Cour
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International
Criminal
Court

Original: **English**

No.: **ICC-02/04-01/15 A A2**
Date: **17 January 2022**

THE APPEALS CHAMBER

Before: **Judge Luz del Carmen Ibáñez Carranza, Presiding Judge**
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

CLRV consolidated response to the *Amici Curiae* observations in the Defence's Appeals against the Conviction and the Sentence

Source: **Office of Public Counsel for Victims**

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REGISTRY

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I. INTRODUCTION

1. On behalf of the 1,532 Victims she represents, the Common Legal Representative of Victims (the "CLRV") submits her consolidated response to the 18 submissions from *Amici Curiae*[1] on several issues to the adjudicated in the Defence's

[1] See the "Amicus Curiae pursuant to Rule 103(1) of the Rules of Procedure and Evidence", No. ICC-02/04-01/15-1928; the "Amicus Curiae Observations on the issue of Sexual and Gender-based Crimes: Sexual Slavery & Forced Marriage", No. ICC-02/04-01/15-1927; the "AMICUS BRIEF BY JUSTICE FRANCIS M. SSEKANDI", No. ICC-02/04-01/15-1926 A A2 – *all notified on 20 December 2021*; the "AMICUS CURIAE OBSERVATION", No. ICC-02/04-01/15-1929, 21 December 2021; the "Amicus Curiae Observations Regarding the Relevance to this Case of the Convention on the Rights of Persons with Disabilities", No. ICC-02/04-01/15-1930; the "Submission of amicus curiae observations by the National Institute of Military Justice (NIMJ)", No. ICC-02/04-01/15-1931; the "Amici Curiae Observations on Duress and the Standards Applicable to Assessing Evidence of Sexual Violence", No. ICC-02/04-01/15-1932 + Anx – *all notified on 22 December 2021*; the "Amici Curiae Observations on Sexual- and Gender-Based Crimes, Particularly Forced Pregnancy, and on Standards of Proof Required for Sexual and Reproductive Violence Pursuant to Rule 103 of the Rules of Procedure and Evidence", No. ICC-02/04-01/15-1933; the "Amici Curiae Observations on Sexual- and Gender-Based Crimes, Particularly Sexual Slavery, and on Cumulative Convictions Pursuant to Rule 103 of the Rules of Procedure and Evidence", No. ICC-02/04-01/15-1934; the "Amici Curiae Brief on Forced Marriage", No. ICC-02/04-01/15-1935 + Anx1; the "Submission of Amicus Curiae observations on the merits of the legal questions presented in the "Order inviting expressions of interest as amici curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)" of 25 October 20", No. ICC-02/04-01/15-1936; the "OBSERVATIONS OF THE ASSOCIATION OF DEFENCE COUNSEL PRACTISING BEFORE THE INTERNATIONAL COURTS AND TRIBUNALS (ADC-ICT) AS AMICUS CURIAE REGARDING QUESTIONS POSED BY THE APPEALS CHAMBER IN PROSECUTOR v. ONGWEN", No. ICC-02/04-01/15-1937; the "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", No. ICC-02/04-01/15-1938; the "Amicus Curiae Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence", No. ICC-02/04-01/15-1939; the "Amicus Curiae Observations by Public International Law & Policy Group", No. ICC-02/04-01/15-1940; the "Amici curiae observations submitted by Prof. Bonita Meyersfeld and the Southern African Litigation Centre Trust pursuant to rule 103 of the Rules of Procedure and Evidence", No. ICC-02/04-01/15-1941; the "Submission of observations pursuant to rule 103 of the Rules of Procedure and Evidence, as amici curiae on transcultural forensic psychiatric issues", No. ICC-02/04-01/15-1942; and the "Amicus curiae observations on issues raised in the Appeals Chamber Order of 25 October 2021 inviting expressions of interest as amici curiae in judicial proceedings (pursuant to Rule 103 of the Rules of Procedure and Evidence)", No. ICC-02/04-01/15-1943 – *all notified on 23 December 2021*.

Appeals against the Conviction and the Sentence,[2] filed following the Appeals Chamber's Order calling for expression of interest to submit observations.[3]

2. The CLRV preliminarily recalls the instructions of the Appeals Chamber (the "Chamber") on the number of pages and the format for the *Amici Curiae* observations,[4] and notes that some of them do not comply with said instructions.[5]

3. More importantly, some of the *Amici Curiae* provide observations going beyond the scope of either their expertise or their role and include conclusions that fall under the powers and functions of the Chamber as the ultimate arbiter of fact and law. In this regard, the CLRV posits that it is not the role of an *Amicus Curiae* to express opinions as to a convicted person's liability, nor as to whether the contextual, material or mental elements of the crimes charged were satisfied by commenting on the evidence presented at trial – a role reserved to the parties and participants in the proceedings, and ultimately, the Trial Chamber's responsibility. The role of an *Amicus Curiae* is instead to *advise* – based on a recognised and demonstrated expertise - on a matter to be adjudicated by the relevant chamber, in order to eventually bring to the Court's attention relevant *facts or arguments not already addressed by the parties and participants*.

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[2] See the "Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021", No. ICC-02/04-01/15-1866-Conf EK A, 21 July 2021 (the "Appeal Brief against the Conviction") and the "Defence Document in Support of its Appeal against the Sentencing Decision", No. ICC-02/04-01/15-1871-Corr-Conf A2, 28 August 2021 (the "Appeal Brief against the Sentence"). A public redacted version of the document was filed on 31 August 2021, see No. ICC-02/04-01/15-1871-Corr-Red A2. See also the "Order scheduling a hearing before the Appeals Chamber" (Appeals Chamber), No. ICC-02/04-01/15-1909, 17 November 2021.

[3] See the "Order inviting expressions of interest as amici curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)" (Appeals Chamber), No. ICC-02/04-01/15-1884, 25 October 2021.

[4] See the "Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence", (Appeals Chamber), No. ICC-02/04-01/15-1914 A A2, 24 November 2021, para. 19: "*The above-mentioned* amici curiae *are invited to submit, by 16h00 on Thursday, 23 December 2021, written observations of no more than 15 pages, on the issues identified in paragraph 19 of the Order inviting expressions of interest*." See also para. 20: "*The Appeals Chamber emphasises that the written observations must adhere, in particular, to the requirements stipulated in regulations 23* [content of documents], *33* [calculation of time limits], *and 36* [format of documents and calculation of page limits] *of the Regulations and regulation 24* [Filing of documents, material, orders and decisions with the Registry] *of the Regulations of the Registry*".

[5] See for instance *Amicus* No. 1929 (24 pages).

Therefore, the CLRV respectfully requests the Chamber to disregard arguments and opinions expressed in the *Amici Curiae* observations which go beyond their role and/or expertise.

4. On the substance, the CLRV is of the opinion that the majority of the *Amici Curiae* observations are of no or limited assistance for the Chamber to determine the issues on appeal. In particular, the CLRV considers that the observations on grounds for excluding criminal responsibility under article 31(1)(a) and (d) of the Rome Statute (the "Statute") should be dismissed, except for some arguments presented by *Amici* No. 1932 and 1943 as detailed *infra*. The CLRV also considers that *Amici* No. 1939, 1941 and 1943 only have some value in presenting arguments on sexual and gender-based crimes as detailed *infra*. Finally, the CLRV considers that all observations on cumulative convictions should be dismissed in their entirety.

5. In light of the page limit imposed by the Chamber, the CLRV limits her response to the aspects raised in the *Amici Curiae* observations which most affect the personal interests of the victims she represents.

II. SUBMISSIONS ON THE SUBSTANCE OF THE *AMICI CURIAE* OBSERVATIONS

1) *Amici Curiae* observations on *area a.* relevant to grounds for excluding criminal responsibility under article 31(1)(a) and (d) of the Statute[6]

a) *Amicus* No. 1926 (Justice Francis Muzingu Ssekandi)

6. The CLRV observes that the *Amicus* does not provide - neither in its request to appear nor in its brief - background information as to its professional status, experience or expertise.[7] In the observations, it mainly makes lengthy comments on the evidence presented at trial and its related opinion. It indicates that it intervenes "*to*

[6] See *Amici* No. 1943, 1942, 1940, 1937, 1936, 1932, 1931, 1930, 1929 and 1926.
[7] See the "Request to Submit an Amicus Curiae pursuant to Rule 103(1) of the Rules of Procedure and Evidence", No. ICC-02/04-01/15-1905, 15 November 2021.

make the case that Mr Dominic Ongwen is entitled to the diminished responsibility defence […]. [And states:] *This Brief will argue that diminished responsibility was adequately established in the evidence adduced by the Prosecution and the Defence, including from mental health experts*".[8] The CLRV submits that the *Amicus* misinterprets its role[9] and that the brief does not provide any useful arguments to adjudicate the issues on appeal. In particular, the proposition as to the existence of diminished responsibility as a partial defence - in addition to the full defence foreseen by article 31 of the Statute and the factor possibly existing as mitigating circumstances for the purpose of sentencing - is not properly supported by legal arguments and it is untenable.[10] Similarly, the comparison developed with the defence of duress is equally untenable in as much as the Rules of Procedure and Evidence already foresee the consideration of the existence of a mental disease or defect falling short of a full defence as possible mitigating factor for the purpose of sentencing.[11] The CLRV therefore submits that the arguments presented should be dismissed in their entirety.

b) *Amicus* No. 1929 (Felicity Gerry QC, Wayne Jordash QC and Ben Douglas-Jones QC, Anna McNeil, Dr Beatrice Krebs, Jennifer Keene-McCann and Philippa Southwell)

7. The CLRV submits that the approach proposed by the *Amicus* is not only confusing but legally incorrect. Although it recognises that the crime of enslavement is a distinct crime under the Statute, the reasoning proposed nonetheless leads to the reduction of the crimes involving child soldiers to the latter, which in itself negates decades of marked evolution in international human rights law and international criminal law, recognising the complexity of child soldiers realities.[12] It proposes to merge the experiences of victims of modern slavery/human trafficking with the ones of children under the age of 15 and victims of forced recruitment into armed groups

[8] See the "AMICUS BRIEF BY JUSTICE FRANCIS M. SSEKANDI", *supra* note 1, paras. 1 and 2. See also paras. 26 to 28.
[9] See, for instance, the comments on the evidence presented at trial: Part IV, paras. 15 to 19 and Part V. paras. 20 to 24.
[10] See para. 8.
[11] See para. 14.
[12] See paras. 7, 16 to 38.

without acknowledging the greater complexity of each of said different situation and experience. It further dangerously blurs the criteria of several distinct legal concepts, by mixing the definition of child soldiers, individual responsibility and duress under an umbrella principle of "*non-prosecution and non-punishment for some victims of modern slavery/trafficking who committed crimes through the means and purposes of others*".[13] The illegal entry into or residence in countries of transit and destination of trafficked persons or their involvement in unlawful activities cannot be compared with the commission of 61 of the most serious crimes against thousands of innocent victims, by an adult criminal who was, at one point, a former child soldier.

8. Importantly, and contrary to what the *Amicus* seems to argue, the Trial Chamber did engage "*with the questions of causation, coercion, and lack of agency*" in order to appreciate the correlation, if any, with Mr Ongwen's criminal offences and his experience as a former child soldier abducted into the LRA at a young age.[14] Fundamentally, the Trial Chamber did analyse, in depth, both an ample amount of evidence and the intricacies of all the relevant provisions forming the legal framework of the Court in order to differentiate between perpetrators, victims and victim perpetrators, and identify where and when criminal responsibility was to be carried and liability recognised.[15]

9. Moreover, the *Amicus* confuses the exclusion of jurisdiction over persons under eighteen (article 26 of the Statute) and the possible impacts of childhood events on one's life, and the very distinct status of victims and defendants before the Court. Through its description of the compulsion and the causations models, the *Amicus* fails to see that an interpretation close to the former has been taken into consideration by the Trial Chamber in assessing the absence of duress in the case of Mr Ongwen,[16] and that another one close to the latter has also been assessed by the Trial Chamber in

[13] See part IV, paras. 16-38.
[14] See para. 25. See the "Trial Judgment" (Trial Chamber IX), No. ICC-02/04-01/15-1762-Conf and No. ICC-02/04-01/15-1762-Red, 4 February 2021, notably paras. 2477 and 2542.
[15] See para. 72.
[16] See paras. 25 to 28. See the "Trial Judgment", *supra* note 14, paras. 2581 to 2672.

evaluating whether Mr Ongwen was suffering from any mental disease or defect at the time he committed the crimes.[17]

10. The *Amicus* submits that "*there should be a fact-finding exercise as to the experiences suffered by those such as Mr Ongwen and any continuing effects*".[18] The CLRV observes that such an exercise was indeed done at trial and information in this regard was carefully assessed and taken into consideration not only in the determination of the convicted person's responsibility for the crimes he committed but also in the determination of his sentence.[19]

11. Furthermore, the CLRV notes that the *Amicus* is also factually and procedurally incorrect in its reading of the proceedings. Indeed, contrary to what it states, there wasn't any "*limitation suggested in Mr Ongwen's case that the consequences of being a child soldier should only be considered as a mitigating factor on sentence,*"[20] since the impact of his individual circumstances have been taken into consideration at length through the defences brought forward at trial for the purpose of the assessment of his liability. Contrary to what the *Amicus* suggests, the Trial Chamber did not follow a principle of "*mere criminalisation*",[21] and *did* assess the complex situation of a victim who became a perpetrator in identifying when and whether the latter was acting autonomously or not (through the assessment of the existence of a mental disease or defect, the assessment of duress, and in the identification of possible mitigating circumstances).[22] Whether the Trial Chamber did refer or not to the relevant "*modern slavery/human trafficking harm*" – as interesting and important as it is with respect to the very distinct situation it is describing - or nevertheless used a similar approach as explained *supra* without reference to these other crimes - cannot and does not constitute an error of the

[17] See paras. 29 to 32. See the "Trial Judgment", *supra* note 14, paras. 2450 to 2580.
[18] See para. 14.
[19] See the "Sentence" (Trial Chamber IX), No. ICC-02/04-01/15-1819-Conf and No. ICC-02/04-01/15-1819-Red, 6 May 2021, paras. 89 to 116.
[20] See para. 33.
[21] See para. 36.
[22] See the "Trial Judgment", *supra* note 14, paras. 2450 to 2580 and paras. 2581 to 2672. See also the "Sentence", *supra* note 19, paras. 61 to 88 and paras. 89 to 116.

Trial Chamber, neither factually, procedurally or legally.[23] The CLRV underlines that the "*moral conundrum*" with which the parties, participants and the Trial Chamber were faced in the case of Mr Ongwen has been duly weighted and assessed, contrary to the *Amicus'* observations.[24]

12. Finally, the CLRV submits that the operative distinction proposed by the *Amicus* between what it refers to as justificatory and excusatory defences[25] is unnecessary in light of the Court's legal framework. It is plainly incorrect to argue that the Trial Chamber only considered five (5) mental health issues[26] and declined the Defence's request to engage in discussions on whether Mr Ongwen's experience as a former child soldier significantly impaired his capacity for moral perception.[27] The Trial Chamber's assessed the testimonies of witnesses, experts and specialists (psychologists and psychiatrists) called in the case who have, to the best of their abilities and possibilities analysed all possible signs and symptoms of various traumas and mental health issues, both at the time of the commission of the crimes and currently (and importantly, Mr Ongwen[28] refused to meet with half of them, rendering their tasks all the more complex). In fact, the question of the accused's agency and moral development was especially discussed and assessed at length.[29] The Judges have cautiously evaluated the very special and complex context of this case based on all relevant and reliable evidence presented at trial (an unprecedented number of it too), and looked at all the evidence produced in order to be in a position to conclude whether or not the accused had the capacity - at the time of his criminal conducts - to take responsibility for his acts or not. This exercise was a very difficult one and this element was recognised by the Judges themselves upfront. The fact that they arrived to the conclusion that Mr Ongwen had the capacity and is fully responsible amounts

[23] See para. 37.
[24] See para. 38.
[25] See paras. 39 to 61.
[26] See para. 47.
[27] See para. 48.
[28] See the "Trial Judgment", *supra* note 14, paras. 2450 to 2580.
[29] *Idem*, and notably paras. 2477, 2480, 2481, 2485 and 2542.

to a very complex legal conclusion, with which, it seems, the *Amicus* is simply disagreeing.

13. This case, as shown in this *Amicus*, triggers many divergent opinions and moral positioning, which, if legitimate in their own rights and necessary in any complete debate, cannot and shall not form the basis of the important decision about the liability of an accused. Said decision ought to be enshrined in precise legal criteria stemming from a clear legal framework, which does exist at the Court, contrary to the *Amicus'* stand, although it is a different one that the one it suggests. At best, the communalities between child soldiers and victims of human trafficking and therefore the jurisprudence in trafficking cases could be consulted when assessing cases of child soldiers (the phenomenon of victims becoming perpetrators being also common in traditional trafficking cases), but the other creative avenues proposed by the *Amicus* cannot form the basis of a decision in this case, for lack of direct application.[30]

14. On a final note, the positioning of the *Amicus* on the sentencing - and in particular on the possibility of the convicted person to recover from his experiences and reintegrate his community later on in his life, as well as to play a role in the reparations process - are germane to the CLRV's own position and to the views expressed by the victims she represents.[31] However, and as suggests in her submissions, in the legal framework of the Court, the appropriate stage of the proceedings to take into consideration these elements is the reparations phase and eventually, depending on how reparations will have been implemented and their impacts on victims, the possible review of Mr Ongwen's sentence. The CLRV therefore submits that the arguments presented should be dismissed in their entirety.

[30] See para. 52.
[31] See paras. 65 ff. See also the "Common Legal Representative of Victims' Submissions on Reparations", No. ICC-02/04-01/15-1923-Conf and No. ICC-02/04-01/15-1923-Red, 6 December 2021.

c) *Amicus* No. 1930 (Tina Minkowitz, New York and Robert D. Fleischner, Massachusetts, United States of America)

15. The CLRV notes that the *Amicus* proposes an assessment of the responsibility of the convicted person through the "*principles of disability non-discrimination*", by considering whether the latter's state of mind when committing the crimes amounted to *mens rea* as defined in article 30 of the Statute.[32] The CLRV posits that this assessment was carefully done by the Trial Chamber already. The *Amicus* underlines that the Convention on the Rights of Persons with Disabilities (the "CRPD") "*permits evidence of a person's distress or unusual perceptions to be used to demonstrate whether and how a defendant's subjective experience of the world may be relevant to negate* mens rea".[33] In this regard, the Trial Chamber did allow such evidence and assessed it carefully. The different interpretation proposed by the *Amicus* is simply incorrect. The Trial Chamber did not deny any relevance to evidence of Mr Ongwen's experience of distress and unusual perceptions other than as possible symptoms of a mental disease or defect, and, to the contrary, did take into consideration the evidence presented at trial as a whole, including the one suggested. Said evidence did include "*direct testimony by the defendant and those who knew him or her well at the time, as well as expert testimony from diverse sources congruent with the social model of disability, including testimony based on experts' interviews with the defendant*"[34] when assessing the *mens rea* and responsibility of the accused for each of the crimes charged.[35]

16. The *Amicus* underlines that "*legal interpretations of Article 31(1)(a) of the Rome Statute necessarily entail an assessment of the rights and duties imposed by international criminal law as they apply to persons with disabilities*".[36] The CLRV concurs with the proposition according to which the Statute should apply in a manner ensuring its compatibility with international human rights law, *as per* its article 21, and

[32] See paras. 7-8.
[33] See paras. 44 to 52.
[34] See para. 50.
[35] See paras. 44 to 52. See the "Trial Judgment", *supra* note 14, paras. 2450 to 2580 and paras. 2581 to 2672. See also the "Sentence", *supra* note 19, paras. 61 to 88 and paras. 89 to 116.
[36] See para. 11.

consequently notably with the CRPD.[37] She submits that the Trial Chamber did respect the terms of the CRPD by assessing and recognising both the legal and the mental capacity of Mr Ongwen, thereby guaranteeing his right to due process and safeguards as a defendant.[38]

17. The other modifications suggested by the *Amicus* touch upon the very letter of the Statute in its article 31 and cannot be taken into consideration by the Chamber without being debated in a distinct forum which would eventually consider amendments to the legal texts of the Court.[39] In any case, whether or not the existence of the defence of mental disease or defect should be framed differently in the Statute, in order to be in full compliance with the CRPD, [40] the rights protected by the latter have been duly taken into consideration by the Trial Chamber and afforded the required protection as developed *supra*. The CLRV therefore respectfully submits that the arguments presented should be dismissed in their entirety.

d) *Amicus* No. 1931 (NIMJ – National Institute of Military Justice)

18. The CLRV notes that the comparison of the ICC with a US court-martial is not entirely accurate (for instance because there is no military judge and no jury to be instructed at the Court).[41] In any case, the information provided in relation to grounds for excluding criminal responsibility appears to repeat information already presented by the parties and participants to the Trial Chamber and therefore does not constitute new arguments or facts for the benefit of the Chamber. The CLRV is therefore not going to comment on it further, and only notes that the Appendix contains an excerpt concerning the evaluation of testimony in the military Judges Benchbook and the guidance provided in relation to lay witnesses with respect to their observation of the accused's appearance, behaviour, speech and actions – which mirrors the approach of

[37] See paras. 9 to 17.
[38] See paras. 26 to 30, and paras. 38 ff: "*A CRPD-amenable approach to criminal responsibility is one that is framed and applied to take account of the lived reality of persons with disabilities on an equal basis with others*".
[39] See paras. 31 to 35.
[40] See para. 56.
[41] See paras. 9, 14.

the Trial Chamber in this case. The CLRV therefore submits that the arguments presented should be dismissed in their entirety.

e) *Amicus* No. 1932 (Louise Arimatsu, Adejoké Babington-Ashaye, Danya Chaikel, Christine Chinkin, Carolyn Edgerton, Angela Mudukuti, Cynthia T. Tai)

19. The CLRV concurs with the *Amicus* submissions as to the required application of a gender analysis when interpreting holistically and contextually the Statute and its conclusion that the Trial Chamber did apply it correctly.[42] Beyond the arguments which repeat information already presented to the Trial Chamber,[43] the new argument submitted by the *Amicus* regarding the defence of duress for sexual and gender-based crimes through the doctrine of prior fault[44] (the accused's conduct up until the materialisation of the threat) calls for some comments. In this regard, the CLRV concurs with the *Amicus* that on the basis alone of the finding that the Mr Ongwen created an environment where sexual and gender-based crimes were sustained and/or normalised, the defence of duress is inapplicable to said crimes.[45] Furthermore, the CLRV concurs with the fact that such a defence "*cannot be inferred simply because an accused asserts it*"[46] and recalls that no evidence was presented at trial to support that the legal elements of duress were met in any way, especially in relation to the sexual and gender-based crimes committed by Mr Ongwen personally or through others.) committed. Therefore, the CLRV concludes that the observations have some value for the Chamber.

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[42] See paras. 2-3 and para. 5: "[…] *Failure to apply a gender analysis leaves the Court with an incomplete picture of what crimes occurred, how they occurred, and why they occurred, which ultimately leads to an unjust result for both the accused and the victims/survivors* […]".

[43] See paras. 4 to 14.

[44] See paras. 15 ff.

[45] See para. 17: "[…] *A gender analysis would be attentive to the ways in which relationships of domination, oppression, and exploitation were normalised by an accused through, for example, the imposition of gender roles and stereotypes making sexual and gender-based violence inevitable*". See also para. 18: "[…] *Applying a gender lens to this illustrative fact pattern requires that the Court consider the Accused's stature, his gender and corresponding superiority in the patriarchal society in which he belonged and personally promoted, and the role of women and underaged girls who were stripped of power*".

[46] See para. 19.

f) *Amicus* No. 1936 (Professor Erin Baines, Professor Kamari M. Clarke, Professor Mark A. Drumb)

20. The CLRV underlines the two incorrect premises on which the *Amicus* appears to be based. First, the argument built around "*the articulation of a therapeutic justice framework that emphasizes a culture of juvenile rights*" which is clearly inappropriate because, in accordance with the clear legal framework of the Court, Mr Ongwen, as any other defendant, has been prosecuted for the crimes he committed as an adult.[47] Second, the opinion - rather than the argument - that "*Dominic Ongwen should not have been found culpable because his forcible abduction by and indoctrination in the LRA has resulted in a mental defect leading to incapacity under Article 31(1)(a) of the Rome Statute*".[48] Such an opinion goes not only beyond the role of an *Amicus*, but it is also far outside of the expertise of the *Amicus* and, in any case, it is contradicted by the findings at trial.

21. On the merits of the arguments presented, the CLRV emphasises the inherent paradox contained in the *Amicus* proposition which, on the one hand, lists all the relevant instruments protecting the rights of *children* and juvenile justice principles, based on the age of the children and the specific vulnerabilities associated to it, and, on the other hand, pleads for the recognition of Mr Ongwen, an adult of 42 years old, as a child soldier.[49] Furthermore, the proposed interpretation of the Court's jurisprudence is incorrect. The over-simplified comparison of the *Lubanga* jurisprudence and the approach followed in this case leads the *Amicus* to factual and legal errors. There was no shifting in the narratives nor was there any in the factual or legal conceptualisation of the effects of child soldiering. Indeed, the findings in the *Lubanga* case regarding the long-lasting impacts of child soldiering have been equally acknowledged and recognised in the present case, both in relation to the children Mr Ongwen forcibly enlisted in the LRA (himself and through others); and in the

[47] See paras. 2 to 5.
[48] See para. 5.
[49] See paras. 6 to 8.

assessment of his own situation *as* a *former* child soldier.[50] However, the nuance in the present case is that Mr Ongwen was not participating in the trial as a victim, nor as a child, let alone as a witness former child-soldier, but as a main perpetrator who - after being a child soldier - became a major commander in the LRA and was therefore prosecuted for the extremely numerous and grave crimes he committed as an adult. It is further incorrect to state that the Trial Chamber adopted a narrative asserting agency, choice and action on the part of Mr Ongwen, while discarding his victimhood and possible continuous trauma, in as much as it did take into consideration all these elements together, in a complex analysis of the evidence presented in order to reach legal conclusions.[51] The question of the rehabilitative and restorative mechanisms that could be granted to Mr Ongwen, therefore, has been asked and assessed, but based on the conclusion that the latter is indeed responsible for the crimes he committed, and consequently, it became part of the assessment of his situation as a convicted person, not as a victim.[52]

22. Another error is the proposition that former child soldiers ought to be approached as a uniform group of individuals, thereby negating the all essential need to assess each and every of their individual situation in order to understand and address their respective realities, statuses, needs and priorities.[53] In this regard the CLRV notes that the *Amicus* draws categorical conclusions such as that "*Dominic Ongwen's abduction and indoctrination into the LRA has resulted in a mental defect that has destroyed his capacity to appreciate the unlawful nature or quality of his acts under Article 31(1)(a)*. […]",[54] basing the argument - or rather the presumption - advanced on a very general understandings of the realities in the LRA. None of the arguments are

[50] See the "Trial Judgment", *supra* note 14, paras. 2450 to 2580 and paras. 2581 to 2672. See also the "Sentence", *supra* note 19, paras. 61 to 88 and paras. 89 to 116.
[51] See paras. 11 and 12. See the "Trial Judgment", *supra* note 14, notably paras. 2477, 2480, 2481, 2485 and 2542.
[52] See para. 12.
[53] See para. 13.
[54] See para. 16. Similarly at para. 34: "*Growing up as a child soldier has undoubtedly had an impact upon Ongwen's mental and moral development — which we assert resulted in a destruction of Ongwen's ability to understand the immorality of his actions*". See also para. 43.

enshrined in either specific expertise, facts or law. Moreover, the provision of the domestic case law, although informative and despite the fact that similar examples were already taken into consideration by the Trial Chamber, further negates the one principle on which all the expert witnesses agreed during trial: that the situation of each individual is different and needs to be assessed specifically and distinctly.[55]

23. Finally, the *Amicus* proposes a reading of article 31 of the Statute to which a theoretical defence of coercive indoctrination would be added, but which lacks a solid legal foundation.[56] The very brief information provided about indoctrination and spiritual cosmologies or about neuroscience and mental development or temporal continuities of childhood trauma are not new arguments that the Trial Chamber has not assessed and considered already[57] - both through the defence of mental disease or defect and the defence of duress, as well as for the purposes of mitigating circumstances for sentencing. Although not termed as such, the Trial Chamber did examine the responsibility of Mr Ongwen in light of what the *Amicus* calls the "*reasonable child soldier*",[58] or, in other words, in light of the accused's specific individual situation in the precise and unique context in which he committed the crimes, and, by so doing, the Trial Chamber reached its conclusion. Contrary to what the *Amicus* purports, and in line with one of the author cited by the latter, the Trial Chamber was "*capable of making an objective determination on whether [Mr] Ongwen's rotten social background destroyed his capacity to appreciate the nature of his conduct*",[59] and concluded in the negative.

[55] See the "Trial Judgment", *supra* note 14, paras. 2450 to 2580.
[56] See paras. 23 to 38.
[57] See paras. 24 to 36. See the "Trial Judgment", *supra* note 14, paras. 597, 2317, 2369, paras. 2450 to 2580 and paras. 2581 to 2672. See also the "Sentence", *supra* note 19, paras. 61 to 88 and paras. 89 to 116.
[58] See paras. 37-38. See the "Trial Judgment", *supra* note 14, paras. 2450 to 2580 and paras. 2581 to 2672. See also the "Sentence", *supra* note 19, paras. 61 to 88 and paras. 89 to 116.
[59] See PANGALANGAN, Raphael Lorenzo Aguiling, *Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals*, 33 Am. U. Int'l L. REV. 605 (2018), page 634.

24. Finally, the CLRV underlines that the comments of the *Amicus* on sentencing amount to mere opinions and beliefs that are equally not supported by any factual or legal arguments.[60] The CLRV therefore submits that the arguments presented should be dismissed in their entirety.

g) *Amicus* No. 1937 (Association of Defence Counsel Practising before the International Courts and Tribunals (ADC-ICT))

25. The CLRV notes that the arguments put forward by the *Amicus* are not new and that the same jurisprudence and reasoning was already presented to the Trial Chamber. Therefore, she only notes that she concurs with the *Amicus* affirmation that "[b]*oth legal and medical scholars recognise that legal professionals are not trained to assess the effect of medical conditions, on legal capacity such that medical and legal practitioners must work together to satisfactorily assess capacity*."[61] This is precisely what was done in the present case.[62] The CLRV therefore submits that the arguments presented should be dismissed in their entirety.

h) *Amicus* No. 1940 (Public International Law & Policy Group)

25. The CLRV submits that the information provided in the *Amicus* is not new and was the subject of debates before the Trial Chamber. The *Amicus* appears to be conveying its own opinion rather than providing arguments that may help the Chamber to adjudicate the issues on appeal. Furthermore, she notes the conclusion according to which the "*outcome of the case would not be different had the Trial Chamber explicitly applied the Evidentiary Production Approach that PILPG proposes*" (*i.e.* with the accused bearing the initial evidentiary burden to adduce sufficient evidence to establish the existence of mental disease or defect or duress, and the Prosecution bearing the burden of proof that the evidence adduced by the accused does not establish a reasonable doubt as to his guilt).[63] To build its arguments, the *Amicus*

[60] See paras. 39-40.
[61] See paras. 14 to 18.
[62] See the "Trial Judgment", *supra* note 14, paras. 2450 to 2580.
[63] See para. 29.

disavows not only the ICTY jurisprudence, but also all national jurisprudence establishing the contrary, and offers an incorrect reading of the Preparatory Works of the Statute.[64] Indeed, rather than establishing "*an absolute prohibition on any reversal of the burden of proof*",[65] the CLRV posits that the fact that the drafters of the Statute finally decided to remain silent rather points to the absence of a marked intention - therefore offering no useful avenue to draw any conclusive interpretation of the legal provisions governing the proceedings of the Court in this regard. The CLRV therefore submits that the arguments presented should be dismissed in their entirety.

i) *Amicus* No. 1942 (Prof. dr. Mario H. Braakman, psychiatrist/ethnologist)

26. The CLRV notes that the *Amicus* appears to have an incorrect or partial reading of the Judgment and the Sentence. Indeed, it reaches the conclusion that the assessment of the Trial Chamber "*is not based on objective and scientific facts but possibly on biased opinions*"[66] and that the "*observations made by lay persons is preferred by the Trial Chamber over the diagnosis made by professional psychiatrists*".[67] The CLRV submits that the *Amicus*, following its own admission, seems to have read the Trial Chamber's decisions partially and followed the trial and the evidence presented in a very fragmented way;[68] otherwise it would have been clear that each and every piece of evidence was individually assessed by taking into consideration both scientific and expert evidence and evidence stemming out of the testimonies of fact and insiders witnesses in order for the Judges to reach their conclusions. Moreover, the reading made by the *Amicus* on the issue of impairment and the absence of arguments provided as to the existing nuances, and how these should be taken into consideration when read in light of the legal criteria used in this regard, not only ignores the same assessment made by the Trial Chamber, but also fails to provide any new argument for the consideration of this

[64] See paras. 11 to 21.
[65] See para. 21.
[66] See pp. 5-6.
[67] See p. 6.
[68] See p. 11.

Chamber.[69] Contrary to the suggestions made by the *Amicus*, transcultural psychiatry was discussed and used at trial too and expert assessments of Mr Ongwen's development regarding the notions of right and wrong in the context in which he grew up were provided to the Trial Chamber.[70] Finally, while stating that it refrains from making any diagnostic conclusion of the convicted person because it did not examine him, the *Amicus* nonetheless offers broad conclusions as to the likelihood of the latter's condition, thereby not only contradicting its own professional stance but also negating the difficulties and individual nature of any such diagnosis.[71] The CLRV therefore submits that the arguments presented should be dismissed in their entirety.

j) *Amicus* No. 1943 (Dr Paul Behrens, University of Edinburgh)

27. The CLRV concurs with the argument according to which: "*it is not incumbent on the Prosecution to prove innocence; and limiting its burden to the positive elements is thus compatible with Art. 66(2). The burden of proof for affirmative defence, like the burden of proof for any other aspects pertaining to innocence, rests with the Defence. Under Art. 66(3), the Prosecution has to prove guilt beyond reasonable doubt. The corresponding standard for the Defence is that of establishing reasonable doubt, and this has to apply to affirmative defences as well.*"[72]

28. Regarding duress, the CLRV notes that the reading made by the *Amicus* is incorrect. Contrary to its assertion, the Trial Chamber did consider the possible existence of a threat both from the accused's perspectives and from the position of a "*reasonable observer from the social circle of the acting person who has the benefit of the special knowledge of the defendant*";[73] and it did consider all the elements of the defence of

[69] See p. 7.
[70] See pp. 8 and 10. See the "Trial Judgment", *supra* note 14, paras. 2450 to 2580 and paras. 2581 to 2672. See also the "Sentence", *supra* note 19, paras. 61 to 88 and paras. 89 to 116
[71] See p. 8.
[72] See paras. 3-4.
[73] See para. 6. See the "Trial Judgment", *supra* note 14, paras. 2450 to 2580.

duress, notably whether the "*Accused had acted 'necessarily and reasonably' to avoid the threat*".[74]

29. The CLRV however concurs with the arguments with regard to the defence of mental disease or defect (especially regarding the assessment of the compatibility of functionality and the destruction of the relevant capacities, and the discharge of the burden of proof by the Defence at the level of creating a reasonable doubt), although she points out that the references provided in support don't bring any new argument to the Chamber.[75] Therefore, the CLRV concludes that the observations have limited value for the Chamber.

2) *Amici Curiae* observations on *area b.* relevant to sexual and gender-based crimes[76]

a) *Amicus* No. 1943 (Dr Paul Behrens, University of Edinburgh)

30. The CLRV only notes that the *Amicus* seems to overlook the important nuance existing between the foreseeability of the existence of the crime of forced marriage as such and the foreseeability of its qualification as a crime against humanity.[77] She, however, concurs with the arguments, although not new to the Chamber, according to which "*forced marriage fulfils the requirements of 'fair labelling': it is the appropriate designation for the relevant conduct, and the conviction of its perpetrators takes into account the specific suffering that its victims had to endure*".[78] The CLRV emphasises once again that recognising forced marriage as a stand-alone crime against humanity constitutes an essential step for the victims of such crime, but also more generally in light of the accountability and deterrence functions of international criminal law. Therefore, the CLRV concludes that the observations have some value for the Chamber.

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[74] See para. 9.
[75] See paras. 10 to 14, and in particular paras. 12 and 14.
[76] See *Amici* No. 1943, 1941, 1939, 1938, 1935, 1934, 1933, 1932, 1928 and 1927.
[77] See paras. 15-16. The CLRV also refers in this regard to the argument made by *Amicus* No. 1935, paras. 2 to 9.
[78] See para. 17.

b) *Amicus* No. 1941 (Professor Bonita Meyersfeld and the Southern African Litigation Centre Trust)

31. The CLRV is not going to comment on all the arguments presented by the *Amicus* and simply notes that the references provided correctly and comprehensively support the conclusion according to which : "*Forced marriage, sexual slavery and forced pregnancy ("SGB crimes") are distinct, cognisable crimes. Each crime has materially distinct elements not contained within the statutory definition of the other. It is possible, therefore, to have concurrent charges and convictions for such crimes where there is common conduct.* […] [T]*he material elements of all SGB crimes – the* actus reus, *the* mens rea, *and, most importantly, the harm – are different*".[79] Regarding the crime of forced marriage, the CLRV wishes to draw the attention of the Chamber on the specific arguments related to its internal and external components.[80] Regarding evidence of SGB crimes, she emphasises the argument regarding the importance of having specialised expert testimony in addition to direct, indirect and contextual evidence,[81] and refers the Chamber to the evidence provided by the expert witness she called at trial, PCV-0001, Prof. D. S. Reicherter.[82] Therefore, the CLRV concludes that the observations have some value for the Chamber.

c) *Amicus* No. 1939 (Mr Arpit Batra)

32. The CLRV wishes in particular to underline two arguments put forward by the *Amicus*. First, the assertion according to which "[b]*y inclusion of the words "conjugal association" while defining the crime of forced marriage, the Trial Chamber erred in severely restricting the scope of the crime of forced marriage to the instances involving imposition of conjugal relations. The terms conjugal in broad sense denote, among other things, sexual relationship. This is problematic because it inflates the level of evidence required to establish crime of forced marriage manifold. This would imply that the conjugal association/union will become a condition precedent to establish the crime of forced marriage*".[83] The CLRV concurs

[79] See, para. 1 ff.
[80] See paras. 5 to 9.
[81] See, paras. 34 to 44, and in particular para. 44.
[82] See UGA-PCV-0001-0020 (Expert Report), and T-175 and T-176 (Expert in-court testimony).
[83] See para. a ii and iii. The CLRV notes that the use of the term *conjugal* may come from the first recognition of the crime of forced marriage as another inhumane act by the Appeals Chamber of the

with the *Amicus* in that the crime of forced marriage covers much more than an imposed sexual relationship to include a social and domestic dimension through which further violence and harms occur. Second, she concurs with the argument according to which "[t]*he Rome Statute's division of slavery into two provisions; sexual slavery and enslavement has created a problem of statutory interpretation. The Ongwen Trial Chamber subsumes enslavement under sexual slavery.* […] *This mischaracterization has led to sexual slavery being narrowly interpreted and enslavement being misconstrued*".[84] And, consequently, she supports the distinct recognition of notably both the crime of forced marriage and the crime of sexual slavery as stand-alone crimes in their own rights.[85] Therefore, the CLRV concludes that the observations have some value for the Chamber.

d) *Amicus* No. 1938 (Dr Rosemary Grey, Global Justice Center, Women's Initiatives for Gender Justice, Amnesty International)

33. As already mentioned in previous submissions,[86] the CLRV underlines that she concurs with the *Amicus*' stand regarding the irrelevance of national abortion law to the ICC's interpretation of force pregnancy and underlines, not only the Preparatory Works of the Statute but also the international texts and initiatives cited to this effect.[87] She also wishes to underline the "[p]*articular attention* [that] *must be paid on the gender-specific harms on children subjected to forced pregnancy*",[88] especially in light of the very young age of the victims of this crime perpetrated by Mr Ongwen. The only point with which the CRLV cannot concur is the last statement put forward by the *Amicus* and according to which: "*This range of harms* [in most cases, the harm to such victims will

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Special Court for the Sierra Leone (AFRC Brima et al. Appeal Judgment, para. 202); and later on by the Trial Chamber of the SCSL in the RUF Sesay et al. case (RUF Sesay et al. Trial Judgment, para. 1295) identifying the *actus reus* of forced marriage as "*the imposition of forced conjugal association*." As underlined by *Amicus* No. 1928, para. 14, p. 12: "*Sexual element is inherent in forced marriage but its dominancy is doubtful*".

[84] See paras. c iii and iv, p. 6.

[85] See *infra* paras. 35 to 37.

[86] See the "CLRV Observations on the 'Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021'", No. ICC-02/04-01/15-1880-Conf and No. ICC-02/04-01/15-1880-Red (filed on 28 October 2021), 21 October 2021.

[87] See paras. 5 to 16.

[88] See para. 33.

extend beyond unlawful confinement. It can include the physical and mental harms of forced pregnancy, labour, birth, parenthood or miscarriage, and may also include further physical, mental, social and economic consequences if the pregnancy results in a child being born] *may best be captured under a broader charge such as enslavement, which as noted above, has been entwined with the crime of forced pregnancy since its inception*".[89] This statement in her opinion defies the whole brief and arguments made by the *Amicus* in relation to the recognition of the specificity of the crime of forced pregnancy and, therefore, of the cascading impacts and multitude of harm attached to it. Therefore, the CLRV submits that the arguments presented should be dismissed in their entirety.

e) *Amicus* No. 1935 (Erin Baines, Anne-Marie de Brouwer, Annie Bunting, Eefje de Volder, Kathleen M. Maloney, Melanie O'Brien, Osai Ojigho, Valerie Oosterveld, Indira Rosenthal)

34. The CLRV concurs with the arguments regarding forced marriage as another inhumane act constituting a crime against humanity and wishes to draw the attention of the Chamber – although it is not the subject *per se* of the brief - on the useful comparison made with the open-ended war crime classification of outrages upon personal dignity and the usage and validity of such category of crimes when applicable (in the context of the Judgment in particular, where the crimes of outrages upon personal dignity have not been recognised although it may adequately have been used to cover and illustrate facts, violation of distinct rights and specific harm not covered by the other crimes thereby recognised).[90] The CLRV wishes also to emphasises the argument that forced marriage is a continuing crime.[91] In this regard, the long-lasting impacts of said crime on the lives of the victims concerned who remain consciously or unconsciously, and socially "married" to Mr Ongwen even years after their escape and return - and despite the fact that the latter is in prison - have important ramification in terms of their sufferings and associated consequences that ought to be recognised by

[89] See para. 39.
[90] See para. 4.
[91] See paras. 30 to 32.

the Court and addressed through its decisions and via the reparations process.[92] Therefore, the CLRV concludes that the observations have value for the Chamber.

f) *Amicus* No. 1934 (Sareta Ashraph, Stephanie Barbour, Kirsten Campbell, Alexandra Lily Kather, Jocelyn Getgen Kestenbaum, Maxine Marcus, Gorana Mlinarević, Valerie Oosterveld, Kathleen Roberts, Susana SáCouto, Jelia Sané, Hyunah Yang)

35. The CLRV strongly dissents from the arguments put forward by the *Amicus* with a view of having the Chamber reversing the Judgment in order to enter convictions for enslavement rather than sexual slavery under crimes against humanity.[93] She underlines the damageable effect of subsuming this specific crime in the more generic crime of enslavement when it has clearly been shown through trial, in the Judgment and in the abundant references provided by other *Amici*, that said crime entails both very specific and distinct elements and consequences. She further underlines that these ought to be recognised not only for the victims of said crime, but also for the important functions of deterrence and accountability of international criminal law.

36. The Trial Chamber did not commit any error in applying the legal framework of the Court which itself foresees sexual slavery as a distinct crime from enslavement, especially in as much as both crimes legally protected interests are distinguishable from other forms of harm. Moreover, the abundant literature cited by the *Amicus* was known to the drafters of the Statute and, hence, was already taken into consideration in their decision regarding this crime. This position is all the more surprising that the *Amicus* further recognised that "*cumulative convictions serve the fundamental purpose of fully reflecting the culpability of an accused*"[94] - and the CLRV adds, the reality lived by the victims and the specific harms they have been suffering from -, but fails to see that the same applies to recognising the existence of distinct and specific crimes too (instead of subsuming one in another). The CLRV submits that it is the duty of a criminal court

[92] See para. 36.
[93] See paras. 2 ff.
[94] See para. 25.

to refine the law and recognise, especially when enshrined in clear legal provisions, the specific realities faced by both the perpetrators and the victims, rather than to blindly apply legal theories. This is because there is a logic in recognising the effects that transcend the more broad values protected by the crime of enslavement, to more adequately capture the realities lived by the victims of, specifically, sexual slavery, particularly when this is recognised by the applicable law. This interpretation is also in line with the principle of fair labelling. The CLRV therefore submits that these arguments should be dismissed in their entirety.

37. There is, however, one element on which the analysis proposed by the *Amicus* brings some new argument to the Chamber that should be taken into consideration. It does not pertain to the recognition of the crime of sexual slavery itself but rather to its interpretation. The CLRV concurs with the consideration that the interpretation of said crime should encompass all types of acts of a sexual nature, beyond rapes and "*experiences of sexual acts* [construed as] *heteronormative male-on-female rapes*".[95] In particular, she agrees that the following victims should have been recognised as victims of sexual slavery and not as enslavement: "*enslaved boy-child soldiers (though solely legally characterised as conscripted)* [who] *were forced to rape; the enslaved girl-child ting tings* [who] *were subjected to the exercise of sexualised ownership, including through forced checking of the onset of menstruation to determine whether they had reached puberty and were "ready" to be raped and groomed to become "wives""*.[96] Consequently, the CLRV concurs with the argument that the crime of enslavement should equally *not* be subsumed in the crime of sexual slavery (a conclusion which has further impact in terms of conviction and sentence)[97] and requests the Chamber to conclude that both crimes, as already distinctly recognised in the legal framework of the Court, should however also individually be interpreted by the chambers in a more comprehensive way.

[95] See paras. 13 to 24, and in particular para. 16.
[96] See para. 18.
[97] See para. 28.

g) *Amicus* No. 1933 (Mariana Ardila María Cecilia Ibáñez Teresa Fernández-Paredes Daniela Kravetz Susana SáCouto Dalila Seoane)

38. As previously mentioned, the CLRV concurs with the *Amicus* that "*as a form of reproductive violence, the criminalisation of forced pregnancy recognises the inherent value of reproductive autonomy of women and girls*".[98] Of essential value is also the fact that it causes specific harms beyond those affecting an individual's sexual autonomy and sexual integrity that ought to be recognised. Indeed, "[i]*ts effects are long-lasting, impacting different stages of the pregnancy, captivity, birth, motherhood and the return of the victims to their community in a post-conflict scenario*".[99] It also includes "*the protection gap that children born as a result of sexual violence and their mothers face in the aftermath of conflict*".[100] The CLRV underlines the long-lasting and multiple harms suffered by the victims of this specific crime and contends that the illustration provided by the *Amicus* accurately reflects her own submissions through trial and the realities faced by her clients.[101] She further concurs with the *Amicus* that this crime entails the violation of multiple human rights, including notably "*their right to reproductive autonomy; their reproductive and sexual rights; their right to decide, freely and responsibly, the number and spacing of their children; their right to the highest attainable standard of health; the prohibition of discrimination on the basis of their sex; their right to be free from cruel, inhumane or degrading treatment; their freedom of movement; and their right to privacy and family life, among others*".[102] Finally, on the arguments and references with regard to the types and nature of evidence relevant to prove sexual violence, the CLRV highlights that the Trial Chamber in this case had the benefit of an array of reliable evidence, from direct, to indirect and circumstantial evidence and testimonies.[103] Therefore, the CLRV concludes that the observations have value for the Chamber.

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[98] See para. 5 ff, as well as para. 13.
[99] See paras. 10 to 12, and in particular para. 11.
[100] See para. 12.
[101] See in particular paras. 11 and 12. See the "Common Legal Representative of Victims' Submissions on Reparations", *supra* note 31; and the "Common Legal Representative of Victims' Closing Brief", No. ICC-02/04-01/15-1720-Conf and No. ICC-02/04-01/15-1720-Red (filed on 28 February 2021), 24 February 2020.
[102] See paras. 18-19.
[103] See paras. 20 to 31.

h) *Amicus* No. 1932 (Louise Arimatsu, Adejoké Babington-Ashaye, Danya Chaikel, Christine Chinkin, Carolyn Edgerton, Angela Mudukuti, Cynthia T. Tai)

39. The CLRV concurs with the *Amicus* when stating that "*a rigorous gender analysis of evidentiary standards will help ensure that discriminatory norms, stereotypes, and inequalities are not inadvertently perpetuated in legal proceedings*".[104] In this regard, the *Amicus* emphasises that the "*Trial Chamber's evaluation of the evidence of sexual violence was consistent with international criminal law and jurisprudence*".[105] Therefore, the CLRV concludes that the observations have some value for the Chamber.

i) *Amicus* No. 1928 (Dr. Mohammad Hadi Zakerhossein)

40. Based on the *Amicus* arguments, the CLRV emphasises that the recognition of the crime of forced marriage as another crime against humanity by the Trial Chamber is not only enshrined in the distinct element of said crime and in the nature and specificity of the harms it causes; but reflects, as well, a correct and comprehensive social and cultural approach to the crime.[106] The impacts of its recognition are broader than a mere accurate reflection of the harms suffered by the victims and the nature and gravity of the liability of the perpetrator and goes as far as giving back a voice to victims who otherwise would be silenced by the use of broader crimes categorisation.[107] The CLRV therefore submits that these arguments should be dismissed in their entirety.

j) *Amicus* No. 1927 (Prof Jean Allain, Monash University, Castan Centre for Human Rights Law)

41. The CLRV refutes in its entirety the *Amicus* arguments and refers to her submissions *supra* which touch upon a similar attempt to subsume specific and stand-alone crimes in a broader crime categorisation.[108] The weakness of the reasoning is

[104] See paras. 21, 23, 24 and 27.
[105] See paras. 21 ff, and in particular paras. 26 to 28 and 30 to 34.
[106] See paras. 8 and 14.
[107] See para. 9.
[108] See *supra* paras. 35 to 37.

demonstrated by the fact that the *Amicus* applies its arguments to the crime of forced marriage to claim that the latter should be subsumed in the crime of sexual slavery, but does not go as far as concluding that by the same vein, the crime of sexual slavery should then be subsumed in the crime of enslavement or even slavery.[109] Not only the arguments ignore the main characteristic of the crime of forced marriage, such as the element of exclusivity not contained in the crime of sexual slavery,[110] and the fact that its consequences go way beyond a sexual crime in nature,[111] but they also run against the principles of fair labelling, legality,[112] accountability and recognition of the harm suffered by the victims concerned. In this regard, it is notable to underline how the *Amicus* reductively summarises what it believes corresponds to the "survivor's perspective" on forced marriage.[113] By focusing on the deprivation of liberty and ownership criterion,[114] the *Amicus* fails to take into consideration the other very specific rights protected under the crime of forced marriage, notably the rights to autonomy, privacy and family life (which in itself has many ramifications that start before the commission of the crime and extend until many years after the crime has stopped). The CLRV concludes that the reductive and short-sighted views adopted by the *Amicus* are maybe explained by the "limited research" the latter admits to have done[115] and refers in response to the references and arguments developed in *Amici* No. 1935 and No. 1941.[116] The CLRV therefore submits that these arguments should be dismissed in their entirety.

[109] See para. 5.
[110] See paras. 9 to 16, as well as 20 to 28, 36-37 and 55.
[111] See paras. 41 to 48.
[112] See paras. 49-50.
[113] See paras. 46, 57 and 58 (which, the CLRV notes, are worded in quite disrespectful terms for the survivors of this crime).
[114] See paras. 29 to 40.
[115] See paras. 49 to 58, and in particular para. 52.
[116] See *Amici* No. 1935 and No. 1941, *supra* note 1.

3) *Amici Curiae* observations on *area c.* relevant to cumulative convictions[117]

a) *Amicus* No. 1943 (Dr Paul Behrens, University of Edinburgh)

42. The CLRV disagrees with the reasoning proposed by the *Amicus* with regard to the assessment of a relationship of speciality between the crimes concerned by the analysis of possible cumulative convictions.[118] The arguments proposed are not grounded in law, and also contradict the legal principle according to which cumulative charging and convictions are applicable when each of the crime concerned calls for the demonstration of a distinct material element not covered by the other. The CLRV therefore submits that these arguments should be dismissed in their entirety.

b) *Amicus* No. 1939 (Mr Arpit Batra)

43. The *Amicus* purports that the test and criteria used in international criminal law, before the ICTY and the ICC notably, to determine whether cumulative convictions are permitted lead to an ambiguous point of law in the international criminal jurisprudence and proposes a reading of the Statute that interprets broadly the *ne bis in idem* principle.[119] The CLRV submits that such arguments are devoid of any legal foundation and underlines that no reference is provided for the submission that a "conduct-based" test approach was the intention of the drafters of the Statute.[120] The CLRV therefore submits that these arguments should be dismissed in their entirety.

c) *Amicus* No. 1937 (ADC-ICT)

44. The CLRV notes the paradoxical reasoning proposed by the *Amicus* which, on the one hand, purports that the starting point to determine the permissibility of cumulative convictions must be the Statute (and therefore, the jurisprudence implementing it), discarding the relevance of any support from national jurisprudence and general principle of law while, on the other hand, refutes the validity of previous

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[117] See *Amici* No. 1943, 1939, 1937, 1934 and 1931, *supra* note 1.
[118] See paras. 29 to 36.
[119] See pp. 9 to 15.
[120] See p. 15.

ICC jurisprudence, including from the Appeals Chamber itself, and calls for the consideration of the reading made of the *ne bis in idem* principle – not in the legal framework of the Court – but by national jurisdictions and scholars.[121] It further bases its proposed change in the test to be used on *dissenting* Judges *opinions* before the ICTY.[122] It suffices to further note that the *Amicus* chooses to focus its reading of article 20(1) of the Statute on the specific use of the term "conduct", while ignoring the rest of the sentence which refers to a "*person* [who] *has been convicted or acquitted by the Court*", hence, pushing aside the interpretation already given by the Appeals Chamber that said provision does not apply to cumulative convictions.[123] The CLRV therefore submits that these arguments should be dismissed in their entirety.

d) *Amicus* No. 1934 (Sareta Ashraph, Stephanie Barbour, Kirsten Campbell, Alexandra Lily Kather, Jocelyn Getgen Kestenbaum, Maxine Marcus, Gorana Mlinarević, Valerie Oosterveld, Kathleen Roberts, Susana SáCouto, Jelia Sané, Hyunah Yang)

45. The CLRV notes that the conclusion reached by the *Amicus* in its determination to have the crime of sexual slavery subsumed in the crime of enslavement, which is legally incorrect and impermissible in light of the very letter of the Statute and not in line with the intention of its drafters, further lead to an incorrect and absurd conclusion regarding cumulative convictions. The *Amicus* argues that the Trial Chamber correctly applied the *Čelebići* test for cumulative convictions for all the crimes concerned by the Judgment but suggests that it should have been departed from it only with respect to enslavement and sexual slavery as crimes against humanity.[124] The CLRV submits that such a conclusion runs against all basic legal principles and has no legal justification. The CLRV therefore submits that these arguments should be dismissed in their entirety.

[121] See paras. 20 to 22.
[122] See paras. 26 to 29.
[123] See paras. 21-22 and 34.
[124] See paras. 28 to 31.

e) *Amicus* No. 1931 (NIMJ)

46. The CLRV notes that the propositions made by the *Amicus* with regard to cumulative convictions are confused and lack a clear and relevant legal foundation.[125] The CLRV therefore submits that these arguments should be dismissed in their entirety.

Respectfully submitted.

Paolina Massidda
Principal Counsel

Dated this 17th day of January 2022

At The Hague (The Netherlands)

[125] See paras. 20 to 33.