

1 International Criminal Court
2 Appeals Chamber
3 Situation: Republic of Uganda
4 In the case of The Prosecutor v. Dominic Ongwen - ICC-02/04-01/15
5 Presiding Judge Luz del Carmen Ibáñez Carranza, Judge Piotr Hofmański,
6 Judge Solomy Balungi Bossa, Judge Reine Alapini-Gansou and
7 Judge Gocha Lordkipanidze
8 Appeals Chamber Judgment (Sentence) - Courtroom 3
9 Thursday, 15 December 2022
10 (The hearing starts in open session at 2.31 p.m.)
11 THE COURT USHER: [14:31:25] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:32:19] Good afternoon.
15 Court officer, please call the case.
16 THE COURT OFFICER: [14:32:25] Thank you, Madam President.
17 The situation in Uganda, in the case of The Prosecutor versus Dominic Ongwen,
18 case reference ICC-02/04-01/15.
19 For the record, we are in open session.
20 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:32:39] I take it that the appearances
21 remain unchanged since our previous session today, unless I hear to the contrary.
22 No? Okay. Yes. Okay. Prosecution. Thank you.
23 Okay, as I see no indication, let's continue the hearing.
24 Earlier today, the Appeals Chamber delivered its judgment on the appeal of
25 Mr Ongwen against the Conviction Decision of the Trial Chamber. The

1 Appeals Chamber unanimously rejected the appeal and confirmed that decision.

2 We shall now turn to the other appeal of Mr Ongwen, which is directed against the
3 sentence imposed to him.

4 Background.

5 (Interpretation) By way of background, on 6 May 2021, the Trial Chamber rendered
6 the Sentencing Decision. It pronounced individual sentences for each of the
7 61 crimes of which Dominic Ongwen was convicted. The individual sentences
8 ranged from 8 to 20 years of imprisonment. The Trial Chamber also pronounced, by
9 majority, a joint sentence of 25 years of imprisonment. Deduced from this is the time
10 that Mr Ongwen spent in detention between 4 January 2015 and the pronouncement
11 of the sentence.

12 (Speaks English) On 26 August 2021, the Defence filed its appeal brief in which it
13 raised 11 grounds of appeal. Although initially, in its notice of appeal, the Defence
14 had raised 12 grounds of appeal, it subsequently withdrew ground of appeal 9.

15 I shall now present the Appeals Chamber's findings on grounds of appeal.

16 Acholi translation of the Confirmation Decision, ground 1.

17 Under the first ground of appeal, the Defence submits that the Trial Chamber violated
18 Mr Ongwen's fair trial rights by issuing the Sentencing Decision before providing
19 Mr Ongwen with an Acholi translation of the Conviction Decision.

20 The Appeals Chamber considers that, generally, when circumstances permit,
21 translation of relevant parts of the Conviction Decision can be provided to the
22 convicted person in the course of sentencing proceedings. However, as a matter of
23 law, the right to receive a translation of a conviction decision under the Statute and
24 the Rules is not, in principle, absolute for the purposes of sentencing, as long as the
25 convicted person, assisted by his or her counsel, is able to understand the

1 conviction decision sufficiently for those purposes. The Appeals Chamber recalls in
2 this respect that an accused person's right to translations under Article 67(1)(f) of the
3 Statute and Rule 144 of the Rules is circumscribed by the requirement of fairness.

4 The Appeals Chamber is of the view that in the case at hand, Mr Ongwen would have
5 benefited from having an Acholi translation of at least parts of the Conviction
6 Decision. However, for the reasons that follow, the Appeals Chamber does not find
7 that the Trial Chamber erred and that proceedings were unfair as a result, within the
8 meaning of Article 83 of the Statute.

9 The Appeals Chamber notes that as part of the delivery of the Conviction Decision,
10 Mr Ongwen received the interpretation into Acholi of the verdict and of an extensive
11 summary of the main findings and underlying reasons. In addition, the Defence was
12 put on notice of the potential aggravating factors and was able to make submissions
13 and introduce evidence in relation to potential mitigating and aggravating
14 circumstances.

15 The Appeals Chamber, therefore, rejects the first ground of appeal.

16 Testimonial evidence from victims, ground 2.

17 Under the second ground of appeal, the Defence submits that the Trial Chamber erred
18 in admitting and using in the Sentencing Decision testimonial evidence submitted by
19 the Legal Representatives of Victims.

20 The Appeals Chamber notes that the Trial Chamber's clarification -- the Appeals
21 Chamber notes the Trial Chamber's clarification that it is appropriate to refer directly
22 to the submissions of the victims as an expression of their will and opinion. The
23 Appeals Chamber finds no error in the Trial Chamber's conclusion.

24 The Appeals Chamber finds that the Defence has not demonstrated that the Trial
25 Chamber erred in this respect and, accordingly, rejects the second ground of appeal.

1 Acholi traditional justice system, ground 3.

2 Under the third ground of appeal, the Defence submits that the Trial Chamber erred
3 when it rejected and failed to objectively consider in this case the Acholi traditional
4 justice system, in particular the Acholi ritual of *mato oput*.

5 In considering the Defence's submissions on this issue, the Trial Chamber noted that
6 Article 23 of the Statute provides that a person convicted by the Court may be
7 punished only in accordance with the Statute.

8 It also took note of Article 77 of the Statute, which stipulates exhaustively the
9 penalties to be imposed for the commission of crimes within the jurisdiction of the
10 Court. In light of these provisions, the Trial Chamber found that any Defence
11 submissions to incorporate traditional justice mechanisms into the sentence imposed
12 on the convicted person must fail directly as a result of the principle of
13 *nulla poena sine lege*.

14 The Appeals Chamber notes that the Trial Chamber correctly found that it was
15 precluded from incorporating a penalty not foreseen in the legal framework of the
16 Statute.

17 The Defence also challenges the Trial Chamber's alleged failure to apply the principle
18 of complementarity to the Acholi traditional justice system.

19 While respectful of the cultural beliefs advanced by the Defence, and mindful of their
20 significance, the Appeals Chamber considers that the question of the incorporation of
21 the Acholi traditional judicial system into the Court's statutory framework has no
22 bearing on complementarity or admissibility matters.

23 The Defence further contends that the Trial Chamber held a biased view of the Acholi
24 traditional justice system because it relied on the testimony of non-Acholi persons
25 and refused to hear witnesses, who, the Defence submits, were "well placed to inform

1 conclusions" on that justice system. It also submits that the Trial Chamber
2 disregarded its submissions on social rehabilitation and reintegration and failed to
3 appreciate correctly the "relevant cultural beliefs and practices" of Mr Ongwen as a
4 personal circumstance.

5 The Appeals Chamber finds no merit in these submissions. For the reasons that
6 were just outlined and for other reasons set out in the judgment, the Appeals
7 Chamber rejects the third ground of appeal.

8 Cumulative sentencing, ground 4.

9 Under the fourth ground of appeal, the Defence argues that the Trial Chamber erred
10 in sentencing Mr Ongwen for both war crimes and crimes against humanity based on
11 the same underlying conduct.

12 The Appeals Chamber notes that the Trial Chamber was aware of the factual overlap
13 and the need to take into account in the determination of the joint sentence. The
14 Defence does not point to any finding of the Trial Chamber that would suggest the
15 contrary.

16 The Appeals Chamber finds no error in the Trial Chamber's approach and, therefore,
17 rejects this ground of appeal.

18 Factors outside the temporal scope, ground 5.

19 Under the fifth ground of appeal, the Defence submits that the Trial Chamber erred in
20 law by relying on events as aggravating circumstances that took place outside of the
21 temporal scope of the charges.

22 The Appeals Chamber notes that, while in the Sentencing Decision the Trial Chamber
23 noted certain events that occurred outside of the temporal scope of the charges, it did
24 not consider crimes allegedly committed prior to the temporal scope of the charges as
25 aggravating circumstances.

1 Regarding the births of children fathered by Mr Ongwen, the Appeals Chamber notes
2 that the Trial Chamber took into consideration births that occurred after the time
3 period relevant to the charges. The Appeals Chamber recalls in this respect that
4 conduct after the crime may inform the assessment of the gravity of the crime or give
5 rise to an aggravating circumstance, as long as there is sufficiently proximate link
6 between the conduct and the crimes.

7 The Appeals Chamber thus rejects the fifth ground of appeal.

8 Family circumstances, ground 6.

9 Under the sixth ground of appeal, the Defence submits that the Trial Chamber erred
10 in rejecting the mitigating factor and personal circumstance of Mr Ongwen's family
11 life.

12 The Appeals Chamber is satisfied that the Trial Chamber correctly weighed
13 Mr Ongwen's fatherhood against the factors calling into question the genuine nature
14 of his motivation to take care of his children. The Defence does not demonstrate any
15 error in this respect.

16 The Appeals Chamber, therefore, rejects the Defence's sixth ground of appeal.

17 Mental capacity, grounds 7 and 10.

18 As the subject matters of grounds of appeal 7 and 10 are related, the Appeals
19 Chamber will address them together.

20 Under the seventh ground of appeal, the Defence raises two issues regarding
21 Mr Ongwen's mental state. Firstly, the Defence submits that the Trial Chamber
22 erred when it found that Mr Ongwen did not suffer from a substantially diminished
23 mental capacity at the time of the crimes. Secondly, the Defence argues that the
24 Trial Chamber erred in finding that Mr Ongwen's current mental health could not be
25 taken into account as a personal circumstance.

1 The Appeals Chamber notes when determining the sentence and after having
2 concluded that the ground of exclusion of criminal responsibility under Article 31(1)(a)
3 of the Statute is not made out, a trial chamber, if it relies on the same evidence upon
4 which it relied for its findings under Article 31(1)(a), must determine whether the
5 same evidence may be sufficient to meet the threshold of Rule 145(2)(a)(i) of the
6 Rules.

7 The Defence challenges, inter alia, the Trial Chamber's reliance on the evidence of the
8 Prosecution experts.

9 The Appeals Chamber notes that in the Conviction Decision, the Trial Chamber
10 considered the experts' evidence related to Mr Ongwen's abduction and possible
11 disorders. The Trial Chamber also considered the experts' evidence that it was
12 "highly unlikely that [Mr Ongwen's] level of functioning was severely impaired".

13 The Appeals Chamber finds that the unambiguous findings of those experts do not
14 support the proposition that Mr Ongwen suffered from substantially diminished
15 mental capacity. It was therefore not unreasonable for the Trial Chamber to
16 conclude, under the standard of a balance of probabilities, that the results of the
17 analysis of the possibility of a mental disease or defect were incompatible with any
18 consideration of substantially diminished mental capacity.

19 The Defence also challenges the Trial Chamber's rejection of Mr Ongwen's current
20 mental state as a mitigating factor.

21 The Trial Chamber set out the standard of "exceptional cases" for accepting poor
22 health as a mitigating factor. It considered the Defence's submissions on this issue
23 and concluded that Mr Ongwen's current mental health could not be taken into
24 account as a mitigating circumstance.

25 The Appeals Chamber notes that the Defence does not expressly argue, nor is it

1 readily apparent from the quoted sources recording Mr Ongwen's condition, that his
2 alleged disabilities are such as to constitute an "exceptional case" within the meaning
3 adopted by the Trial Chamber.

4 Under the tenth ground of appeal, the Defence submits that the Trial Chamber erred
5 by using Mr Ongwen's unsworn statement, which he made in court, against him.

6 In the Sentencing Decision, the Trial Chamber referred to its own impressions of
7 Mr Ongwen's personal statement in court to conclude that his current mental health
8 could not be taken into account as a mitigating circumstance.

9 The Appeals Chamber notes that a trial chamber has broad discretion in determining
10 what constitutes a mitigating factor and the weight, if any, to attribute to it. A trial
11 chamber may, for instance, rely on the person's conduct during the trial proceedings,
12 ascertained primarily through the trial judges' perception of that person.

13 The Appeals Chamber is of the view that the Trial Chamber's reliance on its
14 impressions of Mr Ongwen's personal statement was permissible. For these reasons,
15 the Appeals Chamber rejects the seventh and the tenth grounds of appeal.

16 Duress, ground 8.

17 Under the eighth ground of appeal, the Defence submits that the Trial Chamber erred
18 by disregarding evidence in its assessment of whether Mr Ongwen met the threshold
19 of duress as a circumstance falling short of constituting a ground for exclusion of
20 criminal responsibility.

21 The Trial Chamber found that "duress is not applicable in the present case as a
22 mitigating circumstance pursuant to Rule 145(2)(a)(i) of the Rules."

23 The Appeals Chamber has already considered and rejected in its Conviction Appeal
24 Judgment arguments raised by the Defence in relation to the Trial Chamber's
25 conclusion that duress was not applicable as a ground for excluding criminal

1 responsibility. The Appeals Chamber notes in this regard that in arguing that
2 relevant evidence was ignored or disregarded, the Defence appears to raise identical
3 issues in its sentencing appeal brief.

4 The Appeals Chamber rejects this ground of appeal.

5 Aggravating circumstances, ground 11.

6 Under the eleventh ground of appeal, the Defence submits that the Trial Chamber
7 impermissibly relied on the "accumulation of aggravating factors" when calculating a
8 joint sentence pursuant to Article 78(3) of the Statute and abused its discretion in
9 imposing a joint sentence that was without justifiable legal and evidentiary basis.

10 Contrary to the Defence's suggestion, the Trial Chamber articulated in a clear manner
11 the relevant considerations that informed its exercise of discretion when imposing the
12 joint sentence of 25 years of imprisonment. The Defence incorrectly submits that the
13 Trial Chamber relied on criteria of a "very large extent of cumulative victimisation"
14 and "the extent of accumulation of the individual sentences". The Trial Chamber
15 weighed several relevant considerations but did not impose any criteria in the terms
16 suggested by the Defence.

17 The Appeals Chamber thus rejects the Defence's eleventh ground of appeal.

18 Under the twelfth ground of appeal, the Defence submits that the Trial Chamber
19 erred by violating the prohibition against counting the same factor twice in
20 sentencing.

21 For the reasons set out in the sentencing judgment, the Appeals Chamber finds no
22 merit in the arguments raised by the Defence in relation to the alleged double
23 counting of the following factors: (i) discriminatory intent as a factor of the gravity
24 of the crimes and as an aggravating factor; (ii) the "defencelessness of children
25 recruited into the LRA as an aggravating factor"; and (iii) essential elements of the

1 modes of liability as aggravating factors.

2 Regarding the alleged double counting of the factor concerning the high number of
3 victims, the Appeals Chamber, by majority, Judge Ibáñez dissenting, concurs with the
4 Prosecutor that the Trial Chamber's reference to the number of victims both in the
5 context of discussing the gravity of the crimes and to establish the aggravating
6 circumstance of multiplicity of victims was rather ambiguous. In this regard,
7 although the Trial Chamber may not have been sufficiently careful in its discussion of
8 this factor, the Appeals Chamber, by majority, Judge Ibáñez dissenting, understands
9 that it did not rely upon it twice.

10 I shall explain in more detail shortly, I disagree with the majority on this last point.

11 Noting the Trial Chamber's reasoning, I am of the view that the Trial Chamber took
12 into account and attached weight to the factor of multiplicity of victims twice and
13 therefore committed an error of law that materially affected the individual sentences
14 for 20 counts and, consequently, the joint sentence. For these reasons, the majority of
15 the Appeals Chamber, Judge Ibáñez Carranza dissenting, rejects the twelfth ground of
16 appeal.

17 Partially dissenting opinion of Judge Ibáñez Carranza.

18 As just mentioned, I am unable to agree with the majority on the issue of double
19 counting the factor of the high number of victims, which raises a serious issue as
20 regards the reasoning of the Trial Chamber and which materially affects 20 out of the
21 61 crimes, and thus almost one third of the individual sentences imposed. In
22 particular, the individual sentences for the following crimes are affected: The crimes
23 of murder and attempted murder (counts 2, 3, 12, 13, 14, 15, 25, 26, 27, 28, 38, 39 and
24 40, 41); torture (counts 4, 5); and enslavement (counts 8, 20, 33 and 46).

25 As a consequence, this error materially affects the joint sentence of 25 years. In my

1 view, this issue cannot be overlooked because it has an impact on the fairness of the
2 sentencing proceedings, causing prejudice to the convicted person. Indeed, the
3 rationale behind the prohibition of double counting is to prevent a convicted person
4 from being punished twice in relation to the same factor.

5 In cases such as this one where the number of victims may have been relevant both to
6 the gravity assessment and as aggravating circumstance, the Sentencing Decision
7 should have clearly stated in its reasoning whether weight was given to this factor as
8 part of gravity assessment or as an aggravating circumstance. Since this was not
9 done, the Trial Chamber failed to ensure coherence, consistency and certainty in its
10 reasoning, and the only reasonable conclusion is that, in relation to 20 counts, the
11 Trial Chamber has given weight to the number of victims twice in contravention of
12 the prohibition of double counting, thus affecting fairness.

13 (Interpretation) I also wish to use this opportunity to stress the importance of the
14 personal situation of Dominic Ongwen from the point of view of the sentencing. As
15 far as this is concerned, you should remember that it is the first time that the Court is
16 called upon to address the unique issues of victim perpetrator and its relevance to the
17 determination of sentence.

18 (Speaks English) I also wish to use this opportunity to emphasise the importance of
19 Mr Ongwen's particular individual circumstances in mitigation. In this regard, it is
20 significant that this is the first time that the Court is called upon to address the unique
21 issue of victim perpetrator and its relevance to the determination of the sentence.

22 It must be pointed out that in circumstances of this case, the status of victim
23 perpetrator is not a consideration relevant to a determination of an accused person's
24 guilt or innocence pursuant to Article 74 of the Statute. Rather, these matters inform
25 the appropriate sentence to be imposed in case of a conviction under Article 76 of the

1 Statute.

2 At this stage, the appropriate sentence is not only informed by the facts of the case but
3 also, and importantly, by the personal circumstances of the convicted person. In
4 particular, in this case, it is of crucial importance to consider the impact that
5 Mr Ongwen's abduction, conscription, violent indoctrination, being forced to carry
6 out and participate in criminal acts when he was still a defenceless child of about nine
7 years of age, and his upbringing in the coercive environment of the LRA had on his
8 personality, the development of his brain and moral values, and future opportunities.
9 A determination of appropriate sentence requires thus a holistic analysis that takes
10 into consideration both the blameworthiness of the convicted person and his or her
11 individual circumstances. Mr Ongwen's condition as a victim did not cease when he
12 turned 18 years old.

13 For the reasons fully developed in my partly dissenting opinion, I am of the view that
14 the significant legal error of double counting had a material impact on 20 of the 61
15 individual sentences concerned, thus almost one third, affecting the fairness of the
16 sentencing proceedings and ultimately leading to an incorrect exercise of discretion
17 by the Trial Chamber as a consequence of which the Trial Chamber imposed a
18 disproportionate joint sentence of 25 years of imprisonment. Therefore, I am of the
19 view that the joint sentence must be reversed and the matter remanded to the
20 Trial Chamber for it to determine a new sentence.

21 In its new determination, the Trial Chamber should also consider the weight that
22 ought to be afforded in mitigation of Mr Ongwen's personal circumstances, in
23 particular the impact that the traumatic experiences which he underwent had on his
24 personality, as explained earlier.

25 I further considered that, given the expressive nature of judicial decisions, and

1 specifically of international criminal judgments, recognising in this case the crimes of
2 which Mr Ongwen was a victim provides the means to acknowledge his victim status
3 and reinstate the dignity that was taken away from him when he was only a
4 defenceless child.

5 In determining a new sentence, the object and purpose of sentencing ought to be
6 considered. In this regard, I firmly believe that in the context of international
7 criminal law, sentencing serves various purposes, including, notably, retribution and
8 prevention in all its variants, special and general. In relation to the general
9 preventative purpose, all its aspects ought to be considered, and because of the nature
10 and the context of the crimes, in particular, the positive aspect of general prevention is
11 of relevance. This includes, according to the jurisprudence of the Court and other
12 international tribunals and as illustrated in the recent developments before the
13 Assembly of States Parties, contributions to the promotion of restorative justice and
14 reconciliation as a way to advance the enforcement of the rule of law and therefore
15 sustainable peace.

16 While I consider that the error of double counting should certainly result in an
17 appropriate reduction of the joint sentence of 25 years of imprisonment, I am of the
18 view that the Trial Chamber would be better placed to determine the appropriate
19 sentence, taking into account the findings made in this partially dissenting opinion.

20 Importantly, I would also like to emphasise that nothing in my partly dissenting
21 opinion should be interpreted as negating the great suffering of the victims of the
22 very serious crimes of which Mr Ongwen has been convicted, in particular, that
23 suffered by victims of sexual and gender-based crimes and the victimised children.

24 This suffering has been duly and unanimously acknowledged in the Conviction
25 Decision and Sentencing Decision as confirmed by the Appeals Chamber in today's

1 judgments.

2 I also wish to point out that I am convinced that Mr Ongwen must be sentenced for
3 the crimes which he committed. I am of the view that only through the imposition
4 of an adequate, proportionate and fair sentence will justice for both victims and the
5 convicted person be achieved.

6 Appropriate relief.

7 The Appeals Chamber has unanimously rejected 10 of the 11 grounds of appeal on
8 sentencing. It confirms these aspects of the Sentencing Decision.

9 Regarding ground of appeal 12, the Appeals Chamber rejects it by majority, and, as
10 just discussed, I partly dissent only with respect to the allegation of double counting
11 of the factor of multiplicity of victims. While the majority confirms the Sentencing
12 Decision in this respect, I would reverse the joint sentence of 25 years of
13 imprisonment and remand the matter to the Trial Chamber for it to determine a new
14 sentence.

15 Conclusion.

16 This brings us to the end of the summary of the Appeals Chamber's judgment.

17 As mentioned this morning, the judgments will be notified to the parties and
18 participants shortly after this hearing. Summaries of the judgments will be also
19 available, both in English and in French. A Spanish version of the summary of the
20 two judgments will be available in due course.

21 I would like to thank first the interpreters for its invaluable contribution and all the
22 Registry staff who assisted in this hearing.

23 The hearing is now adjourned.

24 THE COURT USHER: [15:10:34] All rise.

25 (The hearing ends in open session at 3.10 p.m.)