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Feminist Judgments at the International Criminal Court: The Case of Dominic Ongwen

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Abstract:

The Feminist Judgment Method has emerged in recent decades as a powerful analytical framework to critically consider and evaluate common legal practice and judgment writing. The Feminist Judgment Method empowers the author to engage in an imaginative practice whereby they take the position of the Judge, with all the evidence that was presented before the original court, and subsequently re-write the judgment. The result is a new judgment, which is legally possibly within the temporal and geographical space of the original judgment, but with a feminist lens which highlights the inherent masculine bias of the law, allowing for the future potential to disrupt said law.

This work, which is part of a larger project as part of the Cambridge University Press ‘Feminist Judgement Series’, *Feminist Judgments: Re-imagining the International Criminal Court*, reimagines part of the judgment of Mr. Dominic Ongwen. Mr. Ongwen was convicted by Trial Chamber IX of the International Criminal Court on 4 February 2021 of 61 counts of war crimes and crimes against humanity. Mr. Ongwen was found guilty of two counts of forced pregnancy as both a war crime and a crime against humanity. While it was the first conviction of forced pregnancy, the original judgment only briefly considered the gravity and harms of this crime. This work utilises evidence, which was available to Trial Chamber, including the testimony of the two victims as well as that of expert witnesses, to properly situate this crime and its impact as well as place the victims at the forefront of consideration. This work operates to alert academics, judicial officers and future legal chambers to the broad scope that can and should be contemplated when deliberating on the crime of forced pregnancy.

KEYWORDS: International Criminal Court, International Criminal Law, Uganda, Dominic Ongwen, forced pregnancy

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SITUATION IN UGANDA

IN THE CASE OF THE PROSECUTOR v. DOMINIC ONGWEN

Sentencing Decision

I. PROCEDURAL HISTORY¹

1. On 4 February 2021 Trial Chamber IX delivered its judgment in Mr Ongwen's case. It convicted him on 61 counts of war crimes and crimes against humanity committed in Uganda between 1 July 2002 and 31 December 2005, during an armed conflict between the Lord's Resistance Army and the Ugandan armed forces.
2. The conviction encompassed war crimes (intentionally attacking the civilian population; rape; sexual slavery; forced pregnancy; murder and attempted murder; torture; pillage; outrages on personal dignity; conscripting children under the age of 15 into an armed group and using them to participate actively in hostilities; pillage; and destruction of property) and crimes against humanity (rape; sexual slavery; forced pregnancy; murder and attempted murder; torture; enslavement; persecution on political grounds; and inhumane acts including forced marriage).
3. Following conviction by Trial Chamber IX, the sentencing proceedings were assigned to this Chamber, Trial Chamber IX(B).

II. SENTENCING RATIONALES

¹ The ideas in this brief were informed by the *amicus curiae* brief filed in the *Ongwen* case on behalf of the Global Justice Center, Women's Initiatives for Gender Justice, Amnesty International, and Rosemary Grey. We acknowledge, in particular, the intellectual contributions to that brief by Akila Radhakrishnan, Alix Vuillemin and Matthew Cannock. *Ongwen*, Amici Curiae Observations on the Rome Statute's definition of 'forced pregnancy' by Dr Rosemary Grey, Global Justice Center, Women's Initiatives for Gender Justice and Amnesty International (ICC-02/04-01/15-1938), Appeals Chamber, 23 February 2021; *Ongwen*, Transcript of Appeal Hearing (ICC-02/04-01/15-T-264-ENG), 15 February 2022, 68-73 and 94.

4. An in previous ICC sentencing decisions, the Chamber will offer observations on the rationales for sentencing. In this Chamber's view, the strongest rationale for imposing penal sanctions on individuals who have been convicted of one or more crimes under the Rome Statute ('the Statute') is to express the international community's condemnation of these crimes. Rather than a means of exacting revenge, penal sanctions recognise the specific ways in which the perpetrator wronged the victims, their families, and communities.² In this way, the sentence provides access to truth and justice as well as a unified international denunciation of such crimes.³ The process of calculating the sentence must therefore include recognising the specific harms that resulted from each of the perpetrator's crimes.⁴
5. As recognised in the Statute's preamble, the prosecution and sentencing of individuals may also contribute the prevention of crimes. At the specific level, the sentence may discourage the convicted person against recidivism. Access to rehabilitative services such as education and healthcare, particularly if such services have been inaccessible to the individual prior to ICC custody, may assist in decreasing the likelihood of recidivism. At the general level, sentencing aims to dissuade prospective perpetrators from committing similar crimes.⁵
6. The Chamber acknowledges that prosecuting and sentencing individual actors does not ameliorate the structural factors that contribute to the commission of crimes, including economic inequalities, postcolonial legacies, and entrenched beliefs about the inferiority of 'others' along ethnic, racialized and gendered lines. Sentencing is therefore not an effective deterrent in isolation; the structural causes of violence must also be addressed.

III. SENTENCING PRINCIPLES

² For a similar view, see: Katanga Sentencing Decision [38]

³ Ntaganda Sentencing Decision [10]

⁴ For a similar view, see Katanga Sentencing Decision [38]

⁵ Ntaganda Sentencing Decision [10]

7. In determining an appropriate penalty, the Chamber is directed by articles 76 to 78 of the Statute and rules 145 to 148 of the Rules of Procedure and Evidence ('the Rules').⁶ These provisions direct the Chamber to examine the gravity of a crime and the personal circumstances of the accused,⁷ then any mitigating and/or aggravating factors present.⁸ The Chamber notes that factors used to determine the gravity of the crime will not be 'double counted' as aggravating factors.⁹ Discretion is granted to the Chamber in determining the scope and weight of the relevant factors.¹⁰
8. The available penalties include imprisonment for a maximum of 30 years, or for life 'when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.'¹¹ Capital or corporal punishment are impermissible under the Rome Statute.
9. In the present decision, the Chamber will first summarise the parties' submissions, and then analyse *each specific crime* of which Mr Ongwen was convicted, before turning to those aggravating and mitigating circumstances that apply to the *totality* of his crimes.

IV. THE PARTIES' SUBMISSIONS

10. Trial Chamber IX granted 4095 victims standing to participate in Mr Ongwen's trial. Their legal representatives jointly argued that the crimes attributed to Mr Ongwen are 'extremely grave' and warrant a sentence of life imprisonment.¹² In relation to sexual and gender-based crimes, the victims' legal representatives submit that the:

⁶ The Chamber notes that rules 146-148, which allow for fines and orders of forfeiture, do not apply in this case due to the indigence of Mr Ongwen.

⁷ ICCSt, Art. 78(1).

⁸ ICCSt, Art. 78(1), Rule 145(2)

⁹ Al Mahdi Sentencing judgment [77]; Katanga Sentencing Judgment [43]; Ntaganda Sentencing Judgment [14]

¹⁰ Rule 145(2)(b)(vi) allows the Chamber to consider as aggravating circumstances 'other circumstances which, although not enumerated [in the same Rule], by virtue of their nature are similar to those mentioned'. See also *Lubanga* Appeal Sentencing Judgment, para. 43.

¹¹ RS Art. 77(1). The Chamber notes that Art. 77(2) and rules 146-148, which allow for fines and orders of forfeiture, do not apply in this case due to the indigence of Mr Ongwen.

¹² Ongwen Victims Sentencing Brief [116]

particularly repugnant circumstances in which acts of rape; sexual slavery; torture, outrages upon person dignity and enslavement considered under the ambit of sexual violence; forced marriage; and forced pregnancy ... carry a specific high threshold of gravity.¹³

11. In particular, some victims were ‘satisfied and relieved’ that forced pregnancy and forced marriage – neither of which had previously been prosecuted in the ICC – were recognised in this case.¹⁴ In their view, forced pregnancy and forced marriage are ‘very serious crimes worth of life imprisonment in light of the tremendous harm suffered by the victims, especially the harm suffered through the children born out of rape.’¹⁵ The victims emphasise the ‘immensely challenging’ situation of these children, as well as ‘the difficult situation their mothers are confronted with, facing rejection from their families and communities’, many of whom ‘now live on the margins of the society with all the associated psychological, material and financial difficulties.’¹⁶
12. The Prosecution submits that the crimes committed by Mr Ongwen would ordinarily warrant a sentence at the ‘highest range available’ under the Statute’.¹⁷ For sexual and gender-based crimes, the Prosecution proposes a sentence of 30 years for each crime (to be served concurrently). This proposal stems from the ‘inherent gravity’ and ‘long lasting’ effect of the crimes perpetrated against Mr Ongwen’s so called ‘wives’ as well as the indirect victims within his brigade.¹⁸ However, considering the defendant’s personal circumstances, particularly his status both as a victim and a perpetrator,¹⁹ it recommends a one-third reduction in the total joint sentence, resulting in 20 years’ imprisonment.²⁰

¹³ Ongwen Victims Sentencing Brief [43]

¹⁴ Ongwen Victims Sentencing Brief [104]

¹⁵ Ongwen Victims Sentencing Brief [104]

¹⁶ Ongwen Victims Sentencing Brief [44]

¹⁷ Ongwen Prosecution Sentencing Brief [1]

¹⁸ Ibid, Ongwen Prosecution Sentencing Brief [10]-[12], [21], [26], [156].

¹⁹ Ongwen Prosecution Sentencing Brief [156]

²⁰ Ongwen Prosecution Sentencing Brief [156]

13. The Defence submits that Mr Ongwen’s ‘unique circumstances’ warrant a sentence of no longer than 10 years, (if, indeed, their client is not acquitted on appeal). These circumstances, according to the Defence, include Mr Ongwen’s mental defect, the harms suffered by him as an abducted child soldier, his willingness to undergo traditional justice mechanisms in Uganda, his family situation and good deeds with the LRA.²¹ The Defence asks the Chamber to consider rehabilitation and reconciliation above retribution, arguing that deterrence should not be considered in this case.²²
14. Informed by these submissions, the Chamber will now analyse the gravity and relevant circumstances of each specific crime.

V. SPECIFIC CRIMES

[...]

Forced Pregnancy

(a) Evidentiary considerations

15. The Chamber recalls that Mr Ongwen was convicted of forced pregnancy based on evidence that he impregnated and unlawfully confined two women who had been assigned to him as ‘wives’. To protect their privacy, these two women are identified as P-0101 and P-0214 in the court records.
16. Neither witness testified at trial, as would ordinarily happen for key witnesses in the ICC. Rather, Trial Chamber IX viewed a video-recording of the testimony that Mr Ongwen’s forced ‘wives’ (including P-0101 and P-0214) had provided during the pre-trial proceedings. This measure was taken at the request of the Prosecutor, in order to preserve the evidence and to limit the risk of re-traumatising the witnesses by reducing the number of times they had to testify.²³

²¹ Ongwen Defence Sentencing Brief [29]; [52]; [85]; [16]-[128]; [183]

²² Ongwen Defence Sentencing Brief [4]-[5]; [14]-[21].

²³ ICC, *Ongwen*, Public redacted version of “Second Prosecution application to the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute”, Office of the Prosecutor, ICC-02/04-01/15-

17. This is the first conviction of forced pregnancy by an international court. This Chamber recognises the value in a careful analysis of the many harms that can and did occur as a result of this crime. The copious evidence of harms proffered throughout the case records, including the testimony of P-0101 and P-0214 greatly enables this endeavour.
18. Notwithstanding this wealth of evidence, certain questions about P-0101 and P-0214's experiences of forced pregnancy remain unanswered. To fill that information gap, it would have been apt to seek further testimony from these two witnesses earlier in the proceedings.²⁴ However, mindful of our duty to protect the wellbeing of victims and witnesses,²⁵ and noting that calling P-0101 and P-0214 back to answer further questions about sexual violence might cause them distress,²⁶ this Chamber decided *not* to recall these witnesses to give further evidence at the sentencing phase. Instead, we will respond to the gaps in the evidence by raising questions that merit further consideration in subsequent cases where the crime of forced pregnancy is charged.

(b) The forced pregnancies in this case

19. Mr Ongwen was convicted of forced pregnancy as both a war crime and a crime against humanity on the basis that between July 2002 and December 2005, he confined P-0101 and P-0214, both whom he had impregnated, with the intent of continuing to subject them to grave violations of international law (forced marriage, torture, rape and sexual slavery).²⁷ The charges of forced pregnancy were limited to three pregnancies within

310-Red, 27 May 2016; ICC, *Ongwen*, Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute, Trial Chamber IX, ICC-02/04-01/15-520, 10 August 2016.

²⁴ Article 69(3) of the Statute gives the Chamber the authority to request the submission of additional evidence that is considered necessary for the determination of the relevant facts.

²⁵ ICCst, Art. 68(1).

²⁶ ICC, *Ongwen*, Public redacted version of "Decision on the "Second Prosecution application to the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute", Pre-Trial Chamber II, 12 October 2015 (public redacted version dated 23 March 2016), ICC-02/04-01/15-316-Red [12].

²⁷ *Ongwen* Judgment [3061]. Article 7(2)(f) of the Statute defines 'forced pregnancy' as the unlawful confinement of a victim who has been made forcibly pregnant with one of two specific intents: to affect the ethnic composition of any population, or to carry out other grave violations of international law. We note that this article refers to the victim of forced pregnancy as a 'woman'. However, the Statute's drafting history reveals no intention to exclude other victims who are capable of pregnancy, including girls of any age, or non-binary, intersex, or trans people. Moreover, Article 21(3) requires that the Statute must be applied and interpreted in accordance with 'internationally recognised human rights' and without any adverse distinction founded on grounds including age, gender identity, or intersex status. For these reasons, the Chamber appropriate will describe a person subjected to forced pregnancy using the gender-neutral term 'victim'.

the temporal scope of the charges: P-0101's two pregnancies between 2002 and 2004, which resulted in the birth of a daughter and a son, and P-0214's pregnancy in 2002, which resulted in the birth of a daughter.²⁸

20. Both women endured extreme violence in connection to their pregnancies. P-0101 was abducted in August 1996 by Mr Ongwen when she was aged 15.²⁹ He immediately claimed her as his 'wife' and raped her that night.³⁰ This initial rape is illustrative of the circumstances by which P-0101 later became forcibly pregnant. In her words, 'immediately the escorts held my hands and they forced me...He [Mr Ongwen] held me forcefully and he slept with me'³¹ and "He told me if I'm still resisting, can't I see the---what is there beside me, the gun?".³²
21. P-0101 remained with Mr Ongwen for eight years.³³ Her duties as Mr Ongwen's 'wife' included cooking as well as enduring his repeated sexual assaults. P-0101 was under threat of death if she tried to escape. She explained: 'if you're caught when you're trying to escape, if you are not properly prepared for your escape, you would be killed without mercy, and for these reasons I was scared. People who tried to escape and were killed, I saw this.'³⁴
22. During her eight years with Mr Ongwen, P-0101 conceived three children as a result of sexual assault by him; the first around 1999, the second between 2002 and 2004 and the third in 2004, shortly after her return from the bush when her second daughter was shot and taken during an assault from government armed forces.³⁵

²⁸ Ongwen Judgment [2069]

²⁹ Trial Hearing Transcript T 13 Mon 9 November 2015 page 16 lines 11 - 20

³⁰ Trial Hearing Transcript T 13 Mon 9 November 2015 page 16 lines 11 - 20

³¹ Trial Hearing Transcript T 13 Mon 9 November 2015 page 18 line 2 - 9

³² Trial Hearing Transcript T 13 Mon 9 November 2015 page 50-51 lines 24 - 1

³³ Trial Hearing Transcript T13 Mon 9 November 2015 page 9 line 8. There is conjecture as to whether P-0101 was released or escaped.

³⁴ Trial Hearing Transcript T13 Mon 9 November 2015 page 38 lines 8 - 17; Trial Hearing Transcript T13 Mon 9 November 2015 page 18-20; Trial Hearing Transcript T13 Mon 9 November 2015 page 44 lines 11 - 17

³⁵ Trial Hearing Transcript T13 Mon 9 November 2015 page 16 lines 14 - 16; Ongwen Judgment [2088].

23. P-0214 was abducted by LRA forces in June 2000 when she was aged 17.³⁶ She was assigned as a ‘wife’ to Mr Ongwen by LRA leader Joseph Kony.³⁷ Thereafter, P-0214 endured repeated sexual assaults by Mr Ongwen under threat of physical force. In her words, this sexual activity ‘wasn’t my choice’.³⁸ Escape was virtually impossible. P-0214 explained: ‘I could not escape as his [Mr Ongwen’s] security guards guarded me well. They were all armed. And even if you escaped from the LRA, the Dinka and the Lutugu [other groups] in Sudan would kill you. I heard that they had killed people who fled the LRA’.³⁹ P-0214’s chance at freedom eventually came in 2010, when she escaped with another of Mr Ongwen’s ‘wives’.⁴⁰
24. During her ten years with Mr Ongwen, P-0214 conceived four times: in 2005 she delivered a child (sex unspecified); in 2007 she delivered a daughter, who died after a month; in 2007 her third pregnancy ended by miscarriage; and in 2009 she gave birth to a son.⁴¹

(c) *Harm caused by the crimes*

25. The Chamber is cognisant that for some people, it is difficult to conceive of a pregnancy that results in a new life as a source of harm, even if that pregnancy was forced. Yet as the following analysis shows, forced pregnancy can result in serious and extensive harms. As well as being a grave violation of the victim’s dignity and autonomy, this crime can cause serious physical, psychological, social, cultural, economic and legal harms. The fact that it can *also* result in a new life — a life which is inherently valuable — does not erase those harms. Nor does it relieve this Court of its responsibility to punish the perpetrator. The fact that a victim of forced pregnancy may love the resultant child in no way dilutes the wrongdoing by the perpetrator.

³⁶ Ongwen Judgement [2014]

³⁷ Trial Hearing Transcript T15 Wed 1 November 2015 page 36 line 9

³⁸ Trial Hearing Transcript T15 Wed 1 November 2015 page 25 line 21; Trial Hearing Transcript T15 Wed 1 November 2015 page 26 line 10

³⁹ Trial Hearing Transcript T15 Wed 1 November 2015 page 26 lines 10 - 14

⁴⁰ Ongwen Judgment [211]

⁴¹ Trial Hearing Transcript T15 Wed 11 November 2015 pages 29 - 30

(i) Violation of personal and reproductive autonomy

26. Trial Chamber IX observed that the crime of forced pregnancy is grounded in the right to ‘personal and reproductive autonomy.’⁴² This statement is correct. The criminalisation of forced pregnancy protects the right of every individual to exercise agency over their body, their fertility and their sexuality. The protection of reproductive autonomy was the rationale for the inclusion of the crime in the Rome Statute. The recognition of this crime in Rome Statute and other international instruments,⁴³ and the ratification of the Statute by numerous states including Uganda, signals the importance placed on rights to reproductive autonomy by the international community.
27. Reproductive autonomy is a key aspect of human dignity. Rights pertaining to reproductive health and reproductive autonomy are protected in a range of international and regional human rights instruments,⁴⁴ and are the birthright of every individual regardless of their sex, gender, nationality, or culture.
28. By subjecting P-0101 and P-0214 to forced pregnancy, Mr Ongwen violated their rights to personal and reproductive autonomy. As P-0101 explained: ‘When I became pregnant with my three children to Ongwen, I did not think I had a choice as to whether I would become pregnant or not’.⁴⁵
29. The state of pregnancy was used as a control mechanism by Mr. Ongwen⁴⁶ It was ‘understood that pregnancy made it more difficult for women to escape’.⁴⁷ Whilst pregnant, P-0101 and P-0214 were physically confined and monitored.⁴⁸ They were

⁴² Ongwen Judgment [2717]

⁴³ Including the 1993 Vienna Declaration and Programme of Action, [38]; 2019 Draft articles on Prevention and Punishment of Crimes Against Humanity, Art. 2(g).

⁴⁴ Human Rights Committee, General Comment 36 (2018), [8]; Proclamation of Teheran, adopted at the International Conference on Human Rights, Teheran, 1968, Art. 16; Convention on the Elimination of All forms for Discrimination Against Women, Art. 10 and 16(1)(e); Committee on Economic, Social and Cultural Rights, General Comment 22 (2016), [1]; CRC Committee, General Comment 20 on the implementation of the rights of the child during adolescence, UN Doc. CRC/C/GC/20, 2016, [60]; CEDAW, General Recommendation 21 on equality in marriage and family relations, UN Doc. A/49/38, 1994, para 22; Committee on Economic, Social and Cultural Rights, General Comment 22 (2016), [63]; 2003 Protocol to the African Charter on Human and Peoples’ Rights (Rights of Women in Africa), (Maputo Protocol), Art. 14.

⁴⁵ Trial Hearing Transcript T13 Mon 9 November 2015 pg. 21

⁴⁶ Ongwen Prosecution Closing Brief [167]

⁴⁷ Ongwen Prosecution Closing Brief [174]

⁴⁸ Trial Hearing Transcript T27 Wed 7 December 2016 pg. 16; Ongwen Judgment [3058]-[3059]

‘placed under heavy guard’ and were unable to leave, and they were ‘told or came to understand that if they tried to escaped they would be killed’.⁴⁹ There was no access to family planning or contraceptives and abortive attempts and successes were severely punished.⁵⁰

(ii) Physical harms

30. P-0101 and P-0214 endured severe and prolonged physical harm as a result of forced pregnancy. The relevant pregnancies were achieved through sexual assault.⁵¹ During and after these pregnancies, critical medical assistance and perinatal care was limited. P-0214 experienced pre-birth complications close to her due date and had to endure these in the bush with only the support of the other ‘wives’ and Mr Ongwen.⁵² During the delivery, P-0214 stated ‘on that day that I had my baby there was no doctor, I was only with the girls in his household’.⁵³
31. While pregnant, P-0101 and P-0214 were subjected to physically demanding domestic duties⁵⁴ as well as the constant threat and use of physical punishments for perceived failures.⁵⁵ P-0214 was beaten with a machete while pregnant for being ‘too slow to bring’ the bathing water.⁵⁶ While P-0214 was pregnant, Mr Ongwen continued to ‘rape her, torture her, sexually enslave her, and enslave her for domestic purposes’.⁵⁷
32. The available evidence does not divulge whether P-0101 or P-0214 experienced other pregnancy-related health issues disclosed by other victims including, birth-related complications, infertility, painful intercourse, and chronic pain,⁵⁸ , although we are aware that P-0214 endured a miscarriage outside the charged period.⁵⁹ In future cases,

⁴⁹ Ongwen Judgment [3058]

⁵⁰ Prosecution Closing Brief [174]

⁵¹ Ongwen Decision Transcript T259 Thur 4 Feb 2021, 21 -22; Victims Closing Brief [101]

⁵² Trial Hearing Transcript T15 Wed 11 November 2015 pg. 35

⁵³ Trial Hearing Transcript T15 Wed 11 November 2015 pg. 29

⁵⁴ Ongwen Judgment [208] including cooking, laundry fetching and chopping wood and working in the garden

⁵⁵ Trial Hearing Transcript T27 Wed 7 December 2016 page 22 line 14 – 18; Ongwen Judgement[208], [3033]

⁵⁶ Trial Hearing Transcript T27 Wed 7 December 2016 pg. 22 lines 14 to 18

⁵⁷ Trial Hearing Transcript T27 Wed 7 December 2016 page 22-23

⁵⁸ Victims closing brief footnote 557

⁵⁹ Trial Hearing Transcript T15 Wed 11 November 2015 pages 29-30

we urge the parties and Chamber to ask victims of forced pregnancy further questions about physical harms, so that these harms can be addressed in the sentencing decision.

(iii) Psychological and emotional harm

33. Testimony provided by P-0101 and P-0214 reveals that they experienced serious psychological and emotional harm during their captivity, including during their pregnancies. Fear and intimidation were employed to keep them compliant.⁶⁰ P-0214 described being threatened when she refused to have sexual intercourse with Mr Ongwen: ‘He told his security guards to get the sticks. The security guards scared me with the sticks so I went to Ongwen’s place’.⁶¹ This threatening environment was described by P-0101 as extending even when Mr Dominic Ongwen was physically injured: ‘even if he was still weak physically, he could still use his mouth to give instructions or orders because if a superior gives instructions, you have to go and follow what he says’.⁶²
34. The continuation of psychological trauma once the victim is released is evidenced by P-0101’s concern about speaking with ICC investigators. She stated, ‘During the last interview the reason that I did not want to answer questions about Ongwen is because I fear him and thought he might kill me if he came to learn what I was saying.’⁶³
35. We note that the psychological burden on the victims of forced pregnancy can extend ‘beyond the obvious physical effects of pregnancy and childbearing’.⁶⁴ The continual use of the word ‘wife’ to denote P-0101, P-0214 and the other women who were assigned to Mr Ongwen further perpetuates the continuing bond between the defendant and victims.⁶⁵ The situation can be even more complex in cases of forced pregnancy, when the perpetrator is the father of the resultant child and continues to be present in the victims’ lives, as is the case with P-0101 and P-0214.⁶⁶ For example, the Chamber

⁶⁰ Ongwen Judgment [3029]

⁶¹ Trial Hearing Transcript T15 Wed 11 November 2015 page 22 lines 9 - 12

⁶² Ongwen Judgment [1039]

⁶³ Trial Hearing Transcript T13 Mon 9 November 2015 page 46 lines 1 - 8

⁶⁴ Ongwen Judgment [2748]

⁶⁵ Authors’ note: This sentence is adapted from the real Ongwen sentencing decision, at para. 292, although in the imaginative world in which this feminist judgment occurs, the real sentence does not exist.

⁶⁶ Trial Hearing Transcript T27 Wed 7 December 2016 pg. 13

is aware that Mr Ongwen attempted to make financial payments to P-0214,⁶⁷ and the defence, prosecution, registry and victims' legal representative have facilitated contact between Mr Ongwen and his children, with the consent of their mothers.⁶⁸ The victim may even express a degree of affection for the perpetrator, as P-0214 did at points in her testimony.⁶⁹

36. Expert testimony in the case further indicated that victims of sexual and gender-based crimes perpetrated by the LRA often experienced 'PTSD, depression, anxiety and dissociation, loss of perceived control, shame, increased sexual risk/vulnerability'⁷⁰ and that 'When an individual does not perceive that she or he is safe, basic daily activities such as feeding, sleeping and self-care are undermined and dysregulated... higher level pursuits such as taking care of others, gaining employment, and pursuing an education are also threatened and rendered more challenging, if not impossible.'⁷¹ The available evidence does not confirm whether P-0101 or P-0214 experienced these specific harms. In future cases, further evidence on the psychological impact of forced pregnancy on the victims would assist in sentencing.

37. There was also extensive evidence in this trial about the experience of *cen*, which in Acholi culture, is a 'malevolent emanation that comes from those who have experienced or perpetrated violent acts.'⁷² The Chamber did not receive evidence that P-0101 and P-0214 experienced this psychological harm. We suggest that in future cases, there is a fuller examination of psychological harms resulting from forced pregnancy, including harms that are experienced in the victims' particular spiritual context.

⁶⁷ Public Redacted Version of "Defence Response to the Prosecution Filing ICC-02/04-01/15-482-Conf", filed on 4 July 2016 [42]

⁶⁸ Trial Hearing Transcript T261 Thurs 15 April 2021 page 39 lines 11 to 21; CLRV's Response to Defence Request to Lift Communication Restrictions Placed Upon Mr Ongwen [23(iv)]

⁶⁹ Trial Hearing Transcript T27 Wed 7 December 2016 page 13 line 11. See also Trial Hearing Transcript T15 Wed 11 November 2014 pg. 41; Ongwen Judgment [2519]

⁷⁰ Victims Closing Brief [109]

⁷¹ Victims Closing Brief [210]

⁷² Trial Hearing Transcript T15 Wed 11 November 2014 pg. 41

(vi) *Economic harms*

38. Where forced pregnancy results in a child, and therefore caring responsibilities, a significant economic burden can be placed on the victim. Not only do parental responsibilities limit the victims' earning capacity, they also generate additional costs.
39. For example, according to the Defence, almost all of Mr. Dominic Ongwen's children are school-going age or are quickly approaching this age.⁷³ Ugandan primary school costs are on average around UGX 100,000 per school quarter (€25.27) and this cost increases as the children advance through the school system.⁷⁴ UGX 100,00 in education costs is relatively expensive for the average household in the Acholi region of Uganda.
40. The Chamber is aware that in March 2016, while in ICC custody, Mr Ongwen attempted to contribute financially to some of his 'wives'⁷⁵. However, any such contribution will be limited. At the commencement of IC proceedings he was indigent.⁷⁶ His current income in detention stands at €25 per week.⁷⁷ In this context, the Chamber is concerned that the financial burden of raising and educating the children that resulted from forced pregnancy may fall primarily to P-0101 and P-0214. The Chamber will further consider the provision of childcare in its reparations order in this case to address this financial burden and to assist in removing further barriers to employment in the immediate future.
41. When assessing the economic consequences of forced pregnancy, it is also relevant to consider how this crime affected the victims' education. In Uganda, education attainment is associated with economic success, better health, and employment

⁷³ Ongwen Defence Sentencing Brief [142]

⁷⁴ Ongwen Defence Sentencing Brief [144]

⁷⁵ Public Redacted Version of 'Defence Response to the Prosecution Filing ICC-02/04-01/15-482/Conf filed on 4 July 2016 https://www.icc-cpi.int/CourtRecords/CR2016_04898.PDF [38]; Decision on Prosecution 'Request for an order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen' – [17] Single Judge ordered the payments to stop in case they tainted witnesses

⁷⁶ Confidential ex parte Defence Only

Defence Request for the Interim Release of Dominic Ongwen https://www.icc-cpi.int/CourtRecords/CR2015_20739.PDF [12]

⁷⁷ Public Redacted Version of 'Defence Response to the Prosecution Filing ICC-02/04-01/15-482/Conf filed on 4 July 2016 https://www.icc-cpi.int/CourtRecords/CR2016_04898.PDF [37]

opportunities. P-0101 and P-0214 did not have these privileges. Formal education commences for children in Uganda between the ages of six and eight, with seven years of primary school, and six years of secondary school.⁷⁸ P-0101 was abducted when she was in primary 4,⁷⁹ and P-0214 in primary 7⁸⁰

42. The Chamber did not hear evidence as to how P-0101 and P-0214's lost educational opportunities affected their economic status, aside from the fact that P-0214 has been able to 'find work and survive, but not thrive'.⁸¹ However, we were presented with evidence that, in general, time spent 'in the bush' placed victims in a worse economic position than their peers who were not abducted, and were therefore able to finish their education and gain employment without mental and physical trauma.⁸² Regardless, the abduction and confinement of P-0101 and P-0214 immediately severed their educational opportunities. In future cases, we suggest that evidence is led on the impact of forced pregnancy on the victims' education, and subsequent earning capacity, noting that in some countries, education is legally and/or practically inaccessible during and after pregnancy.⁸³

43. As a final note in respect to the gravity of the crimes, the Chamber would like to make some recommendations regarding future forced pregnancy cases. There needs to more detailed examination and specific evidence regarding physical, socio-economic, cultural and psychological harms that are experienced by the victims of forced pregnancy.

(d) Degree of participation by Mr Ongwen

⁷⁸ Trial Hearing transcript T247 Thurs 31 October 2019 Pg 78

⁷⁹ Trial Hearing Transcript T13 Mon 9 November 2015 pg. 16

⁸⁰ Trial Hearing Transcript T15 Wed 11 November 2015 page 5 line 2

⁸¹ Public Redacted Version of 'Defence Response to the Prosecution Filing ICC-02/04-01/15-482/Conf filed on 4 July 2016 https://www.icc-cpi.int/CourtRecords/CR2016_04898.PDF [42] (note: P-0214 was also designated D26-0010).

⁸² Ongwen Judgment [2091] – statement from P-0236 who was abducted for 13 years

⁸³ Ban on school age mothers returning to education – note Uganda repealed such a law but there are currently two African nations which still have such a ban. Others have barriers to return so even if there is a technical right to return, in practice it doesn't exist

44. Mr Ongwen was convicted as the direct perpetrator of forced pregnancy. He personally confined the victims, with the intent of continuing to subject them to sexual and gender-based crimes. He was also the person responsible for forcibly impregnating the victims.⁸⁴ As such, his direct involvement in the crime points in favour of a high sentence.

(e) Aggravating circumstances

45. The Chamber considers three aggravating factors in respect to Mr Ongwen's conviction of forced pregnancy, under Rule 145(2)(b).

(i) Commission of a crime where the victim is particularly defenceless⁸⁵

46. The Chamber heard evidence that within the LRA, young girls were targeted for rape and other sexual crimes because they were believed to be free from HIV/AIDS and sexually transmitted diseases'.⁸⁶ Mr Ongwen himself was frequently involved in the sexual assault of young girls.⁸⁷ These observations apply to P-0101 and P-0214, as detailed above. The victims' youth and gender, and the fact that they faced the threat of punishment or execution for escape made them 'particularly defenceless'.

(ii) Commission of a crime with particular cruelty or with multiple victims⁸⁸

47. Three pregnancies were achieved on two separate victims, utilising physical and psychological methods. The multiplicity of victims and the inherently cruel methods (use of force and threat of force including death threats) used to perform the crime leads this to be a highly significant aggravating factor.

48. We note that while Mr Ongwen's conviction of forced pregnancy is restricted to three incidents occurred between 1 July 2002 and 31 December 2005 DNA evidence links

⁸⁴ This is not always the case with forced pregnancy. To establish this crime, it will suffice if the perpetrator confined the victim with the necessary intent and knowledge. The initial act of forcibly impregnating the victim can be done by a third party.

⁸⁵ Rule 145(2)(b)(iii)

⁸⁶ Trial Hearing Transcript T247 Thurs 31 October 2019 pg. 62

⁸⁷ Trial Hearing Transcript T247 Thurs 31 October 2019 page 62 lines 9-12; T14 Tues 10 November 2015 lines 9-15 page 3

⁸⁸ Rule 145(2)(b)(iv)

Mr Ongwen to nine additional children delivered by his forced ‘wives’.⁸⁹ These nine additional pregnancies were not charged, and therefore do not affect the sentence, but are recognised here a part of the Court’s truth-telling role.

(iii) *Commission of the crime with discriminatory motives*

49. The systemic abduction of girls and women by Mr. Ongwen, coupled with the sexual forced pregnancy and other sexual crimes, illustrates a discriminatory motive, on the grounds of gender. This discriminatory motive constitutes another aggravating factor.

(iv) *Additional aggravating circumstances*⁹⁰

50. Cognisant of the non-exclusive list of aggravating factors under Rule 145(2)(b), the Chamber uses its discretion to consider additional aggravating circumstances, in order to capture the full extent of damage caused by the crime of forced pregnancy.⁹¹

51. The first element worth considering relates to the social harms. Forced pregnancy results in a particular social stigma in Uganda.⁹² Like others who returned from captivity with the LRA, victims of forced pregnancy were referred to as ‘*dwog cen paco*’ (a derogative term for ‘somebody who has come back home’).⁹³ Reintegration was detrimentally affected due to the violations inflicted upon them.

52. The Chamber does not have evidence that these social harms were experienced by P-0101 or P-0214. We urge these potential social consequences of forced pregnancy to be considered as additional aggravating circumstances in future sentencing decisions.

53. The second aspect worth considering relates to the resultant cultural harms to the victims. As many other victims of the LRA, P-0101 and P-0214 were unable to practice

⁸⁹ These include the child delivered by P-0101 in 1999; the two children delivered by P-0214 in 2007 and 2009; the child delivered by P-0999 in 2002; the child delivered by P-0227 between 2005 and 2010; the three children delivered by P-0235 in 2007, 2010 and 2014; the child delivered by P-0236 in 2014.

⁹⁰ Under Rule 145(2)(b)(vi) of the Rules, the Chamber may consider as aggravating circumstances ‘other circumstances which, although not enumerated [in the same Rule], by virtue of their nature are similar to those mentioned’.

⁹¹ See Rule 145(2)(b)(vi) of the Rules. *Prosecutor v Jean-Pierre Bemba Gombo et al*, Appeal Judgement, Case No. ICC-01/05-01/13, Appeals Chamber, 8 March 2018, para. 177. See also Tonny R. Kirabira, Elements of aggravation in ICC sentencing: victim centred perspectives, 13(2) Amsterdam Law Forum (2021) pp. 25-42.

⁹² Victims Closing Brief [105]

⁹³ Trial Hearing Transcript T247 Thurs 31 October 2019 pg. 36

Acholi pregnancy rituals such as observing role changes and the preparation and consumption of specific food.⁹⁴ During labour, a traditional midwife called the *lacele* was not present to supervise and guide through processes such as breastfeeding, nor was there a communal birthing ceremony.⁹⁵

54. Expert evidence from Professor Musisi explained the consequences of the disconnection from cultural practices. Due to the Acholi culture being patrilineal, the mothers and children are unlikely to receive familial claims such as inheritance and fractal rights, which secure the land for Acholi women to work and provide for their family on.⁹⁶

55. In its discretion, the Chamber considers the aggravating factor of cultural harms as relevant within the context of this case. This consideration does not amount to ‘double counting’ as social and cultural circumstances have not been considered for gravity purposes.

(e) Sentencing determination for forced pregnancy

56. As the above analysis shows, forced pregnancy is a crime of the most serious gravity. It violates a person’s dignity, their body, and their reproductive autonomy. The impacts can reverberate through every facet of the victim’s life.

57. In addition, the crime can result in a child, which even if welcomed, can place a heavy economic burden and caring responsibility on the victim. Forced pregnancy, therefore, resonates well after the pregnancy itself. It is a crime whose effects can endure for the duration of the victim’s life, as well as being intergenerational impacts felt by the child.

58. Taking into account the damage caused by the crime, the direct role of Mr Ongwen and the other aggravating factors noted above, and in keeping with previous sentences by this Court for analogous crimes,⁹⁷ it is appropriate to sentence Mr Ongwen to life imprisonment for the crime against humanity of forced pregnancy (Count 58) and the

⁹⁴ Victims Closing Brief [88]

⁹⁵ Victims Closing Brief [88]

⁹⁶ Trial Hearing Transcript T177 Wed 23 May 2018 page 24 lines 10 - 15

⁹⁷ See for example the Ntaganda and Bemba sentences

war crime of forced pregnancy (Count 59), to be served concurrently with his sentence for other crimes.

59. However, this sentence is to be reduced to 30 years taking into account the impact of Mr Ongwen's childhood experiences in the LRA on his moral and psychological development (see Part VI).

VI. MITIGATING FACTORS

60. [...]

VII. DISPOSITION

61. The Chamber pronounces the following sentences for each of the crimes committed by Dominic Ongwen:

- For the crime against humanity of forced pregnancy (Count 58): life imprisonment;
- For the war crime of forced pregnancy (Count 59): life imprisonment;
- [...]

62. Mr Ongwen's total joint sentence would ordinarily be for life. However considering his mitigating circumstances, a reduced sentence of 30 years imprisonment is justified in this case. Time spent in ICC custody will be deducted from this 30 year sentence.

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