

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

*Original: English*

*No.: ICC-  
Date: 15 nov. 21*

**THE APPEALS CHAMBER**

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

**SITUATION IN UGANDA**

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

**Public Document**

**Request to Submit an Amicus Curiae pursuant to Rule 103(1) of the Rules of  
Procedure and Evidence**

**Source:** Justice Francis M. Ssekandi

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

**The Office of the Prosecutor**

Mr. Karim A.A. Khan, Prosecutor

**Counsel for the Defence**

Mr. Krispus Ayena Odongo

**Legal Representatives of the Victims**

Mr. Joseph Akwenyu Manoba

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

[2 names maximum]

**The Office of Public Counsel for the  
Defence**

[2 names maximum]

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

M. Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

ICC-02/04-01/15A

1. The Applicant respectfully requests leave to submit an *Amicus curiae* observation in the form of a written brief pursuant to Rule 103(1) of the Rules of Procedure and Evidence (the “Rules”) on the grounds for excluding criminal responsibility under the Rome Statute, the burden and standard of proof in Criminal Cases, in particular, as it relates to the grounds excluding responsibility and duress.

2. On 4 February 2021, Trial Chamber IX (hereafter: “Trial Chamber”) convicted Dominic Ongwen of crimes against humanity and war crimes (hereafter: “Conviction Decision”). The Trial Chamber held that Mr. Ongwen did not suffer from mental disease or defect or duress at the time relevant for the charges. The Applicant will submit that the Trial Chamber misdirected itself on the evaluation of the mental capacity of the accused by rejecting the evidence of expert witnesses produced by the defense, fully qualified and experienced psychiatrists, in favour of witnesses of the Prosecution admittedly not experts in the area of psychiatry and lay witnesses who selectively testified that Ongwen acted normally, despite the evidence of brutality and mayhem committed on behalf of the Lord Resistance Army for which he was convicted. Such acts were not consistent with a person behaving normally.

3. The Applicant will also submit that the Trial Chamber could have, in the alternative, found the Accused guilty of the crimes committed with diminished responsibility based on the findings of the psychiatrists that he suffered from multiple mental illnesses, a fact confirmed by the findings of Dr. de Jong an independent expert. Based on Article 21 which offers interpretative and legal guidance in applying the Rome Statute, the Trial Chamber was free to use comparative legal analysis based on paragraph (1)(c) of Article 21 that permits application of general principles of law derived from national laws of legal systems of the world, including the national laws of States that would normally exercise jurisdiction over the crime, in this case Uganda. Diminished Responsibility is a well known defense in both the common law and civil law legal systems and is defined in Section 194 of the Penal Code Act also, for example, in Section 1684 of the Criminal Justice and Licensing (Scotland) Act 2010. The

introduction of this partial defense in international criminal law is discussed by Peter Krug “Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation” 94 Am. J. Int’l 317.

4. The Applicant will also make submissions on the burden and standard of proof, in light of Article 67 (1) (i) which includes as rights of the accused not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal. In this case, the Conviction Decision failed to appreciate that while the accused bore the burden to show that he was not criminally responsible for the crimes charged, by reason of mental disease or defect that destroyed his capacity to appreciate the unlawfulness or nature of his conduct, or capacity to control his conduct to conform to the requirements of law, this burden is on a balance of probabilities, as in civil cases, the ultimate burden to prove the accused criminally responsible beyond a reasonable doubt remains on the Prosecution. This burden is also consistent with the presumption of innocence in Article 66 of the Statute. The burden and standard of proof is also amply discussed in the case *Lam Kwong Choi and the Queen* 1959 WL 5654 [1959] HKLR 252. The partial defense of diminished responsibility is defined under Scottish law the effect that if a “person’s ability to determine or control conduct for which the person would otherwise be convicted of murder” was “at the time of the conduct, substantially impaired by reason of abnormality of mind,” shall be liable to be convicted of the lesser offence of culpable homicide. This partial defense is also amply covered in the alternative determination of mental capacity, in paragraph (1)(a) of Article 31 “or capacity to control his or her conduct to conform to the requirements of law”.

5. On duress, the Applicant will submit that Joseph Kony’s powers had on his abductees, such as Dominic Ongwen, falsely claiming that his actions and mission was to advance the will of God was so absolute that Ongwen acted under duress.

15 November, New Jersey, USA

*Francis Ssekandi*

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Justice Francis M. Ssekandi

on behalf of

Dated this 15 November 2021

At [place, country]