



Original: English

**No. ICC-02/04-01/15 A
Date: 25 October 2021**

THE 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 THE PROSECUTOR v. DOMINIC ONGWEN

Public

**Order inviting expressions of interest as *amici curiae* in judicial proceedings
(pursuant to rule 103 of the Rules of Procedure and Evidence)**

Order 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
Ms Helen Brady

Counsel for the Defence

Mr Krispus Ayena Odongo
Chief Charles Achaleke Taku
Ms Beth Lyons

Legal Representatives of Victims

Mr Joseph Akwenyu Manoba
Mr Francisco Cox

Ms Paolina Massidda

REGISTRY

Registrar

Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Dominic Ongwen (ICC-02/04-01/15-1866-Conf) against the “Trial Judgment” of Trial Chamber IX of 4 February 2021 (ICC-02/04-01/15-1762-Red),

Pursuant to rule 103 of the Rules of Procedure and Evidence,

Issues the following

ORDER

Highly qualified scholars and/or practitioners of criminal procedure and/or international law, mental health law and/or neuroscience and law may, by 16h00 on Monday, 15 November 2021, request leave to submit observations on the merits of the legal questions presented in this order. Any such request for leave shall express, in no more than four pages (excluding the title and notification pages), the applicant’s particular expertise in the legal issues presented, specifying the main lines of argument that he or she may wish to submit before the Appeals Chamber.

REASONS

1. On 4 February 2021, Trial Chamber IX (hereinafter: “Trial Chamber”) convicted Mr Dominic Ongwen of crimes against humanity and war crimes (hereinafter: “Conviction Decision”).¹
2. On 21 July 2021, the Defence filed its appeal brief against the Conviction Decision (hereinafter: “Appeal Brief”).²

¹ [Trial Judgment](#), ICC-02/04-01/15-1762-Red (confidential version notified on the same day, ICC-02/04-01/15-1762-Conf).

² [Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021](#), 19 October 2021, ICC-02/04-01/15-1866-Red (confidential version notified on 21 July 2021, ICC-02/04-01/15-1866-Conf).

3. On 21 October 2021, the Prosecutor filed his response to the Appeal Brief³ and the participating victims filed their observations on the appeal.⁴

4. The Appeals Chamber has identified some areas in this appeal on which, because of the novelty and/or complex nature of the issues, *amici curiae*'s observations would be beneficial for the proper determination of the case.

I. GROUNDS FOR EXCLUDING CRIMINAL RESPONSIBILITY

5. In the Conviction Decision, regarding the burden and standard of proof with respect to the grounds excluding criminal responsibility alleged by the Defence in this case, the Trial Chamber held that

there is no specific provision in the Statute regulating the burden and standard of proof with respect to grounds excluding criminal responsibility. However, this is not a lacuna in the Statute. According to Article 66(2) and (3), the burden of proof (incumbent on the Prosecution) and the standard of proof (beyond reasonable doubt) relate to the 'guilt of the accused'. When a finding of the guilt of the accused also depends on a negative finding with respect to the existence of grounds excluding criminal responsibility under Article 31 of the Statute, the general provisions of Article 66(2) and (3) on the burden and standard of proof equally apply, operating (as is always the case for the determination on the guilt or innocence of the accused) solely with respect to the facts 'indispensable for entering a conviction', namely, in this case, the absence of any ground excluding criminal responsibility and, thus, the guilt of the accused.⁵

6. After recalling the elements of the respective grounds for excluding criminal responsibility, and having assessed the relevant evidence submitted before it,⁶ the Trial Chamber concluded that Mr Ongwen "did not suffer from a mental disease or defect at the time of the conduct relevant under the charges" and, therefore, "[a] ground excluding criminal responsibility under Article 31(1)(a) of the Statute is not applicable".⁷ The findings of the Trial Chamber in relation to evidence concerning

³ Prosecution Response to "Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021" (ICC-02/04-01/15-1866-Conf), ICC-02/04-01/15-1882-Conf.

⁴ CLRV Observations on the "Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021", ICC-02/04-01/15-1880-Conf; Victims' Observations on the "Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021", ICC-02/04-01/15-1883-Conf.

⁵ [Conviction Decision](#), para. 231.

⁶ [Conviction Decision](#), paras 2450-2550 (concerning the Trial Chamber's findings on article 31(1)(a) of the Statute), and paras 2581-2672 (concerning the Trial Chamber's findings on article 31(1)(d) of the Statute).

⁷ [Conviction Decision](#), para. 2580. As provided in article 31(1)(a) of the Statute, with respect to grounds for excluding criminal responsibility, a person shall not be criminally responsible if, at the time of that

mental disease or defect were based in part on corroborative evidence provided, *inter alia*, by non-expert witnesses and on evidence regarding Mr Ongwen’s functionality.⁸ In this regard, the Trial Chamber found it “significant that the large number of witnesses who described Dominic Ongwen’s actions and interactions with others, at various times relevant to the charges and in numerous contexts, did not provide any testimony which could corroborate a historical diagnosis of mental disease or defect”.⁹ Furthermore, the Trial Chamber noted that many of Mr Ongwen’s actions “involved careful planning of complex operations, which is incompatible with a mental disorder”.¹⁰

7. In relation to article 31(1)(d) of the Statute,¹¹ the Trial Chamber found that “the actions which Dominic Ongwen took and which underlie the crimes charged and found in this judgment were [...] free of threat of imminent death or imminent or continuing serious bodily harm”, concluding, that “[d]uress as a ground excluding criminal responsibility under Article 31(1)(d) of the Statute is therefore not applicable”.¹²

8. With regard to the burden and standard of proof, the Defence agrees with the Trial Chamber “a) that the Rome Statute is silent on what standard to apply to affirmative defences; and b) the principles of Article 66(2) and (3) of the Statute should be applied”.¹³ However, according to the Defence, the Prosecutor “must disprove each element of the affirmative defence beyond a reasonable doubt”.¹⁴ The Defence submits that the Trial Chamber erred in law by “not indicat[ing] whether or not the Prosecution met its burden in respect to the elements of the mental health and duress defences in

person’s conduct, “[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”.

⁸ [Conviction Decision](#), paras 2520-2521.

⁹ [Conviction Decision](#), para. 2520.

¹⁰ [Conviction Decision](#), para. 2521.

¹¹ As provided in article 31(1)(a) of the Statute, with respect to grounds for excluding criminal responsibility, a person shall not be criminally responsible if, at the time of that person’s conduct, “[t]he conduct which is alleged to constitute a crime within the jurisdiction of the Court 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, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control”.

¹² [Conviction Decision](#), para. 2670.

¹³ [Appeal Brief](#), para. 209. Article 66(2) provides that [t]he onus is on the Prosecutor to prove the guilt of the accused” and article 66(3) provides that “[i]n order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt”.

¹⁴ [Appeal Brief](#), para. 210.

Articles 31(1)(a) and (d) of the Statute”.¹⁵ In relation to the burden of proof, it contends that “[w]ith an affirmative defence, the Defence has no evidentiary burden”¹⁶ and that the Trial Chamber “shift[ed the Prosecutor’s evidentiary burden] arguing that the Defence had opportunities to call witnesses, etc”.¹⁷

9. With regard to the Trial Chamber’s findings in relation to article 31(1)(a) and (d) of the Statute, the Defence raises a number of arguments alleging that the Trial Chamber erred by rejecting the affirmative defences brought by the Defence.¹⁸ Among those, the Defence challenges, *inter alia*, the Trial Chamber’s interpretation of duress under article 31(1)(d).¹⁹ Also, in relation to the Trial Chamber’s findings concerning mental disease or defect, the Defence submits that a reasonable trier of fact would not conclude that lay persons would be able to see symptoms of mental disorders.²⁰ The Defence further submits that mental illness and functionality can co-exist.²¹

10. The Appeals Chamber is interested in observations from *amici curiae* on: (i) the legal interpretation of article 31(1)(a) and (d) of the Statute concerning grounds for excluding criminal responsibility; (ii) evidentiary issues relating to mental disease or defect; (iii) the burden of proof when asserting a ground for excluding criminal responsibility; and the standard of proof applicable to the assessment of mental disease or defect or duress.

II. SEXUAL AND GENDER-BASED CRIMES

11. With respect to sexual and gender-based crimes, the Trial Chamber convicted Mr Ongwen for the following crimes: the crime against humanity of forced marriage as another inhumane act under article 7(1)(k) of the Statute;²² the crime against humanity and war crime of torture under articles 7(1)(f) and 8(2)(c)(i) of the Statute;²³ the crime

¹⁵ [Appeal Brief](#), para. 212.

¹⁶ [Appeal Brief](#), para. 218.

¹⁷ [Appeal Brief](#), para. 219.

¹⁸ [Appeal Brief](#), paras 320-650.

¹⁹ See in particular [Appeal Brief](#), paras 502, 502 and 509, referring to Conviction Decision, para. 2582, referring to A. Eser in O. Triffterer (ed.) Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article (2008), p. 1151.

²⁰ [Appeal Brief](#), para. 386.

²¹ [Appeal Brief](#), para. 387.

²² [Conviction Decision](#), paras 3026 (for those directly perpetrated by Mr Ongwen), 3071 (for those not directly perpetrated by Mr Ongwen).

²³ [Conviction Decision](#), paras 3034 (for those directly perpetrated by Mr Ongwen), 3074-3077 (for those not directly perpetrated by Mr Ongwen).

against humanity and war crime of rape pursuant to articles 7(1)(g) and 8(2)(e)(vi) of the Statute;²⁴ the crime against humanity and war crime of sexual slavery pursuant to articles 7(1)(g) and 8(2)(e)(vi) of the Statute;²⁵ the crime against humanity of enslavement under article 7(1)(c) of the Statute;²⁶ the crime against humanity and war crime of forced pregnancy pursuant to articles 7(1)(g) and 8(2)(e)(vi) of the Statute;²⁷ and the war crime of outrages upon personal dignity under article 8(2)(c)(ii) of the Statute.²⁸

12. The Defence argues, *inter alia*, that the Trial Chamber erred in its legal interpretation of the crime of forced pregnancy under article 7(1)(g) of the Statute²⁹ and that forced marriage “is not a cognizable crime under the Statute”.³⁰

13. Furthermore, in the Conviction Decision, the Trial Chamber assessed the evidence provided by victims of sexual and gender-based violence.³¹ Based on the testimony of witnesses P-0101, P-0214, P-0226, P-0227, P-0235 and P-0236, the Defence avers that the Trial Chamber “disregard[ed] evidence which raised reasonable doubt or was favourable to the Appellant”.³² This raises the question of the manner in which evidence provided by victims of sexual violence is to be assessed.

14. The Appeals Chamber is interested in observations from *amici curiae* on the legal interpretation of the crimes of forced marriage, sexual slavery and forced pregnancy and the standards applicable to assessing evidence of sexual violence.

III. CUMULATIVE CONVICTIONS

15. As to the issue of concurrence of crimes, the Trial Chamber determined that

[...] Concurrence of crimes, also referred to as cumulative conviction, is a situation where the same facts satisfy the legal definition of multiple crimes. In this regard, the Chamber notes that there is no provision in the Statute explicitly

²⁴ [Conviction Decision](#), paras 3043 (for those directly perpetrated by Mr Ongwen), 3080 (for those not directly perpetrated by Mr Ongwen).

²⁵ [Conviction Decision](#), paras 3049 (for those directly perpetrated by Mr Ongwen), 3083-3084 (for those not directly perpetrated by Mr Ongwen).

²⁶ [Conviction Decision](#), para. 3055 (for those directly perpetrated by Mr Ongwen), 3087 (for those not directly perpetrated by Mr Ongwen).

²⁷ [Conviction Decision](#), para. 3062 (for those directly perpetrated by Mr Ongwen).

²⁸ [Conviction Decision](#), para. 3068 (for those directly perpetrated by Mr Ongwen).

²⁹ [Appeal Brief](#), paras 960-964.

³⁰ See e.g. [Appeal Brief](#), paras 975, 978.

³¹ [Conviction Decision](#), p. 141, paras 395-437.

³² [Appeal Brief](#), para. 959. See also paras 947-957.

requiring it to exclude some legal qualifications of facts on the ground that they are in impermissible concurrence with other legal qualifications of the same facts; also, the provisions on sentencing may be considered in themselves adequate to address, in the context of the determination of the sentence to be imposed, those instances in which a person is convicted of more than one crime on the basis of the same conduct. Nonetheless, the Chamber agrees with the consistent stance of Trial Chambers of the Court that there are certain limitations on the permissibility of concurrence of crimes and consequential cumulative convictions. In particular, it has consistently been held that convictions may be entered cumulatively if the conduct in question violates two distinct provisions of the Statute, each having a ‘materially distinct’ element not contained in the other, *i.e.* an element which requires proof of a fact not required by the other. [Footnotes omitted.]³³

16. In light of the above, the Trial Chamber observed that

in the present case, situations in which the same conduct fulfils the legal elements of more than one crime include: (i) the concurrence of analogous crimes against humanity under Article 7 and war crimes under Article 8 of the Statute; (ii) the concurrence of torture and cruel treatment as war crimes under Article 8(2)(c)(i) of the Statute; (iii) the concurrence of torture and other inhumane acts as crimes against humanity under Article 7(1)(f) and (k) of the Statute; (iv) the concurrence of enslavement and sexual slavery as crimes against humanity under Article 7(1)(f) and (g) of the Statute; and (v) the concurrence of rape and sexual slavery, both as crimes against humanity under Article 7(1)(g) of the Statute, and as war crimes under Article 8(2)(e)(vi) of the Statute. [Footnotes omitted.]³⁴

17. In its appeal brief, the Defence submits, *inter alia*, that the Trial Chamber erred “in rejecting the relevance of Article 20’s provisions” when addressing the issue of cumulative convictions.³⁵ In its view, “[w]hile Article 20 does not literally apply to cumulative convictions, [...] the principle of *ne bis in idem* is the foundation for assessing concurrence issues arising within a single trial”.³⁶

³³ [Conviction Decision](#), para. 2792.

³⁴ [Conviction Decision](#), para. 2797 (footnotes omitted).

³⁵ [Appeal Brief](#), para. 277. Article 20 of the Statute, entitled “*Ne bis in idem*” provides: “1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court. 2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court. 3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”

³⁶ [Appeal Brief](#), para. 278.

18. The Appeals Chamber is interested in observations from *amici curiae* on the permissibility or otherwise of entering cumulative convictions when the conduct in question violates two or more distinct provisions of the Statute.

IV. CALL FOR EXPRESSIONS OF INTEREST

19. Considering the nature of the above legal issues, and noting that some of them have been raised in this case for the first time before the Court and that they may have implications beyond the present case, the Appeals Chamber considers that it may be desirable to receive observations from qualified scholars and/or practitioners of criminal procedure and/or international law, mental health law and/or neuroscience and law (criminal and human rights aspects) on the following areas:

- a. Grounds for excluding criminal responsibility under article 31(1)(a) and (d) of the Statute: (i) the legal interpretation of article 31(1)(a) and (d) of the Statute concerning grounds for excluding criminal responsibility; (ii) evidentiary issues relating to mental disease or defect; (iii) the burden of proof when asserting a ground for excluding criminal responsibility; and the standard of proof applicable to the assessment of mental disease or defect or duress;
- b. Sexual and gender-based crimes: (i) the legal interpretation of the crimes of forced marriage, sexual slavery and forced pregnancy, and (ii) the standards applicable to assessing evidence of sexual violence;
- c. Cumulative convictions: the permissibility or otherwise of entering cumulative convictions when the conduct in question violates two or more distinct provisions of the Statute.

20. The Appeals Chamber therefore invites highly qualified scholars and practitioners with the requisite expertise, who are interested in submitting observations on these issues, to file with the Registrar, by 16h00 on Monday, 15 November 2021, expressions of interest in which each of them expresses, in no more than four pages (excluding the title and notification pages), his or her particular expertise in the legal issues presented, specifying the main lines of argument that he or she may wish to submit before the Appeals Chamber.

21. The Appeals Chamber emphasises that any such request for leave to submit observations shall be filed in accordance with regulations 23, 33, 36 and 37 of the Regulations of the Court and regulation 24 of the Regulations of the Registry.

22. The Appeals Chamber shall subsequently determine who will be granted leave to submit observations. Written observations will be expected to be received from *amici curiae* by mid-December 2021. The Appeals Chamber will also specify the modalities for the submission of such observations and responses thereto, bearing in mind the need for an expeditious conduct of the proceedings.

Done in both English and French, the English version being authoritative.



Judge Luz del Carmen Ibáñez Carranza
Presiding

Dated this 25th day of October 2021

At The Hague, The Netherlands