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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 *PROSECUTOR v. DOMINIC ONGWEN*

Public with Public Annex A

Prosecution Response to *Amici Curiae* observations

Source: **Office of the Prosecutor**

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INTRODUCTION

1. At the Appeals Chamber's invitation, eighteen *amici curiae* have submitted extensive observations, addressing three principal topics: grounds excluding criminal responsibility, sexual and gender based crimes, and cumulative convictions. The Prosecution hereby provides its written response. Many *amici curiae* support the Trial Chamber's legal approach and its findings. Others propose innovative theories detached from the applicable law, or irrelevant on the facts of this case. The Defence did not even raise some of these arguments. Overall, these observations only confirm the correctness of the Trial Chamber's legal and factual findings and its detailed knowledge of the evidence gained over three years of trial proceedings, 186 witnesses (130 appearing before the Chamber) and 5,149 items submitted. Mr Ongwen was correctly convicted, and his appeals against the Conviction Decision and Sentence must be dismissed.

I. GROUNDS EXCLUDING CRIMINAL RESPONSIBILITY

2. When considering Ongwen's criminal responsibility, many *amici curiae* raise controversial policy dilemmas for which there is, as yet, no clear consensus—and which, consequently, can at most be considered *de lege ferenda*. Without prejudice to the potential value of these critical reflections, the Appeals Chamber is called in this case to apply the *lex lata* under the Statute, and must therefore approach these policy arguments with caution. The Chamber neither erred in interpreting article 31, conforming to the established law, nor in assessing the evidence before it. This is supported by the Defence's own approach at trial, insofar as it rightly considered article 31(1) to be both pertinent and sufficient to adjudicate Ongwen's responsibility—evident, for example, in the fact that they did not invoke the rule 80 procedure to raise a ground under article 31(3).[1] While some *amici curiae* may prefer a different approach to the allocation of individual criminal responsibility than that in the Statute, litigation in these proceedings is not the proper avenue to achieve what could only properly be the subject of legislative reform.

3. The Prosecution agrees that the need to bring justice for LRA atrocities committed under Ongwen's command may not necessarily preclude sympathy for his initial plight as a child abductee into the LRA. Yet these mixed feelings only heighten the importance of fidelity to the principles of appellate review, so that this case is decided according to the established law, with deference to the Trial Chamber's reasonable approach to the evidence it heard.[2] No matter how well-intentioned, *a priori* assumptions about Ongwen's culpability—rather than the evidence meticulously considered by the Chamber—cannot assist in this judicial process. To the contrary, the merits of this case are "best adjudged on the evidence presented in the course of the trial".[3] The Appeals Chamber will need to exercise caution in considering the assertions of a number of *amici curiae* concerning the evidence in the case and the Trial Chamber's reasoning.

I.A. THE CHAMBER CORRECTLY APPLIED THE BURDEN AND STANDARD OF PROOF

4. *Amici curiae* agree that an accused relying on article 31 has a 'burden' or 'responsibility' to present evidence supporting their claim, but differ on the applicable standard. While ADC-ICT argue that the Defence bears the responsibility to prove article 31 grounds to a

[1] This view seems to be shared by other counsel: *see e.g.* ADC-ICT Brief, para. 4 (considering only article 31(1)).
[2] *See e.g. Tadić* AJ, para. 64.
[3] Pangalangan, p. 634.

preponderance of evidence,[4] Behrens considers that it suffices merely to raise a reasonable doubt.[5] Arimatsu *et al*. require the accused to provide sufficient evidence.[6] PILPG calls for an 'Evidentiary Production Approach' where a Chamber first considers whether there is a "live issue" under article 31 because the accused has established it to a *prima facie* standard, and only then considers whether the Prosecution has proved that the Defence's evidence does not create a reasonable doubt as to the accused's guilt.[7] Finally, NIMJ compares the Court's regime with the practice at US courts-martial.[8]

5. The Prosecution agrees that an accused has the 'evidential burden' to substantiate any ground excluding responsibility under article 31. The Prosecution retains the overall burden to prove the guilt of the accused, namely, the elements of the crimes and modes of liability, including when applicable, the absence of the alleged ground excluding responsibility. A Chamber will assess the totality of the evidence and acquit if there is a reasonable possibility that responsibility is excluded under article 31. By adopting this approach, the Chamber thus did not err in deciding on Ongwen's claims under article 31(1)(a) and (d).[9]

I.A.1. The accused has the 'evidential burden' to substantiate their claim

6. An accused relying on article 31 must substantiate the claim and present evidence supporting this allegation.[10] This accords with rule 79(1)(b) and ensures the effective conduct of the proceedings.[11] Notwithstanding his position on appeal,[12] this was also Ongwen's position at trial, where he adduced evidence, including expert evidence, for the purpose of article 31(1)(a) and (d).[13]

7. It is well established that an 'evidential burden' (to provide arguments and evidence to support or oppose a claim) is distinct from the burden of proof (to prove or disprove the

[4] ADC-ICT Brief, para. 13.
[5] Behrens Brief, paras. 3-4.
[6] Arimatsu *et al*. Brief, para. 19.
[7] PILPG Brief, paras. 4, 29.
[8] NIMJ Brief, paras. 9 (explaining that the accused bears the burden of presenting evidence supporting his/her claim and that the jury will only be instructed on the defence after evidence has been admitted), 10, 18.
[9] Judgment, paras. 231, 2455-2456, 2587-2589.
[10] Ambos (2021), p. 422.
[11] *See also mutatis mutandis* *Al-Senussi* Admissibility AD, para. 167 ("even though the State bears the burden of proof in general, the Appeals Chamber considers that the Pre-Trial Chamber was reasonable in placing an "evidential" burden on the Defence sufficiently to substantiate the factual allegations it was making. This is because, if it were otherwise, the proceedings could potentially be significantly delayed by the need to consider and rebut all factual allegations, including those for which there is no sufficient substantiation").
[12] Appeal, para. 218 ("With an affirmative defence, the Defence has no evidentiary burden").
[13] Defences Standard Request, para. 2 ("The Defence is required only to submit evidence before Trial Chamber IX [...] as to the existence of the mental condition or the circumstances giving rise to duress. The Accused is therefore only under an evidential obligation to raise the defence, which has already occurred in this case").

claim).[14] The Chamber correctly distinguished between the two concepts.[15] The Chamber's approach is consistent with the Court's legal framework where the Prosecution has the obligation to investigate incriminatory and exculpatory circumstances, and the accused cannot have imposed upon him or her a reversal of the burden of proof.[16]

8. Yet, the Prosecution's burden does not mean that it is always necessary to lead specific evidence demonstrating the absence of article 31 grounds, particularly if an accused has not raised them and there is no indication suggesting their existence. Nor is the Prosecution required to rebut all possible interpretations resulting from unclear or abstract defence arguments.[17] That said, given a Chamber's duty to establish the truth under article 69(3), there may be circumstances indicating the necessity to hear evidence on a matter which the parties have not addressed at all.[18] However, this does not apply in this case, where both parties led evidence on all relevant issues, and the Chamber ruled on that basis.

I.A.2. The standard of proof follows from article 66(3)—the "reasonable possibility" of a ground excluding criminal responsibility results in acquittal

9. Contrary to the PILPG's preferred approach, a Chamber need not issue a preliminary ruling finding that particular article 31 claims meet an initial evidentiary threshold ('an air of

[14] Ambos (2021), p. 414; Pauwelyn, p. 89 (distinguishing between the *burden of raising* a claim, *burden of production* of arguments and evidence to substantiate or oppose a claim, and the *burden of persuasion* or 'the real burden of proof' to prove or disprove a claim); *Ruto and Sang* Conduct Decision, Judge Eboe-Osuji's Separate Opinion, paras. 79-80 (distinguishing between the 'persuasive burden' ("the obligation of a party to meet the requirement of a rule of law that a fact in issue must be proved or disproved at the required standard of proof") and the 'evidential burden' ("the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue" or "to adduce evidence that is enough to give an air of realism to the issue aimed at by the evidence in question, thus putting the issue beyond a bare assertion or mere conjecture").

[15] *Compare* Judgment, para. 231 (referring to the Prosecution's burden of proof beyond reasonable doubt "with respect to the facts 'indispensable for entering a conviction', namely, in this case, the absence of any ground excluding criminal responsibility and, thus, the guilt of the accused") with Defences Standard Decision, para. 15 ("As concerns the presentation of the evidence, the Defence itself has maintained that it is under an evidential obligation to raise the grounds for excluding criminal responsibility under Articles 31(1)(a) and (d)").

[16] Statute, arts. 54(1)(a), 67(1)(i). The Chamber's approach differs from the approach adopted at the ICTY where the accused was presumed sane and was required to demonstrate a mental defect to a balance of probabilities: *Čelebići* AJ, para. 582; *Čelebići* TJ, paras. 602-603, 1172. *See also* Schabas and McDermott, p. 1957 (mn. 21).

[17] In *Abd-al-Rahman*, Pre-Trial Chamber II found that even if the Prosecution retained the burden to prove the mental elements of the crimes charged "[it] is not called upon to rebut claims of mistakes of law or fact that are frivolous or merely hypothetical. It is thus incumbent upon suspects invoking a mistake of fact or law to identify sufficient evidence to properly raise the issue": *Abd-al-Rahman* CD, para. 78.

[18] Schabas and McDermott, pp. 1955-1956 (mn. 18) (that the onus lies on the Prosecutor cannot be read to exclude the court's statutory powers, as the court must be convinced of the accused's guilt beyond reasonable doubt). *See also* Weigend, p. 269 (explaining that in Germany, the defendant need not even mention a 'defense' and the court can investigate the defendant's mental health even when the defendant claims to have been in perfect mental health; however, the court will in practice take such steps only if there is some indication of grounds hindering the conviction).

reality'[19] or a *prima facie* showing[20]) to consider them in the Judgment. This is unnecessary for chambers composed of professional judges,[21] who retain the authority to limit (or not allow) the presentation of evidence regarding, for example, frivolous claims.[22] It is also inconsistent with their competence to consider relevant matters at the end of trial based on all the evidence (as illustrated by the 'submission evidentiary regime' adopted in many trials, including in this case). If, in its final deliberations, and based on all the evidence (and not speculation or conjecture), the Chamber finds the *reasonable possibility* of a ground excluding responsibility under article 31, it must acquit. This follows from article 66(3), which requires proof of the accused's guilt beyond reasonable doubt.[23] After carefully assessing the evidence the Chamber correctly found that there was no such possibility in this case.[24]

I.B. THE CHAMBER CORRECTLY INTERPRETED ARTICLE 31 AS A WHOLE

10. The Chamber did not err in interpreting article 31. In particular, it correctly considered that only article 31(1) was engaged, and that there was no need to depart from the most natural interpretation of its provisions based on article 21(3) of the Statute.

I.B.1. Article 31 must be interpreted contextually

11. The Appeals Chamber has repeatedly held that the Statute must be interpreted according to the Vienna Convention on the Law of Treaties—namely, with reference to the ordinary meaning of the terms used, in light of their context and the object and purpose of the Statute itself.[25] In interpreting article 31, and the relationship between article 31(1) and 31(3), context is particularly important. Specifically, article 31(3) cannot be interpreted so as to make article

[19] Cryer *et al*., p. 400 (arguing that art. 31(2) should be interpreted as requiring an 'air of reality' of a defence to be established before permitting detailed argument and evidence to be tendered).
[20] PILPG Brief, para. 29; *see also* Ambos (2021), p. 422 (stating that the Defence should present some initial (*prima facie*) evidence indicating the existence of the defence, and that this corresponds to § 1.2(2)(b) MPC, according to which the presumption of innocence does not 'require the disproof of an affirmative defense unless and until there is evidence supporting such defense').
[21] *Cf. Ruto and Sang* Conduct Decision, Judge Eboe-Osuji's Separate Opinion, para. 81; *Fontaine* (Canada), paras. 48, 68-70.
[22] Likewise, a Chamber cannot be expected to rule on obscure party submissions.
[23] *Čelebići* AJ, para. 458 ("it is not sufficient that [a finding by the Trial Chamber] is a reasonable conclusion available from the evidence. It must be the *only* reasonable conclusion available. If there is another conclusion which is also reasonably available on the evidence and which is consistent with the innocence of the Accused, that conclusion must be adopted and the Accused must be acquitted"); *see also* Judgment, para. 228 ("reasonable doubts must be grounded in reason. The reasonable doubt standard cannot consist of imaginary or frivolous doubt – it must have a rational link to the evidence, lack of evidence or inconsistencies in the evidence"), citing *Ngudjolo* AJ, para. 109, with reference to *Rutaganda* AJ, para. 488. Once the Prosecution presents evidence meeting the 'beyond reasonable doubt' standard, if the accused does not present evidence capable of raising (reasonable) doubt, he can be convicted: *Ntaganda* AJ, para. 586.
[24] Judgment, paras. 2580, 2668-2671.
[25] *See e.g. [Redacted]* AD, para. 56; *Ruto and Sang* Summonses AD, para. 105; *DRC* Extraordinary Review AD, para. 33; *Lubanga* AJ, para. 277.

31(1) redundant. This would be the effect if article 31(3) applies to the same grounds as those set out in article 31(1) but simply with lower standards. Accordingly, article 31(3) must be understood to permit reliance on *additional* grounds excluding criminal responsibility, conforming to the requirements of article 21, *other than* those areas expressly legislated in article 31(1). This interpretation is confirmed by rule 145(2)(a), which makes clear that circumstances falling short of the thresholds in article 31(1) may be addressed in mitigation, but by necessary implication do not permit the exclusion of responsibility under article 31(3). For these reasons, to the extent that *amici curiae* seek to rely on article 31(3), this is inapposite.[26]

I.B.2. The Chamber's interpretation of article 31(1) complied with article 21(3)

12. Two *amici curiae* particularly urge the interpretation and application of article 31 consistent with their view of the rights of children[27] or persons with disabilities.[28] However, while article 31 must be interpreted and applied consistently with internationally recognised human rights pursuant to article 21(3), nothing establishes that the Chamber's interpretation of article 31 failed in these requirements. To the contrary, the Chamber's interpretation is consistent with such rights—including by protecting children and persons with disabilities from the harms occasioned by the crimes charged in this case, which may be deterred by a fair and practicable model of individual criminal responsibility.

13. For example, Clarke *et al*. correctly refer to the special status of children in international law—including "states' obligations to protect children" and provide for their "wellbeing."[29] But they fail to demonstrate that this entails, or even permits, "coercive indoctrination" to be recognised as a "mental defect" for the purpose of article 31(1)(a) or in any other respect under article 31.[30] Practice in two domestic cases (which are not analogous to this case, either in the applicable law, charged crimes, or role of the accused) fails to show any legal requirement to interpret article 31(1)(a) as they suggest.[31] Nor can this be justified since the existence of a "mental disease or defect" is primarily a question of fact to be determined by evidence, and not

[26] *Contra* Gerry *et al.* Brief, paras. 39, 45, 55, 61; Ssekandi Brief, paras. 1, 13, 26. Concerning duress, *see further below* paras. 28-30 (explaining that there is no basis to distinguish 'justificatory' and 'excusatory' duress). Concerning diminished responsibility, *see further below* paras. 21-22 (mitigating factor only).
[27] *See e.g.* Clarke *et al.* Brief, paras. 3-4, 6-8
[28] *See e.g.* Minkowitz *et al.* Brief, paras. 3-4, 6, 9-52.
[29] Clarke *et al.* Brief, para. 6.
[30] Clarke *et al.* Brief, para. 23. *See also* para. 16. Indeed, Clarke *et al*. seem to suggest the reverse, that adopting what they see as a progressive interpretation might "cascade into the development of more robust cultures of human rights"—but this is not the object and purpose of article 21(3): *cf.* paras. 17, 42.
[31] *Contra* Clarke *et al.* Brief, paras. 18-22.

legal opinion.[32] The facts underlying Clarke *et al.*'s opinion—indoctrination, spirituality, abduction at a young age, and potential continuity of childhood traumas—were known at trial and considered by the multitude of expert witnesses who testified before the Chamber.[33] The Chamber did not "gloss over" what Clarke *et al*. regard as a "rich body" of (unspecified) "scientific study, literature, and case studies".[34] Rather, the Judgment shows that the Chamber carefully considered all the expert evidence in detail. Clarke *et al*. also wrongly imply that the Chamber or the expert witnesses assessed the existence of a mental disease or defect based on a general "reasonableness" standard.[35] This was not the case, and indeed would be irrelevant to article 31(1)(a), which requires an assessment of Ongwen's mental health in particular, not a normative assessment of his actions.

14. Similarly, Minkowitz *et al*. propose that the internationally recognised rights of persons with disabilities entail a radical reinterpretation of article 31(1)(a), so that "evidence of distress or unusual perceptions would be examined wherever it may be raised to negate the mental element of a crime or to establish the mental element of a partial or complete defense", without any "finding of incapacity"[36]—but, as they rightly concede, their interpretation of the requirements of the CRPD remains "a subject of controversy".[37] Furthermore, as they also acknowledge, the fundamental concern underlying their proposal—that "persons found to be not culpable due to a 'mental disease or defect' may be deemed to be a threat to society and subject to involuntary institutionalization"—does not apply under the Statute.[38] Where an accused person successfully excludes their criminal responsibility under article 31(1)(a), they are acquitted, and discharged from this Court's custody.[39] Consequently, article 31(1)(a) occasions no harm to the rights of such a person, and cannot be said even tacitly to "reinforce stigma and practice[s] of exclusion such as guardianship and involuntary hospitalization and treatment."[40] It neither diminishes the equality of the accused before the Court, nor their right

[32] *Contra* Clarke *et al.* Brief, para. 41 (referring to the "doctrine of precedent, consistency of application, and stability of law"). *See also* para. 42. *Cf.* Gerry *et al.* Brief, para. 11. *See* ADC-ICT Brief, paras. 14-17. *See also* Prosecution Response (Conviction), para. 178.
[33] *Cf.* Clarke *et al.* Brief, paras. 24-36.
[34] *Contra* Clarke *et al.* Brief, para. 30.
[35] *Contra* Clarke *et al.* Brief, paras. 37-38.
[36] Minkowitz *et al.* Brief, paras. 7-8. *See also* paras. 54-55.
[37] Minkowitz *et al.* Brief, para. 34.
[38] Minkowitz *et al.* Brief, para. 22. *Cf.* Gerry *et al.* Brief, para. 52.
[39] If an accused is unfit to stand trial—which was not the case for Ongwen—the outcome is the adjournment of proceedings: ICC RPE, rule 135(4). This may potentially be associated with interim release, with appropriate conditions. These issues are irrelevant to any argument concerning the correct interpretation of article 31(1)(a).
[40] *Contra* Minkowitz *et al.* Brief, para. 22. *See also* paras. 19-20, 44, 56. Notably, the CRPD Committee appears to have found that article 14 of the Convention prohibits "declarations […] of incapacity to be found criminally

to equal protection, liberty or security of person.[41] It does not lead to any "separate pathway" for defendants with disabilities, or deny them access to any defence, except that it may lead, when warranted on the evidence, to an acquittal by operation of law (which militates in their favour).[42] It is already the case that any person—including any person who may consider that their perceptions were materially altered at the time of the charged crimes—may rely without impediment on both articles 31(1) and 32(1), insofar as these matters are only decided at the conclusion of the trial on the basis of all the evidence.[43]

15. Minkowitz *et al*.'s radical proposal for article 31(1)(a) is, therefore, simply unnecessary—quite apart from the multiple challenges which would follow from the additional emphasis it would apparently place on an accused person's subjective account of "intense distress or unusual perceptions" in assessing their *mens rea*.[44] In particular, this state may be far from uncommon in the acute circumstances in which article 5 crimes are often committed,[45] and there is no international consensus that this excludes or negates criminal responsibility unless it satisfies the requirements of articles 31(1) or 32(1).[46] Yet, on the facts of this case, these questions are moot—as the Chamber found, the evidence did not establish that Ongwen was at the material time subject to a mental disease or defect meeting the requirements of article 31(1)(a) or that he acted under duress; rather, the Chamber was satisfied beyond reasonable doubt, taking account of all the evidence in the case, that he had the required *mens rea* for all charged crimes.[47]

16. Finally, while Gerry *et al*. appropriately recognise that there is no legal requirement to adopt a "non-punishment" model for criminal perpetrators who have also been victimised[48]—especially with regard to international crimes—they nonetheless suggest that the Court should

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responsible in criminal justice systems *and the detention of persons based on those declarations*"—it has not found that a ground excluding criminal responsibility based on mental disease or defect, merely of itself, violates article 14: *see* para. 30 (emphasis added, quoting CRPD Committee 2015 Report, Annex A, para. 16). *See further* CRPD, arts. 12-14; CRPD General Comment 1, paras. 7, 15, 27-28, 40.

[41] *Contra* Minkowitz *et al.* Brief, paras. 24-28.

[42] *Contra* Minkowitz *et al.* Brief, paras. 38-40.

[43] *Contra* Minkowitz *et al.* Brief, para. 45.

[44] *Contra* Minkowitz *et al.* Brief, paras. 39-41. *See also* paras. 7, 35 (noting there is little "guidance"—much less consensus—"on how the subjective element of a crime (*mens rea*) should be constructed in a criminal system in a way that respects Article 14 of the CRPD", as understood by Minkowitz *et al*.).

[45] *See also* Minkowitz *et al.* Brief, paras. 49-50 (apparently suggesting that there would be no threshold for the relevance of such altered perceptions, even if established on the evidence, and emphasising the significance of "direct testimony by the defendant and those who knew him or her well at the time").

[46] *Contra* Minkowitz *et al.* Brief, paras. 42, 46-48 (including suggesting that altered perceptions may be relevant to an assessment of duress under article 31(1)(d)). On this point, *see below* para. 32.

[47] *Cf.* Minkowitz *et al.* Brief, paras. 52-53.

[48] Gerry *et al.* Brief, para. 20. *See also* paras. 23-24.

"be able to take a broader approach" to the impact of victimisation on "what might amount to mental disease or defect".[49] Yet this mistakes the function of the Court and the structure of the Statute. In adjudicating criminal responsibility, a Chamber must convict where it is satisfied that the elements of the charged crimes are proven beyond reasonable doubt, and there are no circumstances excluding criminal responsibility, as defined by the drafters of the Statute. It is not the function of the Court to exercise a moral judgment, nor to exhibit a different approach to legal interpretation in cases to which it may be more sympathetic. By contrast, when deciding on a sentence, the Court may reflect its own view of the gravity of the crimes, and exercise somewhat more flexibility in that respect—provided that it applies the correct procedure and acts on the basis of the evidence before it.[50]

I.C. THE CHAMBER CORRECTLY INTERPRETED ARTICLE 31(1)(A)

17. The Chamber correctly interpreted article 31(1)(a) of the Statute, and reasonably concluded that Ongwen's criminal responsibility could not be excluded on the basis of a mental disease or defect suffered at the time of the charged crimes, destroying the capacities specified.[51] As the following paragraphs show, the drafters intentionally set a high threshold to exclude criminal responsibility under article 31(1)(a), and determined that any lesser degree of diminished responsibility may only mitigate sentence. The observations of the *amici curiae* do not assist the Appeals Chamber in reviewing the evidentiary analysis in the Judgment.

I.C.1. Article 31(1)(a) sets a strict standard because it excludes all criminal responsibility

18. It is plain in the terms of article 31 that it excludes the criminal responsibility of the accused entirely. Consequently, and consistent with the inherent seriousness of article 5 crimes, article 31(1)(a) sets a strict standard which requires the "destruction" of the material capacities of the accused, by reason of a "mental disease or defect" which must be established by evidence. There is no convincing interpretation of article 31(1)(a) which does not respect these two essential elements.

I.C.1.i. "[D]estroys that person's capacity"

19. Some *amici curiae* correctly note that article 31(1)(a) requires the *destruction* of material capacities of the accused, as a consequence of mental disease or defect.[52] Yet others suggest

[49] Gerry *et al.* Brief, paras. 34-36.
[50] *Cf.* Gerry *et al.* Brief, paras. 62-63.
[51] All discussion of Ongwen's alleged mental health in the context of the *amici curiae* observations relates to his state at the time of the alleged crimes, consistent with the requirement of article 31.
[52] *See e.g.* Gerry *et al.* Brief, paras. 50-51; Ssekandi Brief, paras. 4, 10. *See also* ADC-ICT Brief, para. 11.

that this term might be interpreted to mean something less[53]—for example, to mean "severely damaged (and usually beyond repair)" such that their capacities were "not totally eradicated" but only "partial[ly] dysfunction[al]".[54] Braakman suggests that this approach might be desirable because it "open[s] the possibility of diminished responsibility" under article 31, and consequently a finding of "partial accountability" which leads to "treatment or rehabilitation […] in combination with (reduced) imprisonment or not."[55] However, not only is this approach impossible to reconcile with the ordinary meaning of the term "destruction", but it is also inconsistent with the plain intent of the drafters to treat any lesser degree of diminished responsibility only as a mitigating factor—and not as a basis to exclude criminal responsibility.[56] Furthermore, the Court has no power to order treatment as a penalty,[57] and so creation of an intermediate category (neither wholly excluding culpability nor mitigating sentence) would serve no forensic purpose.

I.C.1.ii. Procedure for eliciting evidence of "mental disease or defect"

20. Braakman further opines—as a medical doctor rather than a lawyer[58]—that a party-driven procedure may not lead to the best evidence relevant to article 31(1)(a), and proposes an alternative approach.[59] However, this is irrelevant to this appeal, since the procedural law applicable to the case is not in dispute, and it has never been contended that the Chamber abused its trial management discretion in these respects. It is also noteworthy that the judges of the Chamber were themselves predominantly from civil law jurisdictions, and demonstrated that adherence to the largely party-driven approach of this Court's trial proceedings was no bar to their determination of the truth.[60]

[53] *See e.g.* Braakman Brief, p. 4. The effect of Minkowitz *et al*.'s position would be to reduce this standard even further, to the extent that no finding of any degree of incapacity would be required at all: *see above* fns. 36, 45. *See also* ADC-ICT Brief, para. 11.
[54] Braakman Brief, p. 4.
[55] Braakman Brief, p. 4. *See also* pp. 10-11.
[56] *See below* para. 21.
[57] *See* Statute, art. 77. *See also above* para. 14.
[58] Braakman Brief, p. 10.
[59] Braakman Brief, pp. 8-11.
[60] *Cf.* Gerry *et al.* Brief, para. 52. It is not correct, however, to suggest that the Statute must be "interpreted in the broadest possible way" in order to ensure fair trials "for the unwell". Nor do the *amici curiae* substantiate or show any error in their claim that the Chamber "unnecessarily limited itself to the narrow party driven approach taken at trial" in sentencing: *contra* para. 65. Indeed, where it considered appropriate—for example, to consider whether Ongwen was fit to stand trial—the Chamber did not hesitate to appoint its own expert. It was, therefore, in the best position to determine that his mandate did not extend to matters under article 31(1)(a), especially given the numerous other experts appointed for that purpose: *see* Prosecution Response (Conviction), paras. 183, 256-261.

I.C.2. Lesser degrees of diminished responsibility may only mitigate sentence

21. To the extent that *amici curiae* assert that proof of the diminished responsibility of the accused at the time of the crimes may mitigate any sentence imposed, this is correct[61]—and consistent with the Chamber's legal understanding in this case,[62] as well as the plain wording of rule 145(2)(a).[63] As such, diminished responsibility cannot also constitute a "ground for excluding criminal responsibility" under article 31, including article 31(3).[64]

22. Treating diminished responsibility as a ground excluding criminal responsibility, in whole or in part, is inconsistent with a contextual reading of article 31 as a whole, since it would make article 31(1)(a) redundant.[65] Nor does customary law or the general principles of law reflect any view that diminished responsibility should entirely exclude guilt, which is a necessary condition of article 31.[66] While some common law jurisdictions describe diminished responsibility as a so-called 'partial defence', this shows that it is neither generally applicable to *all* crimes nor excludes criminal responsibility. Rather, it serves to ameliorate the traditionally harsh mandatory penalties for the particular crime of murder[67]—and consequently is inapposite beyond this context.[68] In any event, such a position is rejected by many other national jurisdictions (especially those from the civil law tradition), which treat diminished responsibility as a mitigating factor only.[69] As the ICTY Appeals Chamber has held, "the relevant general principle of law" that can be derived from this practice is only "that the defendant's diminished mental responsibility is relevant *to the sentence to be imposed* and is

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[61] *See e.g.* Ssekandi Brief, para. 1 (referring to the practice of "Civil Law countries"); Clarke *et al.* Brief, para. 5; Braakman Brief, p. 4; ADC-ICT Brief, para. 12.
[62] *See e.g.* Sentencing Judgment, paras. 90-100. *See also* Prosecution Response (Sentence), paras. 137-169.
[63] ICC RPE, rule 145(2)(a) (referring to "circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress").
[64] Ssekandi, for example, appears at times to confuse these distinct concepts: Ssekandi Brief, paras. 1, 12-14.
[65] *See above* para. 11.
[66] *Contra* Ssekandi Brief, paras. 1 (referring, apparently interchangeably, to practice where diminished responsibility is "a defence", a basis for convicting on a lesser included offence ("reduc[ing] the crime of murder to manslaughter"), or "reduce[s] the sentence of the accused"), 6 (asserting that "diminished responsibility […] does not absolve the accused of criminal responsibility", although may "reduce the accused's culpability" by excluding convictions for certain offences such as murder), 8 (fns. 26-27).
[67] *See e.g.* Krebs, p. 387 (note 24).
[68] *See also* Ambos (2013), p. 303 ("Article 31 […] refers only to grounds excluding (not diminishing) criminal responsibility, that is, it recognizes *full defences* only", emphasis supplied).
[69] *Contra* Ssekandi Brief, paras. 12-14. Furthermore, to the extent that Mr Ssekandi appears to argue for a "reduc[tion of] the most serious offences of murder and wilful killing, to the lesser offence of manslaughter, as in England or culpable homicide, as in Scotland", this is not compatible with the Statute, which does not recognise such a crime: *contra* Ssekandi Brief, para. 15. *See also* para. 27 (suggesting that "the Prosecution failed to meet its burden of proof", due to the evidence of diminished responsibility—in the opinion of the *amicus curiae*).

not a defence leading to an acquittal in the true sense."[70] It is for the trier of fact to determine, on the evidence, whether such a mitigating factor is established.[71]

I.C.3. The observations of amici curiae on the evidence in this case should be regarded with caution

23. Some *amici curiae* rightly note that their role is not to favour either of the parties in this case, or to express an opinion on the evidence.[72] Nevertheless certain *amici* not only purport to address the evidence in the case but also fail to take a balanced account of the parties' arguments on appeal, the reasoning in the Judgment, or the entirety of the evidence in the record (which is not all publicly available). Apparently selective or partisan approaches to the evidence or judicial reasoning warrant particular caution in assessing the submissions advanced[73]—as does reference to illogical conclusions.[74]

24. Thus, to the extent that Ssekandi argues that the Chamber "did not inquire [into] or consider" the question of "diminished responsibility",[75] that "diminished responsibility was adequately established in the evidence", and that "mental health experts diagnosed Ongwen to suffer from multiple mental illnesses" at the time of the crimes,[76] this is incorrect. The same applies to Clarke *et al.*'s assertion that Ongwen's "experiences" necessarily "meet the lower requirements for a determination of diminished responsibility" and "should have been considered overwhelmingly mitigating".[77] Both these *amici curiae* flatly contradict the Chamber's own reasoned analysis,[78] without showing error, which is impermissible even for a party.

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[70] *Čelebići* AJ, para. 590 (emphasis added). *See also* para. 839; *Vasiljević* TJ, para. 282. *See also e.g.* Ambos (2013), p. 303 (concluding that 'partial' defences are mitigating factors).
[71] *See e.g. Vasiljević* TJ, paras. 285-287, 289, 294-295 (finding that the evidence in that case did not support any form of diminished mental responsibility).
[72] Braakman Brief, pp. 3, 11.
[73] *See e.g.* Ssekandi Brief, paras. 2 (citing one Defence expert only), 16-17 (citing one Defence witness), 18-19 (suggesting that the Judgment failed to consider the evidence of Ongwen's circumstances in the LRA "to attest to his cruelty" and not to consider "how successfully Ongwen's induction into the LRA succeeded to turn him into a monster", and that the effect on Ongwen "cannot just be wished away"), 20-24 (suggesting that the Chamber was "harsh" in finding that the Defence experts' evidence was not credible—based on the apparent view that the expert witnesses were not equally subject to cross-examination before the Chamber, and an unfavourable comparison of the credentials of the Prosecution experts compared to the Defence experts—and asserting that it is "inevitable to conclude that [Ongwen's] mental capacity was [at least] substantially diminished").
[74] *See e.g.* Ssekandi Brief, para. 28 (implying that Ongwen's conviction and/or sentence is incompatible with reintegration into society or access to any necessary mental health treatment). *See also* para. 24.
[75] Ssekandi Brief, para. 9. *See also* para. 11 ("Had the Trial Chamber done so, Ongwen would have been given a considerably lighter sentence"). *But see* para. 27 (conceding that the Chamber did consider the possible impact on Ongwen's mental capacity for the purpose of sentencing).
[76] Ssekandi Brief, para. 2. *See also* para. 27 (asserting that Ongwen was not guilty as charged). *See above* fn. 51.
[77] Clarke *et al.* Brief, paras. 39-40. *See also* para. 43.
[78] Judgment, paras. 2450-2580; Sentencing Judgment, paras. 90-100.

25. While properly acknowledging that he did not have access to the actual evidence before the Chamber,[79] Braakman makes general observations about psychiatric issues—including those addressed by the expert witnesses in the case—that he considers to be relevant.[80] These observations are misinformed and should not be given any weight. In particular, Braakman incorrectly asserts that: the Chamber "preferred" the observations of lay persons over the "diagnosis of professional psychiatrists";[81] the Chamber assumed that Ongwen's demonstrated cognitive abilities were inconsistent with the severity of the mental disorders claimed in this case;[82] the issue of transcultural expertise was not thoroughly aired before the Chamber;[83] and the expert witnesses did not assess Ongwen's personality.[84] Furthermore, to the extent that Braakman relies on statistical or other information which was not before the Chamber, nor put to the numerous expert witnesses, the Appeals Chamber should not treat this as evidence in the record, or otherwise consider it to impugn the evidence which is in the record.[85] Appointment as an *amicus curiae* is not equivalent to qualification as an expert witness. Nor have the procedures associated with that status—including for the admission of additional evidence on appeal—been observed.

I.D. THE CHAMBER CORRECTLY INTERPRETED ARTICLE 31(1)(D)

26. The Chamber rightly concluded that Ongwen's responsibility was not excluded under article 31(1)(d)**.** First, Ongwen was not under actual threat of imminent death or continuing or imminent serious bodily harm,[86] and never argued that he mistakenly believed in a threat that did not exist in reality. Based on the evidence, such a belief would in any event be unreasonable for a person in comparable circumstances, nor would it fall under article 32(1).[87] Second, Ongwen's conduct (including leading attacks against IDP camps, and repeated rape and torture

[79] Braakman Brief, p. 11.
[80] Braakman Brief, pp. 5-8, 10.
[81] Braakman Brief, p. 6. *Compare* Prosecution Response (Conviction), paras. 178-179, 181, 241-245 (the Chamber considered the evidence of lay persons to corrobotate the evidence of expert witnesses, in particular whether they saw any behaviour by Ongwen potentially consistent with symptoms of mental disorder).
[82] Braakman Brief, p. 7. *Compare* Prosecution Response (Conviction), paras. 173, 177, 222-223 (Prosecution experts testified that Ongwen's demonstrated cognitive abilities were inconsistent with the severity of the disorders claimed, and a Defence expert gave apparently inconsistent evidence on this question). *See also* paras. 181, 236.
[83] Braakman Brief, pp. 7-8. *Compare* Prosecution Response (Conviction), paras. 170, 267-285 (concerning the experts' approach to cultural factors).
[84] Braakman Brief, p. 8. *Compare e.g.* Prosecution Response (Conviction), paras. 171-177, 182, 187-255, 286-301 (the Chamber criticised the evidence of the Defence experts for various other reasons, based on the evidence of the Prosecution experts, but not on this basis).
[85] *Cf.* Braakman Brief, pp. 6-8.
[86] Judgment, para. 2670.
[87] *See e.g.* Judgment, para. 2658 (experienced LRA members did not generally believe in Kony's spiritual powers).

of women in the privacy of his quarters in private over a long period) was unnecessary and unreasonable.[88] Third, Ongwen intended to cause greater harm than any harm purportedly threatened against him, demonstrated by his embrace of the LRA's goals, maintenance of its operational capacity, diligent participation in criminal acts, and promotion within the LRA based on his superiors' trust.[89]

27. It is true that trials of former child soldiers require an approach mindful of their rights and their circumstances.[90] However, as one commentator has observed, article 31(1)(d) enables distinction "between those who (too) readily embraced the ideology of the group and commit crimes in the belief that they will move up the ranks and be empowered, and those who go along as they realise that there is no way they can disregard their 'duties'"—or, as they put it, "the difference between a 'Dominic Ongwen' [former] child soldier and another child soldier".[91]

28. In this context, some *amici curiae* resurrect a historical debate about the nature of the ground excluding criminal responsibility under article 31(1)(d)[92]—in particular, whether article 31(1)(d) encompasses *duress* and/or *necessity*, and whether it constitutes a *justification* and/or an *excuse*.[93] However, the significance of this analysis should not be overstated, given the clarity of the requirements in article 31(1)(d) and its *sui generis* nature.

29. The wording of article 31(1)(d) results from a difficult but deliberate compromise between lawyers of different traditions.[94] The drafting history shows that *duress* and *necessity* were deliberately combined in one provision blending elements of both—and the distinction between *excuse* and *justification* was intentionally abandoned in favour of the neutral term

[88] *See e.g.* Judgment, paras. 2666-2670. *See also* Arimatsu *et al.* Brief, para.13; Behrens Brief, para. 9. *See further* Confirmation Decision, para. 155 (finding that Ongwen's unnecessary and unreasonable conduct could not satisfy the required intent of proportionality).
[89] *See e.g.* Judgment paras. 134-138, 2659-2665, 2668, 2859-2860, 2915-2917, 2921, 2967-2968, 3010, 3014, 3089, 3092, 3106. *See* also Confirmation Decision, para 154 ("Ongwen could have chosen not to rise in hierarchy and expose himself to increasingly higher responsibility to implement the LRA policies. Instead, the available evidence demonstrates that Dominic Ongwen shared the ideology of the LRA, including its brutal and perverted policy with respect to civilians it considered as supporting the government").
[90] *See* generally Gerry *et al.* Brief; Behrens Brief; Ssekandi Brief; Minkowitz *et al.* Brief.
[91] Nortje and Quénivet, p. 124. *See also* Grant, p. 17.
[92] Gerry *et al.* Brief, paras. 53-61; Arimatsu *et al.* Brief, para. 13. *See e.g.* Amati, pp. 252-253; Joyce, pp. 623-642; Krebs, pp. 383-385, 398-399; Nortje and Quénivet, pp. 109-110; Eser and Ambos, pp. 1351-1353 (mns. 1-7); Ambos (2013), pp. 302-310; Scaliotti, pp. 111, 118.
[93] Gerry *et al.* Brief, paras. 39-61.
[94] Stahn, p. 154; Eser and Ambos, p. 1370 (mn. 46); Aktypis, p. 923; Ambos (2013), p. 356; Joyce, p. 639; Krebs, pp. 407-408, 410; Nortje and Quénivet, p. 109; Cassese, p. 954; Bond and Fougere, pp. 489-490.

"exclusion of criminal responsibility".[95] In other words, the ICC Statute consciously rejected this distinction.[96]

30. Attempts to classify article 31(1)(d) as *justification* or *excuse* according to some domestic taxonomies not only contradict the drafters' unequivocal intention but are also unnecessary to interpret and apply the provision correctly. Contrary to Gerry *et al.*'s view,[97] there is no need to interpret article 31(1)(d) as relating only to *excusatory duress*, contradicting its "legislative history".[98] First, as they recognise, essential aspects of article 31(1)(d) make it difficult, if not impossible, to categorise article 31(1)(d) meaningfully as either *excuse* or *justification*.[99] Second, any concern about fair labelling is unjustified since a Chamber may specify in the Judgment whether the accused's conduct under article 31(1)(d) was *justified* or *excused*, on the facts of the case.[100] Finally, as the following paragraphs show, even if the provision blends elements of *duress* and *necessity*, its clear and express requirements to exclude criminal responsibility under article 31(1)(d) makes it unnecessary and unhelpful to interpret it by reference to abstract labels from some domestic jurisdictions.

I.D.1. The duress must result from an actual threat of imminent death or of continuing or imminent serious bodily harm

31. Article 31(1)(d) requires that the crime was caused by duress resulting from a threat (made by other persons or constituted by circumstances beyond the accused's control)[101] of imminent death or of continuing or imminent serious bodily harm.[102] The existence of the threat—entailing a physical consequence of death or bodily harm only—must be objectively assessed and "exist in reality and not merely on the perpetrator's mind".[103] Abstract dangers or

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[95] *See e.g.* Scaliotti, pp. 118, 150-155; Eser and Ambos, pp. 1351-1352 (mns. 2-4); Nortje and Quénivet, pp. 29-30; Joyce, p. 639.
[96] Ambos (2013), p. 356; Scaliotti, p. 155; Eser and Ambos, p. 1370 (mn. 46); Cassese, p. 955; Aktypis, p. 923; Nortje and Quénivet, pp. 29-30.
[97] Gerry *et al.* Brief, paras. 53-61. *See also* Krebs, pp. 398-399, 407-410 (article 31(1)(d) could be classified as a "more or less traditional common law" excusatory duress defence).
[98] Krebs, pp. 407-408 (conceding that her interpretation of article 31(1)(d) only as excusatory duress "is not true" to the legislative history of the provision that was conceived as a compromise between the two concepts).
[99] Gerry *et al.* Brief, para. 60. *See* Krebs, pp. 406-407 (the reasonable response requirement "could be taken as proof that the provision mixes up duress and necessity, creating a hybrid which is difficult to categorise as either excuse or justification"), 410.
[100] Gerry *et al.* Brief, para. 55-56, 58, 61. *See also* Krebs, pp. 383-385, 398.
[101] The source of the threat is one of the aspects of article 31(1)(d) that blends elements typically of duress (threat "made by other persons") and necessity (threat "constituted by other circumstances beyond that person's control").
[102] Judgment, para. 2582.
[103] Ambos (2013), p. 357. *See also* Cryer *et al.*, p. 408; Grant, p. 6; Nortje and Quénivet, p. 54 (in addition to the objective existence of the threat, the accused must also realise the immediacy of the harm in the sense that they "act in the understanding that a real danger is present"); Bond and Fougere, pp. 471, 473, 496 (in addition to the existence of the threat it is important to assess "the actor's reasonable and genuine belief in the threat").

the mere elevated probability of a dangerous situation do not suffice.[104] Article 31(1)(d) expressly precludes non-imminent, abstract threats merely "hanging over the head" of the accused.[105] Furthermore, the threat must have resulted in duress that actually caused the criminal conduct; the accused must have acted because of the threatened harm.[106]

32. Behrens,[107] Ssekandi[108] and Minkowitz *et al.*[109] suggest that the false perceptions of the accused should suffice to establish a "threat" for the purpose of article 31(1)(d). This is incorrect—the threat must objectively exist.[110] Instead, if the accused "genuinely believes in the existence of an effective threat when it never objectively existed",[111] they may avail themselves of article 32(1). But this requires that a mistake of fact negates their "*mens rea*",[112] or in other words that this removes their culpable mental state as a whole, and not merely in part. As such, even if an accused mistakenly believed there was a threat against them causing duress, they remain culpable unless that mistake also affected the other facets of *mens rea* relevant to duress as defined in article 31(1)(d)—namely, that the accused acted necessarily and reasonably to avoid the threat, and that he or she did not intend to cause harm greater than that sought to be avoided. In this case, even if *arguendo* Ongwen was mistaken about any threat to him, the evidence of his conduct contradicts any claim that he was mistaken as to the necessity, reasonableness or purpose of his actions.[113] While the Judgment does not frame this analysis in the context of article 32(1)—because it was not even raised by the Defence—its reasoning under article 31(1)(d) leaves no doubt that it would have reached this same result.

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[104] Judgment, para. 2582; Eser and Ambos, p. 1374 (mns. 54-55); Ambos (2013), p. 358 ("abstract danger or a mere increased general probability of harm, as is typical for dictatorial or war-torn societies, is, however, not sufficient"); Aktypis, p. 924; Werle, p. 53.
[105] *Contra* Behrens Brief, paras. 7-8. On the issue of "omnipresent threats", *see* Bond and Fougere, pp. 491-492 (while article 31(1)(d) "is predicted on the existence of a serious threat", in certain circumstances a "threat of serious harm exist[s], even where it was not explicit or directly issued from a known source", where it is "an omnipresent threat" in the sense that "it is present at all times"). The Prosecution concurs to the extent that the "omnipresent threat" is of imminent death or bodily harm and not just a *general or abstract chance* of harm. The authors appear to share this view, adopting Werle's observation that "[a] mere higher general probability of harm, such as the 'omnipresence of the Gestapo' in the Third Reich is not enough": p. 495 (citing Werle, pp. 145-146).
[106] *See* Arimatsu *et al.* Brief, para. 11.
[107] Behrens Brief, para. 6.
[108] Ssekandi argues that "any personal characteristics relevant to the defendant's *interpretation* of the threat" should be taken into account: Ssekandi Brief, para. 25 (emphasis added). To the extent that he meant to refer to the *existence* of a threat, his argument should also be set aside.
[109] Minkowitz *et al.* Brief, para 8.
[110] *Contra* Bond and Fougere, p. 493 ("where such a belief is not only genuinely held *but also objectively reasonable*, a 'threat' must be deemed to have caused the behaviour—even if a retrospective assessment ultimately reveals that the actor may have been mistaken", emphasis added).
[111] Behrens Brief, para. 6.
[112] Ambos (2013), pp. 357, 374-375.
[113] *See above* para. 26. *See further below* paras. 33-34.

I.D.2. The accused acts necessarily and reasonably

33. Article 31(1)(d) requires the accused to act necessarily and reasonably.[114] First, it should be established that he or she acted upon a threat that a reasonable person in comparable circumstances could not fairly be expected to endure.[115] While "the totality of the circumstances in which the person found themselves"[116] should be taken into account, the test remains an objective one tailored to the circumstances of the case: "*a* reasonable person in comparable circumstances".[117] Second, the accused's response must be limited to the degree that no other means were available and reasonable for a person in the circumstances of the accused to avoid the threatened harm.[118] Unlike article 31(1)(c), article 31(1)(d) does not expressly require that the harm actually caused by the accused is objectively proportionate to the harm threatened.[119] Implicitly, however, 'reasonableness' still entails a balancing exercise.[120] This does not necessarily mean a "lesser evil" test as formulated by Judge Cassese,[121] but a disproportionate reaction is still likely to be unreasonable under article 31(1)(d).[122] In other words, to decide whether an accused acted as a reasonable person in comparable circumstances, a Chamber will consider, *inter alia*, whether the harm caused was reasonably balanced to the harm threatened.

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[114] Judgment, para. 2583.
[115] This idea is reflected in the civil law theory of "fair expectation" (in German "*Zumutbarkeit"*, in Spanish "*exigibilidad*", in Italian "*esigibilità*") whereby duress (and excuses in general) works only if the society could reasonably require the accused to overcome the duress caused by the threat. *See* Eser and Ambos, p. 1374 (mns. 54-55); Ambos (2013), p. 359; Nortje and Quénivet, pp. 64, 124; Cryer *et al*., p. 408. *See also* Arimatsu *et al.* Brief, para.11.
[116] Judgment, para. 2583.
[117] *See e.g.* Nortje and Quénivet, p. 64 ("It is an objective proportionality test which includes the question whether a reasonable person would have given in to the threat. According to this standard, the test is whether a person in similar position would have acted in a similar manner"). Ssekandi's submission that "*any* personal characteristics relevant to the defendant's interpretation of the threat" appears to suggest a purely subjective test: Ssekandi Brief, para. 25 (emphasis added). This unsupported position should be rejected.
[118] *See e.g.* Eser and Ambos, p. 1375 (mn. 56); Cryer *et al*., p. 408; Krebs, p. 409. *See also* NIMJ Brief, para. 17.
[119] Excusatory duress, unlike justificatory necessity, does not traditionally require any balance of harm. This is because the logical and philosophical premise of excuses is that the accused could not be expected to act lawfully and not that his or her harm was justified as lesser evil (like for necessity). *See generally* Ambos (2013), pp. 304-307; Eser and Ambos, pp. 1356-1357 (mn. 17), pp. 1370-1371 (mn. 46); Nortje and Quénivet, pp. 24-30, 115-121; Amati, pp. 256-257.
[120] Nortje and Quénivet, p. 64 (the test "is glaringly similar" to the test for proportionality in self-defence).
[121] *Erdemović* AJ, Dissenting Opinion of Judge Cassese, paras. 16, 42.
[122] Similarly, *see* Eser and Ambos, pp. 1374-1375 (mns. 56-57); Nortje and Quénivet, pp. 122-124; Joyce, p. 639. Other authors appear to be of the view that the reasonable requirement does introduce a purely objective proportionality test: *see e.g.* Aktypis, p. 925.

I.D.3. The accused acts only to avoid the threat

34. Article 31(1)(d) requires that the accused acts only for the purpose of avoiding the threatened harm ("the person acts necessarily and reasonably *to avoid* this threat"),[123] and does not intend to cause a greater harm than the one sought to be avoided.[124] While the focus on intent confirms that an objective "lesser evil" test is not legally required,[125] it sets a high subjective threshold which is not met when "the actor—as was said about *Eichmann*—voluntarily, ambitiously, and with self-interest, participated in a crime".[126]

II. SEXUAL AND GENDER BASED CRIMES (SGBC) AND CUMULATIVE CONVICTIONS

35. Regarding the substantive SGBC (enslavement, sexual slavery, forced marriage as an inhumane act, forced pregnancy) and the standards that apply to assess evidence of sexual violence,[127] the majority of *amici curiae* submissions support the correctness of the Trial Chamber's approach and findings[128]—with which the Prosecution agrees.[129] When some *amici* take different positions or disagree, wholly or partly, with the Chamber's findings on certain crimes,[130] the Prosecution states its view below (and the extent to which it agrees). Similarly, on cumulative convictions, the majority of the *amici* submissions agree with the Trial Chamber's interpretation of the *Čelebići* test[131]—which the Prosecution supports.[132] The

[123] Statute, art. 31(1)(d) (emphasis added). *See* Ambos (2013), pp. 359-360; Aktypis, p. 925; Amati, pp. 257-258; Aitala, p. 103.
[124] Judgment, para. 2584.
[125] *See* Judgment, para. 2584 ("it is not required that the person actually avoided the greater harm, only that he/she intended to do so"); Eser and Ambos, p. 1376 (mn. 59).
[126] Ambos (2013), p. 360. *See also* pp. 349 (discussing the Nuremberg jurisprudence that "real danger or coercion only exists if the defendant does not act voluntarily and in agreement with the superior who issued the illegal order"), 350; *Erdemović* AJ, Dissenting Opinion of Judge Cassese, para. 33; Eser and Ambos, p. 1376 (mn. 59); Amati, pp. 257-258.
[127] *See* Amici Curiae Order, para. 14.
[128] Oosterveld *et al.* Brief, paras. 2-37 (forced marriage as an inhumane act is an independent continuing crime); Zakerhossein Brief, paras. 5-17 (forced marriage is an independent inhumane act, distinct from sexual slavery); Grey *et al.* Brief, paras. 2-39 (the crime of forced pregnancy protects personal, sexual and reproductive autonomy); Ardila *et al.* Brief, paras. 3-19 (forced pregnancy is an autonomous and distinct form of reproductive violence); 20-31 (evidentiary standards for sexual violence); Meyersfeld *et al.* Brief, paras. 2-22, 26-52 (SGBC elements and evidence); Arimatsu *et al.* Brief, paras. 20-34 (Chamber correctly assessed evidence of sexual violence); Behrens Brief, paras. 15-28 (SGBC elements and evidence); Batra Brief, Section B (victims are vulnerable).
[129] Prosecution Response (Conviction), paras. 546-585.
[130] Allain Brief, paras. 2-58 (the crime of "forced marriage" is a "form of sexual slavery", limited to article 1(c), 1956 Supplementary Convention; the *Ongwen* circumstances do not constitute forced marriage); Batra Brief, Section A (elements of SGBC).
[131] NIMJ Brief, paras. 22-25 (the *Blockburger* elements test is the norm at US courts-martial); Kestenbaum *et al.* Brief, paras. 25-28 (*Čelebići* test is correct); Meyersfeld *et al.* Brief, paras. 23-25 (cumulative convictions for SGBC is required); Behrens Brief, paras. 29-36 (cumulative convictions are permissible).
[132] Prosecution Response (Conviction), paras. 138-149 (except for a harmless error in going beyond the strict application of the test). *See below* paras. 56-60 (cumulative convictions).

Prosecution respectfully submits that the Appeals Chamber should *not* depart from the Court's correct and consistent application of the *Čelebići* test for cumulative convictions.[133] Given that the *Čelebići* test already crafts a careful balance between competing fairness concerns and ensures predictability in outcomes across cases for all parties and participants,[134] there are no convincing reasons to depart from it.[135]

II.A. ENSLAVEMENT AND SEXUAL SLAVERY

36. In the specific circumstances of this case, the Chamber correctly found Ongwen responsible, as a direct and indirect co-perpetrator, for the crimes of enslavement as a crime against humanity and sexual slavery as a crime against humanity and a war crime and entered convictions.[136] The convictions properly follow the charges confirmed in this case (which charged enslavement and sexual slavery cumulatively).[137] The Chamber, therefore, correctly applied the *Čelebići* test on cumulative convictions to enslavement and sexual slavery (*as defined under the Statute*), correctly finding that sexual slavery and enslavement cannot concur on the basis of the same facts.[138] It was only in this limited sense (based on considering *abstract statutory elements* to determine whether cumulative convictions on the same underlying facts were permissible) that the Chamber meant that enslavement was "in the abstract entirely encompassed within sexual slavery".[139] It was not with a view to determine or to limit the conduct falling within the scope of those crimes or their legal characterisation.[140] There is, therefore, no basis to reverse the Judgment with respect to these findings.[141]

37. Nonetheless, on the scope of enslavement as a crime, the Prosecution agrees with Kestenbaum *et al.* that acts of a sexual nature, including control over sexuality, sexual integrity

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[133] *Contra* ADC-ICT Brief, paras. 19-34 (depart from *Čelebići* test and apply a "conduct-based" test); Kestenbaum *et al.* Brief, paras. 29-32 (depart from *Čelebići* test for enslavement and sexual slavery); Batra Brief, Section C (apply a "conduct based" test for cumulative convictions).
[134] *Čelebići* AJ, para. 412.
[135] Article 21(2), Statute: The Court may apply principles and rules of law as interpreted in its previous decisions; *Gbagbo & Blé Goudé* Victim Participation AD, para. 14 ("[…] absent 'convincing reasons', [the Appeals Chamber] will not depart from its previous decisions. [In principle], while the Appeals Chamber has discretion to depart from its previous jurisprudence, it will not readily do so, [to ensure] predictability of the law and the fairness of adjudication to foster public reliance on its decisions"); *Bemba* Victims Participation AD, para. 16.
[136] Judgment, paras. 2711-2716 (defining enslavement and sexual slavery); 3044-3055 (direct perpetration); 3081-3087 (indirect co-perpetration).
[137] Confirmation Decision, paras. 66-71 (P-0099), 72-80 (P-0101), 81-89 (P-0214), 90-98 (P-0226), 99-106 (P-0227), 107-112 (P-0235), 113-117 (P-0236) (operative part, pp. 90-99, direct perpetration), 118-124 (operative part, pp. 99-102, indirect co-perpetration).
[138] Judgment, paras. 3051, 3086.
[139] Judgment, para. 3051.
[140] *Contra* Kestenbaum *et al.* Brief, para. 12 (the Chamber erred in finding enslavement is encompassed by sexual slavery).
[141] *Contra* Kestenbaum *et al.* Brief, para. 32.

and sexual and reproductive autonomy, always have been and continue to be inherent in slavery.[142] Accordingly, the 1926 Slavery Convention, and its *travaux préparatoires* (including the Temporary Slavery Commission Reports), contemplate *acts of a sexual nature* and control of sexuality in *all forms of slavery*.[143] The Prosecution also agrees that enslavement under article 7(1)(c) of the Statute must be interpreted in light of the slavery definition in the 1926 Slavery Convention.[144] It is axiomatic that since the crimes of enslavement under article 7(1)(c) and sexual slavery under articles 7(1)(g)-2 share the same common first element, that element must be similarly interpreted for both crimes under the Statute (enslavement and sexual slavery).[145] Put simply, interpretations of the exercise of powers of ownership—in both contexts—must recognise that sexual violence and the control of sexuality are ways in which those powers may be exercised.[146] Nor, in this context, must enslavement under the Statute be interpreted as a crime without gendered or sexual dimensions.

38. This is not a novel interpretation. Chambers of this Court have previously found that the exertion of powers associated with the exercise of ownership requires a case-by-case determination of various non-exhaustive factors—including control of the victim's movement, control of sexuality, assertion of exclusivity, restrictions on freedom and movement, measures to deter escape, use of threats, force or other physical or mental coercion, exaction of forced labour, subjection to cruel treatment and abuse, vulnerability and socio-economic conditions, among others.[147] The *Ongwen* Trial Chamber took the same correct approach, when it defined

[142] Kestenbaum *et al.* Brief, paras. 5-7.
[143] Kestenbaum *et al.* Brief, para. 3 (fn. 4), citing Slavery Convention Sixth Committee Report, Temporary Slavery Commission Report, p. 100 (" it was [the Commission's duty] to [make suggestions to entirely suppress slavery] in all its forms."); Slavery Convention Second Session Minutes, p. 62 (slavery related practices of marriage, concubinage, adoption); Sellers and Kestenbaum, p. 10 ("Unsurprisingly, the drafters deemed it too limiting to qualify specific forms of slavery, preferring to emphasise the abolition of slavery *in all its forms*."); *Kunarac* TJ, para. 539 ("[…] enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person."); *Kunarac* AJ, para. 117.
[144] Kestenbaum *et al.* Brief, para. 8; article 1(1), 1926 Slavery Convention: Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised; Stahn (2022), pp.181-182 (mns. 51-52) ("The concept of exercising powers of ownership should be understood as broader than simply the exercise of control over another person within a legal framework [and should include the exercise of powers of *de facto* ownership]…the crime must be understood in a 'functional sense'"); Jurovics, p. 574 ("[…] La situations de réduction en esclavage…pourront donc être variées dans leur apparence (servitude pour dettes, exploitation sexuelle ou économique, voire enfants soldats)…).
[145] Element 1, article 7(1)(c) and Element 1, article 7(1)(g)-2, Elements of Crimes. The same applies to Elements 1 of articles 8(2)(b)(xxii)-2 and 8(2)(e)(vi)-2.
[146] Kestenbaum *et al.* Brief, para. 9 (forced labour and sexual violence and control should not be decoupled); Grey *et al.* Brief, para. 39.
[147] *Ntaganda* TJ, para. 952; *Katanga* TJ, para. 976; *Katanga* CD, para. 431; *Al Hassan* CD, paras. 546-549.

the crimes.[148]

39. Moreover, the Chamber made numerous factual findings, based on overwhelming evidence, recognising that sexual violence and the control of sexuality was an essential feature, among others, that marked the lives of the girls and women in the LRA—whether as *ting tings* or later on as so-called "wives".[149] The Chamber relied on these factual findings to enter convictions respectively for enslavement and sexual slavery.[150] In this sense, whether charged and legally characterised as enslavement or sexual slavery, the convictions are correctly based on evidence of sexual violence, attacks of sexual integrity, denial of reproductive and sexual autonomy and control of sexuality as indicia of the exercise of powers of ownership over the enslaved girls and women.[151] The Chamber's factual and legal analysis accorded with article 21(3) of the Statute. The Prosecution respectfully requests the Appeals Chamber to confirm the Trial Chamber's findings on this basis.

40. To the extent that some *amici* challenge the findings on sexual slavery and enslavement, several of those findings are a result of the specific charges and evidence led in this case, and

[148] Judgment, paras. 2711-2712 (expressly recognising control of sexuality and assertion of exclusivity as indicia for the exercise of powers of ownership), 2715-2716. *See also* *Kunarac* TJ, paras. 542-543; *Kunarac* AJ, paras. 119, 124; *Sesay et al.* TJ, para. 160; *Taylor* TJ, para. 420.

[149] *See e.g.*, Judgment, paras. 2013 ("[…] After the abduction, Dominic Ongwen separated P-0101 from the other abductees and smeared her with water and shea nut oil to mark her as his"); 2019-2020 ("[Ongwen] chose P-0226 and sent his escorts to take her to his home…and arranged through one of his so-called 'wives' for her to put a shabby dress over her school uniform…P-0226 understood that [Ongwen] was disguising her beauty from Joseph Kony so she would not be selected."); 2037-2038 ("Punishment for having sexual intercourse with anyone else was severe.", describing instances of such punishment); 2040 (P-0101: "If you're 11 years old or 12 years old, if there is a high-ranking commander who is kind, then they will let you actually mature a little bit, but with the rest of them they will just abduct you and make you a wife at a very young age. [Ongwen] was worst when it came to [young girls]. He referred to them as ting ting. But regardless of the fact that he refers to them as ting ting, he still has sex with them at a very young age."); 2044 ("[P-0099] said it was time for me to become a wife. Now if I had refused and if [Ongwen] had ordered that I be killed, what would happen…because [otherwise] he may say that I'm promoting prostitution among his soldiers."); 2099 ("[…] the abduction and abuse of civilian women and girls were a consciously maintained and coordinated effort"), 2100 ("'[t]here were going to be abductions, beautiful girls should be abducted'…'We always collect the young ones who are not infected with HIV'"); 2115, 2119, 2131, 2143 ("[…] young girls were assigned to men as so called 'wives' based on a criterion of sexual maturity, but nevertheless girls as young as around 12 years old were assigned to men as 'wives'. For even younger girls, the assignment to a man as so-called 'wife' occurred at a later point…"); 2152 ("[Ongwen] asked the girl what she would choose between going to this man or death, after which the girl accepted to live with the man she had been assigned to."); 2249 (on the separate status of young girls in the LRA, "[o]nce the girl has started sprouting breasts, and […] once the girl has started her menstrual cycle, then they would make that decision as well."); 2272-2273 ("[there was] a prohibition of sexual relations with *ting tings*, [but the] *ting ting* status did not protect young girls from sexual violence."); 2280 ("[LRA members were prohibited] to sleep with other members' so-called 'wives'"); on repeated sexual violence and coercive environment, *see* paras. 2028-2085; 2183-2309.

[150] Judgment, paras. 3044-3049 (P-0101, P-0214, P-0226, P-0227, sexual slavery, direct perpetration), 3050-3055 (P-0099, P-0235, P-0236, enslavement, direct perpetration); 3081-3084 (sexual slavery, indirect co-perpetration); 3085-3087 (enslavement, indirect co-perpetration).

[151] Kestenbaum *et al.* Brief, para. 16.

others.[152] Other findings are a result of the specificities of the Rome Statute, which prescribes enslavement and sexual slavery as crimes against humanity, and sexual slavery as war crimes.[153] As such, they are not errors by the Trial Chamber or reasons to overturn the Judgement. None of these issues, however, should be taken to limit further discussion on the true scope of the crimes themselves.

41. Finally, in the circumstances of this case, the Prosecution respectfully disagrees with the suggestion to enter convictions of enslavement *in lieu* of sexual slavery.[154] This would result in an unequal application of the *Čelebići* test to the facts of this case, and in some instances, may mean that all of the charged conduct is not fully reflected in the enslavement conviction because of the specific charges in this case.[155] In these circumstances, the Prosecution considers that confirming the existing convictions, with a clarification of the correct legal characterisation of enslavement and sexual slavery under the Statute and conduct captured under the respective convictions (as in paragraph 39 above), is the more apt solution.

II.B. FORCED MARRIAGE AS AN INHUMANE ACT

42. The Chamber correctly convicted Ongwen for the crime of other inhumane acts (forced marriage).[156] In this respect, several *amici* correctly address the nature of the crime and underlying conduct, distinct from other crimes such as sexual slavery.[157]

43. First, as the Prosecution has stated previously,[158] and contrary to some *amici* submissions,[159] "forced marriage" is not a standalone crime under the Statute. Rather, it is the underlying act or conduct of the crime in article 7(1)(k) of the Statute. Therefore, Ongwen was (correctly) charged with and convicted of the crime of other inhumane acts (forced marriage)

[152] *See e.g.*, Kestenbaum *et al.* Brief, paras. 15-16 (victims' experiences of sexual acts were limited to hetero-normative male-on-female rapes for sexual slavery in *Katanga*, *Ntaganda*, etc), 19 (male-on-female rapes in the context of abduction and distribution in *Ongwen*); *see e.g.*, Confirmation Decision, paras. 66-71 (P-0099), 72-80 (P-0101), 81-89 (P-0214), 90-98 (P-0226), 99-106 (P-0227), 107-112 (P-0235), 113-117 (P-0236) (operative part, pp. 90-99, direct perpetration), 118-124 (operative part, pp. 99-102, indirect co-perpetration).
[153] *See e.g.*, Kestenbaum *et al.* Brief, para. 21 (on the additional requirement of Element 2 of sexual slavery under the Statute).
[154] Kestenbaum *et al.* Brief, para. 32.
[155] Kestenbaum *et al.* Brief, para. 32; *but see* Prosecution Response (Conviction), paras. 143-144; *Stakić* AJ, para. 358 ("[the test] does not permit […] discretion to enter one or more of the appropriate convictions, unless the two crimes do not possess materially distinct elements."); *Strugar* AJ, para. 324. *See also* Confirmation Decision, paras. 66-71 (P-0099), 72-80 (P-0101), 81-89 (P-0214), 90-98 (P-0226), 99-106 (P-0227), 107-112 (P-0235), 113-117 (P-0236) (operative part, pp. 90-99, direct perpetration).
[156] Judgment, paras. 2741-2753; Prosecution Response (Conviction), paras. 560-575.
[157] *See* Oosterveld *et al.* Brief, paras. 2-37; Zakerhossein Brief, paras. 5-17; Meyersfeld *et al.* Brief, paras. 2-14; Behrens Brief, paras. 15-28; *contra* Batra Brief, Section A(a) ii and iii.
[158] Prosecution Response (Conviction), paras. 560-565.
[159] Allain Brief, paras. 49-58.

under article 7(1)(k). More so, the crime of other inhumane acts does not violate the principle of legality or *nullum crimen sine lege.*[160]

44. Contrary to the Allain Brief which describes the "international crime" of forced marriage as being limited to three situations in article 1(c) of the 1956 Supplementary Convention,[161] the *conduct* of forced marriage for the purposes of article 7(1)(k) of the Statute is distinctly broader.[162] Nor was the reference to the 1956 Supplementary Convention in the footnote to common element 1 of sexual slavery under the Statute meant to limit the understanding of the conduct of forced marriage.[163] Moreover, contrary to some understandings of the Prosecution's case against Dominic Ongwen,[164] the case theory was not one-dimensional (limited to sexual slavery alone), and the evidence demonstrated, beyond reasonable doubt, the exercise of powers of ownership over *and* the imposition of forced conjugal association upon girls and women in the LRA, among other aspects.

45. Second, regarding the nature of the conduct characterised as forced marriage and the crime of other inhumane acts, the Trial Chamber correctly found that the inhumane act of forced marriage under article 7(1)(k) requires forcing a person, regardless of will, into a conjugal union with another person by using physical or psychological force, threat of force, or taking advantage of a coercive environment.[165] Such conduct is similar in character to other enumerated acts in articles 7(1)(a)-(j), but is not contained in them.[166] Indeed, the forced imposition of the status of "spouse" "causing great suffering, or serious injury to mental or physical health" within the context of article 7(1)(k) is not reflected in the other enumerated acts.[167] As Oosterveld *et al.* states, the underlying conduct of forced marriage is distinct,

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[160] Prosecution Response (Conviction), paras. 560-565; Oosterveld *et al.* Brief, paras. 2-9. *See also* *Abd-Al-Rahman* Jurisdiction AD, para. 86 ("[the test of foreseeability and accessibility] is satisfied [in the context of this Court] if the State in which the conduct occurred is a Party to the Statute or the accused is a national of a State that is a Party to the Statute, which describes the prohibited conduct clearly and defines the crimes entering into force in July of 2002."); Behrens Brief, paras. 15-16; Zakerhossein Brief, paras. 11-12.
[161] Allain Brief, paras. 36-38 (arguing that forced marriage, within article 1(c) of the 1956 Supplementary Convention, is the international crime of forced marriage, and is limited to the sale of a bride, transfer of a wife, and the inheritance of a widow).
[162] Kestenbaum *et al.* Brief, para. 3 (fn. 4), on discussions relating to the 1926 Slavery Convention to suppress slavery in all its forms, including practices of marriage, concubinage); Sellers and Kestenbaum, pp. 10-15.
[163] *Contra* Allain Brief, para. 37.
[164] Allain Brief, para. 39 (arguing that the facts demonstrate *de facto* ownership, and not imposition of conjugal associations).
[165] Judgment, para. 2751; Oosterveld *et al.* Brief, para. 21 ("[…] this description does not create elements of crime. Rather, it describes one of the elements of 'other inhumane acts': "great suffering, or serious injury to body or to mental or physical health"). The Prosecution disagrees with Batra Brief, Section A (arguing that the Chamber erred in using the phrase "conjugal association").
[166] Judgment, para. 2751.
[167] Oosterveld *et al.* Brief, para. 18.

causing a distinct set of harms.[168] Among those harms is the denial of the right to freely and consensually enter into marriage (leading to a violation of relational autonomy), which, in turn, leads to the violations of several other criminal prohibitions and human rights.[169]

46. Third, the Trial Chamber correctly distinguished the conduct of forced marriage from enumerated crimes such as rape and sexual slavery.[170] Moreover, forms of trauma and stigma suffered by victims of forced marriage differ from other crimes.[171] This includes that using the term "wife" in a forced marriage could amount to a form of "psychological manipulation"[172] and suffering. The inhumane act of forced marriage is also a continuing crime.[173] As several *amici* state, the conduct of forced marriage should be fairly labelled to reflect the distinct culpability and suffering it entails.[174]

47. Moreover, because its conduct and consequent harm are distinct from other article 7(1) acts, the crime of inhumane acts (forced marriage) is sufficiently grave, as the Chamber correctly found.[175] Nor must 'forced marriage' be acknowledged as a "cumulative 'super crime'" for the inherent gravity of conduct imposing a forced conjugal association on girls and women in the LRA to be properly recognised as such.[176]

II.C. FORCED PREGNANCY

48. The Chamber correctly convicted Ongwen of forced pregnancy as a crime against humanity and war crime.[177] Several *amici* correctly identify the key interpretations relating to

[168] Oosterveld *et al.* Brief, paras. 10-20.
[169] Oosterveld *et al.* Brief, paras. 13-17 (other violations could include, *inter alia*, abduction, rape, sexual slavery, enforced exclusivity in the sexual relationship, inability to leave the conjugal union for fear of retribution, forced pregnancy, forced child bearing and child rearing, forced domestic labour, forced portering, restrictions on movement, physical and psychological violence); Meyersfeld *et al.* Brief, paras. 5-9.
[170] Judgment, para. 2750 ("Forced marriage implies the imposition of this conjugal association and does not necessarily require the exercise of ownership over a person, an essential element for the existence of the crime of enslavement. Likewise, the crime of rape does not penalise the imposition of the 'marital status' on the victim."); Oosterveld *et al.* Brief, para. 19; *Contra* Allain Brief, para. 39 (arguing that the exercise of ownership over persons, and not the imposition of conjugal association, was fundamental to this case). The Prosecution disagrees that the Trial Chamber erred in this respect.
[171] Oosterveld *et al.* Brief, paras. 19, 28.
[172] Zakerhossein Brief, para. 10.
[173] Oosterveld *et al.* Brief, paras. 30-32.
[174] Behrens Brief, para. 17; Zakerhossein Brief, paras. 5-7, 9 ("Labelling functions as a message, and as such it shall fairly represent harm inflicted upon victims and the nature of the conduct concerned and its gravity."), 10 (noting the expressive function of international justice); 14-16 (distinguishing the harms of forced marriage and sexual slavery).
[175] Judgment, paras. 2750-2751; *Contra* Allain Brief, paras. 57-58.
[176] *Contra* Allain Brief, paras. 57-58.
[177] Judgment, paras. 2717-2729, 3056-3062.

this crime.[178]

49. First, as the Chamber correctly found, the crime of forced pregnancy is grounded in the right to personal and reproductive autonomy, and the right to family.[179] Therefore, it must be interpreted to give it independent meaning and to allow for fair labelling.[180] Such interpretation must recognise reproductive autonomy as the legally protected interest.[181] As Grey *et al.* correctly state, since its inception, the crime of forced pregnancy has been understood as an attack on reproductive integrity.[182] Moreover, reproductive autonomy is a key aspect of human dignity—and conceptually and legally essential to any proper understanding of the crime of forced pregnancy, within the context of the Statute (including article 21(3)).[183] Likewise, as Ardila *et al.* state, due recognition of reproductive autonomy accords due protection of the rights of individuals with reproductive capacity, while ensuring the distinct crime of forced pregnancy is properly investigated and prosecuted.[184]

50. Second, the Chamber correctly interpreted the elements of the crime of forced pregnancy.[185] Moreover, as the drafting history shows, the second special intent option under article 7(2)(f) of the Statute ("carrying out other grave violations of international law") was included because the focus on "ethnic cleansing" in the first special intent option ("affecting the ethnic composition of any population") was "too restrictive".[186] The Prosecution agrees with the *amici* that the phrase "other grave violations of international law" must be interpreted

[178] *See e.g.*, Grey *et al.* Brief, paras. 2-39; Ardila *et al.* Brief, paras. 3-19 (forced pregnancy is an autonomous and distinct form of reproductive violence); Meyersfeld *et al.* Brief, paras. 15-22; Behrens Brief, paras. 19-21.
[179] Judgment, para. 2717; Prosecution Response (Conviction), paras. 578-585.
[180] Judgment, para. 2722.
[181] *See* Ardila *et al.* Brief, para. 4 ("This offence is a form of reproductive violence, which affects a person's reproductive capacity and targets victims because of their reproductive capacity. Reproductive autonomy refers to the capacity and possibility to freely make informed decisions relating to one's reproductive choices…"); Meyersfeld *et al.* Brief, para. 16 ("It is not only a question of denying a woman's right to be pregnant. It is also about denying a woman the right to determine the *way* in which she may choose to be pregnant.").
[182] Grey *et al.* Brief, paras. 35. *See also* para. 36 ("[…] The Trial Chamber's phrase 'personal and reproductive autonomy' aptly expressed this idea, using terms more widely used in international law today. The focus on reproductive autonomy distinguishes 'forced pregnancy' from related crimes such as rape, enslavement or imprisonment."); Ardila *et al.* Brief, para. 10 ("[…] The effects transcend the values protected by both the crimes of enslavement and imprisonment—which capture the element of unlawful confinement—and the crimes of rape and torture—which capture forced conception.")
[183] Grey *et al.* Brief, para. 38 ("[…] The ICC is justified in referring to [the] important concept of [reproductive autonomy]. Declining to do so is not a 'neutral' approach…"); article 21(3), Statute; Ardila *et al.* Brief, para. 8.
[184] Ardila *et al.* Brief, para. 13; *contra* Behrens Brief, para. 21.
[185] Judgment, paras. 2717-2722.
[186] Grey *et al.* Brief, para. 29; Steains, p. 368 ("[…] negotiations on the 'intent element' revealed lingering differences in approach. The Catholic and Arab countries were committed to a high-threshold 'ethnic cleansing' kind of intent; the other group of countries considered this approach too restrictive on the grounds that ethnic cleansing was only one of many situations in which this crime might occur.")

to include not merely international crimes, but also grave violations of human rights law.[187] Indeed, such interpretation is correct in light of the plain text of the provision, its object and purpose, and article 21(3) of the Statute.[188] While the Trial Chamber may not have legally erred in this respect (since its phrasing of the second special intent option is non-exhaustive, and its factual findings were limited to this case, which largely concerned the commission of other international crimes),[189] the Prosecution respectfully requests the Appeals Chamber to clarify this aspect and to interpret the phrase "grave violations of international law" in article 7(2)(f) broadly, in line with the *amici* submissions.

51. Third, national laws on abortion and pregnancy are irrelevant to the Court's determination of the crime of forced pregnancy.[190] As Grey *et al.* correctly state, the second sentence in article 7(2)(f) is "merely stating the obvious": the Court has no authority to directly amend, nullify or void national legislation.[191] Nor does it apply such legislation in its determinations under the Statute.[192] Moreover, not only are variations in national law on abortion irrelevant to considerations under the Statute, if taken into account, they would introduce great uncertainty in the statutory definition of forced pregnancy, contingent on potentially differing national laws on the issue across different cases.[193]

52. Fourth, the Chamber correctly interpreted and applied the requirement on "unlawful confinement".[194] "Unlawful confinement" means restrictions in physical movement contrary to standards of international law.[195] Moreover, at the relevant times, the seven women "distributed" to Ongwen (including P-0101 and P-0214 during their pregnancies) were "not allowed to leave", "placed under heavy guard" and told that "if they tried to escape they would be killed"[196] These findings were made beyond reasonable doubt.

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[187] Ardila *et al.* Brief, paras. 14-19; Grey *et al.* Brief, paras. 29-33.
[188] *See* Ardila *et al.* Brief, paras. 14-19; Grey *et al.* Brief, paras. 29-33.
[189] Judgment, paras. 2727 ("…*or* to carry out other grave violations of international law, e.g., confining a woman with the intent to rape, sexually enslave, enslave and/or torture her."); 3061 ("[…] with the intent of sustaining the continued commission of other crimes found, in particular of forced marriage, torture, rape and sexual slavery.")
[190] Grey *et al.* Brief, paras. 5-16.
[191] Grey *et al.* Brief, para. 6. *See* Powderly and Hayes, pp. 292-293 (mn. 251) ("…Evidently, national laws which prohibit or limit access to safe and legal abortion do not amount to forced pregnancy as defined under the Statute, unless they [involve the special intent]. Consequently, the inclusion of the caveat is entirely superfluous.")
[192] Prosecution Response (Conviction), para. 581.
[193] Grey *et al.* Brief, para. 16; Behrens Brief, para. 20.
[194] Judgment, paras, 2724, 3058-3059. *Contra* Behrens Brief, paras. 27-28.
[195] Judgment, para, 2724.
[196] Judgment, para, 3058.

II.D. SGBC EVIDENTIARY PRINCIPLES AND APPROACH

53. The Chamber correctly assessed the SGBC evidence, both the victims/witnesses of the crimes and related evidence.[197] Several *amici* support the Chamber's approach.[198] The Appeals Chamber can bring clarity and consistency to the Court's overall assessment of SGBC evidence across cases, by setting out relevant approaches and standards.

54. First, SGBC should not be considered "less serious" than other crimes under the Statute, or subject to a higher evidentiary threshold or adverse presumptions contrary to the Statute.[199] SGBC must be similarly assessed to other violent crimes, for instance without labelling them as merely opportunistic and unrelated to the prevailing context.[200] Interpretations of SGBC elements and evidentiary approaches must be consistent with internationally recognised human rights, without adverse distinction on discriminatory grounds in article 21(3) of the Statute.[201] Any analysis of SGBC evidence must avoid common discriminatory presumptions.[202] Moreover, adopting an intersectional gender analysis and approach is key.[203]

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[197] *See e.g.*, Judgment, paras. 251-262, 395-437.
[198] Arimatsu *et al.* Brief, paras. 20-34; Ardila *et al.* Brief, paras. 20-31; Meyersfeld *et al.* Brief, paras. 26-52.
[199] *Gbagbo* NCTA AJ, Judge Ibáñez Carranza Sep. Op. (*Public*), paras. 395-404 (395: finding the Trial Chamber's approach "worrisome" for applying a higher threshold for crimes of rape, and 404: finding error in concluding the motivations for sexual violence was different from other crimes); Ardila *et al.* Brief, para. 26.
[200] *See e.g.*, *Ntaganda* TJ, *(Public)*, paras. 805 ("*Regarding acts of sexual violence, the Chamber notes that the unfolding of the operations shows that these acts were, like the acts of killings and other acts of physical violence,* a tool [to achieve their objective to destroy the community]"), 806; *Gbagbo* NCTA AJ, Judge Eboe-Osuji Sep. Op. *(Public),* para. 334 (error in allowing the question of personal motives of the rapists—even as opportunistic—to detract from considering that rapes were part of a policy to attack the civilian population: "Notably, 'a personal or sexual motive' does not preclude findings that there was intent to commit a crime or a policy to attack civilians"); ICTY: *Đorđević* AJ, para. 887 ("[…] personal motive does not preclude a perpetrator from also having the requisite specific intent […] *the same applies to sexual crimes, which in this regard must not be treated differently from other violent acts simply because of their sexual component*. Thus, a perpetrator may be motivated by sexual desire but at the same time also possess the intent […]"); *Šainović et al.* AJ, para. 580; ICTR: *Karemera et al.* AJ, paras. 624-626 (rapes and sexual assaults were a foreseeable consequence of the joint criminal enterprise, during a war there was a "heightened risk" that combatants would commit rapes), 627-633 (can infer knowledge from high-ranking position, and the open and notorious manner in which criminal acts unfold), emphasis added.
[201] Arimatsu *et al.* Brief, para. 23.
[202] Arimatsu *et al.* Brief, para. 24 (*i.e.*, sexual violence is less serious than other international crimes; SGBC must meet higher evidentiary requirements for gravity and systematicity as international crimes; sexual violence only affects women and girls; other persons are not victims or witnesses of sexual violence; sexual violence evidence is less probative)
[203] Arimatsu *et al.* Brief, para. 23, citing para. 2(c) CEDAW; CEDAW General Recommendation 19, paras. 7(c) and (e) on equal protection under law; CEDAW General Recommendation 28, paras. 3, 5, 11, 18 ("Intersectionality is a basic concept…The discrimination of women based on sex and gender is inextricably linked with other facts that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity"); CEDAW General Recommendation 30, para. 23 ("…International criminal law, including definitions of gender-based violence, in particular sexual violence, must also be interpreted consistently with the Convention and other internationally recognised human rights instruments without adverse distinction as to gender"); CEDAW General Recommendation 35, para. 12; *Ntaganda* Reparations Order, paras. 60-61 ("[…] A gender-inclusive and sensitive perspective should integrate intersectionality as a core component").

55. Second, the Prosecution agrees with the evidentiary standards proposed by Arimatsu *et al.* and Meyersfeld *et al.*[204] Likewise, as Ardila *et al.* and Meyersfeld *et al.* state, the standards of proof for sexual, reproductive and other gender-based violence must consider all forms of evidence, including circumstantial and indirect evidence.[205] Similarly, as the Prosecution has already stated, evidence of uncharged conduct may be probative, as it was in this case.[206]

II.E. CUMULATIVE CONVICTIONS

56. As the Prosecution has submitted, save for one harmless error in its application, the Chamber properly interpreted and applied the *Čelebići* test[207] and entered all permissible convictions.[208] The Prosecution agrees with the majority of the *amici* who support the *Čelebići* test for cumulative convictions.[209] While Kestenbaum *et al.* suggest a departure from the test in one specific instance (enslavement and sexual slavery)—with which the Prosecution disagrees,[210] they otherwise support the *Čelebići* approach.[211] The Prosecution respectfully disagrees with the two *amici* who propose a conduct-based test *in lieu* of the *Čelebići* test.[212]

57. First, while the ADC-ICT suggests that the *Čelebići* test should be replaced by a "conduct based approach based on article 20(1) of the Statute and the *Bemba et al*, Appeals Chamber",[213] neither of these authorities are persuasive. The *Bemba et al.* Appeals Chamber itself confirmed the appropriateness of the *Čelebići* test (expressly rejecting the argument that article 20 was relevant to cumulative convictions within the same trial).[214] Seeking reconsideration of an expressly rejected argument does not constitute convincing reasons to depart from established practice across different Chambers.[215] Moreover, any *obiter dicta* that the Appeals Chamber stated was *in addition* to the *Čelebići* test, not *in lieu* of it.[216]

58. Further, as the plain language of article 20(1) and relevant commentary show, while the protection offered by this provision is broad, article 20 was not designed to determine

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[204] *See* Arimatsu *et al.* Brief, para. 20; Meyersfeld *et al.* Brief, paras. 26-33.
[205] Ardila *et al.* Brief, paras. 20-26, 27-31 (inconsistencies do not necessarily invalidate evidence); Meyersfeld *et al.* Brief, paras. 34-44.
[206] Meyersfeld *et al.* Brief, paras. 45-49; Prosecution Response (Conviction), paras. 547-559.
[207] Judgment, paras. 2792, 2795. *Čelebići* AJ, para. 412.
[208] Prosecution Response (Conviction), para. 138; Judgment, paras. 2796, 3039, 3079.
[209] Meyersfeld *et al.* Brief, paras. 23-25; Behrens Brief, paras. 29-36; NIMJ Brief, paras. 22-25; Kestenbaum *et al.* Brief, paras. 25-28.
[210] *See above* para. 41.
[211] Kestenbaum *et al.* Brief, paras. 25-31.
[212] ADC-ICT Brief, paras. 19-34; Batra Brief, Section C.
[213] ADC-ICT Brief, para. 34.
[214] *Bemba et al.* AJ, para. 748.
[215] *Gbagbo & Blé Goudé* Victim Participation AD, para. 14.
[216] *Bemba et al.* AJ, paras. 750-751.

cumulative convictions *within the same trial*.[217] Indeed, the reference to the phrase "convicted or acquitted by the Court" makes clear that the risk of "jeopardy" occurs only when *res judicata* attaches (*i.e.*, the existence of two different proceedings, and a conviction or acquittal decision in one of them).[218] Moreover, the principle of *in dubio pro reo* cannot be invoked to give article 20(1) a meaning that the drafters clearly did not intend.[219]

59. Second, while the Prosecution recognises the various approaches to cumulative convictions originally described in early ICTY cases,[220] it notes equally that since those early cases, and having critically reviewed the application of the *Čelebići* test over different cases, various chambers of the *ad hoc* tribunals repeatedly and steadily confirmed its correctness.[221] So too have Judges at this Court.[222] This choice was a significant one—and not one to lightly overturn, without convincing reason.

60. Third, the Prosecution agrees that prejudice to the accused (or convicted person) is one factor that a chamber must consider while entering multiple convictions.[223] Yet, it is only one of several factors that a Chamber must carefully balance. Ensuring that an accused is convicted for the full breadth of his culpability is an equally significant consideration at the conviction stage. It is precisely this balance that the *Čelebići* approach provides.[224] The test ensures that convictions are entered for only genuinely distinct offences. None of the suggested alternative

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[217] Coracini and Tallgren, p. 1109 (mn. 24).
[218] Coracini and Tallgren, pp. 1109-1110 (mns. 24-25) ("The application of *ne bis in idem* involves determining the point in time and the circumstances in which it can be said that the first 'jeopardy' has been attached. [Para. 1 targets the final decision of the ICC]…Before the final decision is taken, however, para. 1 is not applicable"); Bernard, p. 948 ("[…] on lit dans l'article 20-1, que la Cour ne peut juger á nouveau celui qu'elle a déjà « condamné ou acquitté » pour les mêmes actes constitutifs de crimes, ce qui paraît exclure les procédures en cours: un verdict doit avoir été prononcé pour que la règle entre en jeu."); Behrens Brief, paras. 29-31; Kestenbaum *et al.* Brief, para. 26.
[219] *Contra* ADC-ICT Brief, para. 22.
[220] ADC-ICT Brief, paras. 24-28 (citing *Čelebići* AJ (Judges Hunt and Bennouna Sep Op), paras. 13-45; *Semanza* TJ (Judge Dolenc Sep Op), paras. 1-35); while the *Kunarac* Appeals Chamber noted that it would consider cumulative convictions with caution, it nonetheless endorsed the *Čelebići* approach, stating "it will be guided by the considerations of justice for the accused: [it] will permit multiple convictions only in cases where the same act or transaction clearly violates two distinct provisions of the Statute and where each statutory provision requires proof of an additional fact which the other does not" (*Kunarac* AJ, paras. 168-174).
[221] *See e.g.*, ICTY: *Čelebići* AJ, paras. 412-427; ICTR: *Musema* AJ, paras. 358-367 (adopting the *Čelebići* test at the ICTR); *Sesay et al.* AJ, paras. 1190-1200 (adopting the *Čelebići* test at the SCSL); ECCC: *Case 001* AJ, paras. 287-336 (adopting the *Čelebići* test at the ECCC).
[222] *Katanga* TJ, para. 1695; *Bemba* TJ, paras. 746-751; *Bemba et al.* TJ, paras. 950-956; *Ntaganda* TJ, paras. 1202-1203.
[223] ADC-ICT Brief, para. 28.
[224] *Čelebići* AJ, para. 412; *Case 001* AJ, paras. 295-300 (no undue prejudice to the convicted person, "the resulting stigma is an appropriate consequence of lawful convictions", "the test guarantees, at a minimum, that offences are sufficiently distinct", "[a single conviction] fails to protect the different societal values at play with respect to different crimes"), 327-332; *Jelisić* AJ Judge Shahabuddeen Dis. Op, para. 42.

approaches achieves this balance.[225] Likewise, considering only the "nature or gravity of the crimes" in accounting for contextual elements of crimes against humanity and war crimes fails to reflect the nature of the crimes prosecuted before the Court.[226] As the Chamber correctly found, contextual elements relating to crimes against humanity and war crimes encapsulate different protected interests.[227] Moreover, in the unique context of the Court tasked with ending impunity for the perpetrators of most serious crimes,[228] all Rome Statute crimes are grave: they cannot be differentiated on that basis.[229] Moreover, as Meyersfeld *et al* correctly notes, assuming that all SGBC protect the same interests would be incorrect.[230] Finally, as the Prosecution has submitted, once the *Čelebići* test is correctly applied at the conviction stage, any residual concerns of additional punishment arising out of partially overlapping conduct can be accounted for in sentencing, as the Chamber did in this case.

RELIEF SOUGHT

61. For the reasons set out above (and those set out in its Response), the Prosecution respectfully requests the Appeals Chamber to dismiss the Appeal against the Judgment and confirm Ongwen's convictions.

Karim A.A. Khan QC, Prosecutor

Dated this 17th day of January 2022
At The Hague, The Netherlands

[225] *Contra* ADC-ICT Brief, paras. 32-34.
[226] ADC-ICT Brief, para. 33.
[227] Judgment, para. 2820; Behrens Brief, para. 33 (link to the perpetrator's conduct is *via* subjective elements); *Jelisić* AJ Judge Shahabuddeen Dis. Op, paras. 41-42; *Kunarac* AJ, para. 171.
[228] Preamble, Statute.
[229] *Tadić* SAJ, para. 69 (no distinction in law between seriousness of crimes against humanity and war crimes); *Tadić* SAJ (Judge Cassese Sep Op), para. 7 ("[…] one cannot say that a certain class of international crimes encompasses facts that are more serious than those prohibited under a different criminal provision. *In abstracto* all international crimes are serious offences [no hierarchy of gravity may *a priori* be established]")
[230] Meyersfeld *et al.* Brief, para. 25.