

**Cour
Pénale
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**International
Criminal
Court**

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

APPEALS CHAMBER

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

SITUATION IN UGANDA

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

PUBLIC

Victims' Observations on *amici curiae* submissions

Source: Legal Representatives of Victims

Document to be notified in accordance with regulation 31 of the *Regulations of the****Court to:*****The Office of the Prosecutor**

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 Ben Douglas-Jones QC, Anna McNeil,
 Philippa Southwell, Dr. Beatrice Krebs
 and Jennifer Keene-McCann;

Erin Baines, Anne-Marie de Brouwer,
 Annie Bunting, Eefje de Volder, Kathleen
 M. Maloney, Melanie O'Brien, Osai
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Sareta Ashraph, Stephanie Barbour,
 Kirsten Campbell, Alexandra Lily Kather,
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 Marcus, Gorana Mlinarević, Valerie
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Tina Minkowitz, Robert D. Fleischner

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REGISTRY

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I. INTRODUCTION

1. Pursuant to the ‘Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence,’¹ the Legal Representatives for Victims (hereafter referred to as “LRVs”) hereby submit their observations on the 18 *amici curiae* submissions filed before the Appeals Chamber on 23 December 2021.

II. PROCEDURAL HISTORY

2. On 4 February 2021, Trial Chamber IX (hereinafter: “Trial Chamber”) convicted Mr Ongwen of crimes against humanity and war crimes (hereinafter: “Judgment”).²
3. On 6 May 2021, the Trial Chamber, by majority, issued a decision (hereinafter: “Sentencing Decision”) sentencing Mr Ongwen to a total period of imprisonment of 25 years as a joint sentence for the crimes he was convicted sentence.³
4. On 21 July and 26 August 2021, the Defence filed its appeal briefs against the Conviction Decision and the Sentencing Decision, respectively.⁴
5. On 21 and 26 October 2021, the Prosecutor filed his responses to the appeal brief against the Conviction Decision and to the appeal brief against the Sentencing

¹ Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, Appeals Chamber, 24 November 2021, ICC-02/04-01/15-1914.

² Trial Judgment, ICC-02/04-01/15-1762-Red (original confidential version filed on the same day, ICC02/04-01/15-1762-Conf).

³ Sentence, ICC-02/04-01/15-1819-Red (original confidential version filed on the same day, ICC-02/04-01/15-1819-Conf).

⁴ Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021, 19 October 2021, ICC-02/04-01/15-1866-Red (with public annexes A, B and confidential annex C; original confidential version filed on 21 July 2021, ICC-02/04-01/15-1866-Conf); Defence Document in Support of its Appeal against the Sentencing Decision, 31 August 2021, ICC-02/04-01/15-1871-Corr-Red (with public redacted annex A; original confidential version filed on 26 October 2021, ICC-02/04-01/15-1871-Conf; corrected confidential version filed on 30 August 2021, ICC-02/04-01/15-1871-Conf-Corr).

Decision, respectively.⁵ On the same dates, the participating victims filed their observations on the two appeals.⁶

6. On 25 October 2021, the Appeals Chamber issued an order inviting expressions of interest as *amici curiae* in judicial proceedings on the merits of the legal questions presented in the same order (hereinafter: “Order inviting expressions of interest”).⁷
7. On 28 October 2021,⁸ and on 15 November 2021,⁹ a total of 18 requests for leave to submit observations under rule 103 of the Rules of Procedure and Evidence (hereinafter: “Rules”) were filed.
8. On 17 November 2021, the Appeals Chamber scheduled a hearing from Monday, 14 February 2022, to Friday, 18 February 2022, to hear submissions and observations by the parties and participants on the merits of the appeals.¹⁰
9. On 24 November 2021, the Appeals Chamber issued its ‘Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence’, granting 18 individuals and organizations to submit *amicus curiae* submissions on selected issues arising from the appeals of the Defence.¹¹

⁵ Prosecution Response to “Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021” (ICC-02/04-01/15-1866-Conf), 9 November 2021, ICC-02/04-01/15-1882-Red (with public annexes A, B and public redacted annex C; original confidential version filed on 21 October 2021, ICC02/04-01/15-1882-Conf); Prosecution response to Sentencing Appeal Brief, 27 October 2021, ICC02/04-01/15-1886-Red (with public annex A; original confidential version filed on 26 October 2021, ICC-02/04-01/15-1886-Conf).

⁶ CLRV Observations on the “Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021”, 28 October 2021, ICC-02/04-01/15-1880-Red (original confidential version filed on 21 October 2021, ICC-02/04-01/15-1880-Conf); Victims’ Observations on the “Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021”, 21 October 2021, ICC-02/04-01/15-1883- Conf; CLRV Observations on the “Defence Appeal of the Sentence”, 28 October 2021, ICC-02/04- 01/15-1885-Red (original confidential version filed on 26 October 2021, ICC-02/04-01/15-1885-Conf); Victims’ Observations on the “Defence Document in Support of its Appeal against the Sentencing Decision”, 26 October 2021, ICC-02/04-01/15-1887-Conf.

⁷ Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence), ICC-02/04-01/15-1884.

⁸ ICC-02/04-01/15-1888.

⁹ ICC-02/04-01/15- 1891, ICC-02/04-01/15-1892, ICC-02/04-01/15-1893, ICC-02/04-01/15-1894, ICC-02/04-01/15-1895; ICC-02/04-01/15-1896, ICC-02/04-01/15-1897, ICC-02/04-01/15-1899, ICC-02/04-01/15-1900, ICC-02/04-01/15-1901, ICC-02/04-01/15-1902, ICC-02/04-01/15-1903, ICC-02/04-01/15-1904, ICC-02/04-01/15-1905, ICC-02/04-01/15-1906, ICC-02/04-01/15-1907-Conf, ICC-02/04-01/15-1908.

¹⁰ Order scheduling a hearing before the Appeals Chamber, ICC-02/04-01/15-1909.

¹¹ ICC-02/04-01/15-1914.

III. SUBMISSIONS

- a. Grounds for excluding criminal responsibility under article 31(1)(a) and (d) of the Statute: (i) the legal interpretation of article 31(1)(a) and (d) of the Statute concerning grounds for excluding criminal responsibility; (ii) evidentiary issues relating to mental disease or defect; (iii) the burden of proof when asserting a ground for excluding criminal responsibility; and the standard of proof applicable to the assessment of mental disease or defect or duress.

10. The LRVs incorporate their previous submissions on this matter as elaborated in the ‘Victims’ Observations on the “Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021,”¹² (hereafter: “Victims’ Observations on Defence Appeal Brief”) filed on 21 October 2021.
11. In relation to the *amicus* submissions by the Arimatsu *et al.*, the LRVs submit that they support the said submissions in their entirety.¹³ Indeed, as noted by the *amici*, the Trial Chamber correctly interpreted article 31 (1)(d) of the Statute and applied a gender analysis in their interpretation of the evidentiary standards contained in the Statute and RPE.¹⁴
12. With regards to Mr Ongwen’s affirmative defence of duress under article 31 (1)(d), the *amici* hold that ‘(a), the Ongwen Trial Chamber correctly found that the threat must be both serious and imminent. This requires: (1) the existence of threat; and (2) a nexus between the threat and the crime.’¹⁵
13. Furthermore, as the *amici* highlight, Sexual and Gender Based Crimes (hereinafter: “SGBC”) are crimes of the utmost gravity and therefore ‘[N]otwithstanding the

¹² ICC-01/04-01/15-1883-Conf, paras 66-68.

¹³ ICC-01/04-01/15-1932.

¹⁴ ICC-01/04-01/15-1932, para. 3.

¹⁵ ICC-01/04-01/15-1932, para. 11.

availability of the defence of duress in the Statute, a lesser harms test or a reasonable test should fail in this specific case.’¹⁶ The LRVs agree with the *amici* that the defence of duress cannot apply in the context of SGBC where the accused has ‘created an environment where such crimes were sustained and/or normalised’¹⁷ and the Court must consider the accused’s ‘stature, his gender and corresponding superiority in the patriarchal society in which he belonged and personally promoted, and the role of women and under aged girls who were stripped of power.’¹⁸

14. In addition, the LRVs support the Arimatsu *et al.* position that the Trial Chamber appropriately exercised its discretion in its evaluation of evidence of sexual violence.
15. The Association of Defence Counsel practising before the International Courts and Tribunals (ADC-ICT), in their *amicus curiae* submissions, submit that ‘the only reasonable reading of the Rome Statute is that drafters envisaged that the defences in Article 31, if proven, constitute complete defences.
16. Furthermore, the LRVs associate themselves with the position articulated by the ADC-ICT that in relation to evidentiary issues when asserting a mental disease or defect, that the definition must come from medical practitioners and that ‘medical and legal practitioners must work together to satisfactorily assess capacity.’¹⁹ As highlighted by the ADC-ICT, the practice of the Court demonstrates that the legal issue of impairment of mental capacity is a decision based on the expert evidence of medical practitioners specific to the individual concerned and ‘[T]o do otherwise would affect the fairness of criminal proceedings.’²⁰
17. Professor Mario H. Braakman’s submission on the foregoing issue offers an approach from a “transcultural forensic psychiatry”. The LRVs respectfully

¹⁶ ICC-01/04-01/15-1932, para. 14.

¹⁷ ICC-01/04-01/15-1932, para. 17.

¹⁸ ICC-01/04-01/15-1932, para. 18.

¹⁹ ICC-02/04-01/15-1937, para. 14.

²⁰ ICC-02/04-01/15-1937, para. 17.

disagree with the entirety of his submission for failure to appreciate the trial Judgment and invite the Appeals Chamber to disregard it. Nothing in the Judgment suggests that the Trial Chamber relied upon observations of lay persons over professional psychiatrists as basis for its conclusions that Mr. Dominic Ongwen did not suffer any mental disease or defect.

18. Baines *et al.*, suggest that Dominic Ongwen should not have been found culpable of any crimes under the Rome Statute as a result of his abduction by and indoctrination in the LRA, which has resulted, they argue, in a mental defect leading to incapacity under Article 31(1)(a) of the Rome Statute. In the event that the Appeals Chamber upholds the decision of the Trial Chamber, they suggest that Dominic Ongwen's former status as a child soldier should result in a substantially reduced sentence.²¹
19. The LRVs respectfully disagree with the Baines *et al.* and request the Appeals Chamber to entirely disregard their submissions. Dominic Ongwen argued that his criminal responsibility was excluded by reason of mental disease or defect under article 31(1)(a) – specifically as a result of: “severe depressive illness, post-traumatic stress disorder[...] and dissociative disorder as well as severe suicidal ideation and high risk of committing suicide’, and [...] ‘dissociative amnesia and symptoms of obsessive compulsive disorder’.”²²
20. Based on the opinion of Prosecution experts P-446, P-445, and P-447, and the corroborating evidence heard at trial, the Chamber concluded that Ongwen suffered from no such mental disease or defect at the times material to the charges.²³ For a mental disease or defect to be relevant for the purpose of article 31 (1)(a), it must either have destroyed the capacity of the accused person “to appreciate the unlawfulness or nature of his or her conduct” or the “capacity to control his or her conduct to conform to the requirements of law.”²⁴

²¹ ICC-02/04-01/15-1943, para. 5.

²² [Judgment](#), para. 2450.

²³ [Judgment](#), para. 2580.

²⁴ [Judgment](#), para. 2452.

21. Dominic Ongwen's defence under article 31(1)(a), an affirmative defence, makes no reference to 'mental defect arising from coercive indoctrination,' and therefore the LRVs submit that there is no room to introduce 'new and broader interpretations'²⁵ of a "mental disease" and "defect" within the confines of an affirmative defence that has already been pleaded by the Defence. For this reason, the LRVs submit that Baines *et al.*'s submissions are better suited as mitigating arguments in relation to Mr Ongwen's sentence. However, given that this is not an issue that the Appeals Chamber requested *amicus curiae* submissions on, the LRVs suggest that the Baines *et al.* submission be disregarded in its entirety.
22. Should the Appeals Chamber be inclined to consider the Baines *et al.*, submissions, the LRVs submit that even if Dominic Ongwen were to be held to a 'reasonable child soldier' standard, he would still be found guilty, given the hundreds of child soldiers who were also abducted at the same age, indoctrinated, forced to commit heinous crimes, and who did not rise through the ranks to become senior commanders of the LRA. Furthermore, all other arguments made regarding Mr Ongwen's level of indoctrination are purely speculative, given that the *amici* are not privy to confidential expert evidence on the record of this case.
23. In relation to the burden of proof when asserting a ground for excluding criminal responsibility in relation to affirmative defences, the position of the LRVs is that the Prosecution does not have the burden to "disprove" the "elements" of the grounds excluding an accused's criminal responsibility under article 31, it must prove the elements of the crimes and modes of liability (including mental elements) and, in order to do so, must address and rebut the Defence's allegations and evidence under article 31. The LRVs agree with Dr Paul Behrens' statement that '[T]he presumption of innocence has never been understood to mean that the Prosecution has the burden of proving the case against its own position'²⁶ and that

²⁵ ICC-02/04-01/15-1906, para. 15.

²⁶ ICC-02/04-01/15-1943, para. 2.

‘the burden of proof for affirmative defence, like the burden of proof for any other aspects pertaining to innocence, rests with the Defence.’²⁷

24. With regards to the standard of proof applicable to the assessment of mental disease or defect or duress, the LRVs agree with Dr Behrens assertion that the Defence’s case in relation to these issues ‘amounts to little more than speculation’²⁸ and that ‘it strains belief that they [higher commanders] would not have had the capacity to understand that acts such as attacks against the civilian population violated international law.’²⁹
25. In their *amicus curiae* submissions, the PILPG contend that with an ‘Evidentiary Production Approach’, would have resulted in the same outcome in the case, but would have allowed the Chamber to frame its analysis differently by addressing two questions namely; (1) does the evidence raised by the accused create a live issue?’ and (2) ‘if a live issue is before the Court, has the Prosecution satisfied its burden?’³⁰ However, the LRVs support the current approach that has been adopted by the Trial Chamber in its legal interpretation of article 31(1)(a) and (d) of the Statute concerning grounds for excluding criminal responsibility, the burden of proof when asserting a ground for excluding criminal responsibility, and its assessment of the standard of proof applicable to the assessment of mental disease or defect or duress as highlighted above.
26. The Chamber clearly found that the Prosecution had satisfied its burden to prove the mental elements of the crimes and modes of liability because, among other reasons, the grounds of mental defect and duress under articles 31(1)(a) and (d) alleged by the Defence did not apply to Dominic Ongwen.³¹ Indeed, the Chamber did not consider that there was a (reasonable) possibility on the evidence that, at

²⁷ ICC-02/04-01/15-1943, para. 3.

²⁸ ICC-02/04-01/15-1943, para. 14.

²⁹ ICC-02/04-01/15-1943, para. 12.

³⁰ ICC-02/04-01/15-1940, para. 29.

³¹ [Judgment](#), paras 2865-2873 (Pajule); 2919-2926 (Odek); 2965-2972 (Lukodi); 3012-3019 (Abok); 3025, 3032, 3042, 3048, 3054, 3060, 3067 (direct SGBC); 3096-3099 (indirect SGBC); paras 3112-3114 (child soldiers).

the time material to the charges, Dominic Ongwen suffered a mental disease or defect, or acted under duress, in order to conclude that there was a ground to exclude his criminal responsibility.

27. With regards to the *amicus curiae* submissions of Minkowitz and Fleischner, on the Convention on the Rights of Persons with Disabilities,³² the LRVs submit that their observations are grounded in a misunderstanding of the manner in which the Trial Chamber interpreted article 31 (1)(a) and (d) of the Statute. As stated previously, the LRVs concur with the ADC-ICT that evidentiary issues arising from pleading a mental defect or disease must be rooted in medical evidence from practitioners in order to assess capacity.
28. The Trial Chamber correctly and fairly weighed the expert evidence from the defence as well as the prosecution in relation to the question of a mental disease or defect, ruling in favour of the latter. Therefore, the LRVs submit that the Minkowitz and Fleischner *amicus* submission is of limited value given that the evaluation of a mental disease or defect must be grounded in the evidence and not in the Convention on the Rights of Persons with Disabilities (“CRPD”).
29. Indeed, the Trial Chamber did assess evidence of ‘distress or unusual perceptions’ in order to assess whether they negated the mental elements of the crimes that Dominic Ongwen was charged with, finding in the Prosecution’s favour.³³ Furthermore,
30. In relation to the Gerry *et al.* submissions, the LRVs reject all notions that the ‘non-punishment’ of victims of modern slavery/human trafficking includes the non-liability of former child soldiers who commit crimes when they continue to suffer the effects of their victimhood through compromised mental health.’³⁴ The LRVs repeat their submissions made above that the existence of a mental disease or defect must be grounded in the *evidence* presented at trial, and not overarching policy

³² ICC-02/04-01/15-1930.

³³ ICC-02/04-01/15-1930, para. 7.

³⁴ ICC-02/04-01/15-1929, Summary, p. 3.

considerations expressed by the *amici*, without being fully cognizant of the legal contours of this case and the evidence presented regarding Mr Ongwen's mental health at present and during the charged period.

31. Indeed, the LRVs submit that Mr Ongwen is no ordinary child soldier as the *amici* seem to suggest, and may be differentiated from the hundreds of child soldiers that the LRVs themselves represent in this case. As a senior ranking commander of the LRA, Mr Ongwen evolved from being a victim, with no control over the crimes that he was forced to commit, to a senior commander with the power to force others under his command to commit heinous crimes with no remorse. This, the LRVs submit, is what distinguishes Dominic Ongwen from the hundreds of thousands of child soldiers in the LRA, many of whom the LRVs represent.
32. Alcinda Honwana has argued that child soldiers are not 'empty vessels into whom violence is poured.' The constraints under which they act does not necessarily result in the dissolution of their agency and they maintain a level of 'tactical agency' whereby '[T]hey can pretend to be ill to avoid certain tasks; they can plan to escape; they can deliberately fail to perform their duties properly.'³⁵ And with this agency comes responsibility for their actions. Furthermore, the LRVs submit that the purpose of these *amicus curiae* requests is not to advocate wholesale policies for the furtherance of the rights of child soldiers in general, but is concerned very specifically with the *Ongwen* case and the parameters that have been laid out by the Appeals Chamber in the Order inviting expressions of interest.³⁶
33. Gerry *et al.*, argue that '[M]r Ongwen's appeal gives the opportunity to consider the most appropriate, measured and *victim* centred approach.'³⁷ The LRVs take issue with this statement as not being consistent with views and concerns expressed by victims that they represent in this case. A significant number of

³⁵ Alcinda Honwana, 'Children in War: Reintegrating Child Soldiers, CORE Papers, IDS Bulletin, Volume 40, Number 1, January 2009, available at: <https://core.ac.uk/download/pdf/43539221.pdf>, p. 4.

³⁶ ICC-02/04-01/15-1884.

³⁷ ICC-02/04-01/15-1929, para. 23, emphasis added.

victims participating in these proceedings were also former child soldiers and/or forced wives. The suggestion therefore that the non-punishment of Mr Ongwen would be a victim-centred approach is a direct affront to justice and accountability demands of hundreds and thousands of victims who have been abducted, murdered, beaten, raped, forced to become forced wives or sexual slaves either directly at the hands of Dominic Ongwen's or his Sinia Brigade.

34. Furthermore, the Gerry *et al.*, approach advocates for wholesale impunity for perpetrators of crimes against humanity based on their status as former child soldiers. The LRVs submit that such an approach is untenable and cannot be allowed to stand as it is directly in contravention with the purpose, spirit and objective of this Court as set out in the Rome Statute.³⁸ Indeed, there are numerous policy considerations that must be taken into account when adopting the approach suggested by Gerry *et al.*, not least of all that this is something that would wholly undermine the Rome Statute as it is currently drafted, and therefore such "non-punishment" or blanket impunity for former child soldiers must be a provision that is directly included into the Statute by the Assembly of States Parties ("ASP") and cannot be something to be advocated through the medium of *amici* submissions.

35. In addition, what is at stake here is not the non-culpability for one or two unlawful acts committed by a trafficked person as noted in the UNHCR Recommended Principles and Guidelines (which carry no legal obligations), but the wholesale participation, organisation and perpetration of 61 different counts of crimes against humanity and war crimes over an extended period of time against hundreds of individuals.³⁹ In *arguendo*, even if one was to adopt the 'causation' model advocated by Gerry *et al.*, the finding of the Trial Chamber would be no different as child soldiers do retain a level of agency as the hundreds of child soldiers who were able to escape from the LRA can demonstrate.⁴⁰ Lastly, the Appeals Chamber did not request *amicus curiae* submissions on Mr Ongwen's sentence, and therefore the

³⁸ Preamble, Rome Statute of the International Criminal Court.

³⁹ ICC-02/04-01/15-1929, para. 27.

⁴⁰ ICC-02/04-01/15-1929, para. 34.

LRVs submit to the Chamber that this section within Gerry *et al. amicus* ought to be disregarded.

36. In relation to *amicus curiae* submissions from Justice Francis Muzingu Ssekandi,⁴¹ the LRVs disagree with these submissions in their entirety and in particular with the proposition that Dominic Ongwen is entitled to the defence of diminished responsibility under article 31(3) of the Statute. The LRVs submit that it is not possible to insert a new defence of diminished responsibility based on the evidence presented in this case and the findings of the Trial Chamber nor is this a defence that was pleaded by the Defence. Furthermore, this *amicus* speculates that a defence of diminished responsibility, which has no legal basis in the Statute, would have resulted in a different outcome in this case. The alleged partial defence of diminished responsibility may be relevant for single incidents of murder in a domestic setting but it has no bearing on serious crimes such as crimes against humanity and war crimes which is the reason why no international criminal tribunal has extended such a defence to an accused as a ground for excluding criminal responsibility.

37. The LRVs reiterate their above submissions relating to the evidence of the mental health experts in this case and will not repeat them here. Furthermore, the LRVs object to Justice Ssekandi's statement that '[T]he Prosecution vigorously cross-examined Professor Ovuga and Dr Akena as hostile witnesses ...,'⁴² ignoring the fact that Professor Ovuga, an expert witness for the Defence was similarly invited to sit in and prepare a report during Professor Weierstall's counter testimony. The remainder of this *amicus* merely outlines a divergence of opinion with the Trial Chamber in relation to the expert evidence in this case. The LRVs submit that the Ssekandi *amicus* is in no way 'desirable for the proper determination of [this] case.'⁴³

⁴¹ ICC-02/04-01/15-1926.

⁴² ICC-02/04-01/15-1926, para. 20.

⁴³ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11, Decision on the "Requests for Leave to Submit Observations under Rule 103 of the Rules of Procedure and Evidence" 13 September 2013, para. 10.

38. Lastly, the *amicus curiae* submissions from the National Institute of Military Justice (hereafter “NIMJ”) demonstrate that there is authority that the affirmative defence of lack of mental responsibility can be a complete defence to some or all court-martial charges, but the ‘defence bears the burden of presenting “some evidence”’ and the prosecution retains the burden to prove guilt beyond a reasonable doubt.⁴⁴ This approach is similar to the approach outlined by the LRVs and adopted by the Trial Chamber. The defence of duress is a special defence to any offence, “except killing an innocent person”.⁴⁵ In addition, this defence has an element of immediacy,⁴⁶ similar to that specified by the Trial Chamber in this case.

b. Sexual and gender-based crimes: (i) the legal interpretation of the crimes of forced marriage, sexual slavery and forced pregnancy, and (ii) the standards applicable to assessing evidence of sexual violence;

39. The LRVs incorporate their previous submissions on this issue as elaborated in the ‘Victims’ Observations on the “Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021,”⁴⁷ filed on 21 October 2021. It is the LRVs contention that the Defence’s challenge to the legal interpretation of the crime of other inhumane acts (forced marriage), sexual slavery and forced pregnancy is incorrect.

40. The LRVs submit that the crimes of forced marriage, sexual slavery and forced pregnancy are specific and distinct crimes, although they may occur in the same context and under the broader category of enslavement in general. The LRVs in this regard support the submissions made by Ardila *et al*, in their *amicus curiae* submissions on sexual and gender-based violence (Hereinafter: “SGBC”), that

⁴⁴ ICC-02/04-01/15-1931, para. 10.

⁴⁵ ICC-02/04-01/15-1931, para. 17.

⁴⁶ ICC-02/04-01/15-1931, para. 18.

⁴⁷ ICC-01/04-01/15-1883-Conf, paras 263-281.

forced pregnancy is an independent crime that must be address separately from other forms of SGBC⁴⁸ and that ‘as a form of reproductive violence, the criminalisation of forced pregnancy recognises the inherent value of reproductive autonomy of women and girls.’⁴⁹

41. Victims participating in this case have communicated to the LRVs the particular and distinct harm that they have suffered from this crime, as well as the harm and stigma that their children face in relation to reintegrating into society. As noted by Ardila *et al.*, ‘persons who become forcibly pregnant and who are unlawfully confined to impair their reproductive agency endure a distinct form of suffering stemming from the pregnancy itself, the childbirth, the subsequent forced maternity, and potential stigma upon return to the victim’s community post-conflict.’⁵⁰ Furthermore, the LRVs agree with Ardila *et al.*, regarding the long-term effects and consequences of the crime of forced pregnancy,⁵¹ and the LRVs have on numerous occasions during the course of these proceedings articulated to the Trial Chamber the harm suffered by victims of forced pregnancy and their children to date, including stigma and the inability to inherit property.

42. As the Appeals Chamber is aware, providing evidence of SGBC is notoriously difficult, not only in domestic contexts, but in the context of international trials that often take place many years after the crimes first took place, the standard applicable to assessing evidence of sexual violence must be flexible. As such, the LRVs agree with Ardila *et al.*, that the Court can rely on indirect evidence or use contextual evidence to infer elements of SGBC.⁵²

43. The LRVs also support the position espoused by Meyersfeld and SALC, in their submission that evidence of SGBC demands ‘a more nuanced use of the regular principles of evidence than those that pertain to other offences.’⁵³ In any case, the

⁴⁸ ICC-01/04-01/15-1933, para. 7.

⁴⁹ ICC-01/04-01/15-1933, para. 5.

⁵⁰ ICC-01/04-01/15-1933, para. 10.

⁵¹ ICC-01/04-01/15-1933, para. 11.

⁵² ICC-01/04-01/15-1933, para. 21.

⁵³ ICC-01/04-01/15-1941, para. 29.

LRVs submit that there has been ample direct evidence provided by victims of SGBC during the course of the proceedings pertaining to both direct and indirect forms of SGBC committed by Dominic Ongwen. The LRVs submit that the Trial Chamber properly convicted Ongwen, as a direct perpetrator, of forced pregnancy *vis-à-vis* P-0101 and P-0214, pursuant to articles 7(1)(g) and 8(2)(e)(vi) of the Statute.⁵⁴

44. The LRVs fully support the submissions made by Dr Rosemary Grey, Global Justice Centre, Women's Initiatives for Gender Justice and Amnesty International (hereafter referred to as "*Grey et al*") in relation to the definition of the crime of 'forced pregnancy.'

45. The *amici* submit that drafting history of 'forced pregnancy' illustrates its definition, and in particular the second sentence of article 7 (2)(f), that forced pregnancy 'shall not in any way be interpreted as affecting national laws relating to pregnancy,' was placed there in order to 'reassure concerned states that the enumeration of 'forced pregnancy' as a crime against humanity and a war crime in the Rome Statute does not invalidate restrictions on abortion under national law.'⁵⁵ The LRVs agree with this position and reiterate their opposition to Defence claims that '[d]isregarding this provision in establishing jurisprudence is a tacit invitation to legal uncertainty regarding these sensitive and divisive issues.'⁵⁶

46. As such, the LRVs support the conclusions of the *amici* that the crime of forced pregnancy is an attack on the personal, sexual, and reproductive autonomy of a person, and that most countries do allow abortion in the context of rape.⁵⁷ In particular, the LRVs agree that the drafters of the Rome Statute viewed the crime of 'forced pregnancy' as necessary to address a harm, defined as an attack on

⁵⁴ [Judgment](#), paras 3058-3062.

⁵⁵ ICC-01/04-01/15-1938, para. 15.

⁵⁶ Defence Appeal Brief, ICC-02/04-01/15-1866-Conf, para. 962.

⁵⁷ ICC-01/04-01/15-1938, para. 35.

personal and reproductive autonomy by the Trial Chamber,⁵⁸ that was not addressed by existing crimes such as rape, enslavement or imprisonment.⁵⁹

47. Consequently, the LRVs agree with Grey *et al.*, that '[T]he harm recognised by the crime of forced pregnancy is therefore not forcing the victim to give birth but violating the victims' personal, sexual, and reproductive autonomy by unlawfully confining them, including by preventing them from accessing an abortion.'⁶⁰ Furthermore, as stated in their previous submissions, the LRVs submit that this is harm distinct from the harm suffered as a result of forced marriage and sexual slavery, although all crimes may arise from the same context.

48. In their *amicus curiae* brief on forced marriage, de Brouwer *et al.*, echo similar arguments to those made by the LRVs during the course of the proceedings and most recently in their Victims' Observations on Defence Appeal Brief.⁶¹ Specifically, that forced marriage is not a novel crime as asserted by the Defence, but rather has been recognized 'the crime against humanity of 'other inhumane acts' by the Special Court for Sierra Leone ("SCSL"), the Extraordinary Chambers in the Courts of Cambodia ("ECCC") [...], convicting multiple defendants relating to factual circumstances dating back more than four decades.'⁶²

49. Substantial evidence has been provided during the course of the Trial proceedings demonstrating that throughout the conflict in Northern Uganda, women and girls were systematically abducted by members of the LRA and compelled to serve as conjugal partners to the LRA soldiers. They were often abducted from their homes, on the way to school, or from camps in circumstances of extreme violence, forced to perform a number of conjugal duties including sexual intercourse, forced labour such as cooking and cleaning, enduring forced pregnancies and bringing up their

⁵⁸ Judgment, paras. 2717 and 2722.

⁵⁹ ICC-01/04-01/15-1938, para. 36.

⁶⁰ ICC-01/04-01/15-1938, para. 37.

⁶¹ ICC-01/04-01/15-1883-Conf, paras 275-281. See also Corrigendum to the Victims' Response to "Defence Motion on Defects in the Confirmation of Charges Decision" (Parts I-IV), ICC-02/04-01/15-1464-Corr, 26 February 2019, paras 49-62; Victims' Response to "Defence Motions on Defects in the Confirmation Decision Regarding SGBC", ICC-02/04-01/15-1618, 30 September 2019.

⁶² ICC-01/04-01/15-1935, para. 2.

children in circumstances where they were compelled to move along with the LRA from place to place.

50. In the landmark Appeals Chamber Judgment in the case of *Prosecutor v. Brima, Kamara and Kanu*, before the Special Court for Sierra Leone (Hereinafter: “SCSL”), the Appeals Chamber recognized ‘forced marriage’ as a separate and distinct crime,⁶³ reversing the ruling of the Trial Chamber that ‘forced marriage’ was subsumed within the charge of sexual slavery. The Appeals Chamber highlighted that in addition to harm related to the ‘sexual slavery’ element of the crime, ‘bush wives’ and their children born out of the forced marriage ‘suffered long-term social stigmatisation’ by their association with the perpetrators and faced difficulties in reintegrating their community after the war.⁶⁴
51. In *Prosecutor v. Sesay, Kallon and Gbao*, the SCSL convicted three senior members of the Revolutionary United Front (Hereinafter: “RUF”) for the crime of forced marriage, despite the fact, as highlighted above; there was no provision of the separate crime of forced marriage within the SCSL Statute.⁶⁵
52. In the closing order of case 002, the Co-Investigating Judges of the ECCC qualified forced marriage as the crime against humanity of an ‘other inhumane act’, following the definition set out by the SCSL Appeals Chamber.⁶⁶ The Chamber determined that acts of forced marriage practiced under the Khmer Rouge satisfied the elements of this definition since they were part of a widespread attack against the civilian population and entailed the forced imposition of a marital status on the victims, which resulted in severe physical or mental suffering of a degree of gravity comparable to the other listed crimes against humanity.⁶⁷
53. The de Brouwer *et al.* submission reiterates previous arguments made by the LRVs regarding the crime of forced marriage, and therefore the LRVs fully endorse it as

⁶³ *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL2004-16-A, Judgment, ¶ 202 (Feb. 22, 2008).

⁶⁴ *Ibid.*, para. 199.

⁶⁵ *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T, (Mar. 2, 2009.)

⁶⁶ Extraordinary Chambers in the Courts of Cambodia, Case 002 Closing Order, 15 September 2010, paras 1442- 1445.

⁶⁷ *Ibid.*

stating the correct position of the law on forced marriage and how it differs from other acts enumerated in article 7(1). The LRVs also support the position that there exist distinctions between forced marriage and the enumerated crimes against humanity⁶⁸ and that ‘the other inhumane act’ of forced marriage is a continuing crime as it endures during the entire period of the conjugal association.⁶⁹

54. Similarly, the LRVs support the position of the Meyersfeld & SALC *amicus curiae* submission, where they argue that that SGBC cannot be subsumed by the other.⁷⁰ In particular, the LRVs support their argument that the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (also known as the “Maputo Protocol”), is a counterweight to the Defence’s position that the criminalisation of forced pregnancy is incompatible with national law.⁷¹ Indeed, they posit that ‘Article 14 of the Protocol sets out a list of reproductive rights and autonomy such as the right to decide whether to have children, the number of children and the spacing of children.’ Furthermore, Uganda as having ratified the Maputo Protocol, has an obligation to ‘protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.’⁷²

55. The LRVs also support Zakerhossein, in his *amicus curiae* submissions on forced marriage, that forced marriage and sexual slavery are distinct and separate crimes.⁷³ As he notes, ‘[F]orced marriage does not target the sexual integrity of victims, but it also violates the fundamental right to free marriage.’⁷⁴

56. Taking into account the above, the LRVs wholly reject the Allain *amicus curiae* submissions⁷⁵ as having no basis in the current practice of international law as it

⁶⁸ ICC-01/04-01/15-1935, para. 19.

⁶⁹ ICC-01/04-01/15-1935, para. 30.

⁷⁰ ICC-01/04-01/15-1941, para. 2.

⁷¹ Defence Appeal Brief, para. 962.

⁷² ICC-01/04-01/15-1941, para.19, citing Article 14(2) of the Maputo Protocol.

⁷³ ICC-02/04-01/15-1928, para. 5.

⁷⁴ ICC-02/04-01/15-1928, para. 9.

⁷⁵ ICC-02/04-01/15-1927.

relates to the crimes of forced marriage, sexual slavery and enslavement. The LRVs urge the Appeals Chamber not to consider these submissions as they do not reflect the current state of the law on these crimes. Furthermore, these submissions are potentially regressive with regards to the expressive goals of international criminal law and reflecting the multiplicity of harms experienced by women in conflict, and in particular by the victims participating in this case.

c. Cumulative convictions: the permissibility or otherwise of entering cumulative convictions when the conduct in question violates two or more distinct provisions of the Statute.

57. The LRVs incorporate their previous submissions on this matter as elaborated in the ‘Victims’ Observations on the “Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021,”⁷⁶ filed on 21 October 2021.

58. In relation to sexual slavery, the ICC Elements of Crimes distinguish “sexual slavery” from “enslavement” by requiring additional proof that the perpetrator caused the victim to engage *in an act* of a sexual nature.⁷⁷ Ashraph *et al.*, in their *amicus* submissions request the Appeals Chamber to (i) recognize that acts of a sexual nature, including control over sexuality constitute enslavement in all forms and therefore request the Appeals Chamber to (ii) reverse the cumulative convictions with respect to sexual slavery and enslavement as crimes against humanity and enter convictions for enslavement rather than sexual slavery.

59. The LRVs agree that sexual slavery is not a distinct form of slavery, and all forms of slavery can and often are inclusive of sexual slavery ‘whenever sexualized violence is integral to the exercise of powers attaching to the right of ownership

⁷⁶ ICC-01/04-01/15-1883-Conf.

⁷⁷ Article 7(1)(c)-2 of the Statute.

over a person.’⁷⁸ As Sellers and Kestenbaum note ‘sexual slavery’ has been codified by various international criminal law instruments, including the Rome Statute as a result of a misconception regarding slavery and the failure to acknowledge, investigate, prosecute and provide redress of victims of slavery which included acts of a sexual nature.⁷⁹

60. As such, the LRVs submit that although sexual slavery is technically subsumed under enslavement as stated by the *amici*, it is important to victims that the distinct and multiple forms of harm that they suffered during their time in the LRA is accurately reflected within the charges for which Dominic Ongwen is eventually convicted. The drafters of the Rome Statute did question whether sexual slavery differed from enslavement and eventually decided that sexual slavery deserved to be recognized as a separate crime given its current status as a crime that affects millions of people worldwide even today.⁸⁰

61. Indeed, the inclusion of the crime of sexual slavery was widely accepted by the Preparatory Committee and the Diplomatic Conference.⁸¹ However, during the Rome Statute negotiations, the Holy See introduced a proposal to delete the reference to sexual slavery and replace it with the crime of enslavement⁸² in order to reduce overlap within the Statute. However, the general consensus amongst delegates was to ensure that the Rome Statute would be able to advance international law’s recognition of crimes of sexual violence that had not been previously enumerated in international instruments.⁸³ The LRVs fully support this position and believe that both crimes were listed in order to capture the different elements of the violation of enslavement.

⁷⁸ Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, ‘Sexual Slavery and Customary International Law,’ (2020), Book Chapters, Yeshiva University, Cardozo School of Law, 90, at p. 8.

⁷⁹ *Ibid*, p. 10.

⁸⁰ Valerie Oosterveld, Sexual Slavery and the International Criminal Court: Advancing International Law, 25 MICH. J. INT’L L. 605 (2004), p. 609.

⁸¹ *Ibid*, p. 614.

⁸² Proposal submitted by the Holy See, U.N. GAOR, Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/AC.249/1997/WG.I/DP.12 (1997).

⁸³ Oosterveld, *supra* note. 28, p. 623.

62. Therefore, the LRVs do not support the suggestions laid out in the Ashraph *et al.*, *amicus curiae* submission and request that they be dismissed in their entirety by the Appeals Chamber.⁸⁴ Indeed, accepting such a proposition, the LRVs submit, would render the crime against humanity of sexual slavery completely redundant within the Rome Statute framework and would result in a failure to capture all the nuances of sexual and gender based violence in this case as well as in future cases before this Court. Furthermore, such a decision would also have a detrimental impact on victims' reparative needs given that victims expect to receive reparations for the myriad and distinct forms of harm that they suffered, including enslavement and sexual slavery.

63. The ADC-ICT's position on cumulative convictions suggests a conduct-based approach, whereby the accused may only be convicted of more than one offence in respect of the same conduct, rather than the elements.⁸⁵ However, the LRVs believe that the Appeals Chamber should apply the established test governing the permissibility of cumulative convictions- the *Čelebići* test⁸⁶- as endorsed by the Appeals Chamber,⁸⁷ and applied uniformly by other Trial Chambers⁸⁸ before this Court and the *ad hoc* international criminal tribunals.⁸⁹

⁸⁴ Similar assertions are made in the Batra *amicus curiae* submission, ICC-01/04-01/15-1939, see para. iii, and the LRVs reiterate these same arguments in response to that submission.

⁸⁵ ICC-02/04-01/15-1937, para. 34.

⁸⁶ [Čelebići AJ](#), para. 412 (“[...] Multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. Any element is materially distinct from another if it requires proof of a fact not required by the other.”)^[SEP]

⁸⁷ [Bemba et al. AJ](#), para. 750 (finding no error with the Trial Chamber's application of the *Čelebići* test); [Ntaganda AJ](#), paras 131-132 (noting the *Čelebići* test)^[SEP]

⁸⁸ [Katanga TJ](#), para. 1695; [Bemba TJ](#), paras 746-751; [Bemba et al. TJ](#), paras 950-956; [Ntaganda TJ](#), paras 1202-1203^[SEP]

⁸⁹ See e.g., ICTY: [Čelebići AJ](#), paras 412-427; [Jelić AJ](#), paras 78-83; [Kordić and Cerkez AJ](#), paras 1040-1044; [Stakić AJ](#), paras 355-367; [Strugar AJ](#), paras 321-333; [Popović et al. AJ](#), paras 537-539; ICTR: [Musema AJ](#), paras 358-367 (adopting the *Čelebići* test at the ICTR); [Nahimana et al. AJ](#), paras 1018-1036; [Gatete AJ](#), paras 259-266; [Karemera et al. AJ](#), paras 710-713; [Bagosora et al. AJ](#), paras 412-417; [Ntabakuze AJ](#), paras. 259-261; SCSL: [Brima et al. TJ](#), paras 2099-2111; [Sesay et al. AJ](#), paras 1190-1200 (adopting the *Čelebići* test at the SCSL); [Taylor AJ](#), paras 575-578; [Brima et al. AJ](#), para. 212; ECCC: [Case 001 AJ](#), paras 287-336 (adopting the *Čelebići* test at the ECCC); [Case 002/01 TJ](#), paras 1055-1060; [Case 002/02 TJ](#), paras 4330-4341.

64. Again, the LRVs support the position of the Meyersfeld & SALC *amicus curiae* submissions on cumulative charges where they argue that it is proper and permissible to have cumulative charges and convictions for SGBC,⁹⁰ and the assumption ‘that any violation of women *qua* women implicates only one interest [...] is a patriarchal and outdated notion that women are reducible to their sex only and that any violation thereto, protects only one interest.’⁹¹ As such, the LRVs oppose suggestions made in the Batra *amicus curiae* submissions that ‘the concurrence of crimes and particularly the crimes of rape and sexual slavery based on the same conduct is not permissible.’⁹²

IV. RELIEF SOUGHT

65. The LRVs request that the Appeals Chamber be pleased to confirm the approach adopted by the Trial Chamber in respect of the issues for which it has received submissions from amici.

66. The LRVs further request that the Appeals Chamber accept the amici submissions by Arimatsu *et al*; Association of Defence Counsel practising before the International Courts; Dr Paul Behrens; Public International Law Policy Group; National Institute of Military Justice; Ardila *et al*; Meyersfeld and SALC; Dr Rosemary Grey *et al*, Women’s Initiatives for Gender Justice and Amnesty International; de Brouwer *et al*; Dr. Mohammad Hadi Zakerhossein in as far as their respective submissions are consistent with the findings and conclusions of the Trial Chamber on the issues addressed.

67. The LRVs further invite the Appeals Chamber to reject the submissions by Professor Mario H. Braakman; Baines *et al*; Minkowitz and Fleischner; Gerry *et al*; Justice Francis Muzingu Ssekandi; Prof. Jean Allain *et al*; Ashraph *et al* and Batra on the issues raised in their respective submissions.

⁹⁰ ICC-01/04-01/15-1941, para. 23.

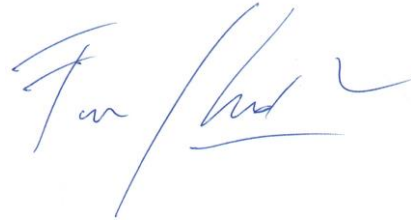
⁹¹ ICC-01/04-01/15-1941, para. 25.

⁹² ICC-02/04-01/15-1929, Conclusion, para. ii.

Respectfully submitted by:

A handwritten signature in blue ink, appearing to read 'Manoba', with a stylized, flowing script.

Joseph A. Manoba

A handwritten signature in blue ink, appearing to read 'Francisco Cox', with a stylized, flowing script.

Francisco Cox

Dated this 17th day of January 2022
At Kampala (Uganda), Santiago (Chile).