwen (Appeals Brief)'], para 218.

³ *Ongwen* (Appeals Brief), para 508.

⁴ *Ongwen* (Appeals Brief), para 503.

scenario, too, has arisen in domestic court cases,⁵ and the applicability of their reasoning to *Ongwen* will be considered.

5. The Trial Chamber found that the relevant serious bodily harm had to 'materialise sufficiently soon';⁶ the Defence debated that point.⁷ The Observations will consider the issue on the basis in particular of the literal interpretation of Article 31(1)(d) ICCSt. Controversy also attaches to specificity of the harm: the Trial Chamber found that 'abstract danger' was not enough.⁸ The Observations will explore whether a literal construction suggests a wider reading: a 'threat of... harm' may easily encompass even harm whose realisation may merely be possible.

1.3 Mental Disease or Defect, Article 31(1)(a) ICCSt

6. Defence and Trial Chamber disagree on whether 'functionality' is compatible with mental illness;⁹ in the literature, some scholars have supported the view of incompatibility.¹⁰ The Observations, however, will also inquire whether 'mental disease or defect' requires interpretation in light of the loss of the relevant capacity (Art. 31).

7. A further controversy concerns the value of observations by lay persons of the perpetrator's mental state. On the one hand, such observations cannot be conclusive for scientific findings of mental disease; on the other hand, the absence of any such observation can introduce situations in which no evidence at all for the disease exists.

8. The question is thus linked to the evidentiary matters which the Appeals Chamber raised. The Observations will assess existing case law, including *Čelebići*, in which the Trial Chamber required 'diminished mental responsibility' to be raised by the Defence, but also accepted a lower standard of proof.¹¹

2. Sexual and Gender-Based Crimes

2.1 Forced Marriage

9. 'Forced marriage' (in the judgment under Art. 7(1)(k)), was felt by the Defence not to constitute 'a cognizable crime'.¹² 'Other inhumane acts' must be of a 'similar character' to the enumerated acts. A point arising here concerns the gravity of the crime: the Defence suggests

⁵ See, eg, 1 StR 483/02 [Judgment of 25 March 2003] (Bundesgerichtshof, Germany).

⁶ *Ongwen* (Trial Chamber), para 2582.

⁷ *Ongwen* (Appeals Brief), para 502.

⁸ *Ongwen* (Trial Chamber), para 2582; see *Ongwen* (Appeals Brief), para 509.

⁹ ICC-02/04-01/15, *Prosecutor v Dominic Ongwen*, Defence Closing Brief (13 March 2020), para 637. [*Ongwen* Closing Brief]

¹⁰ Massimo Scaliotti, 'Defences before the ICC: Substantive Grounds for Excluding Criminal Responsibility - Part 2,' 2:1 *ICLR* 2, (2002) 26.

¹¹ IT-96-21-T, *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić, Esad Landžo* (Judgment 16 November 1998), para 1172.

¹² *Ongwen* (Trial Chamber), para 2751; *Ongwen* (Appeal Brief), para 975

that forced marriage does not meet the gravity threshold envisaged by the drafters.¹³ The Observations will consider this in the light of human rights instruments recognising the importance of consent for marriage (eg, Art 16(2) UDHR). In assessing whether the relevant gravity shows sufficient similarity to enumerated crimes, the Observations will reflect in particular on the deprivation of fundamental rights as part of persecution.¹⁴

10. The Observations will also explore the possible subsumption of forced marriage by other crimes against humanity.¹⁵ They will in particular investigate whether each crime contains an element alien to the other and will also examine whether the principle of Fair Labelling militates in favour of a standalone crime.

2.2 Sexual Slavery

11. On sexual slavery, the Observations will consider in particular the exercise of powers attaching to rights of ownership. In *Ongwen*, the Defence referred to testimony noting that orders were issued 'that girls should be distributed to men' and that such distribution could not be challenged.¹⁶ The Observations will thus explore whether the exercise of powers attaching to ownership is possible where they had not initially been assumed by the perpetrator himself.

2.3 Forced Pregnancy

12. On the Trial Chamber's point that this crime 'is grounded in the woman's right to personal and reproductive autonomy and the right to family',¹⁷ the Defence noted that there had been a failure to enquire whether such interpretation 'affects the national law of Uganda on abortion [...]'.¹⁸ The Observations will explore whether the Chamber was obliged to discuss the potential impact or whether it was sufficient that such impact is not apparent from the judgment.

13. They will also inquire whether the Chamber's understanding of the rationale for the crime puts the defendant at an undue disadvantage. That is so if the rationale impacts on the interpretation of the intent element – if it is seen as satisfying the requirements of 'other grave violations of international law', while the *ejusdem generis* rule (in conjunction with Art. 22(2) ICCSt) may militate for a narrower interpretation.

2.4 Evidentiary Issues

14. The Observations will engage with the standard applicable to the assessment of evidence for crimes of sexual violence. Evidence by witnesses who had been affected by sexual crimes can require particular considerations in that regard (see, eg the treatment of the 'emotional

¹³ ICC-02/04-01/15, *Prosecutor v Dominic Ongwen*, Defence Request for Leave to Appeal (29 March 2016) para 41. [*Ongwen* Leave to Appeal]

¹⁴ Art 7(1)(h), Elements of Crimes, 1st element.

¹⁵ *Ongwen* Leave to Appeal, para 41.

¹⁶ *Ongwen*, Closing Brief, para 475; see also *Ongwen*, Appeal Brief 683.

¹⁷ *Ongwen* Trial Chamber, para 2717.

¹⁸ *Ongwen* Appeal Brief, para 962.

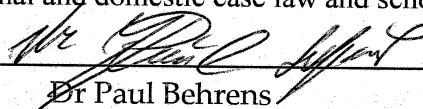
intensity' of the recollections of a relative of a rape victim, but also inconsistent statements in *Kajelijeli*.)¹⁹ The resulting considerations have relevance in *Ongwen* too²⁰ and will be discussed in the light of the relevant evidentiary findings by international courts).

15. Certain points which the Defence has raised in light of their evidentiary value will be explored in more detail. They include the measure of control that Ongwen had on the selection of abducted girls;²¹ the question whether he had placed a witness under 'heavy guard';²² and the lack of freedom of movement of certain victims.²³

3. Cumulative Convictions

16. The applicability of Article 20 ICCSt to concurrences remains an issue of contention, with the Trial Chamber seeking to rely on the restrictive view of the *Bemba* Appeals Chamber,²⁴ while international case law is not undivided on the issue.²⁵ Much depends on the interpretation of 'tried' and 'has been convicted or acquitted' in Art 20(1) ICCSt. But even if the interpretation militated against direct applicability of the norm, the possibility exists that *ne bis in idem* has a wider remit under customary law – a point which the Observations will assess.

17. The Observations will also critically engage with the situations in which the *Ongwen* Chamber has entered a finding of concurrences²⁶ and will assess them as ideal or real concurrences in light of international and domestic case law and scholarly opinion.



Dr Paul Behrens
on behalf of

Dated this 15 November 2015 at Edinburgh, Scotland (UK)

¹⁹ ICTR-98-44-A-T, *Prosecutor v Juvénal Kajelijeli* (Trial Chamber), Judgment, 1 December 2003, para 680.

²⁰ See, in particular, ICC-02/04-01/15, *Prosecutor v Ongwen*, [Transcript], Witness UGA-OTP-P-0101, 9 November 2015, 19, lines 11 – 12 and 20, lines 2 – 3.

²¹ ICC-02/04-01/15, *Prosecutor v Ongwen*, [Transcript], Witness UGA-OTP-P-0214, 11 November 2015, 12, lines 8 – 22; *ibid* 36, lines 8 – 11. [*Ongwen* Transcript 11 November 2015]

²² See *Ongwen* (Trial Chamber), para 3023 and cf *Ongwen* Transcript 11 November 2015, 25, lines 22 – 25 and 26, lines 1 – 7.

²³ See *Ongwen* (Trial Chamber), para 3023, and cf *Ongwen* (Transcript 11 November 2015), 31, lines 20 – 22 and 32, lines 16 – 23.

²⁴ *Ongwen* (Trial Chamber), para 2794; ICC-01/05-01/13 A A2 A3 A4 A5 *Prosecutor v Bemba Gombo et al*, Judgment, 8 March 2018, para 748.

²⁵ See *Prosecutor v Kayishema and Ruzindana* ICTR-95-1-T (Trial Chamber), Judgment 21 May 1999, Dissenting Opinion Khan, para 36; against ICC-01/04-01/07, *Prosecutor v Katanga* (Trial Chamber) Judgment 7 March 2014, para 1694.

²⁶ *Ongwen* (Trial Chamber), para 2797.

At [place, country]