

Ongwen at the International Criminal Court

Introduction

On February 4, 2021, Trial Chamber IX of the International Criminal Court (ICC) issued its judgment in the *Dominic Ongwen* case, convicting him of 61 out of 70 counts of war crimes and crimes against humanity committed as a fighter of the Lord's Resistance Army (LRA) in Uganda.¹ On May 6, 2021, the Chamber sentenced Ongwen to 25 years imprisonment.²

The judgment represents a significant step forward in international criminal law. This is the first time a Chamber has considered the offence of forced pregnancy as a crime against humanity and war crime, the first time it has considered forced marriage, and the first time that a Chamber dealt with a former victim turned perpetrator.³

This *Insight* describes the judgment, with a particular focus on the evolution in the law regarding the conceptualization and recognition of crimes of forced marriage and forced pregnancy. This *Insight* also examines how the Chamber treated the impact of Ongwen's status as a previous child victim on his criminal liability and on his sentence.

Background, Judgment, and Sentencing

The factual background relates to the two decade-long civil war between the Lord's Resistance Army (LRA) and the Uganda People's Defence Forces (UPDF) in Northern Uganda. A range of crimes against humanity and war crimes were committed by the LRA and UPDF. The Uganda Government referred the situation to the ICC in 2003, leading to the investigation and indictment of the LRA's five most senior commanders in 2005.⁴ One

of these five, Dominic Ongwen, was abducted as a 10-year-old child by the LRA under the command of Joseph Kony.

Ongwen was charged with 70 counts of war crimes and crimes against humanity against civilians between 2002 and 2005 under three broad categories: (i) four specific attacks against four Internally Displaced People's (IDP) camps; (ii) sexual and gender-based violence (SGBV) crimes directly perpetrated by him against seven women; and (iii) SGBV crimes and conscription and use in hostilities of children under the age of fifteen.⁵

Ongwen's defence raised two grounds for excluding his criminal responsibility. The first was that he suffered from mental disease or defect, and criminal responsibility was thus excluded under Article 31(1)(a) of the Statute, which applies when "[t]he person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law."⁶ In dismissing this defence, the Chamber was persuaded by expert reports and testimonies, emphasizing that Ongwen was of sound mental capacity during the period under examination.⁷

The second defence was that Ongwen was acting under duress related to his status as a victim-turned-perpetrator, and his actions were excluded under Article 31(1)(d), which requires, *inter alia*, that the accused action "has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person."⁸ Ongwen pleaded that he was under a continuing threat of imminent death and serious bodily harm from Kony. However, in dismissing this defence the Chamber found that Ongwen was not in a situation of complete subordination to Kony.⁹ The Chamber also recognized Ongwen's status in the LRA hierarchy and the fact that he had a possibility of leaving the LRA.¹⁰

Additionally, Ongwen's defence made "some legally unspecified submissions" not formulated as a defence that he was himself a victim on account of his abduction at a young age.¹¹ However, his experience in the LRA had no impact on the Chamber's judgment because "the fact of having been (or being) a victim of a crime does not constitute, in and of itself, a justification of any sort for the commission of similar or other crimes."¹² Additionally, Ongwen was adjudged for crimes committed during his adulthood. In sum, the fact that a defendant is a victim himself – which the Chamber acknowledges – doesn't give him a right to perpetrate crimes.

Within the context of the attacks carried out by the LRA on the four IDP camps, the Chamber convicted Ongwen of the following crimes: (i) attack against the civilian population; (ii) murder as a crime against humanity and war crime; (iii) attempted murder

as a crime against humanity and war crime; (iv) torture as a crime against humanity and war crime; (v) enslavement as a crime against humanity; (vi) pillaging as a war crime; (vii) destruction of property as a war crime; (viii) persecution as a crime against humanity and; (ix) outrages upon personal dignity as a war crime.¹³

Ongwen was also convicted of SGBV crimes directly perpetrated by him against seven women. These were: (i) rape as a crime against humanity and war crime; (ii) enslavement as a crime against humanity; (iii) outrages upon personal dignity; and (iv) sexual slavery as a crime against humanity and war crime. The latter was premised on the fact that he exercised “powers attaching to the right of ownership” over the women.¹⁴

The most noteworthy parts of the decision relate to the crimes of forced marriage and forced pregnancy. Forced marriage is not explicitly set out in the Rome Statute, and the Court rejected the notion that forced marriage is subsumed by the crime of enslavement, or by the crimes of rape or sexual slavery.¹⁵ In this case, forced marriage was interpreted as an independent crime that satisfied the legal elements of “other inhumane acts” as a crime against humanity under Article 7(1)(k).¹⁶ This represents an evolution in the conceptualization of forced marriage, following the jurisprudence of other international tribunals, such as the Special Court for Sierra Leone (SCSL) Appeals Chamber, where forced marriage during armed conflict was defined and recognized as a crime against humanity.¹⁷

Forced pregnancy is set out in Articles 7(1)(g) and 8(2)(b)(22) of the Statute. The Chamber acknowledged it was the first time the court had considered the crime of forced pregnancy, noting that, “[a]s with any crime, forced pregnancy must be interpreted in a manner which gives this crime independent meaning from the other sexual and gender-based violence crimes in the Statute.”¹⁸ It was interpreted to mean “the unlawful confinement of a (forcibly made) pregnant woman, with the effect that the woman is deprived of reproductive autonomy.”¹⁹

Finally, the Chamber convicted Ongwen for SGBV crimes not directly perpetrated by himself: (i) forced marriage; (ii) torture; (iii) rape; (iv) sexual slavery; and (v) enslavement. These convictions were based on the existence of an agreement or common plan among Ongwen, Kony, and the Sinia brigade leadership, and Ongwen’s control over the crimes.²⁰ Ongwen was also convicted for conscription and use of children under the age of 15 years and their use in armed hostilities. Here, too, the Chamber based his individual criminal responsibility on the existence of an agreement or common plan and Ongwen’s control over the crimes.²¹ While his own situation as a former abductee was recognized, the Chamber did not examine any impact it may have had on his subsequent criminal activities.

On May 6, 2021, the Trial Chamber sentenced Ongwen to 25 years of imprisonment. Unlike in the conviction, the Chamber considered the mitigating circumstance of his childhood and abduction by the LRA during sentencing.²²

The Chamber's sentencing decisions under Article 78(1) of the Rome Statute and Rule 145 of the Rules of Procedure and Evidence are based on the gravity of the crimes, together with the individual circumstances of the defendant, and mitigating and aggravating circumstances.²³ In assessing the effect of Ongwen's own victimhood the Chamber noted that Ongwen,

“despite well aware of such suffering which he himself had been subjected to several years earlier and fully appreciating its wrongfulness, did nothing to spare similar experiences to other children after him, but, on the contrary, willfully sustained and contributed to perpetuate the systemic, methodical and widespread abduction, integration and use as fighters of large number of children by the LRA.”²⁴

Twenty-five years of imprisonment is not significantly less than the defendant might have received had he not been a victim. The only partly dissenting opinion was made by Judge Raul Cano Pangalangan, who preferred a joint sentence of 30 years imprisonment.²⁵

Ongwen's lawyers have announced an intention to appeal against the judgment, emphasizing the same defenses previously argued of duress and mental disability.²⁶

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¹ *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-1762-Red, Trial Judgment, (Feb. 4, 2021), https://www.icc-cpi.int/CourtRecords/CR2021_01026.PDF [hereinafter *Trial Judgment*].

² *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-1819-Red, Sentence, ¶ 100–111 (May 6, 2021), https://www.icc-cpi.int/CourtRecords/CR2021_04230.PDF [hereinafter *Sentencing Decision*].

³ See Tonny R. Kirabira & Leïla Choukroune, *Dominic Ongwen: ICC conviction of former child soldier establishes 'forced pregnancy' as a war crime*, THE CONVERSATION (Feb. 9, 2021), <https://theconversation.com/dominic-ongwen-icc-conviction-of-former-child-soldier-establishes-forced-pregnancy-as-a-war-crime-154671>.

⁴ ICC Press Release, *Statement by the Chief Prosecutor on the Uganda Arrest Warrants*. (Oct. 14, 2005), https://www.icc-cpi.int/nr/rdonlyres/3255817D-fd00-4072-9F58-fdb869F9B7cf/143834/lmo_20051014_English1.pdf.

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- ⁵ Trial Judgment, ¶ 33.
- ⁶ Rome Statute of the International Criminal Court, art. 31(1)(a), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].
- ⁷ Trial Judgment, ¶¶ 2450-2580.
- ⁸ Rome Statute, art. 31(1)(d).
- ⁹ Trial Judgment, ¶¶ 2585, 2591, 2668.
- ¹⁰ *Id.* ¶¶ 2619, 2640, 2668.
- ¹¹ *Id.* ¶ 2672.
- ¹² *Id.* ¶ 2672.
- ¹³ *Id.* ¶¶ 2874, 2973, 3020.
- ¹⁴ *Id.* ¶ 3046.
- ¹⁵ *Id.* ¶ 2750.
- ¹⁶ *Id.* ¶ 3071.
- ¹⁷ *Id.* ¶ 2744.
- ¹⁸ *Id.* ¶ 2722.
- ¹⁹ *Id.*
- ²⁰ *Id.* ¶¶ 3092, 3093.
- ²¹ *Id.* ¶ 3106
- ²² See Sentencing Decision.
- ²³ Rome Statute; ICC, Rules of Procedure and Evidence, ICC-ASP/1/3, R. 48 (2013), <https://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf>.
- ²⁴ Sentencing Decision, ¶ 370.
- ²⁵ See Partly Dissenting Opinion of Judge Raul C. Pangalangan, ICC-02/04-01/15-1819-Anx, ¶ 9, https://www.icc-cpi.int/RelatedRecords/CR2021_04227.PDF.
- ²⁶ Julius Barigaba, *Ongwen to appeal ICC verdict, claims mental disability*, THE EAST AFRICAN, (Feb. 15, 2021), <https://www.theeastafrican.co.ke/tea/news/east-africa/ongwen-to-appeal-icc-verdict-3291646>.