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2. THE TRIAL CHAMBER IX JUDGMENT IN THE CASE *PROSECUTOR V. DOMINIC ONGWEN*

1. *Introduction*

On 4 February 2021, more than five years after the submission by the Office of the Prosecutor of the document containing the charges on 22 December 2015, the Trial Chamber IX (hereinafter: TC IX, the Chamber) of the International Criminal Court (ICC) issued its judgment on the criminal charges against Dominic Ongwen, a member of the organised armed group named Lord's Resistance Army (LRA). These charges included international crimes of a sexual and gender-based nature, such as forced pregnancy, forced marriage and sexual slavery. The TC IX (presided by Judge Bertram Schmitt and composed of Judges Péter Kovács and Raul C. Pangalangan) unanimously found Dominic Ongwen guilty of several crimes ascribed to him (Part VI - Verdict, pp. 1068 ff.). On 6 May 2021, the Chamber sentenced Dominic Ongwen to 25 years imprisonment.

In this short comment, I will focus on some peculiar and original aspects of the trial judgment; in particular, I will enumerate the crimes Ongwen was convicted of and provide an analysis in relation to those of a sexual and gender-based nature, and I will examine the judges' findings in relation to the modes of Ongwen's criminal liability.

As I will show in Section 4 of the comment, the relevance of this findings mostly depends on the innovative character of the approach adopted by the judges with regard to sexual and gender-based crimes. In Section 4 I will also focus on the issue of the concurrence of crimes originating from the same criminal conduct, as the Chamber seems to have provided much needed clarifications concerning the "sameness" requirement, both in terms of material and mental element. In turn, such findings allowed the TC IX to enter a conviction, among others, in relation to sexual slavery and forced pregnancy as both crimes against humanity and war crimes.

a) The Facts and Historical Context of the Case

With regard to the historical and cultural background of the decision, it should be immediately noted that the case was part of a group of cases that the ICC Prosecutor has been investigating in the context of the situation in Uganda. The events that were examined

by the TC IX judges cover the period from 1 July 2002 to 31 December 2005; the Chamber also considered the social and cultural context in which these events took place, namely the activities of the LRA, a non-state armed group active since the mid-1980s (para. 1). Therefore, after the establishment of the LRA and the defeat of its spiritual leader, Alice Auma, the armed struggle against the Government of Uganda was carried on by Joseph Kony. The armed activities also led to the commission of repeated violence against the local population; among the various crimes committed, there were crimes of a sexual nature and forced recruitment of soldiers under 15 years of age (para. 7). In the mid-90s, in order to counter this outbreak of violence the Ugandan government established Internally Displaced Person (IDP) camps with the aim of moving the civilian population out of rural areas and place them under the protection of the governmental armed forces (para. 10). However, this strategy was ineffective and made these camps the target of attacks by LRA troops (para. 11). At the same time, having obtained support from the Sudanese government (para. 12), in 2002 the Ugandan army started an anti-insurgency campaign (para. 13). It is against this background that the LRA launched the attacks against Ugandan villages in the context of which the crimes attributed to Ongwen would have been committed.

b) Procedural History of the Case

The ICC Pre-Trial Chamber II issued an arrest warrant for Dominic Ongwen on 8 July 2005, along with those for Kony, Otti, Lukwiya and Odjambo (para. 15). On 16 January 2015, Ongwen was surrendered by the Central African Republic authorities to the ICC; on 26 January 2015, he was brought before the Pre-Trial Chamber II (para. 16). The trial phase began on 6-7 December 2016, with the opening statement of the Office of Prosecutor, the Victims' Legal Representative and the Victims' Common Legal Representatives (para. 19). The evidence gathering phase ended on 12 December 2019 (para. 23), while the parties to the trial submitted their closing statements on 10-12 March 2020 (para. 24).

2. *The History of the Accused and the Charges Laid Against Him*

The judgment has offered an examination of the personal facts of the accused, explaining how they may have affected the commission of the crimes (paras. 26 ff.). Ongwen was abducted by the LRA at the age of nine, in 1987 (para. 27). On the basis of this time frame, Ongwen was determined to be between 24 and 27 years old at the time of the commission of the crimes charged against him (para. 31). These circumstances are considered decisive to explain both his permanence in the ranks of the LRA, and to explain that he was aware of being part of a consolidated and organised system and of having climbed up the hierarchy quickly under the command of Kony.

The charges confirmed by the Pre-Trial Chamber covered 70 counts and concern both war crimes and crimes against humanity allegedly committed by Ongwen against civilians in Northern Uganda between 1 July 2002 – the time of the Statute's entry into force – and 31 December 2005 (para. 32). The TC IX divided the crimes into three macro-categories for the purpose of judging: a) crimes committed against the population of some of the IDP camps; b) crimes of a sexual and gender-based nature, committed directly by

Ongwen against seven women identified and called to testify; c) other crimes committed during the relevant period in a systematic manner and perpetrated indirectly or under the control of Ongwen himself (para. 33). Under the first macro-category, Ongwen was accused of having committed several crimes, including attacking the civilian population, murder, attempted murder, torture, cruel treatment and other inhuman acts, enslavement, pillaging and destruction of property (para. 34). Under the second macro-category, Ongwen was charged with forced marriage, torture, rape, sexual slavery, enslavement, forced pregnancy and outrage against human dignity – all of which characterized both as crimes against humanity and as war crimes, depending on the context in which they were committed (para. 35, and paras. 2673 ff. for a contextual analysis). The third and final macro-category consists of crimes committed indirectly by Ongwen through his subordinates or women who forcibly lived with him, including forced marriage, torture, rape, sexual slavery, enslavement and conscription and the use of children under the age of 15 as soldiers (para. 36). For the purpose of this comment, in Section 4 I will only focus on the second macro-category, as it consists of the crimes in relation to which the Chamber has offered the most interesting interpretation of the Statute.

3. *Modes of Liability and the Rejection of Grounds Excluding the Criminal Liability*

In analysing the material element of the crimes committed by Ongwen, the TC IX identified and assessed three ways in which the criminal conduct was carried out.

First, the judges focused on the crimes that the accused had allegedly perpetrated directly and with "knowledge" of committing an international crime, as required under Article 25(3)(a) of the ICC Statute (para. 2782).

The second category pertains to the indirect commission of the crime, according to which the criminal conduct is carried out by means of other persons. In this regard, the judges have to consider relationships of subordination (as in the case of the members of the Simia Brigade – see para. 2783) and control (as in the case of some women Ongwen kept as "wives" – see para. 2784). This is based on a criterion of control whereby *«the indirect perpetrator used "at least part of the apparatus of power subordinate to him or her, so as to steer it intentionally towards the commission of the crime, without leaving one of the subordinates at liberty to decide whether the crime is to be executed"*» (*see* para. 778 of *Ntaganda* trial judgment; and para. 1411 of *Katanga* trial judgment).

The third mode pertains to indirect co-perpetration, i.e. a joint mode of execution of international crimes. This would occur through a "common plan" designed by members of an organizational structure and implemented through their subordinates, as a result of the fact that the former could exercise control over the latter. Hence, it was necessary to show that the accused had control over the crime in question «*by virtue of his … essential contribution to it and the resulting power to frustrate its commission*» (para. 2787, citing para. 473 of the *Lubanga* Appeals Judgement), carried out with the knowledge that the criminal plan was being implemented (para. 2788).

With regard to the psychological element of the crimes, the TC IX also assessed the existence of possible grounds for excluding responsibility, invoked by Ongwen's defence (on the "mental disorder" defence, see also M. Fortuna, "*The 'Mental Disorder' Defence in*

Prosecutor v Ongwen", in *Groningen Journal of International Law Blog*, 16 February 2021, available here). With regard to *mental disease*, the TC IX recalled that the defence had raised this ground on the basis of two expert reports, according to which Ongwen suffered from «"*severe depressive illness, post-traumatic stress disorder ("PTSD") and dissociative disorder (including depersonalization and multiple identity disorder) as well as severe suicidal ideation and high risk of committing suicide", and from "dissociative amnesia and symptoms of obsessive-compulsive disorder"*» (para. 2450). The TC IX, however, noted that the state of mental disease must have existed at the time of the commission of the crime, and that according to Article 31(1) of the ICC Statute such a disease must be capable of destroying «*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*» (para. 2452). On the basis of the testimonies given by the experts called to assess the existence of the specific symptoms (paras. 2458 ff.), the TC IX makes it clear that it must base its judgment only on the facts that have been proved, and therefore cannot judge the question of mental disease *in abstracto*, nor it can allow psychiatric analyses of the accused to be carried out at trial (para. 2501). In addition, the judges rejected the argument that the symptoms were temporarily masked by the accused (para. 2503). Such conclusions were also supported by the testimony of witnesses who had spent a considerable amount of time with Ongwen, and who did not detect any mental disease or attempt to conceal it (para. 2517). Moreover, the Chamber noted that the violent acts perpetrated by Ongwen required complex and cumbersome planning, development, control and execution by subordinates or persons under his supervision, and that this results in a general incompatibility with the mental disease as invoked by the Defence (paras. 2520-2521). Having ruled out any possible configuration of mental disease and its subsistence throughout the period during which Ongwen took part in LRA operations (paras. 2556 ff.), the TC IX concluded that the explanations provided in the psychiatric reports submitted by the defence did not meet the requirements of Article 31(1) of the ICC Statute and that the evidence the experts had offered was not reliable (paras. 2573-2574).

With regard to *duress*, the TC IX identified three elements. First, a threat of imminent death or danger or threat of imminent or continuing bodily harm against the person engaging in the conduct or against another person. In this regard, the TC IX noted that the adjectives "imminent" and "continuing" refer to the nature of the threat, and not to the threat itself, so that «[*a*] *merely abstract danger or simply an elevated probability that a dangerous situation might occur - even if continuously present - does not suffice*» (paras. 2581-2582). Second, that the person acts "necessarily and reasonably" to prevent the threat from being carried out. As to the necessity and reasonableness of the action, the Chamber must consider what the person may have done in the concrete circumstances of the case (para. 2583). Third, the person must intend to cause less harm than the perceived one to suffer. As the Statute only requires that the person intended to avoid the greater harm, the Chamber noted that such assessment depends on the character of the harms under comparison (para. 2584) considering that the first element of extreme danger had not been detected – since the conduct constituting the crimes was prolonged and systematic over time –, according to the TC IX it was not necessary to consider the other elements (paras. 2585-2586). However, the TC IX decided to assess whether a persistent threat to Ongwen's life existed at the time he committed the conduct under scrutiny (para. 2587). Among the factors the judges considered, it is worth mentioning the fact that the LRA was not under the absolute control of

Joseph Kony, but the latter relied on the cooperation of various commanders; that high-ranking commanders of the LRA did not always execute Joseph Kony's orders; and that Ongwen was a self-confident commander who took his own decisions (paras. 2590-2602). The TC IX also noted that the possibility of escaping for Onwen was more than feasible, but never really thought of or realized, given his interest in the activities of the LRA (paras. 2620, 2635 ff.) and the fact that he refused to surrender to the Ugandan authorities in September 2006 (paras. 2640-2641). With regard to the constraint given by Kony's "spiritual powers", the TC IX found it to be present in younger people and especially in minors abducted from the various villages and IDP camps, but less consistent for those who had grown up and moved up the hierarchy (para. 2645). Finally, the TC IX found that Ongwen's continued loyalty to Kony himself could not have led to a situation of extreme danger, since it was the accused himself who faithfully executed orders; in addition, the judges considered that the initiatives he undertook in light of his hierarchical position, including the planning of the attacks on Lukodi and Abok IDP camps, were incompatible with the mental state of someone acting under duress (paras. 2659 ff., in particular para. 2665).

4. *International Crimes Committed by Dominic Ongwen*

On 4 February 2021, the TC IX has unanimously convicted Dominic Ongwen in relation to 61 counts of war crimes and crimes against humanity committed in Northern Uganda between 1 July 2002 and 31 December 2005, including 19 counts of sexual and gender-based crimes characterized as both crimes against humanity (of forced pregnancy, torture, rape, sexual slavery, enslavement, and forced marriage as an inhumane act) and war crimes (of torture, rape, forced pregnancy, and outrages upon personal dignity).

For the purpose of this comment, I will only focus on the Chambers' findings in relation to forced pregnancy, forced marriage as an inhumane act, sexual slavery, and rape. In addition, I will also examine the very interesting findings of the Chamber in relation to the concurrence of crimes – which allowed the judges, *inter alia*, to enter distinct convictions in relation to sexual slavery and forced marriage, and to convict Ongwen of conducts amounting to rape and sexual slavery as both crimes against humanity and war crimes.

a) *Sexual and Gender-based Crimes Committed by Ongwen: Forced Pregnancy…*

With regard to the crimes of a sexual and gender-based nature in relation to which Ongwen was charged with direct perpetration, the TC IX provided a thorough examination of the testimonial evidence offered by seven women who had been kidnapped, raped, kept as "wives" (in some cases even forced to marry), and subjected to Ongwen's abuse (including being coerced to beat a prisoner to death, as in the case of P-0226 – see paras. 209-210) as well as to mental disturbances and post-traumatic anxiety, and subsequently set out its reasoning on the basis of the elements required for the commission of the above-mentioned crimes (paras. 2693 ff.). In this as well as in the following paragraphs, I am going to expose the analysis of those sexual and gender-based crimes for which the Chamber offered an original or funding analysis in the ICC jurisprudence (on such findings, *see* also A. L. Kather, A. Nassar, "*The Ongwen case: A prism glass for the concurrent commission of gender-based crimes*", in *Völkerrechtsblog*, 15 March 2021, available here).

The most "innovative" finding is provided by the Chamber with regard to the charges of forced pregnancy, which had never been considered by the Court as a distinct crime (para. 2717). First, the TC IX explained that such crime is detrimental to the fundamental rights of women, such as «*personal and reproductive autonomy and the right to family*» (under Article 16(1)(e) of the Convention on the Elimination of All Forms of Discrimination Against Women). Although the definition contained in Articles 7(1)(g) and 8(2)(e)(vi) of the ICC Statute was tightly negotiated by States (para. 2718, which also recalls the negotiating history and the criminal pattern of reference – namely, forced pregnancies of women during the conflict in Bosnia-Herzegovina), the TC IX found that this definition was a "delicate compromise" based on a specific *mens rea* requirement – i.e. «*affecting the ethnic composition of any population or carrying out other grave violations of international law*» (para. 2721).

The Chamber's decision to recognize independent meaning to such crime reflects two legal principles: (i) the rule against surplusage, according to which «*the legislator does nothing in vain*» and «*the court must endeavour to give significance to every word of a statutory instrument*»; and (ii) the principle of fair labelling, according to which «*the proper characterisation of the evil committed … is part of the justice sought by the victims*». In fact, according to the TC IX « [*t*]*he crime of forced pregnancy depends on the unlawful confinement of a (forcibly made) pregnant woman, with the effect that the woman is deprived of reproductive autonomy*» (para. 2722).

In assessing the existence of the material elements of the crime in the specific circumstances of the case, the TC IX observed that forced pregnancy may have been carried out before or during the unlawful detention, not requiring a direct action by the perpetrator; in turn, the material element can be divided into the "unlawful confinement", by which a woman is forcibly deprived of physical and travel autonomy, and the action of "forcibly made pregnant" a woman, by which a woman is made pregnant through the use of various physical or psychological constraints, without her being able to express genuine consent (paras. 2723-2725). With regard to *mens rea*, the TC IX emphasised that this must be specific and aimed at undermining the ethnic composition of the population or at committing other serious violations of international law (e.g. raping a woman or making her a sex slave,); however, it is not required that the perpetrator intended to keep the woman pregnant beyond those specific intentions. Therefore, if a prison warden keeps women forcibly made pregnant in an internment camp in order to torture them – i.e. carrying out any other violation of international law –, he/she should be guilty of forced pregnancy (paras. 2727-2729).

In relation to Ongwen's conduct, the TC IX found that the accused had engaged in the proscribed conduct against the women described as "wives" on a repeated basis. The Chamber found no possibility for these women to leave Ongwen's home, so the conduct in question could not have been carried out by anyone else; against this background, the TC IX also noted that during the period of time under scrutiny two of these women would have given birth to a daughter and a son fathered by Ongwen (paras. 3057-3058). As regards the psychological element of the crime, in light of the fact that the acts had been committed over a long period of time and had sustained the commission of other crimes, the Chamber found that Ongwen meant to engage in the relevant conduct with the required specific purpose (paras. 3059-3061).

b) ... *Other Inhumane Acts, including Forced Marriage*

According to the Chamber, in compliance with the principle of legality the category of other inhumane acts «*must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity*» (para. 2741). International jurisdictions have already characterized forced marriage as an inhumane act falling under the scope of crimes against humanity (para. 2744, which cites several international pronouncements, including this ECCC pronouncement, paras. 740-49). Under the practice of the ICC, the category of other inhumane acts is understood as a residual and non-exhaustive category of crimes against humanity (para. 2745). However, the Chamber found that in order to fall under this category, the conduct does not need to fall *entirely* outside any act under Article 7(1)(a)-(j), but can comprise acts falling under one or more of the enumerated crimes and be "similar" in terms of nature and gravity to those crimes (para. 2747). Therefore, the Chamber considered forced marriage to fall under this category, its underlying act consisting in «*the imposition, regardless of the will of the victim, of duties that are associated with marriage … as well as the consequent social stigma*». In fact, the status created by marriage has «*also social, ethical and even religious effects which have a serious impact on the victim's physical and psychological well-being*», since the victims «*see themselves as being bonded or united to another person despite the lack of consent*» – all the more so when forced marriage results in the birth of children (para. 2748). The harm suffered from forced marriage can thus «*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*» (para. 2749). The relevant conduct is not comparable to that of other crimes against humanity or inhumane acts, as there are no elements such as possession of the person (as in the case of slavery) and the presence of marital status (which does not appear in rape); therefore, it should be considered as an inhumane act different from the others to be included in a residual category, which is associated with the continuous character of the crime and the perpetrator's awareness of the factual elements of the crime (paras. 2750-2753 – on the peculiar nature of forced marriage, *see* Kather, Nassar, "*The Ongwen case: A prism glass for the concurrent commission of gender-based crimes*", *cit.*).

In light of the above, the TC IX found that Dominic Ongwen «*executed the specific legal elements of forced marriage as another inhumane act*» against five women identified as P-0099, P-0101, P-0214, P-0226 and P-0227, and that he meant to engage in his relevant conduct and to cause the above-mentioned (psychological and social) consequences (paras. 3024-3025).

c) ... *Sexual Slavery and Rape*

With regard to the characterization of conducts as sexual slavery, the TC IX noted that this is to be understood as entirely included in the conduct of enslavement (para. 2715). Therefore, the conducts of restricting or controlling the victim's sexual autonomy while holding him/her in the state of enslavement and causing such person to engage in one or more acts of a sexual nature constitute the material element of the crime. The assessment concerning the sexual nature of the conduct is made on a case-by-case basis, as it depends on the specific circumstances of the case (para. 2716). In relation to Ongwen's specific conduct, the TC IX found that the control exercised over the women with whom the accused had close relations had very often resulted in punitive acts and physical violence, as well as in a condition of general subservience on the basis of which those women were forced to obediently carry out Ongwen's orders. With respect to those women de-

fined as "wives", Ongwen would also have forced them to perform sexual acts whenever he wanted. As regards the psychological element of the crime, the Chamber held that Ongwen intended to carry out the conduct of that crime (paras. 3046-3048).

In relation to rape, the Chamber held that the defence's argument (concerning the overlap of the material elements of this crime and of the crime of sexual slavery) could not be accepted, as the principle of speciality was to be applied, according to which the relevant statutory provisions required the conducts as involving different material elements. With regard to rape, for example, the conduct consisting in the invasion of the victim's body is to be regarded as sufficient for the purposes of establishing the material element, whereas the crime of sexual slavery requires the exercise of any or all of the powers attaching to the right of ownership over the victim (para. 3037). In this regard, the TC IX considered the practice of the ICC according to which the full consumption of one crime by another may result in the impermissibility of concurrence (in particular, see para. 751 of the appeal judgment in *Bemba et al.*), but concluded that this was not the case as the crimes of rape are not «*fully consumed within the crimes of sexual slavery*» and the two crimes are not in a relation of subsidiarity (paras. 3038-3039).

d) *Reasoning of the Trial Chamber in Relation to the Concurrence of Crimes*

With regard to the material element of the crimes, the TC IX has considered the possible concurrence of crimes against humanity and war crimes. Concurrence occurs when a given conduct can meet the legal requirements of different crimes. However, in such circumstances the principle of legality may forbid the judge to enter convictions in relation to multiple offences.

As recalled by the TC IX, under the constant practice of the ICC «*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*» (para. 2792). Therefore the TC IX found that under Article 20(1) of the ICC Statute, cumulative conviction is admissible under the condition that the conducts are defined by materially distinct legal elements – namely, elements which require proof of a fact not required by the other (para. 2794). However, there are situations in which crimes may nevertheless be in impermissible concurrence, such as when one offence is fully consumed by the other offence or is viewed as subsidiary to it (para. 2796, citing para. 751 of *Bemba et al.* appeals judgment). Therefore, the TC IX identified five relevant situations in terms of concurrence: (i) analogous crimes against humanity under Article 7 and war crimes under Article 8; (ii) torture and cruel treatment as war crimes under Article 8(2)(c)(i) of the Statute; (iii) torture and other inhumane acts as crimes against humanity under Articles 7(1)(f) and (k) of the Statute; (iv) enslavement and sexual slavery as crimes against humanity under Articles 7(1)(f) and (g) of the Statute; and (v) 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.

Against this background, the Chamber found that the contextual elements of crimes against humanity are not qualitatively different from the specific elements of the crimes, and that they require proof of facts not required by war crimes. Also considering that contextual elements «*encapsulate distinct interests*», the judges concluded that «*the two sets of crimes reflect (partly) different forms of criminality*» and cannot thus be subsumed or consumed by the

other (para. 2820) – making concurrence between them permissible. Hence, TC IX considered its own reasoning as involving a conduct-based and contextual analysis on the single crimes as charged to Ongwen.

5. *Conclusions*

In concluding this comment, I would like to highlight that the ICC has made a significant step forward in this judgment concerning sexual and gender-based crimes.

A first progressive step consists in the consideration of sexual slavery as a crime with a distinct material element than the one required with regard to enslavement. The TC IX expressly considered the conduct of the former as inclusive of the conduct of the latter, but at the same time emphasized the peculiar context in which the first conduct was committed and the intent of the perpetrator. In fact, the Chamber has stressed the sexual nature of the conduct and the will of the perpetrator to sexually abuse his victims.

A second step forward saw the crime of forced pregnancy as the protagonist. The TC IX highlighted that Ongwen's continuous conduct towards some women could not be considered as only harmful to human dignity nor merely as an inhumane act, since it would not fully capture the perpetrator's intent to sexually force such women to the point of leading them to give birth to children. The TC IX also found that the disvalue of an unwanted pregnancy was decisive in considering the consequences for the victim of crime, which are not limited to the personal sphere but have a social impact which may result in a stigma affecting the victim *and* the children.

Regarding forced marriage, it is noteworthy that the TC IX recognized the specific social disvalue that the imposition of conjugal duties entails. The fact that the judges highlighted that the underlying conduct may result in a social impact – the stigma affecting the victim – is to be welcomed as a serious attempt to pave the way for the recognition of "forced marriage" as an autonomous crime.

In light of the above, I believe that it is important to recognize and praise the innovative character of this judgment in the context of the ICC practice.

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