

The Trial of Dominic Ongwen at the ICC: The Judgment

February 2021

Executive Summary

On February 4, 2021, the International Criminal Court (ICC) in The Hague will deliver its judgment in the trial of Dominic Ongwen, marking the seventh case to reach the verdict stage at the ICC. It is also the first case in the situation of Uganda to be tried before the court. This background paper summarizes some of the main arguments in the closing briefs filed before Trial Chamber IX on February 24, 2020. It also summarizes some of the main arguments the prosecution and defense made in their closing statements to the judges in March 2020. The paper provides hyperlinks to relevant portions of our trial monitoring website [International Justice Monitor](#) and the closing briefs posted to the ICC website.

The Defendant

Dominic Ongwen is a former Lord's Resistance Army (LRA) commander who held a number of command positions. Prosecutors allege that he was [a key member of the LRA leadership](#) responsible for devising and implementing LRA strategy. The charges against him cover the period from July 2002 to December 2005 during which time he was commander of Oka battalion, which was one of three battalions in the LRA's Sinia brigade. During the charge period he was promoted to commander of Sinia brigade.

Ongwen is currently being held at [the ICC detention center](#) in The Hague. He has been detained there since January 2015. After leaving the Lord's Resistance Army (LRA) he surrendered while in the Central Africa Republic, and [was eventually handed over to ICC officials](#).

The Charges

Prosecutors have charged Ongwen with [70 counts of war crimes and crimes against humanity](#) he is alleged to have committed between July 2002 and December 2005 in northern Uganda. The counts against Ongwen involve LRA attacks on four camps for internally displaced people (IDP), namely (in order of chronology) Pajule (October 10, 2003), Odek (April 29, 2004), Lukodi (May 19, 2004) and Abok (June 8, 2004). The IDP camps were later disbanded after the LRA left northern Uganda in 2006 as part of the conditions of the peace talks mediated in Juba, Sudan (now South Sudan).

The charges against Ongwen also include 19 counts of sexual and gender-based crimes he is alleged to have committed directly and indirectly. Ongwen has also been charged with conscripting and using child soldiers in hostilities.

Together with the 70 counts of war crimes and crimes against humanity, Ongwen has been charged with eight modes of liability. In previous trials at the ICC, an accused person has not faced as many modes of liability but this may mean that



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the judges will not recharacterize the modes of liability as has happened in [previous trials](#).

The Trial

This trial is important for several reasons. It is the first time a defendant at the ICC has faced so many counts. It is the first time an accused person has presented [an affirmative defense](#) at the ICC. Ongwen is arguing he had a mental disease or defect during the period he is alleged to have committed the crimes. He further argues that he was under duress when he is alleged to have committed the crimes.

There are other significant milestones, including that Uganda was the first country to refer a case to the ICC. That referral led to arrest warrants being issued in 2005 for five of the LRA's top commanders, including the rebel group's leader, Joseph Kony; his deputy at the time, Vincent Otti; and Ongwen. Ongwen is the first of the leaders to be tried at the ICC.

The Prosecution

The [prosecution phase of the trial](#) took place between December 2016 and April 2018. During this phase, 69 prosecution witnesses testified over 142 days of hearings. Judges admitted the statements of another 40 witnesses into the trial record under Rule 68(2) of the ICC Rules of Procedure and Evidence. Before the trial began seven prosecution witnesses had testified before a Pre-Trial Chamber II judge and the record of their testimony was [admitted into the trial record](#) under Article 56 of the Rome Statute. In total, 116 prosecution witnesses are considered to have testified at the trial either in person or by their statements being admitted into the record.

Victims

[As of December 2020](#), there were 4,065 victims participating in the trial. They are split into two groups represented by two different legal teams. Joseph Akwenyu Manoba and Francisco Cox represent the larger group of 2,564 victims. Most of these victims were residents of the former IDP camps in Odek, Lukodi, and Abok. Paolina Massidda, principal counsel at the ICC's in-house Office of Public Counsel for Victims, represents the other group of 1,501 victims. Most of these victims were residents of the former IDP camp of Pajule.

After the prosecution completed its presentation of evidence, judges permitted the two legal teams for victims to call witnesses during [the victims' phase of the trial](#) in May 2018. Seven witnesses, including participating victims as well as experts, testified.

The Defense

The [defense phase of the trial](#) took place from September 2018 to November 2019 with a total of 75 days of hearings. During this phase, 54 defense witnesses testified (one defense expert witness testified twice, once as a rejoinder witness). A prosecution rebuttal witness also testified during this phase.

The Attacks on IDP Camps

Pajule

In their [closing brief](#), the defense argue Ongwen had an alibi for the October 10, 2003 attack on the Pajule IDP camp. The defense say both prosecution and defense witnesses testified about Ongwen being injured in one leg in November 2002. The defense argue Ongwen continued to receive medical attention for this injury throughout most of 2003 and he was therefore physically incapable of participating in the Pajule attack as the prosecution alleged. The defense further argue that several of their witnesses testified that Ongwen did not participate in the Pajule attack.

The defense say another reason Ongwen did not have a role in the Pajule attack was that he was under arrest and stripped of his command in April 2003, and was still under arrest during the time of the Pajule attack.

In their [closing brief](#), the prosecution dispute this. They say Ongwen was under medical care for only one month after his leg was injured, that is until December 2002. The prosecution say the evidence shows Ongwen was not incapacitated for most of 2003. The prosecution accept that Ongwen was under arrest in April 2003 but they argue he only remained so for a few days. The prosecution further argue that the defense witnesses who testified that Ongwen was not present during the October 10, 2003 Pajule attack were testifying about a different attack on Pajule.

Intercept Evidence

To corroborate the witness testimony about the four attacks Ongwen is alleged to have had a role in, the prosecution presented LRA radio communications intercepted by Ugandan security agencies as evidence. During the trial hearings, the prosecution played excerpts of some recordings in which Ongwen was said to be reporting details of some of the attacks to his superiors. Together with the recordings, the prosecution presented notes Ugandan security agents took as they intercepted the LRA radio communications.

The defense argue in their closing brief that the intercept evidence was neither reliable nor credible. The defense argue that the chain of custody of the recordings and notebooks is unclear, raising questions about their credibility. The defense claim the Ugandan security agents who testified in court said they recorded the intercepts of LRA radio communications in order to gather intelligence and not to gather evidence for a trial. The defense argue this means the recordings cannot be relied on as evidence. The defense further argue that none of the agents had ever met Ongwen and therefore they could not authoritatively say the person they heard in the intercepts was Ongwen.

The prosecution say that several former members of the LRA who knew Ongwen testified that the voice they heard in the recordings played back to them in court was Ongwen's voice. The prosecution question the defense's claim that the intercept recordings were unreliable. They say the defense used the recordings to prove the timing of Ongwen's November 2002 injury.

Sexual and Gender-Based Crimes

Seven witnesses testified between September 2015 and November 2015 about Ongwen's alleged direct role in sexual and gender-based crimes (SGBC) committed against them. The transcripts of their testimony before the Single Judge of Pre-Trial Chamber II were adopted as evidence in the trial following an August 10, 2016 decision by Trial Chamber IX. The chamber made this decision using Article 56 of the ICC's founding law, the Rome Statute. The prosecution also called Ate Kloosterman, an expert on DNA, who testified that 11 of 12 children whose samples he tested were Ongwen's children.

In their closing brief, the defense say the Single Judge of Pre-Trial Chamber II declined to hear any objections to the testimony of the seven women. The defense also say that when the seven witnesses testified the Single Judge declined to make clear whether they were prosecution or defense witnesses even though the defense had interviewed some of them as potential defense witnesses. The defense argue

that in the circumstances using the testimony of the seven witnesses as part of trial record went against Ongwen's fair trial rights.

In their closing statements, the prosecution say there was [no dispute](#) as to whether Ongwen knew the women or whether he had children with them.

Mental Disease Defense

This defense is provided for in Article 31(1)(a) of the Rome Statute. It is the first time this provision is being used in a trial at the ICC. In [their closing statements](#), the defense argue that the two psychiatrists they called to testify showed that Ongwen had two mental diseases at the time he is alleged to have committed the crimes he has been charged with and that he was not aware of those crimes. They say the psychiatrists showed Ongwen had post-traumatic stress disorder and a dissociative identity disorder during the charge period. They say the psychiatrists also determined that Ongwen showed symptoms of depression. The defense further argue that the prosecution failed to show beyond reasonable doubt that Ongwen did not have a mental disease during the time he is alleged to have committed the crimes he has been charged with.

The prosecution argue the defense psychiatrists said that their assessment of Ongwen's mental health did not cover the sexual and gender-based crimes he is charged with. The prosecution further argue that the defense psychiatrists failed to determine whether Ongwen faked his mental illness during their interviews so that their report would support a mental disease defense. The prosecution say the psychiatrists they called concluded from a review of the reports of the defense psychiatrists, a separate report by a court-appointed expert, court transcripts, and other material that Ongwen faked his mental illness.

Duress

Another line of defense Ongwen's lawyers pursued was to show the court that Ongwen, while not admitting guilt, committed any actions he did out of fear for his life. A duress defense is provided for in Article 31(1)(d). This is also the first time this affirmative defense has been used in a trial at the ICC.

The defense say shortly after Ongwen was abducted as a boy he was forced to skin alive a fellow abductee in order to dissuade others from attempting to escape the LRA. The defense argue that this and other acts of violence against those who attempted to escape made him fear leaving the LRA or disobeying any orders he

was given. The defense say that when Ongwen did try to escape the LRA in April 2003 he was arrested and stripped of his command. They argue that this further discouraged Ongwen from going against Kony or any orders he was given, and that these and other experiences formed the duress Ongwen was under while in the LRA.

The prosecution argue that Ongwen did not suffer any duress while he was in the LRA and that instead he actively sought promotion up the ranks and enjoyed the benefits that came with such promotions. The prosecution say that Kony commended Ongwen for being a good soldier. They say rank and file members of the LRA who testified in court also described Ongwen as a good fighter and as someone who could argue with Kony against actions Kony had ordered.

Legal Questions

Trial Chamber IX will be considering at least two major legal issues that may affect whether the three judges convict or acquit Ongwen.

Article 56

This trial is the first at the ICC in which Article 56 has been used to take advantage of a unique investigative opportunity in order to preserve evidence. The article describes the measures that the prosecutor can take, with oversight from the pre-trial chamber, but not how to undertake them, e.g., if any particular evidentiary threshold needs to be met. Using this provision Trial Chamber IX [admitted the testimony](#) of seven women who made direct allegations against Ongwen concerning sexual and gender-based crimes into the trial record. The seven women testified during the pre-trial phase of Ongwen's case, in which the standard of proof is "substantial grounds," which is a lower standard of proof than the "beyond reasonable doubt" standard that is required at trial. The trial chamber judges deferred a decision on "the relevance and probative value" of that evidence until they write their judgement.

Article 31

This article lays out what affirmative defense an accused person may make, but it does not establish what burden of proof an accused person needs to satisfy. Nor does it establish the standard of proof an accused person needs to meet. Ongwen's

lawyers [raised this matter](#) and Trial Chamber IX said it would [defer its decision](#) on these issues to its judgement.

What Next?

Trial Chamber IX will make its verdict known on February 4, 2021. The chamber's verdict can be to convict or to acquit Ongwen. The chamber's verdict may be unanimous or by a majority decision. Whatever the chamber decides, the three judges will have to state whether their verdict applies to all or only some of the 70 counts of war crimes and crimes against humanity Ongwen has been charged with. They will also be required to provide analysis of the evidence that has been submitted and their reasons for reaching their verdict. Trial Chamber IX decided at the beginning of the trial that it will receive all evidence and withhold any assessment of the value of the evidence until the end of the trial. If the prosecution or defense disagree with the verdict they will have 30 days to file an appeal against it.

Timeline

1987: Joseph Kony forms the Lord's Resistance Army from the remnants of the Holy Spirit Movement that was led by Alice Lakwena.

1987: Dominic Ongwen is abducted by the LRA.

March 17, 1999: Uganda signs the Rome Statute.

June 14, 2002: Uganda ratifies the Rome Statute and becomes a party to the ICC.

December 16, 2003: Uganda refers the situation in northern Uganda to the ICC.

July 29, 2004: ICC Prosecutor says the crimes fall within the jurisdiction of the ICC and there are grounds to investigate the situation in northern Uganda.

July 8, 2005: Pre-Trial Chamber II issues sealed warrant of arrest for five leaders of the LRA, including Dominic Ongwen.

October 13, 2005: Pre-Trial Chamber II unseals warrant of arrest against LRA leaders.

July 2006: The autonomous government of South Sudan initiates peace talks between the Ugandan government and the LRA. As the talks progress they get the backing of the United Nations.

July 11, 2007: Pre-Trial Chamber II terminates proceedings against Raska Lukwiya following forensic confirmation of his death.

2008: Peace talks fail because LRA leader Joseph Kony does not sign the final agreement reached between LRA negotiators and the Ugandan government.

2010: Uganda incorporates the Rome Statute into its domestic law.

2010: The US government sends 100 Special Forces soldiers to hunt for LRA leaders who by then have dispersed to the border regions between the Central African Republic, the Democratic Republic of Congo, and South Sudan.

November 2011: The African Union designates the LRA as a terrorist group and appoints Mr. Francisco Madeira, then Special Representative for Counter-Terrorism Cooperation and Director of the African Centre for the Study and Research on Terrorism (ACSRT), as the special envoy on the LRA issue.

January 16, 2015: Ongwen is surrendered to ICC custody by the Central African Republic.

January 26, 2015: Ongwen makes his initial appearance before Pre-Trial Chamber II. The Pre-Trial Chamber provisionally schedules the confirmation of charges hearing for August 24, 2015.

February 6, 2015: Pre-Trial Chamber II severs the Ongwen proceedings from the case against Joseph Kony, Vincent Otti, and Okot Odhiambo. The three other suspects have not been apprehended or have not appeared before the ICC.

September 10, 2015: Pre-Trial Chamber II terminates proceedings against Odhiambo following forensic confirmation of his death.

September 18, 2015: The prosecutor announces that she will charge Ongwen with 70 counts of war crimes and crimes against humanity.

October 28, 2015: The ICC Presidency decides that the confirmation of charges hearing will be held at the seat of the court in The Hague, the Netherlands.

January 21-27, 2016: The confirmation of charges hearing is held.

March 23, 2016: The pre-trial chamber confirms 70 charges of war crimes and crimes against humanity against Ongwen.

July 18, 2016: The trial chamber rejects requests to hold opening statements in the Ongwen trial in northern Uganda, citing security concerns and the workload of the judges hearing the case.

December 6, 2016: The trial opens in The Hague with opening statements from the prosecution and lawyers representing victims. The defense defer making their opening statement to when the defense phase of the trial begins.

January 16, 2017: The prosecution calls its first witness.

April 13, 2018: The prosecution issues notice formally closing its case after 69 witnesses have testified during 142 days of hearings.

May 1-24, 2018: Seven witnesses called by victims testify.

June 3-9, 2018: Judges of Trial Chamber IX visit Pajule, Odek, Lukodi and Abok.

September 18, 2018: Defense make their opening statement.

October 1, 2018: The defense call their first witness.

November 29, 2019: The final defense witness testifies, closing their case after 55 witnesses testified during 75 days of hearings.

March 10-12, 2020: The prosecution, defense and victims' lawyers make their closing statements.

February 4, 2021: Trial Chamber IX renders its judgment.