**The ICC’s *Dominic Ongwen* judgment: Expansion and limits of the Rome Statute**

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**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]](#endnote-1)

The judgment represents a significant step forward in international criminal law. Not only is this the first time the Chamber has considered the offence of forced pregnancy as a crime against humanity and war crime, it is also the first time that the Chamber dealt with a former victim turned perpetrator.[[2]](#endnote-2)

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.

**Background and Decision**

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 2013, leading to the investigation and indictment of the LRA’s five most senior commanders in 2005.[[3]](#endnote-3) 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.[[4]](#endnote-4)

 Ongwen’s defence raised two grounds for excluding his criminal responsibility. The first wasthat 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”.[[5]](#endnote-5) 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.[[6]](#endnote-6)

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”.[[7]](#endnote-7) 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.[[8]](#endnote-8) The Chamber also recognized Ongwen’s status in the LRA hierarchy and the fact that he had a possibility of leaving the LRA.[[9]](#endnote-9)

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.[[10]](#endnote-10) 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.”[[11]](#endnote-11) 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.[[12]](#endnote-12)

*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.[[13]](#endnote-13)

However, 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.[[14]](#endnote-14) In this case, forced marriage was interpreted as an independent crime that satisfied the legal elements of “other humane act” under Article 7(1)(k).[[15]](#endnote-15) 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.[[16]](#endnote-16) Besides the direct victims of the crime of forced marriage, the Chamber recognised the consequential harm, noting:

“To the extent forced marriage results in the birth of children, this creates even more complex emotional and psychological effects on the victim and their children beyond the obvious physical effects of pregnancy and childbearing.”[[17]](#endnote-17)

This analysis encapsulates the Chamber’s recognition of vulnerability above and beyond the period when the crimes were committed.

Forced pregnancy is set out in Article 7(1)(g). The Chamber acknowledged it was the first time the court had considered the crime of forced pregnancy, noting that, “As 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]](#endnote-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]](#endnote-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]](#endnote-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]](#endnote-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.

**Should the defendant's own victimhood be considered in assessing culpability or penalty?**

Throughout the course of the trial, there were mixed views among the affected communities on whether Ongwen should be penalized owing to his experiences as an abducted child soldier.[[22]](#endnote-22)

 Ongwen’s lawyers have announced an intention to appeal against the judgement, emphasizing the same defences of duress and mental disability.[[23]](#endnote-23) It remains to be seen how the Appeals Chamber will deal with the complex victim-perpetrator binary. Nontheless,this triggers some reflections on how the Chamber could have dealt with the defendant’s victim-perpetuator binary.

In considering Ongwen’s culpable conduct as an adult, the Chamber could have taken cognisance of the devastation surrounding child soldiering. In particular, such experiences enhance the potential for institutionalized duress, which excludes criminal liability under Article 31(1)(d) of the Rome Statue.[[24]](#endnote-24) Indeed, the failure to recognize such historical circumstances could be regarded as limiting the necessary protection towards child soldiers under the Rome Statute, Humanitarian law and International human rights law,[[25]](#endnote-25) also recognized in emerging scholarship.[[26]](#endnote-26)

Additionally, this is a shift from the approach taken in the case against Thomas Lubanga Dyilo - the first defendant to be convicted for conscription, enlistment and use of child soldiers by the ICC.[[27]](#endnote-27) More notably, while individual circumstances of former child soldiers, including long term consequences were recognized in the *Lubanga case*, the Chamber did not make any such finding regarding Ongwen’s situation.[[28]](#endnote-28) It is important to note however, that in the *Lubanga case,* the child soldiers were the victims recruited by Lubanga during the hostilities, whose victimhood was considered to be continuous.

The above reasoning demonstrates why a detailed assessment of Ongwen’s individual circumstances was necessary, especially in analysing the defence of duress vis a vis the crimes of conscription and use in hostilities of children under the age of fifteen. This would have the effect of making international criminal law more relevant when addressing complex armed situations.[[29]](#endnote-29)

**Conclusion**

The Chamber missed a vital opportunity to examine the impact of previous child victimhood status on criminal liability. This can be attributed to the complexity of the nature of the conflict in Northern Uganda. Nonetheless, the judgment sets a key precedent for the conceptualization and recognition of crimes of forced marriage and forced pregnancy.

For the future, the Chamber’s sentencing decision will serve as a particularly interesting test, especially as to how it will balance his critical mitigating factor of victimhood, against his aggravating factors. Specifically, it could reflect a much-needed middle-ground position regarding the culpability of former child soldiers,[[30]](#endnote-30)and serve as an ideal decision for the distinction between victims and perpetrator.

1. Prosecutor v. Dominic Ongwen, ICC-02/04-01/15-1762-Red, Trial Judgment, (February 4, 2021), available at <https://www.icc-cpi.int/CourtRecords/CR2021_01026.PDF> [↑](#endnote-ref-1)
2. *See* Tonny R. Kirabira & Leïla Choukroune, *Dominic Ongwen: ICC conviction of former child soldier establishes ‘forced pregnancy’ as a war crime,* The Conversation (February 9, 2021), <https://theconversation.com/dominic-ongwen-icc-conviction-of-former-child-soldier-establishes-forced-pregnancy-as-a-war-crime-154671> . [↑](#endnote-ref-2)
3. 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> [↑](#endnote-ref-3)
4. Ongwen, *supra*note 1, ¶33. [↑](#endnote-ref-4)
5. Rome Statute of the International Criminal Court, art. 31(1)(a), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. [↑](#endnote-ref-5)
6. Ongwen, *supra*note 1, ¶¶ 2450-2580. [↑](#endnote-ref-6)
7. Rome Statute, *supra* note 5, art. 31(1)(d). [↑](#endnote-ref-7)
8. Ongwen, *supra*note 1, ¶¶ 2585,2591,2668. [↑](#endnote-ref-8)
9. *Id.* ¶¶ 2619,2640,2668. [↑](#endnote-ref-9)
10. *Id.* ¶2672. [↑](#endnote-ref-10)
11. *Id.* ¶2672. [↑](#endnote-ref-11)
12. *Id.* ¶¶ 2874,2973,3020. [↑](#endnote-ref-12)
13. *I**d.* ¶3046. [↑](#endnote-ref-13)
14. *Id.* ¶2750. [↑](#endnote-ref-14)
15. *Id.* ¶3071. [↑](#endnote-ref-15)
16. *Id.* ¶2744. [↑](#endnote-ref-16)
17. *Id.* ¶2748. [↑](#endnote-ref-17)
18. *Id.* ¶2722. [↑](#endnote-ref-18)
19. *Id.* ¶2722. [↑](#endnote-ref-19)
20. *Id.* ¶¶ 3092, 3093. [↑](#endnote-ref-20)
21. *Id.* ¶3106 [↑](#endnote-ref-21)
22. Lino O. Ogora, *Just or Unjust? Mixed Reactions on Whether Ongwen Should be on Trial,* International Justice Monitor, (April 24, 2017), <https://www.ijmonitor.org/2017/04/just-or-unjust-mixed-reactions-on-whether-ongwen-should-be-on-trial/> [↑](#endnote-ref-22)
23. Julius Barigaba, *Ongwen to appeal ICC verdict, claims mental disability,* The EastAfrican, (February 15,2021), <https://www.theeastafrican.co.ke/tea/news/east-africa/ongwen-to-appeal-icc-verdict-3291646> [↑](#endnote-ref-23)
24. Rome Statute, *supra* note 5, art. 31(1)(d). [↑](#endnote-ref-24)
25. *ld.* art. 8(2) (b) (xxvi), Convention on the Rights of the Child, art. 38, (1) U.N. Doc. 1/44/49 (1989), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 77(2), 1125 U.N.T.S. 3, 39. [↑](#endnote-ref-25)
26. Mark A. Drumbl, *Victims Who Victimize,* 4 LONDON REV. INT'L L. 217,241 (2016); Drumbl, *‘Getting’ an Unforgettable Gettable: The Trial of Dominic Ongwen,* Justice in Conflict (February 5, 2021), <https://justiceinconflict.org/2021/02/05/getting-an-unforgettable-gettable-the-trial-of-dominic-ongwen/>. [↑](#endnote-ref-26)
27. Prosecutor v. Thomas Lubanga, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, (Mar.14, 2012), available at <https://www.icccpi.int/CourtRecords/CR2012_03942.PDF> [↑](#endnote-ref-27)
28. *Id.* ¶¶ 103,105,479, Ongwen, *supra*note 1, ¶ 2672. [↑](#endnote-ref-28)
29. For discussion see Kerstin B. Carlson, *ICC judges ignored Ongwen’s background in guilty verdict: Why it’s a mistake,* The Conversation (February 10, 2021), <https://theconversation.com/icc-judges-ignored-ongwens-background-in-guilty-verdict-why-its-a-mistake-154985> [↑](#endnote-ref-29)
30. For discussion see Barbora Hola and Thijs Bouwknegt, *Dominic Ongwen: the ICC’s Poster and Problem Child,* Almendron (March 17,2020), <https://www.almendron.com/tribuna/dominic-ongwen-the-iccs-poster-and-problem-child/> [↑](#endnote-ref-30)