

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/04-01/15 A A2

Date: 28 January 2022

THE APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, Presiding Judge
 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

**Common Legal Representative of Victims' Response
 to *Amicus Curiae* Observations No. ICC-02/04-01/15-1958
 in the Defence's Appeals against the Conviction and the Sentence**

Source: Office of Public Counsel for Victims

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

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REGISTRY

Registrar

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I. INTRODUCTION

1. On behalf of the 1,532 Victims she represents, the Common Legal Representative of Victims (the “CLR”) submits her response to the *Amicus Curiae* filed by the UN Special Rapporteur on Trafficking in Persons especially women and children on 21 January 2022,¹ following an exceptional extension of time granted by the Appeals Chamber (the “Chamber”).² The current observations complement her Response³ to the 18 other *Amici Curiae* observations⁴ filed in the appeal proceedings.

¹ See the “Observations on the crimes of sexual slavery, enslavement and trafficking in persons, and on the grounds for excluding criminal responsibility: defences of duress, mental defect or disease and the non-punishment principle”, [No. ICC-02/04-01/15-1958](#), 21 January 2022.

² See the “Decision on the request for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence” (Appeals Chamber), [No. ICC-02/04-01/15-1955](#), 20 January 2022. See also the “Request for Leave to File an Amici Curiae Brief on sexual slavery and defence of duress Pursuant to Rule 103 of the Rules of Procedure and Evidence”, [No. ICC-02/04-01/15-1954](#), 18 January 2022.

³ See the “CLR consolidated response to the Amici Curiae observations in the Defence’s Appeals against the Conviction and the Sentence”, [No. ICC-02/04-01/15-1951](#), 17 January 2022 (the “Consolidated Response”).

⁴ See also the “Amicus Curiae pursuant to Rule 103(1) of the Rules of Procedure and Evidence”, [No. ICC-02/04-01/15-1928](#); the “Amicus Curiae Observations on the issue of Sexual and Gender-based Crimes: Sexual Slavery & Forced Marriage”, [No. ICC-02/04-01/15-1927](#); the “AMICUS BRIEF BY JUSTICE FRANCIS M. SSEKANDI”, [No. ICC-02/04-01/15-1926 A A2](#); the “AMICUS CURIAE OBSERVATION”, [No. ICC-02/04-01/15-1929](#), 21 December 2021; the “Amicus Curiae Observations Regarding the Relevance to this Case of the Convention on the Rights of Persons with Disabilities”, [No. ICC-02/04-01/15-1930](#); the “Submission of amicus curiae observations by the National Institute of Military Justice (NIMJ)”, [No. ICC-02/04-01/15-1931](#); the “Amici Curiae Observations on Duress and the Standards Applicable to Assessing Evidence of Sexual Violence”, [No. ICC-02/04-01/15-1932](#) + [Anx – all notified on 22 December 2021](#); the “Amici Curiae Observations on Sexual- and Gender-Based Crimes, Particularly Forced Pregnancy, and on Standards of Proof Required for Sexual and Reproductive Violence Pursuant to Rule 103 of the Rules of Procedure and Evidence”, [No. ICC-02/04-01/15-1933](#); the “Amici Curiae Observations on Sexual- and Gender-Based Crimes, Particularly Sexual Slavery, and on Cumulative Convictions Pursuant to Rule 103 of the Rules of Procedure and Evidence”, [No. ICC-02/04-01/15-1934](#); the “Amici Curiae Brief on Forced Marriage”, [No. ICC-02/04-01/15-1935](#) + [Anx1](#); the “Submission of Amicus Curiae observations on the merits of the legal questions presented in the “Order inviting expressions of interest as amici curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)” of 25 October 20”, [No. ICC-02/04-01/15-1936](#); the “OBSERVATIONS OF THE ASSOCIATION OF DEFENCE COUNSEL PRACTISING BEFORE THE INTERNATIONAL COURTS AND TRIBUNALS (ADC-ICT) AS AMICUS CURIAE REGARDING QUESTIONS POSED BY THE APPEALS CHAMBER IN PROSECUTOR v. ONGWEN”, [No. ICC-02/04-01/15-1937](#); the “Amici Curiae Observations on the Rome Statute’s definition of ‘forced pregnancy’ by Dr Rosemary Grey, Global Justice Center, Women’s Initiatives for Gender Justice and Amnesty International”, [No. ICC-02/04-01/15-1938](#); the “Amicus Curiae Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence”, [No. ICC-02/04-01/15-1939](#); the “Amicus Curiae Observations by Public International Law & Policy Group”, [No. ICC-02/04-01/15-1940](#); the “Amici curiae observations submitted by Prof. Bonita Meyersfeld and the Southern African Litigation Centre Trust pursuant to rule 103 of the Rules of Procedure and Evidence”, [No. ICC-02/04-01/15-1941](#); the “Submission of observations pursuant to rule 103 of the Rules of Procedure and Evidence, as amici curiae on transcultural forensic psychiatric issues”,

2. As highlighted in her Consolidated Response,⁵⁵ the CLRV notes that the *Amicus Curiae* also provides observations going beyond the scope of its role, which is simply to *advise* – based on a recognised and demonstrated expertise - on a matter(s) to be adjudicated by the relevant chamber, in order to eventually bring to the Court’s attention the relevant *facts or arguments not already addressed by the parties and participants*. Therefore, the CLRV requests the Chamber to disregard arguments and opinions expressed in the *Amicus Curiae* observations which go beyond its role and/or expertise.

3. On the substance, the CLRV is of the opinion that the majority of the *Amicus Curiae* arguments are of no assistance for the Chamber in its determination of the issues on appeal.

4. More generally, the CLRV wishes to underline the disappointment of the participating victims in knowing about the substance of the submissions of the *Amici* in these proceedings. In this regard, they express concerns in relation to the patent misunderstanding of several *Amici* about the fact that Mr Ongwen committed crimes as an adult fully capable of understanding and measuring the effects and impacts of his unlawful conduct(s). The re-opening of the discussion related to the affirmative defences brought by the accused at trial is particularly painful for the participating victims because it affects directly the recognition of their victimisation. Finally, victims of sexual and gender based crimes who - at the time of the delivery of the Judgment - expressed relief for the interpretation by the Trial Chamber of the conduct of the accused as characterising distinct crimes having different impacts on them, are concerned by what appears to them as a purely theoretical discussion about the crimes committed without knowing nor taking into account the reality they faced.

[No. ICC-02/04-01/15-1942](#); and the “Amicus curiae observations on issues raised in the Appeals Chamber Order of 25 October 2021 inviting expressions of interest as amici curiae in judicial proceedings (pursuant to Rule 103 of the Rules of Procedure and Evidence)”, [No. ICC-02/04-01/15-1943](#).

⁵⁵ See the Consolidated Response, *supra* note 3, para. 3.

II. SUBMISSIONS ON THE SUBSTANCE OF THE *AMICUS CURIAE* OBSERVATIONS

1) Observations on *area a.* relevant to grounds for excluding criminal responsibility under article 31(1)(a) and (d) of the Statute⁶

5. The CLRV observes that the *Amicus* seems to argue, first, that Mr Ongwen should be considered as a child benefitting from the protection of all the international texts on children's rights,⁷ especially child victims of trafficking. This premise is incorrect because it fails to acknowledge that Mr Ongwen was convicted for the crimes he had committed as an adult. Second, the *Amicus* seems to contend that Mr Ongwen is a victim of trafficking, and therefore that he should benefit from the non-punishment principle.⁸ In this regard, the reports used as references (non-binding recommendations of a Group of Experts from the Council of Europe or of the OSCE, or the own Reports by the *Amicus*) do not find any direct binding application in the legal framework of this Court. More importantly, the legal theory proposed therein runs against the clear letter and spirit of the Rome Statute regarding affirmative defences,⁹ for which a comprehensive set of legal provisions exist. In any case, the core question of whether Mr Ongwen was somehow compelled to commit the crimes for which he was declared guilty was comprehensively adjudicated by the Trial Chamber when assessing both the affirmative defences of mental disease or defect, and of duress. Following a comprehensive assessment of all the evidence presented at trial, the Trial Chamber reached the conclusion that he was not.¹⁰ Finally, the *Amicus* further seems to consider that Mr Ongwen is a disabled person. In this regard, the CLRV

⁶ See also *Amici* No. 1943, 1942, 1940, 1937, 1936, 1932, 1931, 1930, 1929 and 1926, *supra* note 4.

⁷ See paras. 11 and 12.

⁸ See paras. 13 to 16.

⁹ *Ibid.*

¹⁰ See the "Trial Judgment" (Trial Chamber IX), [No. ICC-02/04-01/15-1762-Conf](#) and [No. ICC-02/04-01/15-1762-Red](#), 4 February 2021, notably paras. 2450 to 2580 and paras. 2581 to 2672. See also the "Sentence" (Trial Chamber IX), [No. ICC-02/04-01/15-1819-Conf](#) and [No. ICC-02/04-01/15-1819-Red](#), 6 May 2021, paras. 61 to 88 and paras. 89 to 116.

recalls once more that such a definitive medical and legal conclusion was never reached in this case.¹¹

6. The CLRV therefore submits that the arguments presented in relation to the grounds for excluding criminal responsibility should be dismissed in their entirety.

2) Observations on *area b.* relevant to sexual and gender-based crimes¹²

7. The CLRV notes that the *Amicus* seems to recognise, on the one hand, that the drafters of the Rome Statute carefully distinguished the crimes of enslavement and sexual slavery, notably for reasons of fair labelling and recognition of the specific nature and type of harms covered by each of these crimes.¹³ However, on the other hand, while suggesting that the crime of enslavement cannot be subsumed in the crime of sexual slavery (a proposition with which the CLRV concurs), it seems to nonetheless argue that the crime of sexual slavery can be a “*form of enslavement*” (thereby maybe suggesting that it should or could be subsumed in the latter),¹⁴ and, further, that it “*can be characterised as coming within the scope of the crime of trafficking*” (thereby apparently suggesting the latter as a better characterisation in these proceedings).¹⁵ These assertions are paradoxical and cannot stand concurrently. Indeed, the CLRV stresses that the recognition of the distinct and separate crimes of sexual slavery, enslavement and trafficking is in line with a) the existence of materially distinct elements of each conduct not contained within the statutory definitions of the others, and b) the fact that the *actus reus*, *mens rea* and the specific types of harm and attached consequences are unquestionably different. She further reiterates that these legal characteristics ought to be recognised not only for the victims of said crimes, but also for the important functions of deterrence and accountability of international criminal law. Proceeding otherwise would be legally incorrect and impermissible in light of the very

¹¹ See para. 17.

¹² See also *Amici* No. 1943, 1941, 1939, 1938, 1935, 1934, 1933, 1932, 1928 and 1927, *supra* note 4.

¹³ See para. 6.

¹⁴ *Ibid.*

¹⁵ *Idem*, paras. 2 to 5, 7 and 8.

letter and spirit of the Rome Statute and the intention of its drafters.¹⁶ As previously argued, the supposed similarities between victims of sexual slavery and victims of human trafficking, the jurisprudence (unrelated, although possibly of inspirational value) in trafficking cases and the other avenues proposed by the *Amicus* cannot form the basis of a decision in this case, for lack of direct application.¹⁷

8. The CLRV therefore submits that the arguments related to the characterisation of the crime of sexual slavery as trafficking should be dismissed in their entirety.

9. Regarding the assessment of evidence in relation to sexual and gender based crimes,¹⁸ although the CLRV concurs with the *Amicus* in relation to the crucial recognition of the impact of trauma in assessing victims' testimony and the necessity of implementing measures to support victims and witnesses participating in legal proceedings, she notes that these arguments are not new to the Chamber and thus fail to make any meaningful contribution to the determination of the issues on appeal. Therefore, she posits that said arguments should be disregarded.

Respectfully submitted.



Paolina Massidda
Principal Counsel

Dated this 28th day of January 2022

At The Hague (The Netherlands)

¹⁶ See the Consolidated Response, *supra* note 3, paras. 31, 32, 35 to 37, 41 and 45.

¹⁷ *Idem*, paras. 7 to 14.

¹⁸ See para. 9.