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

Date: **28 January 2022**

APPEALS CHAMBER

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

SITUATION IN UGANDA

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

Public with Public Annex A

**Prosecution Response to *Amicus Curiae* observations by the United Nations Special
Rapporteur on Trafficking in Persons, especially women and children**

Source: Office of the Prosecutor

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

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I. SEXUAL AND GENDER BASED CRIMES (SGBC)

1. The Prosecution acknowledges the expertise of the UN Special Rapporteur on Trafficking in Persons, especially women and children, on general trafficking-related matters. Nonetheless, the submissions on SGBC must be viewed in the context of the Court’s legal framework and the confines of this case.¹

2. First, the Rome Statute does not recognise trafficking *as an international crime*.² The Court has no jurisdiction over trafficking *per se*.³ Rather, the Court’s legal framework recognises that “trafficking”—when combined with the exercise of powers attaching to the right of ownership over a person—can describe pertinent conduct underlying the shared common element of the crimes of enslavement and sexual slavery.⁴ It follows therefore that the phrase “similar deprivation of liberty” in the relevant statutory provisions refers to other means by which powers attaching to the rights of ownership may be exercised, for the purposes of enslavement and sexual slavery.⁵ Moreover, there are key differences between trafficking as defined as the transnational organised crime under the Palermo Protocol, and the Rome Statute crimes.⁶ Accordingly, understandings of trafficking in other contexts should not be imposed on the Statute to bypass its requirements.⁷

3. Second, while enslavement is not limited to “forced labour or services” and should be more broadly understood (as the Prosecution has also stated),⁸ the Mullally Brief does not account for the Trial Chamber’s application of the *Čelebići* test on cumulative convictions to enslavement and sexual slavery⁹—an analysis which the Chamber correctly restricted to the abstract legal elements of the two crimes under the Statute, without limiting the factual scope of the crimes, or indicia relevant to proving their elements.¹⁰ Further, as the Mullally Brief

¹ *Contra* [Mullally Brief](#), paras. 2-9.

² *Contra* [Mullally Brief](#), para. 3.

³ [OTP SGBC Policy](#), paras. 8 (Executive Summary), 34; [OTP Strategic Plan 2016-2018](#), para. 30; [Siller](#), p. 415; [CEDAW General Comment No. 38 \(2020\)](#), para. 14.

⁴ [Statute](#), art. 7(2)(c); [Elements of Crimes](#), arts. 7(1)(c) (fn. 11), 7(1)(g)-2 (fn. 18), 8(2)(b)(xxii)-2 (fn. 53), 8(2)(e)(vi)-2 (fn. 66). See [Sellers and Kestenbaum \(2020-A\)](#), p. 56 (“[...] Under the Rome Statute, trafficking in persons is neither a separate crime nor an element of enslavement, but a mere description of enslavement conduct without legal force.”); [Siller](#), pp. 414-415, 427; [Sellers and Kestenbaum \(2020-B\)](#), p. 533.

⁵ *Contra* [Mullally Brief](#), para. 3 (seemingly equating “deprivations of liberty” with all trafficking); [Oosterveld](#), pp. 634-635.

⁶ [Palermo Protocol](#), art. 3. See e.g., [Sellers and Kestenbaum \(2020-B\)](#), pp. 534-535 (trafficking *inter alia* requires proof of exploitation and of “means” (lack of consent); it does not require an intent to reduce someone into slavery); [Siller](#), pp. 416-426.

⁷ *Contra* [Mullally Brief](#), paras. 4-5, 7-8.

⁸ [Mullally Brief](#), para. 6; [OTP Amici Curiae Response](#), paras. 36-41.

⁹ [Mullally Brief](#), para. 6 (enslavement “is in the abstract entirely encompassed within sexual slavery”).

¹⁰ [Judgment](#), paras. 2792-2797, 3044-3055, 3081-3087.

notes, the drafters of the Statute sought to specifically include sexual slavery as a crime.¹¹ Its specific elements more accurately describe the crime of sexual slavery similar to other violent crimes, with a focus on the perpetrator's actions to exercise powers attaching to the right of ownership.¹² Notwithstanding, in its factual scope, "sexual slavery is slavery", and a form of enslavement.¹³ The Chamber's findings are correct and consistent under the Statute.

II. GROUNDS FOR EXCLUDING CRIMINAL RESPONSIBILITY

4. Mullally's general observations regarding the 'non-punishment' of victims of trafficking are misplaced in this case, whatever their potential merit in other circumstances or fora.¹⁴ It is unclear whether the observations considered the findings in the Judgment.¹⁵ Yet even if Ongwen could be said to have been 'trafficked',¹⁶ the charged crimes were not the necessary, direct, or proximate result of that victimisation,¹⁷ nor at those times was he deprived of his autonomy or free will.¹⁸ His criminal responsibility thus remains justified.

5. Indeed, this case does not address Ongwen's actions as a child at all, but his conduct "many years" later "when he was an adult and in a commanding position"¹⁹—a self-confident commander who moved up the ranks, took independent action, and exercised his own judgement.²⁰ In this case, these factors broke any nexus between Ongwen's initial victimisation and later conduct; it stands to reason that the 'non-punishment' principle cannot exclude responsibility for life.²¹ Nor does the legal framework of the Court expressly recognise any such principle. The article 5 crimes proved in this case are of a nature and magnitude wholly different from the crimes ordinarily associated with trafficking—and Ongwen is responsible not just for his own conduct but also the conduct of others (who may not be prosecuted) whom

¹¹ [Oosterveld](#), pp. 608 ("[Sexual slavery] was an obvious codification of a specific kind of slavery increasingly recognised as a major problem worldwide [...] and a contemporary and more correct way to describe certain harms..."), 614-615, 622-625; [Mullally Brief](#), para. 6.

¹² [Oosterveld](#), p. 651.

¹³ [Oosterveld](#), p. 651; [McDougall 1998 Report](#), para. 30; [Judgment](#), para. 3051 (sexual slavery, as a crime against humanity, is a specific form of enslavement).

¹⁴ Cf. [Mullally Brief](#), paras. 10-12.

¹⁵ See [Mullally Brief](#), para. 10 (referring only to her understanding of the claim raised by the Defence on appeal). See also [Mullally Request](#), paras. 10-11 (as 18 January 2022, the *amicus curiae* only "recently" had capacity to engage with this case, and even then only on "legal issues").

¹⁶ See e.g. [Mullally Brief](#), paras. 8, 12.

¹⁷ See [Mullally Brief](#), para. 10 (quoting the [OHCHR Trafficking Principles](#)' requirement for criminality to be "a direct consequence" of being trafficked, emphasis added). Cf. paras. 12, 14.

¹⁸ Contra [Mullally Brief](#), paras. 14, 16.

¹⁹ [Judgment](#), para. 2592. Cf. [Mullally Brief](#), para. 11.

²⁰ [Judgment](#), paras. 2593, 2602.

²¹ See [Judgment](#), para. 2672 (dismissing similar Defence submissions at trial).

he used to victimise men, women, and children.²² Accountability for high ranking, high functioning, adult LRA members like Ongwen thus gives effect to the very law to which Mullally refers, in order “[t]o prevent and combat trafficking in persons, paying particular attention to women and children”, and “[t]o protect and assist the victims of such trafficking”.²³

6. As the Trial Chamber found beyond reasonable doubt, Ongwen’s capacity to control his actions in accordance with article 31(1)(a) was not destroyed by mental disease or defect, nor did he act under duress—even if there had been a material threat (which the Chamber rejected), his actions were not necessary and reasonable to avoid such a threat.²⁴ In this way, the Chamber properly established that Ongwen acted with autonomy and was legally responsible for his conduct. These standards were calibrated by the drafters of the Statute to ensure that the Court can deter the most serious crimes, by ensuring that criminal accountability is both meaningful and practicable. Mullally shows no reason in law, either under article 31(1) or 21(3), to depart from these standards.²⁵ In the passages upon which she relies, neither the UNODC nor ECtHR set out prescriptions of law, but merely statements of policy.²⁶ At most, these views are *de lege ferenda*, which cannot be applied in this case.²⁷

7. For the reasons set out above (and those set out previously), the Prosecution respectfully requests the Appeals Chamber to dismiss the appeals and confirm Ongwen’s convictions.



Karim A.A. Khan QC, Prosecutor

Dated this 28th day of January 2022
At The Hague, The Netherlands

²² *Contra* [Mullally Brief](#), para. 13. Compare e.g. [OSCE Trafficking Recommendations](#) (crimes typically associated with trafficking include immigration and document offences, drugs offences, shoplifting, and so on).

²³ See e.g. [Palermo Protocol](#), arts. 2-3, 5; [OHCHR Trafficking Principles](#), paras. 12-17; [ACHPR](#), art. 5.

²⁴ See [Judgment](#), paras. 2580, 2670; [OTP Response](#), paras. 166-380; [OTP Amici Curiae Response](#), paras. 26, 32.

²⁵ *Contra* [Mullally Brief](#), paras. 14-15, 17. See [OTP Amici Curiae Response](#), paras. 11-22, 27-34.

²⁶ *Cf.* [Mullally Brief](#), paras. 15-16.

²⁷ See [OTP Amici Curiae Response](#), paras. 2-3.