

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **28 January 2022**

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

**Defence Response to the UN Special Rapporteur Siobhán Mullally's *Amicus Curiae*
Observations**

Source: Defence for Dominic Ongwen

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

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UN Special Rapporteur Siobhán Mullally

I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby responds to *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* ('Amicus' or 'Doc 1958'), ICC-02/04-01/15-1958.

II. SUBMISSIONS

A. Sexual slavery and enslavement

2. The Defence agrees with the *Amicus* that human trafficking "can amount to an international crime in the form of enslavement, and sexual slavery, as crimes against humanity, and/or sexual slavery as a war crime."¹
3. However, the Defence disagrees with the *Amicus* that the Trial Chamber erred in finding that all of the elements of enslavement were included in the elements of sexual slavery. The *Amicus* posits that the Trial Chamber's finding "does not recognise the distinct though related crimes, and the potentially wider definition of the crime of enslavement, not entirely encompassed within sexual slavery, as such." As the Trial Chamber correctly stated: "[t]he crime of sexual slavery, whether as a crime against humanity or war crime, is committed when the material element of enslavement is fulfilled and the perpetrator also caused such person or persons to engage in one or more acts of a sexual nature."²
4. The *Amicus* mistakes the possibility that enslavement could include non-sexual acts with the analysis that all legal elements of enslavement are included in the definition of sexual slavery. Sexual slavery includes all of the elements of enslavement in the same way that the war crime of torture includes all the elements of the war crime of cruel treatment. The Trial Chamber found that torture and cruel treatment are an impermissible concurrence.³ The listing of torture and cruel treatment as separate crimes under Article 8 does not invalidate finding an impermissible concurrence of the crimes. Similarly, the listing of enslavement and sexual slavery as separate crimes under Article 8 does not negate their impermissible concurrence.
5. The Defence further points out that there is no appeal of the Trial Chamber's finding of an impermissible concurrence and the dismissal of enslavement charges with regard to the four

¹ [Doc 1958](#), para. 3.

² Trial Chamber IX, *Trial Judgment*, [ICC-02/04-01/15-1762-Red](#), para. 2715.

³ Trial Chamber IX, *Trial Judgment*, [ICC-02/04-01/15-1762-Red](#), para. 2835.

victims where both crimes were charged.⁴ Neither the Defence nor the Prosecution⁵ has appealed this finding. Under either an elements-based/Blockburger test, or under the more refined specialty analysis, sexual slavery and enslavement are an impermissible concurrence. As such, the issue is not raised in this appeal.

B. Articles 31(1)(a) and (d)

6. The Defence agrees with the *Amicus* comments on the Articles 31(1)(a) and 31(1)(d).
7. In respect to **Article 31(1)(a)**, the *Amicus* correctly suggests that both the jurisprudence and practice of the ICC, pursuant to Article 21, is mandated to reflect the internationally recognised protocols, guidelines and other agreements in respect to the rights of disabled persons.⁶
8. In respect to **Article 31(1)(d)**, the *Amicus* correctly advocates for the principle of non-punishment for victims of trafficking.⁷ This position is consistent with both *amici curiae* in Docs **1929** and **1936**.⁸
9. The Defence supports the principle of non-punishment for child soldiers, and has argued that Mr Ongwen is a continuing victim of trafficking.⁹ The Defence emphasizes that being a child soldier never ends.¹⁰ In other words, as expressed by Doc **1936**, “[o]nce a child soldier in fact, always a child soldier in mind, body, and soul.”¹¹ The principle of non-punishment should be applied to Mr Ongwen, and the chronological timing of the events for which Mr Ongwen was charged and convicted should not moot the principle of non-punishment.
10. The Defence agrees with the *Amicus* that the interpretation of the defences of duress and necessity should take account of the context of trafficking,¹² as is reflected in her Report on Implementation of the Non-Punishment Principle. She emphasizes that an offence may be the

⁴ Trial Chamber IX, *Trial Judgment*, [ICC-02/04-01/15-1762-Red](#), para. 3051.

⁵ Appeals Chamber, *Public redacted version of “Prosecution Response to ‘Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021’ (ICC-02/04-01/15-1866-Conf)”*, 21 October 2021, ICC-02/04-01/15-1882-Conf, [ICC-02/04-01/15-1882-Red](#), para. 138. “It also correctly found that cumulative convictions for enslavement and sexual slavery on the same facts (articles 7(1)(c) and (g)) were impermissible.”

⁶ [Doc 1958](#), paras 2 and 17.

⁷ [Doc 1958](#), paras 10-17. See also, Appeals Chamber, *Defence Response to the Amici Curiae Observations*, [ICC-02/04-01/15-1950](#), paras 19-21 and 27.

⁸ [Doc 1936](#), paras 1-43 and [Doc 1929](#), paras 16-38.

⁹ Appeals Chamber, *Defence Response to the Amici Curiae Observations*, [ICC-02/04-01/15-1950](#), paras 19-21.

¹⁰ Appeals Chamber, *Defence Response to the Amici Curiae Observations*, [ICC-02/04-01/15-1950](#), para. 3. See also Appeals Chamber, *Public Redacted Version of “Corrected Version of “Defence Closing Brief”, filed on 24 February 2020”*, [ICC-02/04-01/15-1722-Corr-Red](#), paras 565-693 and Appeals Chamber, *Public Redacted Version of “Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021”*, filed on 21 July 2021 as ICC-02/04-01/15-1866-Conf, [ICC-02/04-01/15-1866-Red](#), paras 611-650.

¹¹ [Doc 1936](#), para. 11 (quoting from Mark Drumbl).

¹² [Doc 1958](#), para. 14.

result of the “lack of independence or ability to exercise free will.”¹³ This clearly was the situation with Mr Ongwen.

11. The Defence notes that Chief Prosecutor Fatou Bensouda painted a gruesome picture of the LRA’s coercive environment which was characterised by strict rules and punishments. Both the Chamber and the Prosecutor acknowledged that Mr Ongwen was also a victim within this environment.¹⁴ Evidence of Joseph Kony’s total control, for example, through his systemic policies of abduction and distribution of women, and his enforcement of these policies, is found in the Trial Judgment.¹⁵
12. The *Amicus*,¹⁶ like the *amicus curiae* in Doc **1929**,¹⁷ argues for a broad approach to the causation requirement for non-punishment for child soldier (both current and former). The Defence submits that this approach also applies to the interpretation of “imminency” and “harm.” The Trial Judgment states that imminent applies to the harm, not the threat.¹⁸ The *Amicus* points out that the trauma of being a trafficking victim is complex, and there is a continuing risk of abuse. The Defence agrees. The absence of an “immediate” harm does not negate harm for the purposes of interpreting non-punishment to the realities of child soldiering within the defence of duress.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 28th day of January, 2022

At Gulu, Uganda

¹³ [Doc 1958](#), para. 16.

¹⁴ [ICC-02/04-01/15-T-26](#), pp 6, 27, 31-32 and 35. See also Trial Chamber IX, Trial Judgment, [ICC-02/04-01/15-1762-Red](#), para. 2672.

¹⁵ See, Appeals Chamber, *Defence Response to the Amici Curiae Observations*, [ICC-02/04-01/15-1950](#), paras 91-95 (citing Trial Judgment in footnotes).

¹⁶ [Doc 1958](#), para. 16.

¹⁷ [Doc 1936](#), para. 30.

¹⁸ Trial Chamber IX, Trial Judgment, [ICC-02/04-01/15-1762-Red](#), para. 2582.