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## Epilogue



# Ongwen and the Legitimacy of the ICC

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## 1 Introduction

The discussions surrounding the *lights* and *shadows* of the *Ongwen* case set the grounds for a broader debate about the legitimacy of the International Criminal Court (ICC), a concept that is frequently invoked to evaluate (and often criticize) the court's fairness and efficacy in administering justice. Following Langvatn and Squarrito's<sup>1</sup> conceptualization, we understand that legitimacy involves the assessment of three dimensions: (a) *origin*, *pedigree*

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1 S.A. Langvatn and T.J. Squarrito, 'Conceptualising and measuring the legitimacy of international criminal tribunals', in N. Hayashi and C. Bailliet (eds.) *The Legitimacy of International Criminal Tribunals: Studies on International Courts and Tribunals* (Cambridge University Press, Cambridge, 2017), pp. 41–65.

or source legitimacy, i.e., the way in which the international criminal tribunal was created; (b) *procedural legitimacy*, i.e., the process through which the court or tribunal exercises its power; and (c) *result or outcome legitimacy*, i.e., the qualities of the selection of cases and decisions produced by the Court.

The special issue comprises contributions that illustrate how the *Ongwen* case could potentially impact (positively or negatively) the legitimacy of the International Criminal Court (ICC). The discussion presented herein is structured around three key dimensions previously outlined: (i) origin, source, or pedigree legitimacy; (ii) procedural legitimacy; and (iii) source or outcome legitimacy.

## 2 Origin, Pedigree, or Source Legitimacy

At the origin level, the special issue explored the court's authority and credibility, scrutinizing its establishment, mandate, and legal foundation to gauge alignment with international law and founding principles. For example, Nortje and Quénivet's analysis allows us to conclude that the ICC legal framework and its legal instruments have proven partially insufficient to handle several complex issues such as grounds for excluding criminal responsibility, especially concerning claims of coercive environment – as it was the case in *Ongwen*. In this regard, the legitimacy of the ICC and, especially, its legal framework may be affected. Yet, it could be argued that the same legal framework provides an avenue for the ICC to potentially enhance its origin or pedigree legitimacy. That is, under article 21(1)(c) of the Rome Statute, the ICC can and should rely on general principles derived by the Court from comparing national legal systems since there is no international treaty containing or fleshing out defences in international criminal law – other than the Rome Statute<sup>2</sup>.

Another example derives from Sánchez-Mera's discussion about victimhood recognition and gender representations in the enslavement charges. It can be argued that the origin legitimacy of the ICC was arguably compromised because the Office of the Prosecutor did not charge the enslavement concerning the forced military training and fighting imposed on men and, thus, the manner in which the case and then the trial were brought into existence corresponded to stereotypes about or traditional representations of gender and war, which partially distorted the scope of perpetrators and victimhood regarding the

2 W. Nortje and N. Quénivet, 'Fertile or Futile Grounds for Excluding Criminal Responsibility? A Critical Analysis of the *Ongwen* Judgment in Relation to the Claim of Coercive Environment', 23(5–6) *International Criminal Law Review* (2023) 675–704, pp. 690–691.

enslavement charges.<sup>3</sup> All in all, the fact that the Office of the Prosecutor included enslavement charges for the forced labour imposed on civilians and for the forced labour inflicted on women and girls may plausibly enhance the pedigree legitimacy of the ICC regarding the scope of the *Ongwen* case and the subsequent trial.

Based on Frisso's discussion, one can argue also that the source legitimacy of the ICC was partially affected since the *Ongwen* case involved a challenge linked to the recognition of children born of war as victims by the ICC, which exceeded the victimhood criteria crafted by the drafters of the ICC Rules of Procedure and Evidence and the subsequent related ICC's jurisprudence on victims. In this case, the source legitimacy of the ICC legal framework does not really help to strengthen the ICC's origin legitimacy as it poses conceptual challenges to acknowledging children born of war as victims of international crimes.<sup>4</sup> Nevertheless, unlike previous cases such as *Lubanga* and *Katanga & Ngudjolo Chui*, the *Ongwen* case arguably provided the ICC with additional source legitimacy through a broader range of charges, particularly sexual and gender-based violence charges.<sup>5</sup> This means that the *Ongwen* case from its very origin was designed to more comprehensively capture the crimes perpetrated as opposed to other ICC cases.

Finally, Maloney, O'Brien and Oosterveld's analysis revealed that while the ICC provided clarity concerning forced marriage as a crime against humanity, the *Ongwen* case arguably revealed a normative gap: the lack of the said crime in the ICC Statute.<sup>6</sup> Such omission in the ICC legal instruments may be problematic for the ICC's source legitimacy.

### 3 Procedural Legitimacy

As for procedural legitimacy, the focus moves to evaluating the fairness and transparency of legal processes throughout the *Ongwen* case, including investigation, pre-trial, and particularly courtroom procedures. In most cases,

3 S. Sánchez Mera, 'Fighters, Not Victims: On Victimhood Recognition and Gender Representations in the Enslavement Charges in the Ongwen Case', 23(5-6) *International Criminal Law Review* (2023) 782-803, p.784.

4 G. Frisso, 'Children Born of War: The Recognition of Children Born of War as Victims in the Ongwen Case', *International Criminal Law Review* 24 (2024), this issue, doi: 10.1163/15718123-bja10171, p. 1

5 *Ibid.*, pp. 17-18.

6 K. Maloney, M. O'Brien and V. Oosterveld, 'Forced Marriage as the Crime Against Humanity of 'Other Inhumane Acts' in the International Criminal Court's Ongwen Case', *International Criminal Law Review* 23(5-6) (2023) 705-730, p. 707.

the authors highlight problematic aspects of the trial, often associated with the unique cultural context in which the alleged crimes occurred and which could undermine the procedural legitimacy of the Court.

One strong example comes from Mushoriwa, whose work deals with the consequences of the refusal of the ICC Chambers to take into account the *mato oput* traditional justice mechanism of the Acholi people in the sentencing proceedings. By doing so, both the Trial and Appeals Chambers plausibly missed a great opportunity to shed some light on the function and suitability of traditional justice mechanisms at the ICC and discuss how this could be holistically considered and/or adapted into the ICC proceedings.<sup>7</sup> In any event, this procedural legitimacy deficit has arguably been (partially) mitigated by the fact that the ICC has not looked down on traditional customs as well as that the ICC Statute does not include traditional justice mechanisms.<sup>8</sup>

The cultural context in the *Ongwen* case also lays the foundation for Nistor's analysis, which illuminates the issues that arise from intertwining culture into the legal submissions made before the judges at the ICC, that is, the difficulties to 'transform' and 'translate' spiritual beliefs into oral testimony and objective evidence through the legal process.<sup>9</sup> Nistor's powerful critique provides insights for questioning the procedural legitimacy of the ICC by showing that the Court is not particularly well-equipped for assessing and evaluating matters of culture and spiritual beliefs. The critical view is shared by Viswanath and Li, but the authors offered an alternative explanation for the ICC's failure in adopting a culturally-sensitive approach to adjudicate the *Ongwen* case. For them, the purely textual format of the judgment creates singular and depersonalized narratives that obscure the socio-cultural contexts in which the events investigated happened and oral testimonies were produced. In this sense, the authors argue that the prevalence of textual format creates epistemic and procedural injustice, thus potentially damaging the ICC's legitimacy.

From a procedural standpoint, the *Ongwen* case was also problematic due to the way in which the ICC approached the analysis of the rights of children born out of sexual and gender-based violence. For example, Friso argued that the Court endorsed a patriarchal form of understanding motherhood, one that

7 L. Mushoriwa, 'The Prosecutor v Dominic Ongwen: An Examination of the Role of Traditional Justice Mechanisms in International Criminal Justice', *International Criminal Law Review* 23, 5–6 (2023) 731–754.

8 *Ibid.*, p.753–754.

9 A. Nistor, 'Culture and the Illusion of Self-Evidence: Spiritual Beliefs in the Ongwen Trial', *International Criminal Law Review* (published online ahead of print 2023), p.8.

makes maternal and femininity synonyms and focuses on the mother's role to raise her children.<sup>10</sup>

Despite the complex procedural problems faced by the ICC in adjudicating Ongwen, the case has also contributed towards the procedural legitimacy of the Court. One example is highlighted Maloney, O'Brien and Oosterveld, for whom both the Trial and Appeals Chambers provided a straightforward answer for the *nullum crimen* question regarding forced marriage as a crime against humanity of inhumane acts.<sup>11</sup> By doing so, the ICC has further contributed towards the re-affirmation of the legality of prosecuting, trying, and convicting individuals based on forced marriage charges in the practice of international criminal courts and tribunals.<sup>12</sup> Another potential positive impact of the *Ongwen* case on the ICC procedural legitimacy involves the way in which the Court has dealt with the duress defence filed by Ongwen as a ground for excluding his criminal responsibility. As Nortje and Quéniwet have demonstrated, duress is not a suitable defence for the exclusion of criminal responsibility in cases in which the accused grew in a coercive environment. As the authors' legal analysis of *Ongwen* have shown, this would also apply to cases in which duress is invoked to characterize continuing, implied, and/or latent coercive environment.<sup>13</sup> Yet, what slightly undermines the overall contributions to the ICC's procedural legitimacy is that the ICC did not apply all the requirements laid down in Article 31(1)(d) of the ICC Statute.<sup>14</sup>

#### 4 Result or Outcome Legitimacy

Lastly, our discussion extends to issues of result or outcome legitimacy, which changes the focus to the quality of the judgment and sentencing in the *Ongwen* case, i.e. its perceived fairness and appropriateness. Following Nortje and Quéniwet's argument, the Chamber's decision to reject a coercive environment-related defence can be considered to be an appropriate or correct outcome as a whole, which plausibly enhances the ICC's result legitimacy. This is because even if the ICC Chambers had been 'creative', the said defence could have not been seemingly derived from comparative national laws.<sup>15</sup>

<sup>10</sup> Frisso, *supra* note 4.

<sup>11</sup> Maloney et al., *supra* note 6, p. 727.

<sup>12</sup> *Ibid.*

<sup>13</sup> Nortje and Quéniwet, *supra* note 2, pp. 688–689.

<sup>14</sup> *Ibid.*, pp. 684–685.

<sup>15</sup> *Ibid.*, p. 677.

Maloney, O'Brien and Oosterveld point to potential positive contributions in the judicial findings related to forced marriage as a crime against humanity as the Chamber for example: (i) clarified that forced marriage constitutes a sub-category of 'other inhumane acts', which is in turn an underlying criminal conduct within crimes against humanity; (ii) acknowledged and confirmed the conduct and harms encapsulated by the expression 'forced marriage', differentiating it from other categories of crimes against humanity; and (iii) confirmed that prosecuting forced marriage is coherent with the *nullum crimen sine lege* principle.<sup>16</sup>

On one hand, it can be said that the *Ongwen* case has contributed towards enhancing the ICC's result legitimacy by acknowledging that forced domestic labour constitutes enslavement and remarking its gender-related dimensions. On the other hand, while such jurisprudential development or finding is important for recognizing the differentiated impact of war on women, it may however reinforce the representation of women as victims by disregarding their fighting roles in non-state armed groups such as the Lord's Resistance Army, as demonstrated by Sanchez Mera.<sup>17</sup>

The evaluation of the results or outcomes of the *Ongwen* case includes also the sentencing stage. Sorvatzioti, for example, questions the quality of the sentencing decision<sup>18</sup>. She argues that, in sentencing Ongwen, the Chamber did not sufficiently analyze the case's mitigating circumstances, i.e. how the social and cultural background in which the defendant operated affected his moral blameworthiness. By not addressing Ongwen's unique dual status as former child abducted soldier and perpetrator, the ICC failed to produce a proportional sentence, one which would be completely autonomous from the judgment, i.e., the conviction decision.

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16 Maloney et al., *supra* note 6, p.705.

17 Sanchez Mera, *supra* note 3, p. 800.

18 D. Sorvatzioti, 'Proportionality and Moral Blameworthiness in Ongwen's ICC Sentencing Decision', *International Criminal Law Review* 23(5-6) (2023), 755-781.