Dominic Ongwen convicted by the International Criminal Court

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By: Dr Joseph Rikhof

The International Criminal Court

Introduction

On February 4, 2021, the trial chamber issued its judgment in the Dominic Ongwen case, a senior commander in the Lord's Resistance Army (LRA) under Joseph Kony (see here). In a very lengthy judgment (1077 pages and 3116 paragraphs), he was convicted of 61 of the original 70 charges related to war crimes and crimes against humanity. (paragraph 3116) The trial chamber also issued an order setting the hearing dates for sentencing for the week of April 12-16, 2021 (see here).

The conviction was related to the following international crimes: murder (both as a war crime and crime against humanity, paragraphs 2696-2699); torture (also for both crimes, paragraphs 2700-2707); rape (again both crimes, paragraphs 2708-2710); sexual slavery (as both crimes, paragraphs 2715-2716); forced pregnancy (both crimes, paragraphs 2717-2729); enslavement (as a crime against humanity, paragraphs 2711-2714); persecution (as a crime against humanity, paragraphs 2730-2740); inhumane acts (as a crime against humanity, paragraphs 2741-2753); cruel treatment (as a war crime, paragraph 2754); outrages upon personal dignity (as a war crime, paragraphs 2755-2767); attacks against a civilian population (as a war crime, paragraphs 2758-2761); pillaging (as a war crime, paragraphs 2762-2767); conscription of children (as a war crime, paragraphs 2768-2772); destruction of property (as a war crime, paragraphs 2773-2779).

In addition, the trial chamber set out the legal parameters of the overarching elements of crimes against humanity, namely a systematic or widespread attack against a civilian pollution pursuant to an organizational policy (paragraphs 2673-2682) and war crimes committed in a non-international armed conflict (paragraphs 2683-2693); the types of liability relevant for the situation at hand, namely personal commission (paragraph 2782); indirect perpetration (paragraphs 2783-2785) and indirect co-perpetration (paragraphs 2786-2788) and the inchoate crime of attempt (paragraph 2699); and finally, the two defences raised by Ongwen, mental disease or defect (paragraphs 2450-2457) and duress (paragraphs 2581-2589).

As most of the legal issues just mentioned had already been addressed by previous ICC jurisprudence (the Ongwen trial chamber made numerous references to previous trial chamber judgments, in particular the 2019 Ntaganda decision, see here), this article will only discuss the novel legal findings of the trial chamber, namely the crimes of forced pregnancy (which had been only addressed briefly in an earlier Ongwen decision of the pre-trial chamber, see here, paragraphs 96-101, to which the trial judgment makes reference in its paragraphs 2724 and 2728); outrages upon personal dignity (which had been addressed before in the jurisprudence of the ICTY, ICTR and SLSC, (see Currie and Rikhof, International & Transnational Criminal Law, (3d 2020), pages 179-180) and while it also had been briefly referred to in a report by the ICC prosecutor, see here, paragraphs 70-71); inhumane acts as applied to forced marriage (which had been discussed before by the SLSC and the ECCC, see Currie and Rikhof, page 144); and, as well, the two defences (of which only the last one, duress, had been addressed by the ICTY and ECCC, see Currie and Rikhof, pages 747-748).

The Crimes

Outrages upon personal dignity

Relying on both the ICC Elements of Crime document (see here, page 33) as well as ICTY and SLSC jurisprudence, the trial chamber found that the crime of outrages upon personal dignity had the following cumulative elements:

- the perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons;
- the severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity; and
- such person or persons were either hors de combat, or were civilians, medical personnel or religious personnel taking no active part in the hostilities. (paragraph 2755)

As well, the severity of the act's impact on the dignity of a person must be assessed on a case-by-case basis but there is no requirement that the suffering or injury must have long term effects (paragraph 2756); as to *mens rea* the perpetrator must have been aware of the factual circumstances that established the status of the victim but there is no need to show that the perpetrator had a discriminatory intent or motive or had made a value judgment as to the severity of acts inflicted (paragraph 2757). Applying these requirements to the facts, the trial chamber found that forcing a person to kill another person with a club and to inspect corpses, forcing a person to watch someone being killed, as well as forcing mothers to abandon their children on the side of the road constituted a violation of the dignity of the victims sufficiently severe to amount to the war crime of outrages upon personal dignity. (paragraphs 2903 and 3065, the latter of which indicated that Ongwen has been involved in these activities and therefore guilty of the crime of outrages upon personal dignity).

Forced pregnancy

Articles 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi) of the *Rome Statute* (see here) make forced pregnancy a crime against humanity (as set out in article 7 or a war crime in article 8; article 7(2)(f) of the Statute,

which provides more detail to article 7(1)(g) and to which the two war crimes articles also refer, says:

"'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy."

The trial chamber explained (after discussing the history behind this provision in some detail (in paragraphs 2717-2722) in paragraph 2723 that "the forcible conception of the woman could occur prior to or during the unlawful confinement" and that "the perpetrator need not have personally made the victim forcibly pregnant – confining a woman made forcibly pregnant by another is necessary and sufficient for the crime of forced pregnancy." With respect to the first element of this crime, the "unlawful confinement", the trial chamber was of the view that the "woman must have been restricted in her physical movement contrary to standards of international law", which does not require a duration of confinement nor that the deprivation of liberty has to be severe as is required for the crime of imprisonment. (paragraph 2724) With respect to the second element, being " forcibly made pregnant", the trial chamber said that this might go beyond physical violence alone and, like the other sexual crimes in the statute, can also include other coercive circumstances such as having been "caused by fear of violence, duress, detention, psychological oppression or abuse of power, against her or another person, or by taking advantage of a coercive environment, or that the woman made pregnant was a person incapable of giving genuine consent." (paragraph 2725)

With respect to the mental elements, which is captured in article 7(2)(f) by the words "with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law", the trial chamber emphasized that this sentence is framed in a disjunctive fashion so that "confining a woman with the intent to rape, sexually enslave, enslave and/or torture" would be included in the second part of the sentence. (paragraph 2727) As well, the trial chamber considered the historical background of the provision, "it is not required that the accused intended to keep the woman pregnant beyond these alternative intentions," meaning that the crime is made out whether or not an accused specifically intended to keep the woman pregnant. (paragraphs 2728-2729)

Ongwen was found guilty of this crime as he made two women forcibly pregnant, did not allow them to leave by placing them under heavy guard and told them they would be killed if they tried to escape (paragraph 3058-3059); due to the nature of the acts carried out by Ongwen and the fact that they occurred over a long period of time, combined with his intent to continue to commit other crimes, such as forced marriage, torture, rape and sexual slavery, the mental element was fulfilled as well. (paragraphs 3060-3061)

Inhumane act of forced marriage

After discussing the general parameters and examples of the crime against humanity of inhumane acts by referring to the jurisprudence of the ICTY, ICTR and ECCC (paragraph 2744) as well two ICC

pre-trial chambers' decisions (paragraph 2745), the trial chamber engaged in the discussion of forced marriage as a crime against humanity.

The trial chamber set out first, in some detail, the nature and consequences of forced marriage by stating in paragraphs 2748-2749:

"The central element, and underlying act of forced marriage is the imposition of this status on the victim, i.e. the imposition, regardless of the will of the victim, of duties that are associated with marriage – including in terms of exclusivity of the (forced) conjugal union imposed on the victim – as well as the consequent social stigma. Such a state, beyond its illegality, has also social, ethical and even religious effects which have a serious impact on the victim's physical and psychological well-being. The victim may see themselves as being bonded or united to another person despite the lack of consent. Additionally, a given social group may see the victim as being a 'legitimate' spouse. 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."

"Accordingly, the harm suffered from forced marriage can consist of being ostracised from the community, mental trauma, the serious attack on the victim's dignity, and the deprivation of the victim's fundamental rights to choose his or her spouse."

The trial chamber explained why the conduct underlying forced marriage is not fully captured by other crimes against humanity by distinguishing it from the crime of sexual enslavement (which was the original approach taken by the trial chamber of the SLSC) or rape by saying:

"To focus on sexual slavery and rape in particular, these crimes and forced marriage exist independently of each other. While the crime of sexual enslavement penalises the perpetrator's restriction or control of the victim's sexual autonomy while held in a state of enslavement, the 'other inhumane act' of forced marriage penalises the perpetrator's imposition of 'conjugal association' with the victim. Forced marriage implies the imposition of this conjugal association and does not necessarily require the exercise of ownership over a person, an essential element for the existence of the crime of enslavement. Likewise, the crime of rape does not penalise the imposition of the 'marital status' on the victim. When a concept like 'marriage' is used to legitimatise a status that often involves serial rape, victims suffer trauma and stigma beyond that caused by being a rape victim alone." (paragraph 2750)

As result of these observations, the trial chamber came to the conclusion that the elements of this crime are "forcing a person, regardless of his or her will, into a conjugal union with another person by using physical or psychological force, threat of force or taking advantage of a coercive environment." (paragraph 2751) From this description it follows that forced marriage is a continuing crime "in the sense that it covers the entire period of the forced conjugal relationship, and only ends when the individual is freed from it." (paragraph 2752) Ongwen was convicted of the crime of forced marriage of

five women in three years. (paragraphs 3021-3026)

The defences

General

The *Rome Statute* mentions a number of defences or in its parlance “grounds for excluding criminal responsibility” in its articles 31-33 (see here). Mental disease or defect is mentioned in article 31(1)(a) while the other defences in that article are intoxication (article 31(1)(b)); self-defence (article 31(1)(c), which has been addressed in a report by the Prosecutor, see here); and duress together with necessity (article 31(1)(d)); mistake of fact or law can be found in article 32 and last, superior orders, is set out in article 33.

Before the *Rome Statute*, defences had been sporadically discussed in the jurisprudence of the ICTY, ICTR and SLSC. The ICTY has elaborated on the defence of *tu quoque* (which stands for the proposition that if one party commits atrocities the other party should be justified in doing the same, which was rejected on a number of occasions) and the defence of military reprisals as well as self-defence (both of which were accepted in principle but usually rejected on the facts, as was the latter by the ICTR). The SLSC Trial Chamber utilized the defence of state necessity but this was rejected at the appeal level (see Currie and Rikhof, pages 746-747, footnote 200).

Mental disease or defect

The trial chamber started out by repeating the wording of article 31(1)(a) by saying that a person is not criminally responsible if, “at the time of that 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” and adding that destruction of either of these capacities is enough to exclude criminal responsibility. (paragraph 2452). It also indicated that the relevant time to assess the mental capacity of the accused is at the time the alleged crimes were committed and not during the trial although there could be a connection between the two. (paragraph 2454)

The trial chamber then discusses in great detail the testimony of the three prosecution experts (paragraphs 2458-2496) and the two defence experts (paragraphs 2522-2574) as well as the evidence adduced at trial (paragraphs 2497-2521), preferring the evidence of the former and coming to the conclusion that Ongwen did not suffer from a mental disease or defect. (paragraph 2580)

Duress

This is not the first time that the defence of duress has been discussed by international criminal institutions. Both the ICTY and ECCC have addressed the issue but in the unusual circumstances where the crimes committed by the accused involved murder (see Currie and Rikhof, pages 747-748). Since in the Ongwen case the duress defence was related to mostly other crimes, this case

represents a welcome expansion regarding the parameters of this defence.

The trial chamber identified three elements for duress in article 31(1)(d) of the Statute, namely a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person; that the threat was made by other persons or was the result of other circumstances beyond that person's control (although by way of commentary, the second aspect relates to the defence of necessity and not duress); and the threat is to be assessed at the time the alleged crimes were committed. (paragraph 2581)

Regarding the first element, the trial chamber said this:

"From the plain language of the provision, the words 'imminent' and 'continuing' refer to the nature of the threatened harm, and not the threat itself. It is not an 'imminent threat' of death or a 'continuing or imminent threat' of serious bodily harm – the Statute does not contain such terms. Rather, the threatened harm in question must be either to be killed immediately ('imminent death'), or to suffer serious bodily harm immediately or in an ongoing manner ('continuing or imminent serious bodily harm'). On this understanding, duress is unavailable if the accused is threatened with serious bodily harm that is not going to materialise sufficiently soon. A merely abstract danger or simply an elevated probability that a dangerous situation might occur – even if continuously present – does not suffice." (paragraph 2582)

With respect to the second element, the trial chamber was of the view that a person needs to act "necessarily and reasonably to avoid the threat. The person is not required to take all conceivable action to avoid the threat, irrespective of considerations of proportionality or feasibility." It appears to introduce the notion of the modified objective standard used in Canadian criminal law (see here, which is discussed as part of a larger analysis here, pages 17-28) by saying "what the person should have done must be assessed under the totality of the circumstances in which the person found themselves. Whether others in comparable circumstances were able to necessarily and reasonably avoid the same threat is relevant in assessing what acts were necessarily and reasonably available." (paragraph 2583) The third element is met by showing that that the person does not intend to cause a greater harm than the one sought to be avoided, the element of proportionality. (paragraph 2584)

In order to determine whether this defence is present, the trial chamber decided to assess the facts with respect to Ongwen's status in the LRA hierarchy and the applicability of LRA disciplinary regime to him (paragraphs 2590-2608); the executions of senior LRA commanders on Kony's orders (paragraphs 2609-2618); the possibility of escaping from or leaving the LRA in general and by Ogwen himself (paragraphs 2619-2643); Kony's alleged spiritual powers and its connection to a possible threat (paragraphs 2643-2658); Ongwen's loyalty to Kony and his career advancement (paragraphs 2659-2665); and the fact that a number of crimes committed by Ongwen were committed in private and as such were easy to hide from Kony (paragraphs 2666-2667). It reached the following conclusion:

“It transpires from the above that there is no basis in the evidence to hold that Dominic Ongwen was subjected to a threat of imminent death or imminent or continuing serious bodily harm to himself or another person at the time of his conduct underlying the charged crimes. In fact, based on the above, the Chamber finds that Dominic Ongwen was not in a situation of complete subordination vis-à-vis Joseph Kony, but frequently acted independently and even contested orders received from Joseph Kony. The evidence indicates that in the period of the charges, Dominic Ongwen did not face any prospective punishment by death or serious bodily harm when he disobeyed Joseph Kony. Dominic Ongwen also had a realistic possibility of leaving the LRA, which he did not pursue. Rather, he rose in rank and position, including during the period of the charges. Finally, he committed some of the charged crimes in private, in circumstances where any threats otherwise made to him could have no effect.” (paragraph 2668)

Because of this negative finding, the trial chamber decided there was no need to examine the other two elements as all the elements are cumulative. (paragraph 2669)

Last, in the discussion regarding duress, the trial chamber dismissed out of hand the defence argument that Ongwen was a victim of crimes himself after he had been forcibly recruited in the LRA as a child. The trial chamber said that the crimes with which he was charged were committed as an adult and that being a victim of crime is not a justification for committing more crimes. (paragraph 2672). This argument combined with the issue that being inducted into the LRA at a young age and as such becoming conditioned to the violence surrounding him had been an important theme before the Ongwen judgment (see for example here and here) as well as after this decision (see here, here and here). It is very likely that this argument will play a role during the sentencing portion of the case as part of possible mitigating circumstances.

Conclusion

Ongwen is the ninth person at the ICC that has been the subject of a final trial judgment after the conviction of Lubanga and acquittal of Chui in 2012; convictions of Katanga in 2014, Bemba and Al-Mahdi in 2016 and Ntaganda in 2019; and acquittals of Gbagbo and Blé Goudé in 2019. (In the case of two persons pertaining to the Kenya situation, the trial was not finished.)

The judgment is an interesting combination of the application of existing jurisprudence developed by the ICC judges in other cases while also providing directions for the parameters of different crimes as well as two defences, for which the trial chamber was not adverse to relying on the jurisprudence of other international institutions.

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About the author

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