

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-02/04-01/15 A
Date: 14 November 2021

THE APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, President
Judge Piotr Hofmański
Judge Solomy Balungi Bossa
Judge Reine Alapini-Gansou
Judge Gocha Lordkipanidze

SITUATION IN UGANDA

**IN THE CASE OF
THE PROSECUTOR v. DOMINIC ONGWEN**

Public Document

**Request for leave to file *amicus curiae* submission pursuant to Rule 103 of the
Rules of Procedure and Evidence**

Source: NIMJ – National Institute of Military Justice

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor

Mr Karim A. A. Khan, Prosecutor
Ms Helen Brady

Counsel for the Defence

Mr Krispus Ayena Odongo
Chief Charles Achaleke Taku

Legal Representatives of the Victims

Mr Joseph Akwenyu Manoba
Mr Franciso Cox
Ms Paolina Massidda

REGISTRY

Registrar

M. Peter Lewis

I. Introduction

1. The National Institute of Military Justice (NIMJ) requests permission to file an amicus curiae brief as called for in the Appeals Chamber's 25 October 2021 Order in the Ongwen case.
2. NIMJ is a 30-year-old civil society organization in the United States dedicated to the fair administration of justice in the U.S. armed forces and improved public understanding of military justice. NIMJ has no affiliation with the U.S. government or any other government. NIMJ's leadership includes former military attorneys, private practitioners, and legal scholars. You can find additional information about NIMJ at <https://www.nimj.org/>.
3. NIMJ's expertise could assist with the proper determination of the first and third issues for which the Appeals Chamber seeks amicus input: the proper legal interpretation of Articles 31(1)(a) and (d) concerning grounds for excluding criminal responsibility, and the consideration that should be given to cumulative convictions at trial.

II. Applicants Particular Expertise

4. Franklin D. Rosenblatt is an Assistant Professor at Mississippi College School of Law where he teaches international criminal law, evidence, and trial practice. Professor Rosenblatt previously served for 12 years as a military lawyer in the U.S. Army JAG Corps. He prosecuted violent crimes, military offenses, and international crimes. He later served as the lead military defense counsel for Sergeant Bowe Bergdahl in the most publicized court-martial in United States history. After his military service, Professor Rosenblatt worked at an AmLaw 200 law firm where he headed the firm's Military and National Security Law practice group. He is the President of the Criminal and Disciplinary Law Committee for the International Society of Military Law and the Law of War. He is on the board of directors of NIMJ. He is a judge on the Mississippi Court of Military Appeals. He was a summer fellow at the Nuremberg Principles Academy. He is co-author of several books, including MILITARY JUSTICE: CASES AND MATERIALS, MILITARY COURT RULES OF THE UNITED STATES, and MARCH TO JUSTICE: GLOBAL MILITARY LAW LANDMARKS. In addition, he writes for the Global Military Justice Reform blog about military law developments worldwide.
5. Philip D. Cave has practiced military law exclusively for 42 years. He served for 20 years as an active duty judge advocate in the U.S. Navy as a defense counsel, senior

defense counsel, trial counsel (prosecutor), senior trial counsel, and appellate defense counsel. Since 2000, he has practiced as a civilian lawyer representing U.S. service members at courts-martial or with a court-martial appeal. Mr. Cave is a director (and past President) of NIMJ. He has filed numerous amicus petitions before the U.S. Supreme Court and the U.S. military appellate courts. He is the executive editor of CAAFlog.org, a blog dedicated to informing the public about ongoing military law issues. He also writes for the Global Military Justice Reform blog.

6. James A. Young served more than 30 years in the United States Air Force, more than 27 of which were as a judge advocate. As a judge advocate, he prosecuted more than 60 cases at courts-martial, served as the general counsel to the Air Force Office of Special Investigations, six years as a trial judge, and six years as an appellate judge. After he retired from military service, he served more than 14 years as the senior legal advisor to a judge on the U.S. Court of Appeals for the Armed Forces. As a result, he is familiar with the law and practice regarding affirmative defenses and multiplicity in the U.S. armed forces. *See, e.g.,* Colonel James A. Young, *Multiplicity and Lesser-Included Offenses*, 39 Air Force Law Rev. 159 (1996).
7. Emily Eslinger is a NIMJ rapporteur. She recently received her Juris Doctor degree from Columbia Law School, where she was a prestigious Harlan Fiske Stone scholar. She focused on military law and international law in law school, including studies under Professor Amal Clooney. Ms. Eslinger is a contributor to and editor of the CAAFlog website devoted to military criminal law and procedure. She will soon begin her career in public service as an active duty judge advocate in the U.S. Army.

III. How NIMJ's Expertise Could Assist the Appeals Chamber

a. In General

8. Dominic Ongwen was convicted of crimes that occurred in the context of armed conflict. Moreover, he was a military commander. Accordingly, military law could assist the Appeals Chamber and serve as persuasive authority. This is so for two reasons. First, the military law systems for which NIMJ has expertise (especially the United States) have extensive caselaw and expert works regarding the first and third issues that the Appeals Chamber identified. Second, while these military law authorities are not binding authority on the Appeals Chamber, the Chamber may find some of these authorities and doctrines closely analogous due to the shared circumstances of armed

conflict in which both the NIMJ expertise and the Ongwen case reside. Finally, the subjects of NIMJ expertise were developed primarily as part of efforts to improve quality control in military criminal procedure, rather than in response to any sort of unique American political or policy considerations.

b. Standards for Affirmative Defenses

9. NIMJ expertise would benefit the Appeals Chamber on the burden and standard of proof for the assertion of affirmative defenses. The Rome Statute is silent on the standard to apply. The U.S. military justice system requires the prosecution to prove that an affirmative defense did not exist beyond a reasonable doubt. *See* Manual for Court-Martial (U.S.) (2019), Rule for Court-Martial (RCM) 916(e)(1)(B)(1). However, one exception to this rule is for the defense of lack of mental responsibility. When asserting lack of mental responsibility as an affirmative defense, the accused has the burden of proving lack of mental responsibility by clear and convincing evidence. RCM 916(e)(1)(B)(2).
10. Military law also permits a limited defense of *partial mental responsibility*, a defense that frequently arises during the stresses and exigencies of military operations. RCM 916(k)(2).
11. As for the affirmative defense of duress, the rule follows the ordinary standards for affirmative defenses. However, the defense of duress is expressly declared inapplicable to several situations of armed conflict, including the killing of innocent persons. RCM 916(h).
12. Additionally, there is a repository of cases interpreting and explaining each of these U.S. rules. The NIMJ brief would identify those rules and cases that may be of assistance to the Appeals Chamber.

c. Cumulative Convictions

13. NIMJ expertise would also aid the Appeals Chamber on the question of cumulative convictions. The Trial Chamber found a limit on cumulative convictions when the conduct in question “violates two distinct provisions of the Statute, each having a ‘materially distinct’ element not contained in the other...” This rule is harmonious with U.S. constitutional law, as well.

14. However, the Rome Statute contains one offense pertinent to the Ongwen case in that the elements of which are not fully statutorily defined: Article 7(1)(K). That provision instead criminalizes all undefined acts which cause suffering or injury. That makes it difficult to compare the statutory elements of the offenses.
15. The U.S. Military has a somewhat similar offense which is not fully statutorily defined: Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. This statute criminalizes all conduct to the prejudice of good order and discipline in the armed forces, or which is service discrediting. To take account of this anomaly, in cases in which that offense is directly involved in the cumulative convictions question, the U.S. military compares not just the statutory elements of the offenses but also the pleadings, since the pleadings establish, in part, the elements of the Article 134 offense.

IV. Conclusion

16. For the reasons mentioned above, NIMJ respectfully requests the Chamber to grant leave to submit observations pursuant to Rule 103.



Franklin D. Rosenblatt

on behalf of
NIMJ – National Institute of Military Justice

Dated this 14 day of November, 2021

At Jackson, Mississippi, USA