

Uganda: Q&A on Dominic Ongwen at the ICC

Wednesday 20 January 2016

Questions and Answers on the occasion of the opening of confirmation of charges hearing against Dominic Ongwen at the ICC

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1. Who is Dominic Ongwen and what are the charges that the Office of the Prosecutor will present against him?

Dominic Ongwen was born in Gulu, northern Uganda in 1975. He was abducted as a child and recruited to become part of the armed rebel group Lord's Resistance Army (LRA). In March 2004, Ongwen was put in charge of the Sinia brigade. He commanded this brigade during numerous operations in 2004 and 2005, including the attacks of internally displaced persons (IDP) camps which form the basis for his charges. Towards the end of 2005, Ongwen was the most senior LRA commander in Uganda. [1]

In total, Dominic Ongwen is charged with being criminally responsible for 67 counts of war crimes and crimes against humanity committed between July 2002 and December 2005 in 4 IDP camps in northern Uganda (Lukodi IDP camp in Gulu, Odek IDP camp in Gulu, Pajule IDP camp in Pader district, and the Abok IDP camp in Apac district).

Charges include murder, enslavement, inhumane acts of inflicting serious bodily injury and suffering, use and conscription of child soldiers, sexual and gender-based crimes including rape, torture, forced marriage and sexual slavery, attacks on internally displaced persons camps and persecution, intentionally directing an attack against a civilian population, pillaging. [2]

2. What is the Lord's Resistance Army and what is the scope of the ICC crimes targeted in the Uganda situation?

The Lord's Resistance Army (LRA) is an armed rebel group led by Joseph Kony which was organised in about 1987. It initially fought the Ugandan government in northern Uganda, with incursions into southern Sudan. From at least July 2002 to December 2005 an armed conflict not of an international character between the LRA and armed forces of the Government of Uganda existed in northern Uganda. Ugandan military operations forced the group out of Uganda in 2005 and 2006. After that, the LRA gradually became a regional threat, operating in the remote border areas between southern Sudan, the Democratic Republic of Congo, and the Central African Republic (CAR).

Aside from Ongwen, two other LRA commanders are suspected by the ICC in the Uganda situation: Joseph Kony, leader, chairman and LRA commander, and Vincent Otti, vice-chairman and LRA second-in-command. Two other high-ranking LRA officials were initially targeted but proceedings terminated when their death was confirmed.

Since its creation, including the period from July 2002 to at least December 2005, the LRA allegedly carried out an insurgency against the Government of Uganda and the Ugandan Army (also known as the Uganda People's Defence Force - UPDF - and local defence units - LDUs) and against civilian populations. In pursuing its goals, the LRA has engaged in a cycle of violence and established a pattern of "brutalisation of civilians" by acts including murder, abduction, sexual enslavement, mutilation of men, women and children, as well as mass burnings of houses and looting of camp settlements. The abducted civilians, including children, are said to have been forcibly recruited as fighters, porters and sex slaves to serve the LRA and to contribute to attacks against the Ugandan army and civilian communities. [3] There was also a policy of abducting women and girls to distribute them among LRA fighters to serve as domestic slaves and/or exclusive conjugal partners made, inter alia, to perform domestic duties and to submit to sexual intercourse. [4]

3. Why is the confirmation of charges hearing taking place more than ten years after the issuance of the first warrant of arrest against Ongwen and other LRA commanders?

Uganda signed the Rome Statute on 17 March 1999 and ratified on 14 June 2002 becoming a State Party to the International Criminal Court Statute. On 16 December 2003, the Government of Uganda referred the situation concerning northern Uganda to the Office of the Prosecutor as the first country to self-refer following years of unsuccessful peace talks with the LRA. On 29 July 2004, the Prosecutor determined that there was a reasonable basis to open an investigation into the situation concerning northern Uganda. [5]

On 8 July 2005, Pre-Trial Chamber II issued warrants of arrest against Dominic Ongwen, together with four other LRA senior leaders - Joseph Kony, Vincent Otti, Raska Lukwiya and Okot Odhiambo - for the commission of crimes against humanity and war crimes and requested the Republic of Uganda to search for, arrest, detain and surrender them to the Court.

For more than 10 years, national, regional and international security forces were unable to apprehend these suspects. On 6 January 2015, Dominic Ongwen surrendered to US military stationed in CAR, fighting against the LRA. Following talks between the US, CAR and Uganda, Ongwen was transferred into the custody of the Ugandan contingent of the African Union Anti - LRA Task Force. He was then transferred to the ICC detention center in the Hague where he arrived on 21 January 2015, triggering the proceedings towards his confirmation of charges hearing.

His initial appearance before the single Judge of Pre-Trial Chamber II took place on 26 January 2015 [6] and the provisional date for the confirmation hearing was set for 24 August 2015. [7] In February 2015,

the Prosecutor had requested a postponement of Ongwen's confirmation of charges hearing to allow more time to carry out additional investigations, after which she provided, on 18 September 2015, the extended list of charges she intends to bring against Dominic Ongwen. [8] The opening of the confirmation of charges hearing in respect of Dominic Ongwen is scheduled for 21 January 2016 and is a step to decide whether or not there is sufficient evidence to proceed to trial. [9]

Proceedings against the other remaining two suspects in the Uganda situation, Joseph Kony and Vincent Otti, who are still at large, have been separated from the Ongwen case.

4. What will happen during the Ongwen confirmation of charges hearing and what will be decided?

The opening of the confirmation of charges hearing of Ongwen is provisionally scheduled for 21 January 2016. The purpose of the confirmation of charges hearing is to determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. The three Pre-Trial Judges will hear the charges presented by the Office of the Prosecutor, and the comments by the defence and the victims. The confirmation of charges hearing is not a trial.

After the confirmation of charges hearing, the three Pre-Trial judges will have 60 days to reach a decision whether or not to confirm the charges - in total or partially - and to send Ongwen to trial.

5. How many victims are participating in the Ongwen case and how are they represented?

Participation in ICC proceedings and legal representation are rights guaranteed to victims by the ICC Statute. Their participation, as guaranteed by Article 68(3) of the ICC Statute, is a key part of the accountability process and thus constitutes an essential component of justice. As a main principle, recalled in Rule 90(1) of the ICC Rules of Procedure and Evidence, victims are free to choose a legal representative. "Effective legal representation has two very essential components: 1) to represent victims' interests genuinely in Court, and 2) to ensure that victims actually 'participate' through regular opportunities for them to give views and instruct lawyers". [10] To enable victims to participate, the ICC has established a system where victims can be represented by external lawyers, who may benefit from the ICC legal aid scheme, with the support of the ICC Office of Public Counsel for Victims (OPCV), which can also represent victims in proceedings when needed.

Victims of LRA crimes have taken great interest in the Ongwen case and many have decided to apply for participation in the case before the ICC. On 18 November 2015 the ICC Registry reported that it had received approximately 2050 victim applications to participate in proceedings. [11] As of 12 January 2016, at least 2026 victims have been granted the right to participate in the Ongwen confirmation of charges hearing.

From these 2026 victims, 592 individuals are represented by counsel from the Office of Public Counsel for Victims (OPCV), and 1434 by two external lawyers of their choice, Joseph Akwenyu Manoba from Uganda and Francisco Cox from Chile. [12]

In a decision issued on 27 November 2015 Judge Cuno Tarfusser confirmed the appointment of Manoba and Cox as representatives of the group of admitted victims at the time. However, the Judge ruled that this group of victims is not entitled to legal aid to pay their legal team on the basis of the fact that the counsel chosen by victims shall not be considered a "common legal representative", within the applicable rules, because he "was not chosen by the Court".

The Chamber explained that external lawyers haven't been chosen on the basis of a "transparent and competitive procedure organised by the Registry" and that allocating legal aid would be "a disproportionate and unjustified burden to the Court's legal aid budget." [13] The Judge therefore ruled that the victims, "even if they lack the means to pay, do not qualify for financial assistance by the Court." [14]

This is a new interpretation of Rule 90, and may raise particular concerns. Victims' free choice of counsel can only be overridden in exceptional circumstances, as reminded by Judge Cuno Tarfusser himself. It is regrettable that, when ruling out legal aid for victims represented by the two chosen external lawyers, the Chamber focused its considerations on the costs external representation would entail, the non implication of the Registry in the selection process, as well as counsel's experience in the procedure of the Court, and not on other, even more relevant aspects of legal representation, i.e. the lawyers' expertise and knowledge of the national context and of the impact of the crimes on victims and affected communities, or the involvement of victims in the selection of the representative who will be defending their interests and share their views and concerns. [15]

6. Are there any domestic proceedings in Uganda in relation to the LRA crimes?

The situation in Uganda presents a challenge to the principle of complementarity under which the ICC will intervene only when a domestic justice system is unable or unwilling to prosecute international crimes. Since the original arrest warrants were issued, the Uganda government has created the International Crimes Division, a branch of the judiciary dedicated to try war crimes, crimes against humanity, and other crimes. Although national trials could make an important contribution to securing justice for crimes committed during the conflict in northern Uganda, serious legal obstacles have emerged that call into question whether the division can fulfil its potential.

One of them is the 2000 Amnesty Act implemented by Uganda government which gives blanket amnesty to all rebels - including LRA members - who willingly surrender and renounce their participation in armed rebellion against the state. Over 12,000 LRA members (along with approximately another 14,000 members of other armed groups) have received amnesty to date under the law. [16] By many accounts Dominic Ongwen is eligible for amnesty under the Amnesty Act as he has willingly surrendered.

The only case to the date related to the conflict in northern Uganda that has been brought before the International Crimes Division is against Thomas Kwoyelo, a former LRA member captured in Congo in March 2009, who is charged with war crimes. Kwoyelo's trial was stopped after Uganda's Constitutional Court concluded that he had been treated unequally under the country's Amnesty Act and ordered his release. He remains in prison while an appeal of the Constitutional Court ruling is pending before Uganda's Supreme Court. [17]

7. Why is the ICC not prosecuting Ongwen for international crimes committed by the LRA in other States Parties to the ICC, as in CAR or DRC?

The LRA has allegedly committed grave crimes outside of Uganda as well, including in the Democratic Republic of Congo, the Central African Republic and South Sudan. Nonetheless, the ICC has focused its investigation in Uganda, due to the State's referral of the situation in 2003 establishing the Court's jurisdiction. The ICC must establish jurisdiction over crimes in each State where investigations occur, though jurisdiction of the Court already exists in CAR and DRC due to separate situations previously referred. Thus far, no national proceedings have occurred to bring about justice for LRA crimes in the wider region.

8. Can Ongwen be charged if he was a child soldier?

The ICC Statute does not provide jurisdiction over crimes committed by a person under the age of 18 years. Dominic Ongwen, however, is being suspected of international crimes he allegedly committed as an adult. Mr Ongwen`s status as a child abductee could be a mitigating factor during sentencing in the event of trial and conviction, and may also be relevant to his legal defence.

P.S.

FIDH

FHRI - Foundation for Human Rights Initiative

Footnotes

[1] Notice of intended charges against Dominic Ongwen, ICC-02/04-01/15, 18 September 2015, available at: <https://www.icc-cpi.int/iccdocs/doc/doc2067716.pdf>, para. 9

[2] Notice of intended charges against Dominic Ongwen, ICC-02/04-01/15, 18 September 2015, available at: <https://www.icc-cpi.int/iccdocs/doc/doc2067716.pdf>

[3] Warrant of arrest for Dominic Ongwen, 8 July 2005, ICC-02/04-01/05-57, para. 5, available at: <https://www.icc-cpi.int/iccdocs/doc/doc97201.pdf>

[4] Notice of intended charges against Dominic Ongwen, ICC-02/04-01/15, 18 September 2015, available at: <https://www.icc-cpi.int/iccdocs/doc/doc2067716.pdf>, para. 4

[5] Prosecutor of the International Criminal Court opens an investigation into Northern Uganda, ICC-OTP-20040729-65, available at: https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20northern%20uganda.aspx

[6] ICC, Situation in Uganda, available at: https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/Pages/situation%20index.aspx

[7] ICC-02/04-01/05-T-10-ENG ET, p. 14, lns. 7-8, available at: <https://www.icc-cpi.int/iccdocs/doc/doc1908336.pdf>

[8] Notice of intended charges against Dominic Ongwen, ICC-02/04-01/15, 18 September 2015, available at: <https://www.icc-cpi.int/iccdocs/doc/doc2067716.pdf>

[9] ICC, Ongwen case: Confirmation of charges hearing postponed to 21 January 2016, 6 March 2015, ICC-CPI-20150306-MA179, available at: https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/ma179.aspx

[10] FIDH report "Five Myths about Victim Participation in ICC Proceedings", December 2014, page 19: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/16592-five-myths-about-victim-participation-in-icc-proceedings>.

[11] Pre- Trial Chamber II, Third Report on Applications to Participate in the Proceedings, No. ICC-02/04-01/15, 18 November 2015, p. 4, available at: <https://www.icc-cpi.int/iccdocs/doc/doc2145620.pdf>

[12] Pre-Trial Chamber II, Decision on requests to postpone the hearing on the confirmation of charges, ICC-02/04-01/15, 12 January 2016, available at: <https://www.icc-cpi.int/iccdocs/doc/doc2189932.pdf>

[13] Pre-Trial Chamber II, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15, 27 November 2015, para. 20.

[14] Pre-Trial Chamber II, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15, 27 November 2015, para. 18, available at: <https://www.icc-cpi.int/iccdocs/doc/doc2167343.pdf>

[15] For more information on our organisations views on legal representation for victims, legal aid and the ReVision project, please consult "FIDH Recommendations to the 14th Assembly of States Parties to the ICC Statute", November 2015, in particular part III (<https://www.fidh.org/en/issues/international-justice/fidh-recommendations-to-the-14th-assembly-of-states-parties-to-the>), and FIDH report "Five Myths about Victim Participation in ICC Proceedings", December 2014: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/16592-five-myths-about-victim-participation-in-icc-proceedings>.

[16] Beth Van Schaack, Ongwen Onward to the Hague: Lord's Resistance Army commander to face justice, January 2014, available at: <https://www.justsecurity.org/author/vanschaackbeth/>

[17] Cyanne E. Loyle, Amnesty, the ICC and Complications with the Dominic Ongwen Case, 23 March 2015, available at: <http://politicalviolenceataglance.org/2015/03/23/amnesty-the-icc-and-complications-with-the-dominic-ongwen-case/>