

The Trial of Dominic Ongwen at the ICC: Closing Statements

March 2020

Executive Summary

On March 10-12, 2020, the International Criminal (ICC) in The Hague will hear closing statements in the trial of Dominic Ongwen, marking the sixth case to reach this 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 the main issues in the case, with hyperlinks to relevant portions of our trial monitoring website www.IJMonitor.org.

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 July 2002 and 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 also promoted to be commander of Sinia brigade.

Ongwen is currently being held at the ICC Detention Center at The Hague. He has been detained since January 2015 after he surrendered himself to United States forces in the Central Africa Republic.

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, 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 been further charged with two counts of 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 the judges are less likely to re-characterize the modes of liability Ongwen has been charged with, 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. (Bosco Ntaganda previously had the highest total number of counts at 18.) It is also the first time an accused person has presented an affirmative



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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 at the time when he is alleged to have committed the crimes.

There are other significant milestones, including that Uganda was the first country to refer a situation 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 from December 2016 to 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 Pre-Trial Chamber II, and the court admitted their testimony 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 February 2020, there were 4,107 victims participating in the trial. The victims are split into two groups represented by two different legal teams. Joseph Akwenyu Manoba and Francisco Cox represent the larger group of 2,601 victims. Most of these victims were residents of the former IDP camps in Odek, Lukodi, and Abok. Paolina Massidda, Principal Counsel at the Office of Public Counsel for Victims, represents the other group of 1,502 victims. Most of these victims were residents of the former IDP camp of Pajule. According to the ICC's Case Information Sheet, there are four victims with unclear representation.

After the prosecution completed its presentation of evidence, judges permitted the Legal Representatives of the Victims to call seven 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.

Witnesses for the Prosecution

Pajule

Seventeen people testified about the October 10, 2003 attack on the Pajule IDP camp. Many of them were former LRA members of different ranks who belonged to different brigades. Several survivors also testified as well as two commanders of the Ugandan army.

Odek

A childhood friend of LRA leader Joseph Kony was among the survivors who testified about the April 29, 2004 attack on the Odek IDP camp. Kony was born and grew up in Odek. In total, 18 witnesses testified about the Odek attack, including former members of the LRA of different ranks and from different brigades.

Lukodi

Most of the former LRA fighters who testified about the May 19, 2004 attack on the Lukodi IDP camp were members of the Sinia brigade that Ongwen belonged to. In total, seven people testified about that attack, including some survivors.

Abok

This is another attack that several former members of the Sinia brigade testified about. In total, 10 witnesses testified about the June 8, 2004 attack on the Abok IDP camp, including survivors.

Intercept Evidence

To corroborate the witness testimony about the four attacks in which prosecutors allege Ongwen played a role, the prosecution called four members of Uganda's security agencies to testify about their interception of LRA radio communications. Witnesses P-003 and P-339 spoke about the Uganda People's Defense Force's (UPDF's) intercept program. Witness P-059 testified about his work as an interceptor for the Internal Security Organization (ISO). Another, Patrick Lumumba Nyeru, spoke about being an interceptor for the Uganda Police Force. Two prosecution staff members testified as expert witnesses about how they handled the recordings of the intercepts they received from the UPDF and ISO.

Sexual and Gender-based Crimes

Seven witnesses testified about Ongwen's alleged direct role in crimes 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 a decision of Trial Chamber IX. The trial chamber made this decision using Article 56 of the Rome Statute, which is an exception to the general rule that the parties must present evidence during trial. In this instance, the prosecution and victims representatives' noted the use of Article 56 is consistent with the chamber's obligation to protect vulnerable witnesses.

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.

Conscripting Child Soldiers

Many insider and crime-base witnesses testified about either Ongwen's alleged role in conscripting child soldiers or how the LRA regularly conscripted child soldiers. They told the court about their abduction and the rituals and beatings LRA members subjected them to in the course of initiation ceremonies.

Witnesses for the Victims

Victims' lawyers Joseph Akwenyu Manoba and Francisco Cox called Teddy Atim as an expert witness. Atim testified about a report she co-wrote in which she compared the lives of survivors of the attacks on Odek, Lukodi, and Abok with the lives of other northern Ugandan residents who had not been subjected to attacks. One conclusion Atim and her co-researchers came to was that the survivors of attacks, and their children born after the attacks, continue to be negatively affected by those attacks to date.

Witnesses for the Defense

Alibi for Attack on Pajule

The defense argued Ongwen had an alibi for the October 10, 2003 LRA attack on Pajule. Defense witness Christopher Oloya, who had served as Ongwen's escort, told the court that Ongwen was injured and in a sick bay when the Pajule attack took place. He said Ongwen was not involved in the planning of the attack nor did he participate in the attack. Oloya described his own participation in the attack during his testimony.

Sam Opiyo is another former LRA member who testified that Ongwen had no role in the Pajule attack. Opiyo told the court he participated in the attack. Three other defense witnesses testified they did not see Ongwen during the attack. Two of these defense witnesses were LRA members who had a role in the Pajule attack.

Disputed Facts

The defense also called witnesses to explain why civilians were killed in the attacks on the Odek, Lukodi, and Abok IDP camps and what motivated the LRA to attack those camps. Former LRA fighter Kenneth Opiyo testified that he participated in the LRA attack on the Abok IDP camp, but the LRA did not kill any civilians or burn any homes. Opiyo said the LRA only went to Abok to take food.

Julius Nyeko, a former member of a government-backed militia, told the court that the civilians who died in the Odek attack were killed in the crossfire between the LRA and government soldiers.

Evidence on Ongwen's Mental State

Mental Disease or Defect

Two defense psychiatrists, Dickens Akena and Emilio Ovuga, testified that Ongwen had post-traumatic stress disorder and a dissociative identity disorder at the time the alleged crimes took place. They further testified that because of these mental illnesses, Ongwen was not

aware of the crimes he is alleged to have committed. This defense is provided for in Article 31(1)(a) of the Rome Statute and is the first time this provision is being used in a trial at the ICC.

Akena and Ovuga also testified that Ongwen showed symptoms of depression. They based their conclusions on up to 18 interviews they had with Ongwen between February 2016 and April 2018. The experts wrote two reports based on these interviews: one in December 2016 and the other in April 2018.

The prosecution presented two psychiatrists and one clinical psychologist who responded to the first report by Akena and Ovuga. The three mental health experts also testified on other material to offer the court their opinion of Ongwen's mental state during the period covered by the charges. They all concluded that Ongwen did not have a mental disease between July 2002 and December 2005. Two of them said they believed Ongwen faked the mental illness the defense psychiatrists described in their report. None of the prosecution experts interviewed Ongwen because he declined to see them. The testimony of Gillian Clare Mezey, Catherine Abbo, and Roland Weierstall occurred between March and April 2018 before Akena and Ovuga testified in November 2019.

Trial Chamber IX decided Mezey, Abbo, and Weierstall should testify near the conclusion of the prosecution phase of the trial and, if needed, the prosecution could call a rebuttal witness when the defense mental experts testified. The prosecution called Weierstall-Pust (his name changed after he got married) as a rebuttal witness when Akena and Ovuga testified.

Duress

Another line of defense Ongwen's lawyers have pursued is that Ongwen, while not admitting guilt, acted as 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 did not specifically call a witness or group of witnesses in order to make a duress defense. Rather, Ongwen's lawyers began presenting this defense when questioning prosecution witnesses and continued to do so as defense witnesses testified.

To shape the duress defense Ongwen's lawyers asked witnesses about the belief in spirits within the LRA; the alleged killing of senior commanders on Kony's orders; the violent initiation ceremonies; and the threat of death for disobeying rules or attempting to escape.

Dickens Akena, one of the defense psychiatrists, testified that Ongwen told him and his colleague, Emilio Ovuga, that within a month of his being abducted in 1987, Ongwen made four attempts to escape the LRA. Akena said Ongwen told them that after one such attempt, he was forced to skin another abductee alive because he had also tried to escape, as a way of dissuading him from attempting to escape again.

Florence Ayot testified about a 2003 plan she and Ongwen were involved in to escape the LRA. When the plan was discovered, Ongwen was demoted, arrested, and put in the custody of then deputy leader of the LRA, Vincent Otti. Ayot is one of several women identified as a former "wife" to Ongwen.

Jackson Acama and Kristof Titeca testified about how LRA members believed that LRA leader Joseph Kony talked to spirits and that these spirits determined many things in the group, including their success in battle.

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 time 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 (for instance if any particular evidentiary threshold needs to be met). Trial Chamber IX admitted the testimony of seven women, who made direct allegations against Ongwen concerning sexual and gender-based crimes, into the record of the trial under this provision. The seven women testified during the pre-trial phase of Ongwen's case where the threshold for proof is "substantial grounds," which is a lower standard of proof than the "beyond reasonable doubt" threshold that is required for a conviction 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 defenses an accused person may make, but it does not establish what burden of proof an accused person needs to satisfy in relation to those defenses. 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 Happens Next?

All parties to the trial will make closing statements starting March 10, 2020. Once completed, the three trial chamber judges will retreat from the courtroom to consider the evidence and write their judgement. They have 10 months in which to do so, according to guidelines set out in the fourth edition of the Chambers Practice Manual issued in November 2019.

Article 74 of the Rome Statute states that the decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges and must be based only on evidence submitted and discussed before the trial.

Judges' decisions do not have to be unanimous, but in order to find the accused guilty, a majority of the judges must find that the evidence proved the guilt of the defendant beyond reasonable doubt. The judges could reach a number of conclusions. They could find the accused guilty of all charges, or they could find him not guilty if the prosecution fails to meet the burden to prove the defendant's guilt beyond reasonable doubt on any of the charges. A third possibility is that the judges could find the accused guilty of some charges but acquit him of others.

Timeline

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

March 17, 1999: Uganda signs the Rome Statute of the International Criminal Court.

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, specifically mentioning the case of the LRA. The ICC Prosecutor at the time, Luis Moreno-Ocampo, interprets the referral to apply to all crimes committed in northern Uganda and that the ICC investigation would be impartial.

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

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

October 13, 2005: Pre-Trial Chamber II unseals warrants of arrest against five 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.

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

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 Francisco Madeira, then Special Representative for Counter-Terrorism Cooperation and Director of the African Center 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 18, 2015: The prosecutor announces that she will charge Ongwen with 70 counts of war crimes and crimes against humanity, including 19 charges relating to sexual and

gender-based crimes. The original indictment issued only included seven counts of war crimes and crimes against humanity.

January 21-27, 2016: Pre-Trial Chamber II holds the confirmation of charges hearing.

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

July 18, 2016: Trial Chamber IX 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: The 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 have testified during 75 days of hearings.

March 10, 2020: Trial Chamber IX begins hearing closing statements.