Cour Pénale Internationale

International Criminal Court

Original: **English**

No.**: ICC-02/04-01/15A**
Date: **23 December 2021**

THE APPEALS CHAMBER

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

SITUATION IN UGANDA

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

Public Document

Amicus Curiae Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence

Source: **Mr. Arpit Batra**

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

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INTRODUCTION

1. The Trial Chamber found Dominic Ongwen guilty of forced pregnancy as a Crime against Humanity under Article 7(1) (g) of the Rome Statute and as a War Crime under Article 8(2) (e) (vi) of the Statute under Counts 58 and 59 and for War Crime of Sexual Slavery under the counts 55 and 56, 66 and 67. Further, the Chamber also found Dominic Ongwen Guilty of the crime of Forced Marriage, under Article 7(1) (k) as a Crime against Humanity under counts 50 and 61.

2. The submissions mentioned herein seek to unfold issues with respect to:
    A. The import and legal interpretation of the three offences falling under the general head of, "Sexual and Gender Based Crimes", namely:
        (a) Forced Marriage,
        (b) Forced Pregnancy and
        (c) Sexual Slavery

    B. The standards applicable to assessing evidence of sexual violence;

    C. The permissibility or otherwise of entering cumulative convictions when the conduct in question violates two or more distinct provisions of the Statute.

3. In light of the recognition of the Appeals Chamber that some of the issues have been raised in this case for the first time before the Court and that they may have implications beyond the present case[1], the present submissions are being made keeping in view the larger issue of setting the jurisprudence on the issues. Further, the issues raised herein are exclusive of the issues raised in appeal briefs and responses as directed by the Appeals Chamber[2].

[1] Appeals Chamber order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence), ICC-02/04-01/15 A, dated October 25th, 2021 Para 19
[2] Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence ICC-02/04-01/15 A, dated November 24th, 2021, Para 19

A. IMPORT AND LEGAL INTERPRETATION OF THE OFFENCES FALLING UNDER "SEXUAL AND GENDER BASED CRIMES"

a. FORCED MARRIAGE:

i. According to the Chamber[3], the central element of forced marriage is the imposition of "marriage" on the victim, i.e. the imposition, regardless of the will of the victim, of duties that are associated with marriage, as well as of a social status of the perpetrator's "wife". The fact that such "marriage" is illegal and not recognised by, in this case, Uganda, is irrelevant. What matters is that the so called "marriage" is factually imposed on the victim, with the consequent social stigma. The element of exclusivity of this forced conjugal union imposed on the victim is the characteristic aspect of forced marriage and is an element which is absent from any other crime with which Dominic Ongwen is charged. As held by the Special Court for Sierra Leone, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the "husband" and "wife", which could lead to disciplinary consequences for breach of this exclusive arrangement and, therefore, is "not predominantly a sexual crime"[4].

ii. By inclusion of the words "conjugal association"[5] while defining the crime of forced marriage, the Trial Chamber erred in severely restricting the scope of the crime of forced marriage to the instances involving imposition of conjugal relations. The terms conjugal in broad sense denote, among other things, sexual relationship.

iii. This is problematic because it inflates the level of evidence required to establish crime of forced marriage manifold. This would imply that the conjugal association/union will become a condition precedent to establish the crime of forced marriage. The crime of forced marriage should not be and cannot be based upon such conditions.[6] The crime of forced marriage is committed the moment an individual is forced/coerced to assume the status of spouse to someone.

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[3] PRE-TRIAL CHAMBER II Decision on the confirmation of charges against Dominic Ongwen, Para 93

[4] AFRC Appeal Judgement, para. 195

[5]The terms conjugal is defined by the Cambridge online dictionary as "connected with marriage or the relationship between two married people, especially their sexual relationship", https://dictionary.cambridge.org/dictionary/english/conjugal

[6] Forced marriage is a marriage in which one and/or both parties have not personally expressed their full and free consent to the union, https://www.ohchr.org/EN/Issues/Women/WRGS/Pages/ChildMarriage.aspx; Article 16 of the Convention of elimination of all forms of discrimination against women gives equal rights to women to, amongst other rights, right to enter into marriage and right to choose spouse.

b. FORCED PREGNANCY:

i. To state it in practical terms, in order for the prosecution to establish the offence of forced pregnancy, the following ingredients are to be proved:

   a. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
   b. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
   c. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

ii. To further break down the components of the offence: the *actus reus* of the said offence is unlawfully confining the pregnant women at a large scale or effecting large scale forceful pregnancies on women by confining the said victims in unlawful confinement. The said act is perpetuated with the intent of affecting the ethnic composition of any population for carrying out “other grave violations” of international law.

iii. It is important to note that as a gravamen of the offence is of wide spread and systematic attempt, a single evidence of the said act will not be sufficient to prove the offence of forced marriage. In this regard, it is submitted that a co-joint reading and understanding of witness testimonies in the present case do not inspire confidence qua the crime under discussion. Credibility of the statement of the witness together with quantity are to be looked into for the purpose of adjudicating upon such mass crimes.

iv. The elements of forced pregnancy as a War Crime are soft than those of forced pregnancy as a Crime against Humanity. The perpetrator need only be aware that an armed conflict exists and he need not know that there is a "widespread or systematic" attack or his particular role in the attack. The armed conflict and the crimes committed therein need not be in furtherance of a state or organizational policy. Moreover, the forced pregnancy does not have to be committed as a part of the armed conflict. It merely has to be associated with it. As long as an armed conflict involves the large-scale or purposeful commission of War Crimes, and the perpetrator of forced pregnancy had some connection to the conflict, he can be convicted for committing a War Crime.

c. SEXUAL SLAVERY:

i. As against the judgment of the Trial Chamber, it is not required to constitute a crime of sexual slavery that the victim is caused to "engage"[7] in any act of sexual nature. Such a definition would needlessly and erroneously narrow the definition of sexual slavery. A victim of sexual slavery may be subjected or exposed to intercourse between two individuals or merely sexual acts of a person through Acts or words and to that extent it is not required that the victim "engage" in any act of sexual nature.

ii. The Trial judgment also lays bare the legal misconceptualization of sexual slavery that is rooted in the Rome Statute. "Sexual slavery" appears in three provisions: as a Crime against Humanity under Article 7[8], in addition to Enslavement and as a War Crime in both international and non-international armed conflict under Article 8[9]. The ICC Elements of Crimes document states the identical elements for each provision, requiring for that "the perpetrator caused the person or persons over which the right of ownership was exercised to engage in one or more acts of a sexual nature."

iii. In the present case, sexual slavery as *lex specialis* seems to have taken priority over enslavement as *lex generalis*, given the elements of sexual slavery and the elements of enslavement. The Chamber states that "the legal elements of enslavement are wholly included within the legal elements of sexual slavery" and that "sexual slavery and enslavement cannot concur on the basis of the same facts"[10] This mischaracterization has led to sexual slavery being narrowly interpreted and enslavement being misconstrued.

iv. The Rome Statute's division of slavery into two provisions; sexual slavery and enslavement has created a problem of statutory interpretation. The *Ongwen* Trial Chamber subsumes enslavement under sexual slavery.

[7]Engage is defined by the Cambridge online dictionary as "to employ someone", https://dictionary.cambridge.org/dictionary/english/engage; employ is defined by the Cambridge online dictionary as "to have someone work or do a job for you…" https://dictionary.cambridge.org/dictionary/english/employ
[8] Rome Statute of the International Criminal Court Article 7
[9] Rome Statute of the International Criminal Court Article 8
[10] Trial Judgement Prosecutor vs. Dominic Ongwen Paras. 3051 and 3086

B. THE STANDARDS APPLICABLE TO ASSESSING EVIDENCE OF SEXUAL VIOLENCE

i. It is pertinent to note that it has been recognised in past that the victims of sexual violence are particularly vulnerable witnesses[11], and to this extent certain concessions have been given to the prosecution and towards the protection of the interests of the victims in such offence. Further, the adoption of Policy Paper on Sexual and Gender-Based Crimes in 2014 by the Office of the Prosecutor of ICC also presupposes the top priority for "effective investigation and prosecution of sexual and gender-based crimes"[12] The paper also recognizes that the sexual and gender-based crimes are amongst the gravest under the Statute[13].

ii. Article 43 of the Rome Statute requires the Registrar to set up a Victims and Witnesses Unit within the Registry to provide protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by witnesses. Article 54(1) (b) binds the Prosecutor to respect, during the investigation, the interests, personal circumstances, and any special needs of victims and witnesses. Article 54(3) (f) requires that the Prosecutor shall take necessary measures, or request that necessary measures be taken, in order to ensure the protection of any person. Articles 57(3Hc) and 64(6)(e) of the Statute provide the Court with a general legal basis for ensuring the protection of witnesses and victims. Article 68(2) creates an exception to the right of the accused under Article 67 to a public hearing. Article 68(1) of The Rome Statute provides that court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of the victims and witnesses. Article *68(5)* provides the Prosecutor with the option to rest his case on summary evidence at the confirmation stage to protect the security of a witness or his family. Article 93(1) (j) of the Statute specifically provides for the cooperation of State Parties to permit effective witness protection.

iii. Rule 16-19 of the ICC Rules of Procedure and Evidence cover the responsibilities of the Registrar and the Victims and Witnesses Unit. While Rule 16(4) of the ICC Rules of Procedure and Evidence stipulates that, agreements on relocation of victims and

[11] Trial Chamber II Decision in Prosecutor Vs. Germain Katanga, para 204
[12] See Policy Paper on Sexual and Gender-Based Crimes, June 2014, para 2 of the executive summary
[13] See Policy Paper on Sexual and Gender-Based Crimes, June 2014, para 3 of the executive summary

witnesses may be negotiated with States by the Registrar on behalf of the Court. It also puts responsibility on the registrar for "Taking gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings."; Rule 17(2)(b)(3) puts similar responsibility of the Victims and Witnesses Unit; In terms of cases involving sexual offences, liberal rules of admissibility of evidence coupled with sufficient victim protections both on and off stand arguably better serve a search for truth than rigid and formalized rules of evidence. This is particularly true given there are no witnesses to the actual sexual assault or violence, and proof of these acts may be based on hearsay or other evidence that would be inadmissible under common law rules of evidence. Specific provision is made for the support, comfort, and protection of victims, their security and rights in Rule 17. Rule 70 set out principles of evidence by which the court shall be guided in case of sexual violence. Restrictions to disclosure of evidence for the protection of victims and witnesses are also dealt with in Rule 81. Rule 86 recalls to the Chamber the necessity of taking into consideration the needs of all victims and witnesses when making any direction or order. Rules 87 and 88 provide that the Chamber may grant protective and special measures, which usually cover measures to facilitate the testimony of a vulnerable victim or witness.

iv. Rule 63(4) of the ICC Rules of Procedure and Evidence[14] which states that "A Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence", is at least one established indicator to establish that the level of evidence required in assessing evidence of sexual violence is lower than for any other offence. This is significant given the challenges faced in obtaining evidence in respect of sexual and gender-based crimes, and the physical and psychological impact on the victims. In cases of sexual violence, according to Rule 70 consent cannot be inferred where the victim was under coercion, incapable of giving genuine consent, or by reason of silence or lack of resistance. Finally, under Rule 71 evidence of the prior or subsequent sexual conduct of a victim or witness is generally inadmissible in order to prevent attempts to undermine or discredit victims of sexual violence.

v. Considering the above, it is incorrect to put the crimes involving sexual violence at the same pedestal as the crimes of other nature as was done in Bemba Judgement. The exclusivity of the additional requirement of "corroboration" in the cases involving

[14] ICC Rules of Procedure and Evidence

sexual violence also indicate, to certain degree, that the quantitative aspect regarding the evidence against the crimes involving sexual violence is significantly lower, if not completely absent.

C. PERMISSIBILITY OR OTHERWISE OF ENTERING CUMULATIVE CONVICTIONS WHEN THE CONDUCT IN QUESTION VIOLATES TWO OR MORE DISTINCT PROVISIONS OF THE STATUTE.

Cumulative Convictions occur when from the same conduct, multiple criminal convictions are entered under different legal headings. Time and again, many types of cumulative convictions have been addressed by multiple adjudicatory authorities, but with differing results.

a. THE CUMULATIVE CONVICTIONS OF AN ACCUSED MUST BE DECIDED BY APPLYING THE "CONDUCT-BASED TEST" AND NOT "MATERIAL ELEMENT TEST".

i. The Celebici test adopted in *Delalic*[15] case by the ICTY which became the main authority and was thereafter followed in many other cases, relies heavily on the US national law. The 'same-evidence' test laid down by the United States Supreme Court in the case of *Blockburger v. United States*[16] in 1932 has come to be one of the most relied upon tests. Though the US national law also witnessed a departure from the Blockburger test in the cases of *Albernaz v. United States*[17] and especially in the *Grady v. Corbin*[18] wherein the US Supreme court developed an approach which bars multiple offences of the same 'act type' based on the same set of facts, adding some reinforcement to the overly simplified Blockburger test, the same was overruled in the case of *State v. Dixon*[19] which reiterated the Blockburger test. This test has been predominantly embraced by the ad hoc tribunals with little dissent.

According to this test, 'multiple criminal convictions entered under different statutory

[15] Prosecutor v. Delalic et al., (Case no. IT-96-21), Judgment, 20 February 2001
[16] 284 US 299 (1932)
[17] Albernaz v. United States, 450 U.S. 333, 101S. Ct. 1137, 67 L. Ed. 2d 275 (1981)
[18] Grady v. Corbin, 495U.S.508 (1990)
[19] State v. Dixon, 113S. Ct. 2849 (1993)

provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other'. An element is considered 'materially distinct' 'if it requires proof of a fact not required by the other'.

ii. It is also asserted that various decisions of the ad hoc tribunals gave rise to differing results causing instability in the application of the Blockburger test in determining cumulative convictions. In the case of *Kayishema and Ruzindana*, the ICTR Trial Chamber while employing the 'same-evidence' and 'protected social interest' tests, rejected cumulative convictions based on the same set of facts, as the prosecution uses the same elements to show genocide, extermination and murder, and relies upon the same evidence to prove these elements.[20]

iii. The dissent against the Celebici test has manifested considerably in separate and dissenting opinions and the same is necessary to be considered while deciding any case of cumulative convictions. The whole bench of the ICTY Appeals Chamber in Kunarac[21], fittingly raised one of the strongest critiques and observed that the Celebici test is 'deceptively simple and, in practice, difficult to apply it in a way that is conceptually coherent and promotes the interests of justice'. However, the Appeals Chamber still employed the test scrutinising with the greatest caution multiple or cumulative convictions and reached the similar outcome.

iv. Further it is also pertinent to mention that in their dissenting opinion, Judges Hunt and Bennouna to the Celebici judgment by the ICTY Appeals Chamber agreeing that the accused should be convicted of the more specific crime, considered that the same-evidence test was unsatisfactory. They considered that the test should focus on the personal conduct of the accused (i.e., their actus reus and mens rea) instead of inclusion of legal elements. The reasoning laid out was that an accused should not be penalized more than once for the same conduct and the purpose of the test should therefore be to determine whether the conduct comprised more than one crime. Accordingly, it was considered that 'it is not meaningful to consider for this purpose legal prerequisites or

[20] Judgment, Kayishema and Ruzindana (ICTR-95-1-T), Trial Chamber, 21 May 1999
[21] Judgment, Kunarac (IT-96-23 & IT-96-23/1-A), Appeals Chamber, 12 June 2002

contextual elements which do not have a bearing on the accused's conduct, and that the focus of the test should therefore be on the substantive elements which relate to an accused's conduct, including his mental state'.[22]

v. Another notable dissent was provided by Judge Dolenc in the *Semanza*[23] trial judgment of the ICTR wherein it was held that although the Celebici test purports to limit cumulative convictions by requiring that each of the cumulative crimes has different elements, the practical result is that inter-article cumulative convictions for the crimes in the three Statute are always possible without any legal obstacle and in practice, the test does not really provide any limiting effect. As an alternative, he proposed the comparison of the different elements of the crimes and then making a substantive assessment of whether the contextual elements of each article are of such significance that they considerably change the nature or gravity of the crimes in question and therefore justify cumulative convictions for the ideal concurrence of crimes under several articles. For making this substantive analysis principles such as consumption, subsidiarity or inclusion, including concepts such as apparent ideal concurrence or apparent real concurrence of crimes are to be put to use.

vi. Coming to the ICC, though the Statute doesn't expressly address the issue of cumulative convictions based on the same conduct or same set of facts, both Trial Chambers in the cases of *Katanga*[24] and *Bemba*[25] reasoned that the accused maybe convicted for same conduct if distinct offences were made out. Regarding cumulative convictions, citing *Delalic*, these Trial Chambers established that:

> "Since it is appropriate to employ criteria similar to those developed in the jurisprudence of the ad hoc tribunals, the Chamber will permit cumulative convictions only where the conduct in question clearly violates two distinct provisions of the Statute, each demanding proof of a 'materially distinct' element not required by the others."

[22] Separate and Dissenting Opinion Judge David Hunt and Judge Mohamed Bennouna, Delalic Appeal Judgment, supra note 3.
[23] Separate and dissenting opinion of Judge Pavel Dolenc, Judgement, Semanza (ICTR-97-20-T), Trial Chamber, 15 May 2003
[24] Judgment pursuant to Article 74 of the Statute, Katanga (ICC-01/04-01/07-3436-tENG), Trial Chamber, 7 March 2014
[25] Judgment pursuant to Article 74 of the Statute, Bemba (ICC-01/05-01/08-3343), Trial Chamber, 21 March 2016

vii. The Trial Chambers time and again held that the crimes of murder as a and as a War Crime and rape as a Crime against Humanity and as a War Crime contained materially distinct elements and concluded that multiple convictions could be entered for the same conduct without engaging into well founded scrutiny on the concept of the same. Evidently, the *Celebici* test has been embraced by the ICC, resulting in the outcome of unrestricted cumulative convictions between Articles 7 (Crimes against Humanity) and 8 (War Crimes) of the Rome Statute. There was hardly any debate on the consideration of alternative approaches in deciding the cumulative convictions based on the same conduct.

b. ARTICLE 20 OF THE ROME STATUTE USES THE TERM 'CONDUCT'.

i. Article 20 provides:

1. Except as provided in this Statute, no person shall be tried before the Court with respect to **conduct** which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a **crime** referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the **same conduct** unless the proceedings in the other court:

   a. Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

   b. Otherwise, were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

ii. It is submitted that the language of the Rome Statute, which bars an ICC prosecution

when the accused has been tried already for the same "conduct", is far broader than the specific language of the ad hoc statutes, which clearly designed to allow an international prosecution when the state prosecution was for an "ordinary crime." The language of the ICC statute does not use a legal characterization of the crime as in the ICTY and ICTR statutes.

iii. By varying with the ICTY and ICTR provisions, the Rome statute's language connotes that the usage of the nomenclature "same conduct" by the drawers of the statute, the same is to be interpreted more broadly than the legal characterization of the crimes solely. It is further submitted that the fact that the ICC drafters deleted the language exempting "ordinary crimes" supports the interpretation that the drafters intended a broad reach with the term "same conduct."

iv. With regard to cumulative convictions, the ICTY and ICTR have adopted the "same elements" test as described above which is a narrow test as it only bars multiple convictions if all the elements of one crime are contained within the elements of the other. In case each crime has a different element from the other, the principle of *ne bis in idem* does not bar a multiple conviction. Using this test, the ICTY and ICTR have, on multiple occasions, found cumulative convictions based on the same conduct are permissible for genocide and crimes against humanity; War Crimes and crimes against humanity; and even for different counts of crimes against humanity. The narrow interpretation is constructed on adopting the language and test of "same elements", which is fundamentally corresponding to the use of the term "same crime." On the contrary, the term "same conduct" is construed to be broader than the term "same elements" or "same crime." Consequently, the utilization of the term "same conduct" instead of the terms "same elements" or "same crime" in the Rome statute clearly displays an intention to broadly interpret the principle of *ne bis in idem.*

v. This clearly shows that the unchecked implementation of the Blockburger test by the ad hoc tribunals has cleared the way to be assumed into the ill-defined application of the same by the Trial Chambers of the ICC with hardly any deliberation. This has resulted in inaccurate analysis on the tests to be used in determining cumulative convictions leading to an ambiguous point of law in the International criminal jurisprudence.

vi. It is further submitted that the Trial Chamber erred in dismissing the conduct-based test and finding that the material element test is apt to be applied and went on to discuss the various situations in which the same conduct fulfils the legal elements of more than one crime. While deciding upon the Ongwen's claim over the impermissible concurrence especially with regard to sexual offences, the Trial Chamber, noted as under:

> *"The Chamber observes that in application of the test based on the principle of speciality i.e. whether each statutory provision involved has a materially distinct element not included in the other, requiring proof of at least one additional fact – concurrence of the crimes of rape and sexual slavery is in principle permissible, on the ground that each of the crimes requires an element not required by the other.*[26]

However, it is to be noted that in light of the above arguments and submissions made, the concurrence of crimes based on the same conduct and especially the crimes of rape and sexual slavery is not permissible even when the ingredients and elements of the crimes are materially distinct or separate from each other.

CONCLUSION

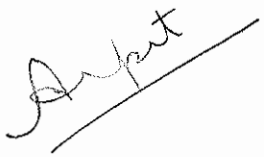
i. The undersigned through the above submissions attempts to assert before this Appeals Chamber that the sexual offences of 'Rape', 'Sexual slavery', 'Forced marriage' and 'Forced pregnancy' are to be interpreted independently and in a way that does not necessarily include each other. The offences may be separately made out without the inclusion of the ingredients of another. It is also asserted that the standard of evidence of each of these crimes is different and the degree of burden of proof on the prosecution to prove the aforesaid offences is to be seen at a different pedestal than other offences under the statute.

ii. Coming to the submission on cumulative convictions, it is asserted before this Chamber that while the offences are not necessarily inclusive of each other and can exist

[26] Prosecutor vs Dominic Ongwen Trial Judgment para 3037

independently, the resultant conviction, even after proving the guilt in each of the offences separately, should be based on conduct-based test approach and not on the basis of material element test or the Blockburger test. The utilization of the conduct-based test would result in the broader scope of appraisal in deciding cumulative convictions which was the intention of the drawers of statute. The Appeals Chambers should therefore hold that the concurrence of crimes and particularly the crimes of rape and sexual slavery based on the same conduct is not permissible.

Respectfully submitted,



ARPIT BATRA

23 December, 2021

At New Delhi, India.