The *Ongwen* Judgment: A Stain on International Justice

Beth S. Lyons, Esq.

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Dominic Ongwen was abducted in 1987 when he was 8 or 9 years old by the Lord's Resistance Army ('LRA') in Northern Uganda and trafficked as a child soldier; he made multiple unsuccessful attempts to escape, and finally succeeded in late 2014. He turned himself into the International Criminal Court in 2015 and was prosecuted. Mr. Ongwen's defence was that he was not responsible for the crimes of the LRA, based on his mental illnesses and duress, stemming from his abduction and subsequent coercion and indoctrination under Joseph Kony within the LRA. In February 2021, the ICC's Trial Chamber IX convicted Dominic Ongwen of 61 charges and two modes of liability and he was sentenced to 25 years incarceration.

Ongwen case – A case of “firsts” and staggering numbers

- 1st prosecution of a mentally disabled defendant who was asserting affirmative defence under Article 31 (1)(a) and (d) as complete defences
- 1st case in which culture and spiritualism played a prominent role in the duress defence
- 1st case in in which a single defendant was convicted of 61 crimes and 2 modes of liability, resulting in the longest judgment in ICC history
- 1st case in which a defendant was charged with crimes of which he was a victim (conscription and use of child soldiers)

- Mr Ongwen was charged with 70 counts and 7 modes of liability — the most of any single defendant at the International Criminal Court (ICC). The Confirmation of Charges (‘COC’) decision was 104 pages — the longest for any single defendant before the Court.
- The *Ongwen* case was in the ICC system for 17 years and counting: from the initial arrest warrant in 2005 through the Appeal Judgment in 2022, and currently in the Reparations Phase. When Mr Ongwen, on his own initiative, chose to surrender himself in January 2015, pre-trial proceedings started.
- The Trial Chamber issued a total of 663 decisions in various formats.[1]
- There were 5149 items recognized as formally submitted into evidence.[2]
- The Prosecution presented 116 witnesses. The Defence presented 63 witnesses.[3] The Trial Judgment was 1077 pages; the Appeal Judgment was 611 pages.

[1] TJ, § 25.

[2] *Ibid.*, § 25.

[3] *Ibid.*, §a. 19.

The *Ongwen* case is still one of the most complex cases at the ICC, and presents a myriad of issues which are fundamental to international criminal law and whether international justice can attain legitimacy. The Defence in the *Ongwen* case challenged the default settings of the ICC in respect to its white supremacy, racism, culturalism and lack of access to justice for the disabled.

PRESIDING JUDGE SCHMITT: Thank you very much. Mr Ongwen, please rise. Mr Ongwen, as Presiding Judge of this Chamber, I would like to ask you some questions on behalf of the Chamber. Mr Ongwen, on 21 January 2016, do you remember being in this courtroom for your confirmation hearing?

THE ACCUSED: (Interpretation) Yes, I do recall.

PRESIDING JUDGE SCHMITT: At that hearing, Mr Ongwen, do you remember being asked by a judge if you were fully aware of the charges?

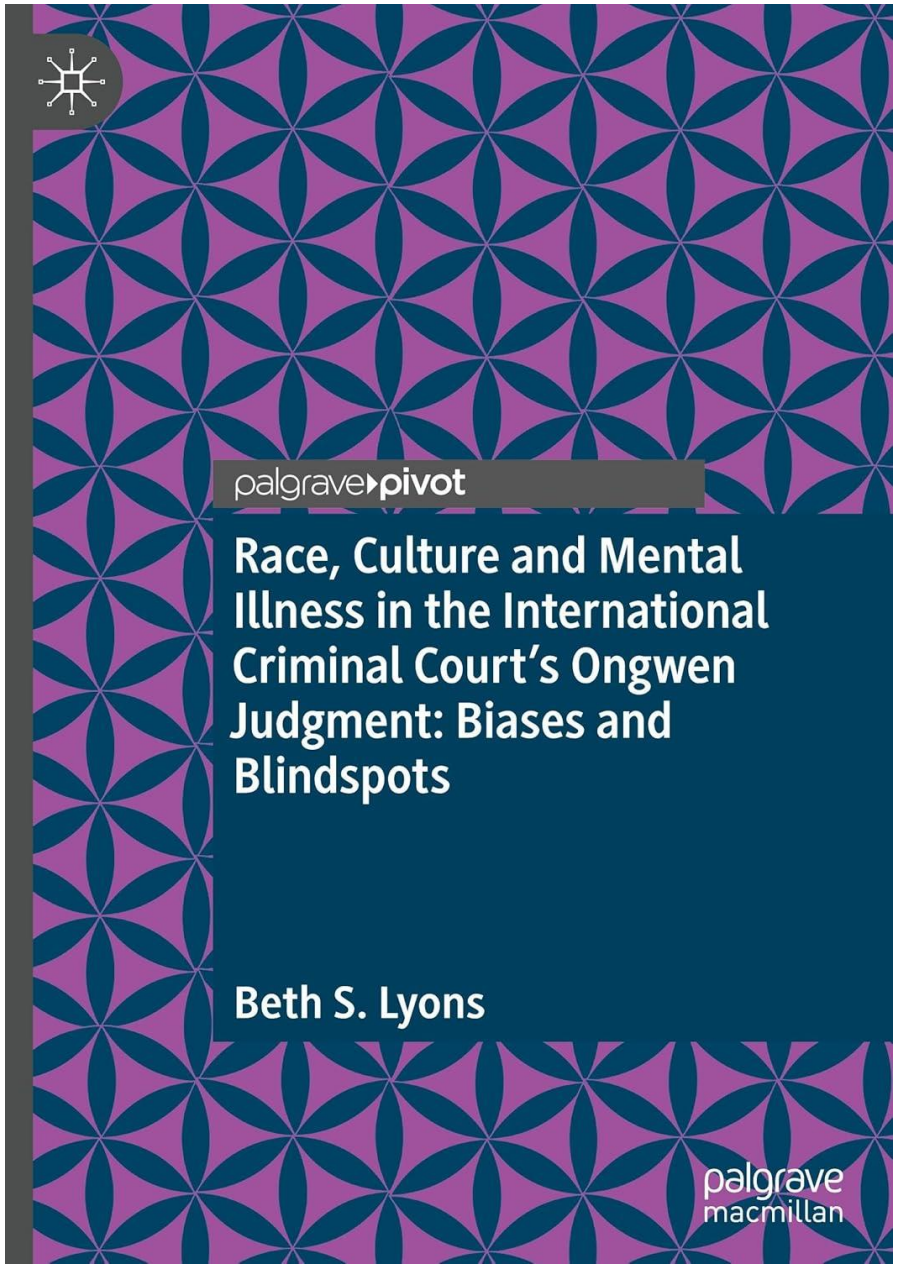
THE ACCUSED: (Interpretation) I do recall being asked that question and I do recall answering that I do not understand the charges against me.

PRESIDING JUDGE SCHMITT: You say you do recall that you answered that you do not understand the charges. Do you recall saying- give it a second thought- that you have, and I quote, said that you "read and understood the document containing the charges"?

THE ACCUSED: (Interpretation) I did understand the document containing the-- I do understand-- I did understand the document containing the charges but not the charges, because the charges-- the charges I do understand as being brought against LRA but not me, because I'm not the LRA. The LRA is Joseph Kony who is the leader of the LRA.

PRESIDING JUDGE SCHMITT: Is it correct that you received the decision confirming the 70 charges also in Acholi?

THE ACCUSED: (Interpretation) Yes, I did receive the charges in Acholi, but I reiterate it is the LRA who abducted people in northern Uganda. The LRA killed people in northern Uganda. LRA committed atrocities in northern Uganda, and I'm one of the people against whom the LRA committed atrocities. But it's not me, Dominic Ongwen, personally, who is the LRA



Race, Culture and Mental Illness in the International Criminal Court's Ongwen Judgment: Biases and Blindspots: Biases and Blind Spots

About the book: **Chapter 1** demonstrates how the Ongwen Trial Chamber's biases and blindspots in respect to race and culture impacted its jurisprudence, resulting in its rejection of the mental illness and duress affirmative defences and any relevance of, and role for Acholi traditional justice in its sentencing.

Chapter 2 focuses on the Trial Chamber's failure to reasonably accommodate Mr. Ongwen, a mentally disabled defendant and provide equal access to justice for him, resulting in a violation of his fair trial rights.

Chief Charles A. Taku, Lead Counsel in *Ongwen*, contributed the Introduction to the book.

ANALYTICAL APPROACH: Biases and Blindspots

If the Lord's Resistance Army were a predominantly white cult, if it functioned in a predominantly white/European country, if the Defence expert psychiatrists from Uganda were white or if the defendant, Mr. Dominic Ongwen, were white - would the Trial Chamber have reached a different conclusion about the affirmative defences of mental disease or defect and duress?

My answer is a resounding "yes."

If any one of these factors of whiteness existed, I contend that the Trial Judgment's approach and conclusions on the mental disease or defect and duress defences would have been favorable to Mr. Ongwen. The result would have been a finding that the Prosecution had not disproved the elements of the affirmative defences for excluding criminal responsibility under Article 31 (1)(a) and (d) beyond a reasonable doubt. Mr. Ongwen would have been acquitted.

Article 31 Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys 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. . .

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

Mr. Ongwen's Diagnoses

Defence Experts: severe depressive illness, dissociative disorder (including dissociative identity disorder); PTSD; and severe suicidal ideation and is at a very high risk of committing suicide. Also depersonalization and derealization associated with dissociation, dissociative amnesia and symptoms of obsessive compulsive disorder

Court-Appointed Expert: Major Depressive Disorder (MDD); PTSD; and Other Specified Dissociative Disorder; labelled MDD and PTSD as severe.

Trial Chamber's Methodology Critique

Conclusion from Trial Judgment on mental disease or defect defence

2580. In line with the above, based on the expert evidence of Professor Mezey, Dr Abbo and Professor Weierstall-Pust, who did not identify any mental disease or disorder in Dominic Ongwen during the period of the charges, further based on the corroborating evidence heard during the trial, which is incompatible with any such mental disease or disorder, and noting that the evidence of Professor Ovuga and Dr Akena cannot be relied upon, the Chamber finds that Dominic Ongwen did not suffer from a mental disease or defect at the time of the conduct relevant under the charges. A ground excluding criminal responsibility under Article 31(1)(a) of the Statute is not applicable.

Methodology Critique Prongs

#1 Blurring the role of Defence Experts (whether treating or forensic psychiatrists)

#2 Failure to apply "scientifically validated methods and tools"

#3 Unexpected contradictions between observations and final conclusions

#4 Failed to use other resources or collateral information to corroborate conclusions

#5 Explanations for excluding malingering were not satisfactory

#6 Reports were general and not focused on relevant period of charges

- The Judgment's "methodology critique" communicates a (not so) veiled criticism that the Defence Experts are incompetent and unqualified and should not be regarded as experts….but this critique is also personal because it is nearly impossible to separate out the "person" from the "professional conduct."
- The race of the Defence Experts, both of whom are Black Ugandans, was never articulated as a factor by the Trial Chamber in reaching its conclusions. But, it becomes an issue in the Chamber's choice and application of criteria for methodology. This is compounded by the Chamber's failure to acknowledge even a possibility that its biases influenced its conclusion that the Defence Experts' evidence is unreliable, based on its deficient methodology. The unarticulated biases of the Chamber make its position on reliability of the evidence even more suspect, given that the Chamber had accepted the expert status of both Defence Experts, as well as their reports, with no objection from the Prosecution.

Five Key Examples of Racial/Cultural Biases

1. Psychometric Tests and Malingering (#2 and #5)
2. The "Layperson Criterion" and Spirit Possession (#4)
3. The Ongwen Exception and the Role of Spiritualism
4. Child Soldier Expert and Language of Escape
5. Acholi traditional justice, complementarity and sentencing

2463. [in response to Defence objections re language] . . . Two of these, i.e. the interpretation of Dominic Ongwen's request for termites as a serious food request rather than a joke and the absence of the word 'blues' in 'many African languages', are **trivial and without any serious link to the issue under consideration**.

2501.....Further, as correctly pointed out by the Prosecution, **the possibility that witnesses may regard symptoms of mental disorders as spirit possession is immaterial,** insofar as they would still describe certain symptoms, irrespective of the cause attributed to them.

Ongwen Exception

DEHUMANIZATION – INVISIBILITY – RACISM

"I am an invisible man. No I am not a spook like those who haunted Edgar Allen Poe. Nor am I one of your Hollywood move ectoplasms. I am a man of substance, of flesh and bone, fiber and liquids and I might even be said to possess a mind. **I am invisible, simply because people refuse to see me**." (bold added)

----Ralph Ellison, *Invisible Man* (1952)

Def Child Soldier Expert

Article 26, Rome Statute

- Exclusion of jurisdiction over persons under eighteen
- The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

From *Ongwen* Trial Judgment, TC IX, 4 February 2021

i. Pollar Awich (D-0133) [Defence Child Soldier Expert]

612. Pollar Awich testified live before the Chamber.1081 The witness testified about having been abducted as a child and integrated in the National Resistance Army1082 and about the experiences of persons who were forced to be soldiers as children. He testified about his own experience, provided evidence on children in the LRA and wrote a report on this issue, which was submitted into evidence.1083 Pollar Awich answered in a clear and structured manner. The Chamber deems his testimony to be credible. However, the Chamber also notes Pollar Awich's general conclusions concerning the enduring effect on the mental health of having been a child soldier,1084 the conditions within the LRA on abductees and the influence on their free will as a grown up1085 and whether they are, ultimately, responsible for any of their actions undertaken as an adult.1086 First, Pollar Awich is not a mental health expert and, more importantly, the question of whether Article 31(1)(a) or (d) of the Statute are fulfilled can only be determined by the Chamber. Lastly, the Chamber finds Pollar Awich's statement that 'there are no cases where children escaped [...] voluntary'1087 incredible considering the ample evidence received to the contrary. The remainder of Pollar Awich's testimony does not go to issues of relevance to the disposal of the charged crimes.

Preamble to the Rome Statute

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage and concerned that this delicate mosaic may be shattered at any time, . . .

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions. . .

Determination of Sentence

Article 78, Determination of Sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime **and the individual circumstances of the convicted person. . .**

Rule 145 Determination of sentence

1. In its determination of the sentence pursuant to article 78, paragraph 1, the Court shall:

. . . (b) Balance all the relevant factors, including any mitigating and aggravating factors and **consider the circumstances both of the convicted person and of the crime**;

(c)In addition to the factors mentioned in article 78, paragraph 1, give consideration, inter alia, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; **and the age, education, social and economic condition of the convicted person.**

Article 78 (determination of sentence) and Rule 145 should be amended to include traditional justice mechanisms within its process

Rule 145 (determination of sentence) should be amended to include the factors of race, culture, religion and disability as individual circumstances.

The ICC has to identify, assess and evaluate the extent of the problem of racial and cultural biases in its judgments, starting from its beginnings.

Article 84 (revision of conviction or sentence)

Article 21(3) (application and interpretation of law must be consistent with internationally recognized human rights. . .)

Construct an argument for revision, based on "interests of justice" jurisdiction, that racial & cultural biases resulted in jurisprudence which violated Article 21(3)

CONCLUSION:

Is it “just” biases and blindspots or is it legal racism and culturism?