

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

THE APPEALS CHAMBER

Before:

**Judge Luz del Carmen Ibáñez Carranza, Presiding
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

**ASSOCIATION OF DEFENCE COUNSEL PRACTISING BEFORE THE
INTERNATIONAL COURTS AND TRIBUNALS (ADC-ICT)
MOTION FOR LEAVE TO SUBMIT OBSERVATIONS AS *AMICUS
CURIAE***

**Source: Association of Defence Counsel Practising before the International
Courts and Tribunals (ADC-ICT)**

Order 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 QC, Prosecutor
Ms Helen Brady

Counsel for the Defence

Mr Krispus Ayena Odongo
Chief Charles Taku
Ms Beth Lyons

Legal Representatives of Victims

Mr Joseph Akwenyu Manoba
Mr Francisco Cox

**Office of Public Counsel for
Victims**

Ms Paolina Massidda

**Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keita

Unrepresented Victims

Unrepresented Applicants

States Representatives

Amicus Curiae Applicant
ADC-ICT

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Mr Esteban Peralta Losilla

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Unit

Mr Harry Tjonk

**Victims Participation and Reparation
Section**

Mr Philipp Ambach

Trust Fund for Victims

Mr Pieter de Baan

I. INTRODUCTION

1. The Association of Defence Counsel practising before the International Courts and Tribunals (“ADC-ICT”), pursuant to Rule 103 of the ICC Rules of Procedure and Evidence, seeks the leave of the Appeals Chamber to submit observations as *amicus curiae* in accordance with regulations 23, 33, 36 and 37 of the Regulations of the Court and regulation 24 of the Regulations of the Registry.
2. The ADC-ICT seeks to file submissions on the merits of the legal questions presented in Court’s Order,¹ specifically on following issues raised:
 - (i) the legal interpretation of article 31(1)(a) and (d) of the Statute concerning grounds for excluding criminal responsibility;*
 - (ii) evidentiary issues relating to mental disease or defect;*
 - (iii) the burden of proof when asserting a ground for excluding criminal responsibility; and the standard of proof applicable to the assessment of mental disease or defect or duress;*
 - (v) the permissibility or otherwise of entering cumulative convictions when the conduct in question violates two or more distinct provisions of the Statute.*
3. The ADC-ICT will submit observations in accordance the modalities for the submission of such observations and responses, pursuant to Appeals Chamber guidelines, in the event leave to appear as *amicus curiae* is granted.

II. EXPERTISE IN LEGAL ISSUES TO BE PRESENTED

4. The ADC-ICT is well qualified to offer submissions of assistance in relation to the questions at issue. The ADC-ICT is the body officially recognised by the Registrar of the United Nations International Residual Mechanism for Criminal Tribunals (hereinafter: “Mechanism”) as representing all Defence Counsel practising before the Mechanism, pursuant to Mechanism Rule 42(A)(iii). This recognition is in addition to the fact that the ADC-ICT (formerly ADC-ICTY) has been the body officially

¹ *Prosecutor v. Dominic Ongwen*, Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence), dated 25 October 2021.

recognised by the Registrar of the ICTY as representing all Defence Counsel practising before the ICTY since 2002.²

5. In its Preamble, the ADC-ICT Constitution states that it “is a partner, along with the organs of the respective International Courts or Tribunals at which they are the recognised Association of Counsel.”³ A key objective of the ADC-ICT is to “offer advice to the President, the Chambers and the Registrar of the International Courts and Tribunals in relation to the rights of the accused to a fair trial and the Rules of Procedure and Evidence.”⁴
6. The ADC-ICT considers that part of its mission is to promote the fairness of proceedings in general. The ADC-ICT respectfully submits that it has a particular role in offering views on issues affecting the rights of individuals who were subject to trial proceedings before the *ad hoc* and other international criminal tribunals.
7. The ADC-ICT has also previously appeared as *amicus curiae* in international criminal cases, including, for example, *Prosecutor v Brđanin* (on substantive law questions regarding the joint criminal enterprise doctrine);⁵ *Prosecutor v Prlić et al.* (regarding whether conduct of counsel constituted contempt of court, violation of the Rules of Procedure and Evidence or misconduct),⁶ *Prosecutor v Hadžihasanović & Kubura* (regarding the impact of the allocation of resources to the Accused on his right to a fair trial),⁷ and *Prosecutor v. Kamuhanda* (on the issue of Defence counsel contacting Prosecution witnesses).⁸
8. The ADC-ICT respectfully submits that the expertise it has gathered as an organisation through its individual members could assist the Appeals Chamber in the resolution of issues raised in Court’s Order.

² The ADC-ICTY was founded in September 2002 and recognised by the ICTY Registry the following month. The ADC-ICTY was recognised pursuant to ICTY Rule 44(A)(iii).

³ Preamble, ADC-ICT Constitution.

⁴ Article 2(3), ADC-ICT Constitution.

⁵ *Prosecutor v Brđanin*, Case No. IT-99-36-A, Amicus Brief of Association of Defence Counsel—ICTY, 6 July 2005.

⁶ *Prosecutor v Prlić et al.*, Case No. IT-04-74-T, Advisory Opinion of Amicus Curiae Disciplinary Council of the Association of Defence Counsel of the ICTY, 13 August 2009.

⁷ *Prosecutor v Hadžihasanović & Kubura*, Case No. IT-01-47-PT, Amicus Brief of the Association of Defence Counsel Practicing Before the International Criminal Tribunal for the Former Yugoslavia in Support of Joint Defence Oral Motion for Reconsideration of Decision on Urgent Motion for Ex Parte Oral Hearing on Allocation of Resources to the Defence and Consequences Thereof for the Rights of the Accused to a Fair Trial, 14 July 2003.

⁸ *Prosecutor v. Kamuhanda*, Case No. MICT-13-33, ADC-ICTY *Amicus Curiae* Observations, 10 September 2015.

III. ADC-ICT WISH TO SUBMIT ARGUMENTS BEFORE APPEALS CHAMBER

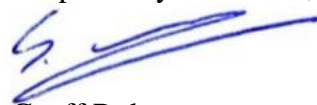
9. The ADC-ICT notes that the specific legal issues raised in Court's Order, considering their complexity, may generally affect overall jurisprudence in international criminal proceedings. The identified legal issues are generally important for international criminal justice in the future, and could affect any international criminal proceeding, particularly within the context of standard of proof and evidentiary matters.
10. The ADC-ICT is in a position to provide a more comprehensive view of above identified legal issues, in the event leave to appear and submit observations as *amicus curiae* is granted.
11. In particular, regarding questions (i) -(iii), the ADC-ICT will focus its submissions on a legal interpretation of Article 31 vis-à-vis the statutory construction and its contrast with the statutes of the ICTY and ICTR. The ADC-ICT is in a position to provide perspective regarding the contemporaneous state of the law regarding mental defect and excuse before the *ad hoc* tribunals at the time the Rome Statute was negotiated and drafted.
12. For question (v), the ADC-ICT would provide submissions that the settled jurisprudence at the ICTY and ICTR, in fact, engaged in impermissible double counting and should not be relied upon as a reliable source of law regarding cumulative convictions. The ADC-ICT will provide the Appeals Chamber with reasons to limit the use of cumulative convictions.

IV. RELIEF SOUGHT

13. For the foregoing reasons, the ADC-ICT respectfully requests that the Appeals Chamber grant it leave to appear and submit observations as *amicus curiae* in the case of *Prosecutor v. Ongwen*, on the issues identified above at paragraph 2.

Word count: 1,005

Respectfully submitted,



Geoff Roberts
Vice President on behalf of ADC-ICT

Dated this 15th day of November 2021

At The Hague, The Netherlands