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INTRODUCTORY NOTE TO SITUATION IN UGANDA (PROSECUTOR V. DOMINIC ONGWEN) (JUDGMENT ON APPEAL) (INT'L CRIM. CT. APP. CHAMBER)

BY ARTHUR TRALDI*

[December 15, 2022]

Introduction

On December 15, 2022, the International Criminal Court's Appeals Chamber unanimously confirmed Dominic Ongwen's convictions for crimes against humanity and war crimes[1] and, by majority vote, confirmed his sentence of twenty-five years' imprisonment.[2]

Ongwen was convicted for his role in crimes committed by the Lord's Resistance Army (LRA). Evidence at trial showed that he himself had been abducted by the LRA as a child and forcibly integrated into it before rising up its ranks to the positions of authority in which he served at the time of the crimes for which he was convicted. The case is most notable for how the Trial and Appeal Chambers engaged with Ongwen's status as both victim and perpetrator by treating his victimization as a mitigating factor for sentencing purposes, but not as a defense to the charges against him.

Background

In December 2003, the Ugandan government referred the situation in its territory since July 1, 2002, to the ICC.[3] The Office of the Prosecutor subsequently conducted a preliminary examination and, in July 2004, opened an investigation.[4] On July 8, 2005, the Court issued arrest warrants for Ongwen and four others, including LRA leader Joseph Kony, on charges of crimes against humanity and war crimes including enslavement and murder.[5] In January 2015, Ongwen surrendered and was transferred to the Hague.[6]

Ongwen's trial began in December 2016.[7] Over the next three years, the parties called almost 200 witnesses and more than 5,000 items were submitted into evidence.[8] Closing arguments were held in March 2020.[9]

On February 4, 2021, Trial Chamber IX convicted Ongwen on sixty-two out of seventy counts of crimes against humanity and war crimes.[10] Among other charges, he was convicted of murder, torture, persecution, and crimes of sexual and gender-based violence (SGBV) including sexual enslavement, forced marriage, and forced pregnancy.[11] He was subsequently sentenced to twenty-five years' imprisonment.[12] The Trial Chamber noted that the gravity of Ongwen's crimes would "surely" justify a sentence of life imprisonment.[13] However, it considered that Ongwen's own abduction by the LRA as a child, and his subsequent forcible integration into the LRA, rendered life imprisonment inappropriate for his individual circumstances.[14] Ongwen appealed his conviction, raising ninety grounds of appeal,[15] and separately appealed his sentence.[16]

The Appeals Chamber's Judgments

The Appeals Chamber issued two judgments in the case: one on Ongwen's appeal of his conviction and one on his appeal of his sentence. It unanimously dismissed all grounds of Ongwen's appeal of his conviction and dismissed all grounds of his appeal of sentence, with Judge Ibanez Carrera dissenting on one ground. The judgments were particularly important in addressing the defenses of duress and mental disease or defect under Article 31(1) of the Rome Statute, confirming that forced marriage is an "other inhumane act" punishable under Article 7(1)(k) of the Rome Statute, and addressing whether convictions for multiple sexual and gender-based violence offenses are impermissibly cumulative.

The Ongwen case has always been particularly noted because of Ongwen's status as a victim of atrocity crimes himself. As the Appeals Chamber explained:

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> [Ongwen] was also a victim of a serious crime, as he was abducted at the age of nine years, trained and integrated as a fighter into the LRA ranks. Mr. Ongwen's abduction as a young child and his early years spent in the adverse and extremely violent environment of the LRA brought to him great suffering.[17]

However, the Appeals Chamber rejected Ongwen's arguments that the crimes against him as a child gave rise to a defense of duress, or to a mental disease or defect that excused him from any criminal responsibility.[18] It reasoned that because Ongwen was not subject to a threat of imminent death or serious bodily harm that was present at the time of his crimes, the test for duress was not satisfied.[19] As to mental disease or defect, while the Appeals Chamber acknowledged evidence that Ongwen could not control the negative environment of the LRA in which he lived as an adolescent, it concluded such evidence was "not exculpatory of his criminal responsibility for the crimes he was found to have committed as an adult,"[20] although it acknowledged that such evidence "may be viewed as significant for the purposes of sentencing" by mitigating Ongwen's responsibility.[21]

Ongwen was convicted of forced marriage as an other inhumane act under Article 7(1)(k) of the Rome Statute, as well as of other crimes of sexual and gender-based violence, which are specifically enumerated in Article 7(1)(g).[22] In considering forced marriage, the Appeals Chamber affirmed the nature of "other inhumane acts" as a residual category of offenses, limited to acts of a similar character and gravity to other crimes against humanity that cause great suffering or serious injury.[23] The Appeals Chamber found this residual category consistent with international human rights law, and that it did not violate the principle of *nullum crimen sine lege*.[24] The Appeals Chamber then concluded that forced marriage qualified as an "other inhumane act," reasoning that (1) forcing someone to marry without their consent violates international human rights law; (2) it imposes serious harms on the victim similar to other crimes against humanity; and (3) those harms are not fully captured by other crimes against humanity.[25] It then affirmed Ongwen's conviction for forced marriage as an "other inhumane act."[26]

The Appeals Chamber dismissed Ongwen's claims that his convictions for multiple SGBV offenses were impermissibly cumulative. After reiterating the test for cumulative convictions, it concluded that the crimes of rape, sexual enslavement, and forced marriage have distinct legal elements and are directed at preventing distinct harms.[27] Consequently, it found that Ongwen's convictions were not cumulative.

The Appeals Chamber also dismissed Ongwen's other appeals of his conviction, determining *inter alia* that Ongwen's trial had satisfied the ICC's procedural guarantees and the Prosecution had adduced sufficient evidence of his individual criminal responsibility.

Judge Ibanez Carrara dissented. She found that in relation to twenty counts, the Trial Chamber appeared to have treated the quantity of victims both as a factor enhancing the gravity of the crime and as an aggravating factor, thus impermissibly double-counting the same factor for sentencing purposes.[28]

Conclusion

The judgments in this case have drawn mixed reactions. Because the trial and appeal judgments took similar approaches and reached similar conclusions, it is worth noting reactions at both levels.

Many have emphasized that the judgments provided a measure of justice for the thousands of victims of the LRA—especially victims of crimes of sexual and gender-based violence. Proponents have emphasized that the *Ongwen* case was a milestone for prosecuting violations of reproductive rights.[29] Similarly, commenters commended the trial judgment for considering crimes of forced marriage and forced pregnancy as separate crimes against humanity.[30]

However, the judgments have also been criticized, particularly for the Court's approach to Ongwen's own victimization. This is the first decision by the ICC in which the defendant is both a victim and perpetrator.[31] As noted above, Ongwen was abducted by the LRA as a child and—like other LRA child soldiers—subjected to brutal indoctrination. Critics of the judgments have noted that they leave unanswered questions about why Ongwen's victimization was found to be a mitigating factor,[32] challenged the Court's approach to mitigation[33] and its findings on specific issues, such as the role of spiritual beliefs about Joseph Kony's powers within the LRA,[34] and asserted that the ICC's "binary" test for mental illness was not sufficiently nuanced to capture the complex relationship between mental health issues and behavioral regulation.[35]

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Moreover, almost two decades after the opening of the ICC investigation in Uganda, Ongwen remains the only accused person in custody, though warrants have been issued for others.[36] In particular, Joseph Kony—the subject of a large-scale campaign to arrest him known by the shorthand "Kony 2012" and the alleged architect of the LRA policies that victimized Ongwen and that Ongwen later implemented in committing his own crimes—remains a fugitive more than a decade later.[37] The Prosecution requested to hold an *in absentia* hearing on the confirmation of the charges against Kony in November 2022,[38] but as of this writing no decision on that request has been issued and no hearing has been held. Meanwhile, in Uganda, thousands of LRA members have been granted amnesty.[39]

As this context illustrates, the impact of the *Ongwen* case remains to be seen. Immediately, the case reflects OTP's emphasis on crimes of sexual and gender-based violence, and OTP's success in securing a conviction may encourage the ICC and other international criminal justice institutions to continue prioritizing the prosecution of such crimes.

Over the long term, the case has significantly increased the discussion of how to treat crimes committed by perpetrators who had previously been victimized themselves. It is possible that this may lead to further development of this area of law, as future panels of judges conduct fact-specific analyses of other mixed victims and perpetrators in attempting to assess the relationship between their guilt and their victimization.

More broadly, Ongwen was only the fifth person to be convicted of an atrocity crime at the ICC—and every other person convicted of an atrocity crime as a result of a contentious proceeding (rather than a guilty plea) committed their crimes in a single country, the Democratic Republic of the Congo.[40] For supporters of the ICC, the case may reflect a sign that the court may be able to secure convictions and do justice in additional situations—not just the DRC. By contrast, ICC skeptics may focus on the fact that nineteen years into the Court's investigation in Uganda, only one defendant has been convicted, and that defendant had previously been victimized himself. Only time, and the outcomes of additional cases, will demonstrate which view is correct.

ENDNOTES

1 Situation in Uganda (Prosecutor v. Ongwen) (Judgment on the Appeal), ICC-02/04-01/15-2022-Red (Dec. 15, 2022) [hereinafter Conviction Appeal Judgment]. The trial judgment was issued on February 4, 2021 (ICC-02/04-01/15-1762-Red) [hereinafter Trial Judgment].

2 Situation in Uganda (Prosecutor v. Ongwen) (Sentencing Appeal Judgment), ICC-02/04-01/15-2023 (Dec. 15, 2022). The sentencing judgment was issued on May 6, 2021 (ICC-02/04-01/15-1819-Red) [hereinafter Sentence].

3 President of Uganda refers the situation concerning the Lord's Resistance Army (LRA) to the ICC (Jan. 29, 2004), https://www.icc-cpi.int/news/icc-president-uganda-refers-situation-concerning-lords-resistance-army-lra-icc.

4 Prosecutor of the International Criminal Court opens an investigation into Northern Uganda (July 29, 2004), https://www.icc-cpi.int/news/icc-prosecutor-international-criminal-court-opens-investigation-nothern-uganda.

5 Warrant of arrest for Dominic Ongwen, ICC-02/04-01/05-10 (July 8, 2005). The warrant was initially issued under seal but was made public in October 2005. Decision on the Prosecutor's application for unsealing of the warrants of arrest, ICC-02/04-01/15-34 (Oct. 13, 2005).

6 ICC Press Release, Dominic Ongwen transferred to The Hague (Jan. 20, 2015), https://www.icc-cpi.int/news/dominic-ongwen-transferred-hague.

7 Trial Judgment, ¶ 19.

8 *Id.* ¶¶ 19–25.

9 *Id.* ¶ 24.

10 *Id.* ¶ 3116.

11 *Id.*

12 Sentence, ¶ 392.

13 *Id.* ¶ 386.

14 *Id.* ¶¶ 387–392.

15 Public Redacted Version of "Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021," filed on July 21, 2021, as ICC-02/04-01/15-1866-Conf (Oct. 19, 2021).

16 Public Redacted Version of 'Corrected Version of "Defence Document in Support of its Appeal Against the Sentencing Decision," filed on 26 August 2021,' filed on August 30, 2021, as ICC-02/04-01/15-1871-Conf-Corr (Aug. 31, 2021).

17 Conviction Appeal Judgment, ¶ 35.

18 *Id.* ¶¶ 1105–1427.

19 *Id.* ¶¶ 1423–1425.

20 *Id.* ¶ 1377.

21 *Id.* ¶ 1376.

22 Rome Statute of the International Criminal Court, art. 7(1), https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf.

23 Conviction Appeal Judgment, ¶ 1018.

24 *Id.* ¶¶ 1019–1020.

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25 *Id.* ¶¶ 1021–1024.

26 *Id.* ¶ 1040.

27 *Id.* ¶¶ 1677–1683.

28 Sentencing Appeal Judgment, Annex I, ¶¶ 48–63.

29 *See, e.g.,* Global Justice Center, *International Criminal Court Upholds Conviction of Lord's Resistance Army Commander*, (Dec. 15, 2022), https://www.globaljusticecenter.net/press-center/press-releases/1648-international-criminal-court-upholds-conviction-of-lord-s-resistance-army-commander; American University Washington College of Law, Interview with Susana SáCouto, *ICC Case Prosecutor v. Ongwen: Forced Pregnancy is a Form of Reproductive Violence and Attack on Reproductive Integrity*, https://www.wcl.american.edu/impact/initiatives-programs/international/icc-decision-in-prosecutor-v-ongwen-advances-recognition-of-forced-pregnancy-as-war-crimes; Southern Africa Litigation Centre, *The Prosecutor v Dominic Ongwen: Landmark judgment for the prosecution of sexual and gender-based crimes at the ICC* (Dec. 17, 2022), https://www.southernafricalitigationcentre.org/2022/12/17/the-prosecutor-v-dominic-ongwen-landmark-judgment-for-the-prosecution-of-sexual-and-gender-based-crimes-at-the-icc. *See also* Julia Tétrault-Provencher, *Replicating the Definition of "Forced Pregnancy" from the Rome Statute in A Future Convention on Crimes Against Humanity: A Tough Pill to Swallow*, 33 HASTINGS J. GENDER & L. 105, 107 (2022) (commenting on the trial judgment).

30 Marina Kumskova, *Invisible Crimes Against Humanity of Gender Persecution: Taking A Feminist Lens to the ICC's Ntaganda and Ongwen Cases*, 57 TEX. INT'L L.J. 239, 249 (2022) citing Trial Judgment, ¶ 35.

31 Nini Els Pieters, et al., *The Ongwen Judgement at the ICC: A Missed Opportunity for Former Child Soldiers?*, (June 22, 2021), https://internationallaw.blog/2021/06/22/the-ongwen-judgement-at-the-icc-a-missed-opportunity-for-former-child-soldiers, citing Erin K Baines, *Complex Political Perpetrators: Reflections on Dominic Ongwen*, 47 J. MODERN AFR. STUD. 163 (2009).

32 *See, e.g.,* John Cubbon, *Mitigation of Dominic Ongwen's Sentence: Gaps in the Justification*, EJIL! TALK, (Jan. 5, 2023), https://www.ejiltalk.org/mitigation-of-dominic-ongwens-sentence-gaps-in-the-justification.

33 *See, e.g.,* Kerstin Bree Carlson, *ICC Judges Ignored Ongwen's Background in guilty verdict: Why It's a Mistake*, THE CONVERSATION (Feb. 10, 2021), https://theconversation.com/icc-judges-ignored-ongwens-background-in-guilty-verdict-why-its-a-mistake-154985 (commenting on the trial judgment).

34 *See, e.g.,* Kjell Anderson (@Kjell_Anderson), Twitter (Dec.15, 2022), https://twitter.com/Kjell_Anderson/status/1603357470780698624.

35 Lee Hiromoto and Landy F. Sparr, *Ongwen and Mental Health Defenses at the International Criminal Court*, 51 J. AM. ACAD PSYCHIATRY L. (Jan. 10, 2023), https://jaapl.org/content/early/2023/01/10/JAAPL.220034-21.

36 *See* https://www.icc-cpi.int/uganda.

37 *See, e.g.*, Kate Madden, *"Kony 2012" Ten Years Later*, NEW YORK TIMES (Mar. 8, 2022), https://www.nytimes.com/2022/03/08/style/kony-2012-invisible-children.html.

38 Prosecutor v. Joseph Kony and Vincent Otti, ICC 02/04-01/05, Public Redacted Version of the "Prosecution's Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence" (Nov. 24, 2022).

39 *See, e.g.,* Paul Bradfield, *The Moral and Legal Correctness of Dominic Ongwen's Conviction, Justice in Conflict*, (Feb. 10, 2021), https://justiceinconflict.org/2021/02/10/the-moral-and-legal-correctness-of-dominic-ongwens-conviction/.

40 *See, e.g.,* Douglas Guilfoyle, *Is the International Criminal Court Destined to Pick Fights with Non-State-Parties?*, EJIL: TALK! (July 14, 2020), https://www.ejiltalk.org/is-the-international-criminal-court-destined-to-pick-fights-with-non-state-parties.

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SITUATION IN UGANDA (PROSECUTOR V. DOMINIC ONGWEN)
(JUDGMENT ON APPEAL) (INT'L CRIM. CT. APP. CHAMBER)*
[December 15, 20220]

Cour Pénale Internationale

International Criminal Court

Summary

Judgment of the Appeals Chamber

in

The Prosecutor v. Dominic Ongwen

Read by

Judge Luz del Carmen Ibáñez Carranza

Presiding

(15 December 2022)

1. The Appeals Chamber is delivering its judgment today on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 (hereinafter: "Conviction Decision") by which he was convicted of numerous crimes, comprising of war crimes and crimes against humanity. The written judgment and not this summary is authoritative.

Appeal against conviction

Background of the appeal proceedings

2. This case concerns Mr Dominic Ongwen's alleged conduct as a high level member of the Lord's Resistance Army (hereinafter: "LRA") that pursued an armed rebellion against the government of Uganda and in particular the civilian population living in Northern Uganda between 1 July 2002 and 31 December 2005.

3. As noted by the Trial Chamber, while the evidence presented during the trial and the factual findings made in the Conviction Decision focussed on events which took place in Northern Uganda between 1 July 2002 and 31 December 2005, the LRA had been active since the 1980s, and the related conflict in Northern Uganda has spanned over four decades.

4. The LRA, including Mr Ongwen, perceived the civilians living in Northern Uganda as being associated with the government of Uganda, in particular those who lived in government-established Internally Displaced Persons camps (hereinafter: "IDP camps"). The IDP camps were the result of an anti-insurgency strategy adopted by the Ugandan government to remove the population from rural areas where it might assist the rebels. A significant

*Due to the length of the appellate judgment, what follows is the official ICC summary of the judgment. The full judgment (and annex) can be accessed at https://www.icc-cpi.int/court-record/icc-02/04-01/15-2022-red. The following summary was reproduced and reformatted from the text available at the ICC website (visited May 30, 2023), https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-15-ongwen-judgment-summary-eng.pdf.

number of crimes committed by the accused relate to attacks carried out against some of these camps, in particular the Lukodi, Abok, Pajule and Odek IDP camps.

5. As acknowledged by the Trial Chamber, Mr Ongwen himself was abducted by the LRA in 1987 as a young child and experienced much suffering in his childhood and youth. However, based on the charges, the Trial Chamber focused on crimes committed by Mr Ongwen as an adult and as a battalion commander of the Sinia Brigade in the LRA.

6. On 4 February 2021, Mr Ongwen was found criminally responsible and convicted of 61crimes, comprising both crimes against humanity and war crimes. In particular, he was found responsible as an indirect perpetrator of crimes committed in the context of the attacks carried out on the Lukodi IDP camp on or about 19 May 2004 and the Abok IDP camp, on or about 8 June 2004. He was also found criminally responsible as an indirect co-perpetrator of crimes committed in the context of the attacks on the Pajule IDP camp on or about 10 October 2003 and the Odek IDP camp on or about 29 April 2004. The crimes committed within these four attacks included attacks against the civilian population, murder, torture, enslavement, pillaging, destruction of property and persecution. Mr Ongwen was also convicted as an indirect co-perpetrator for sexual and gender-based crimes (including the crimes of forced marriage as a form of other inhumane acts, torture, rape, sexual slavery, and enslavement); and the crime of conscription of children under the age of 15 years and their use in armed hostilities. Furthermore, Mr Ongwen was found to be criminally responsible as a direct perpetrator of a number of sexual and gender-based crimes (including the crimes of forced marriage as a form of other inhumane acts, torture, rape, sexual slavery, enslavement, forced pregnancy, and outrages upon personal dignity).

7. For these crimes, the Trial Chamber imposed a joint sentence of 25 years of imprisonment.

8. On 21 May 2021, the Defence filed its Notice of Appeal and on 21 July 2021, its Appeal Brief.

9. In the Defence's appeal against the Conviction Decision, the Defence raises 90 grounds of appeal alleging legal, factual and procedural errors that, in the Defence's view, materially affected this decision, and requests that the Appeals Chamber reverse all the convictions and enter a verdict of acquittal.

10. The present appeal contains novel and at times complex issues, which the Appeals Chamber has been required to address for the first time. These include the assessment of grounds for excluding criminal responsibility (namely, the defences of mental disease or defect and duress) and the interpretation of the elements of certain sexual and gender-based crimes, in particular forced marriage and forced pregnancy. Furthermore, this case concerns an accused person who was abducted by the LRA at the age of nine years, indoctrinated, trained and forced to carry out and participate in criminal acts in the LRA. Mr Ongwen's abduction as a young child and his early years spent in the adverse and extremely violent environment of the LRA brought to him great suffering.

11. The Appeals Chamber decided to invite 19 *amici curiae* to participate in these proceedings in light of their expertise and high qualifications on some of the novel issues arising in the appeal, in addition to the submissions it had received from the parties and the legal representatives of the victims. A hearing of the Appeals Chamber was convened in February 2022, where the parties and participants, including certain invited *amici curiae*, were afforded an opportunity to make oral submissions on the issues at stake.

12. Considering the Defence's many grounds of appeal and taking into account their presentation and the overlap between them, the Appeals Chamber has decided to structure its analysis in its judgment and group the grounds of appeal, as follows. The Appeals Chamber has first addressed the grounds of appeal raising a number of alleged violations of Mr Ongwen's right to a fair trial and "other human rights violations", and those challenging specific evidentiary assessments and findings made by the Trial Chamber. It has then addressed the Defence's challenges to the Trial Chamber's findings on Mr Ongwen's individual criminal responsibility as an indirect perpetrator and as an indirect co- perpetrator with respect to the crimes committed during the attacks carried out on the above-mentioned four IDP camps (Lukodi, Abok, Pajule and Odek); and the crime of conscription of children under the age of 15. The Appeals Chamber has then addressed the Defence's submissions related to the Trial Chamber's findings concerning sexual and gender-based crimes; followed by those concerning the grounds for excluding criminal responsibility, *i.e.* mental disease or defect, and duress, pursuant to article 31(1)(a) and (d) of the Statute, respectively. Finally, the Defence's submissions concerning the issue of cumulative convictions are addressed.

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Appeal against conviction

ALLEGED ERRORS CONCERNING MR ONGWEN'S RIGHT TO A FAIR TRIAL AND "OTHER HUMAN RIGHTS VIOLATIONS" AND OTHER ALLEGED EVIDENTIARY ERRORS

13. In the first part of its Appeal Brief, the Defence raises under several grounds of appeal, a number of alleged violations of Mr Ongwen's rights, which, in its view, were committed throughout the proceedings. In its submission these violations made a fair trial impossible and resulted in the legitimacy of the judgment in this case being compromised.

14. The Defence mainly alleges: (i) errors in the conduct of the article 56 proceedings, which took place in the early phase of this case; (ii) errors in the procedure in which Mr Ongwen entered a plea of not-guilty; (iii) violations of the accused's right to be informed "promptly and in detail" of the charges under article 67(1)(a) of the Statute; (iv) that the Trial Chamber expanded the scope of the charges; (v) that the Trial Chamber failed to provide Mr Ongwen with relevant translations of documents into Acholi, the language he fully understands and speaks; (vi) that the Trial Chamber discriminated against Mr Ongwen due to his alleged mental disability; and (vii) that the Trial Chamber failed to explain the outcome of its evidentiary rulings.

15. While all grounds of appeal raising fair trial issues are fully addressed in the judgment, for the purposes of this summary only some of the main allegations and the related findings will be recalled.

16. Under grounds of appeal 1 to 3, the Defence raises procedural, legal and evidentiary issues with respect to the article 56 proceedings before the Single Judge of the Pre-Trial Chamber. The purpose of these proceedings was to elicit testimony of several witnesses in the context of a "unique investigative opportunity". With regard to the main issue raised by the Defence, concerning the propriety of a judge's concurrent involvement in the taking of testimony under article 56 of the Statute and the conduct of confirmation proceedings, the Appeals Chamber finds that there is nothing in the applicable law to suggest that a judge of the pre-trial chamber who has participated in a unique investigative opportunity should be excluded from subsequent proceedings in the pre-trial phase. On the contrary, all these procedural steps are part of the same pre-trial phase, of which the same pre-trial chamber is in charge.

17. Under its fourth ground of appeal, the Defence contends that Mr Ongwen's fair trial rights were violated by the Trial Chamber's failure to ensure, pursuant to article 64(8)(a) of the Statute, that he understood the nature of the charges against him and proceeded to trial on an "illegal plea" of not guilty. The Defence asserts, *inter alia*, the lack of a full Acholi translation of the Confirmation Decision at the time of the plea contributed to his lack of understanding of the nature of the charges at the time of entering a plea.

18. The Appeals Chamber finds that in circumstances where the operative part of a confirmation decision defines the acts that an accused person is alleged to have committed, and the legal characterisation given to such acts (including the mode of liability charged for each crime) and is provided to an accused in a language that he or she fully understands and speaks, a further translation of the reasoning underpinning such decision and any related separate or dissenting opinion, in a language that an accused fully understands and speaks, may not be essential to place an accused on notice of the charges in order to enter a plea pursuant to article 64(8)(a) of the Statute.

19. One of the main arguments raised under grounds of appeal 7, 8, 10 (in part), 25 and 45, concerns the alleged erroneous application of the burden and standard of proof for grounds excluding Mr Ongwen's criminal liability. The Appeals Chamber finds that in the absence of a specific provision in the Statute regulating the burden and standard of proof with respect to grounds excluding criminal responsibility, the general provisions of article 66 of the Statute apply. The Appeals Chamber considers that generally, the Prosecutor does not bear the burden *per se* to "disprove each element" of a ground excluding an accused's criminal responsibility. However, he or she must establish the guilt of the accused beyond reasonable doubt even when the Defence alleges a ground for excluding criminal responsibility. The Appeals Chamber also finds that when raising grounds purporting to exclude an accused's criminal responsibility, it is not enough to merely give notice of such an intention. The Defence must also present evidence to substantiate its allegations. This so-called "evidentiary burden" on the part of the Defence does not equate to a shift in the burden of proof as the Prosecutor is not absolved of his or her burden to establish the elements of the crimes (such as the mental element) and the modes of liability beyond reasonable doubt.

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20. Under ground of appeal 23, the Defence has raised errors concerning the submission of evidence, challenging in particular the Trial Chamber's failure to explain the outcome of its evidentiary rulings either during the trial or in the Conviction Decision.

21. In this respect, the Appeals Chamber notes that the Trial Chamber in this case considered the relevance and probative value of the evidence submitted at trial holistically when deciding on Mr Ongwen's guilt or innocence. It was not *per se* erroneous for the Trial Chamber not to include, in the Conviction Decision, evidentiary rulings with respect to each item of evidence submitted at trial. However, the Appeals Chamber notes that, in light of the requirement of a reasoned statement under article 74(5) of the Statute, the trial chamber must "explain with sufficient clarity the basis for its determination".

22. The Appeals Chamber considers that this duty to provide a reasoned statement of findings on the evidence is of particular significance when any party raises an issue concerning the relevance, probative value or a potential prejudicial effect of a piece of evidence, especially when the opposing party raised an objection. Whether the trial chamber's failure to provide such a reasoned statement amounts to an error must be assessed on a case-by-case basis. However, as the Defence does not provide any examples of alleged insufficiently reasoned rulings on evidence, the Appeals Chamber rejects ground of appeal 23.

23. The Defence has also raised other alleged evidentiary errors: (i) errors in the Trial Chamber's assessment of the credibility and reliability of witness evidence (grounds of appeal 24 and 71) and (ii) errors in the Trial Chamber's assessment of intercept evidence (grounds of appeal 60, 72 and 73).

24. Regarding grounds of appeal 24 and 71, the Appeals Chamber notes that the Trial Chamber was aware of inconsistencies in the evidence of witnesses. The Appeals Chamber recalls that a trial chamber may rely on certain aspects of a witness's evidence and consider other aspects unreliable. Furthermore, the Appeals Chamber finds reasonable the Trial Chamber's consideration that a witness's frankness about his own participation in potentially incriminating events demonstrates the credibility of his accounts. Similarly, it was reasonable for the Trial Chamber to conclude that the absence of a witness's attempt to incriminate Mr Ongwen "at all cost", strengthens its finding that the witness was not biased against the accused. The Appeals Chamber therefore rejects grounds of appeal 24 and 71.

25. Regarding grounds of appeal 72, 73 and 60, the Defence submits a number of arguments concerning the Trial Chamber's assessment of intercept evidence. In particular, the Defence submits that the Trial Chamber erred in making a "general assessment" of the reliability of logbooks, based on a limited sample of intercepted communications. After a review of the Trial Chamber's findings and the evidence relied upon, the Appeals Chamber finds that the Trial Chamber assessed the reliability of logbooks by first providing its overall understanding of the voluminous intercept evidence submitted in this case, including the procedures employed to produce them, and further by referring to all the relevant parts of logbooks which reflect each intercepted communication it relied upon in the Conviction Decision. The Appeals Chamber also reviewed the Trial Chamber's use of intercept evidence in the specific charges, such as persecution and sexual and gender-based crimes, and finds no error in its findings. Accordingly, the Appeals Chamber rejects grounds of appeal 72, 73 and 60.

Alleged errors concerning the Trial Chamber's findings on Mr Ongwen's individual criminal responsibility as indirect perpetrator and as indirect co-perpetrator

26. Under grounds of appeal 60, 64, 65, 68, 28 (in part), 69,70, and 74 to 86 the Defence challenges some of the Trial Chamber's findings underpinning its determination that Mr Ongwen is criminally responsible as an indirect perpetrator through an organised power apparatus for crimes committed in the context of the attacks on Lukodi IDP camp on or about 19 May 2004 and on the Abok IDP camp, on or about 8 June 2004, and as an indirect co-perpetrator through an organised power apparatus for crimes committed (i) in the context of the attacks on the Pajule IDP camp on or about 10 October 2003 and the Odek IDP camp on or about 29 April 2004; (ii) for sexual and gender-based crimes not directly perpetrated by Mr Ongwen; and (iii) for the conscription of children under the age of 15 years and their use in armed hostilities.

27. The Appeals Chamber notes that the arguments raised on appeal by the Defence are to a large extent premised either on a misunderstanding of, or a disagreement with, indirect perpetration and indirect co-perpetration

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as modes of liability provided for in article 25(3)(a) of the Statute. The Appeals Chamber therefore finds it important for this and future cases to set out the parameters of these modes of liability.

28. The wording of article 25(3)(a) of the Statute is clear in that a person is considered a perpetrator when he or she (i) directly commits a crime as an individual (direct perpetration); (ii) commits a crime jointly with another person (co-perpetration); and/or (iii) indirectly commits a crime (indirect perpetration). While the direct perpetrators are those who physically execute the elements of the crimes, indirect perpetrators have control over the crime through controlling the actions of the direct perpetrators. In such cases, the direct perpetrators are instruments used for the commission of crimes.

29. Generally, indirect perpetrators control the actions of the direct perpetrators in different ways, including when the direct perpetrator is not responsible – for example because he or she is a minor, when the direct perpetrator is mentally disabled, or when the direct perpetrator is coerced – and through controlling their will through the use of an organised power structure. Whether an indirect perpetrator retains control over the actions of the physical perpetrators by virtue of controlling their will through the functioning of an organised hierarchical organisation is a factual consideration. Consequently, the use of an organised power apparatus is not a legal requirement for establishing this specific mode of responsibility.

30. Generally, the following features of an organised power apparatus may be of assistance in determining whether the indirect perpetrator retained control over the crimes by virtue of controlling the will of the physical perpetrators: the hierarchical organisation of the apparatus; its functional automatism; the replaceable nature of its members; and the fact that the criminal acts of the direct perpetrator are to the benefit of the organisation. Therefore, in an organised power apparatus, typically those at the top of the organisation retain functional control over the crimes committed and the low-level members are interchangeable (fungible).

31. As to the proximity or remoteness of the indirect perpetrator to the criminal act, it is correct that, as a general rule, in cases of direct perpetration the further removed a person is from the criminal act, the more he or she is pushed to the margins of events and excluded from control over the acts. However, in cases of indirect perpetration through the use of an organised power apparatus, the converse is generally true. In such cases, the loss of proximity to the act is compensated by an increasing degree of organizational control by the leadership positions in the apparatus.

32. In this case, the Defence appears to question the existence of indirect co-perpetration as a mode of liability under the Statute. The Appeals Chamber notes that indirect co-perpetration constitutes an integrated mode of liability provided for in the Statute that combines the constitutive elements of indirect perpetration and co-perpetration and is, therefore, compatible with the principle of legality and the rights of the accused. The main elements of indirect co-perpetration are: (i) the control over the crime by the indirect co-perpetrators which, in cases of commission through an organised power apparatus, occurs by virtue of controlling the will of the direct perpetrators through the automatic functioning of the apparatus; and (ii) the existence of an agreement or common plan between those who carry out the elements of the crime through another individual or other individuals, including when those persons form part of an organised power apparatus.

33. Accordingly, the Defence's arguments that are premised either on a misunderstanding of, or a disagreement with, indirect perpetration and indirect co-perpetration as modes of liability provided for in article 25(3)(a) of the Statute are rejected.

34. The Defence also alleges under grounds of appeal 60, 69, 70, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85 and 86 several errors in the factual findings regarding the structure of the LRA, Mr Ongwen's control over the crimes, the required *mens rea*, the common plans, the age determination of the children conscripted and used in hostilities, and the Trial Chamber's assessment of the evidence. In particular, the Defence alleges that the Trial Chamber: incorrectly assessed the evidence provided by several prosecution witnesses; failed to rely on documentary evidence submitted by the Defence; failed to properly assess intercept evidence; that its conclusions regarding Mr Ongwen's degree of involvement in the attacks on the four IDP camps and its rejection of the likelihood of civilian deaths by crossfire were unreasonable; that it failed to consider that the policy of conscripting children below the age of 15 years predates the timeframe relevant to the charges; and that it failed to consider that Mr Ongwen only became commander of the Sinia brigade on 4 March 2004.

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35. Given the number of factual errors alleged, the Appeals Chamber will summarise its determination of one of the challenges brought by the Defence under grounds of appeal 60 and 70. This is done merely to illustrate the approach that the Appeals Chamber has taken when addressing the numerous alleged factual errors raised by the Defence.

36. With regard to the Trial Chamber's finding that Mr Ongwen ordered the attack on Odek IDP camp, the Defence submits that it is possible to make a literal interpretation of the evidence elicited from witnesses P-0054, P-0264, P-0142, P-0314, P-0340, P-0372 and P-0314 that the instructions primarily related to collecting food as there was a genuine hunger problem at the time. Contrary to the Defence's argument, the Trial Chamber did not find that the witnesses contradicted each other on the point or that their evidence was otherwise inconsistent. It considered that the evidence before it justified and necessitated the finding that Mr Ongwen, as well as other commanders, ordered LRA fighters to target everyone they find at Odek, including civilians, noting that this is plainly the content of the testimony of P-0205 and P-0410, who stated, respectively, that the order was to 'destroy Odek' and to 'exterminate everything', and who are corroborated by P-0054 and recalling that there is consistent evidence from multiple witnesses that the orders included looting food and abducting civilians.

37. With respect to the instruction to "collect food", the Trial Chamber recalled the testimony of P-0340 as to the meaning of this expression. The witness stated that "[w]hen you go there, you have to fight, you have to shoot at them, and they shoot at you because they are the people who protect that food" and further indicated that collecting food means that "when we reached there, other people went to the barracks and other people went to the camp". From the above passages, it is clear that the Trial Chamber's finding was not based on an impermissible inference that fails to reflect the evidence on the trial record as suggested by the Defence. Rather, it was supported by the evidence on the record. The Appeals Chamber notes that P-0142 P-0314, P-0340 and P-0372 confirmed that the order involved the looting of food. Furthermore, the Trial Chamber noted P-0314's mention of an instruction from Mr Ongwen to abduct children. As the Trial Chamber correctly found, this evidence is consistent with that provided by P-0410, P-0205, P-0054 and P-0264.

38. Based on the foregoing, the Appeals Chamber considers that the Defence fails to identify any error in the Trial Chamber's finding that the evidence before it justifies and necessitates the finding that Mr Ongwen, as well as other commanders, ordered LRA fighters to target everyone they find at Odek, including civilians. The Defence's argument is accordingly rejected.

39. In relation to all of the remaining arguments alleging errors, for reasons fully set out in the judgment, the Appeals Chamber considers that the Defence fails to identify any error in the Trial Chamber's reasoning and conclusions, often repeating arguments raised before the Trial Chamber without disclosing any error in the Trial Chamber's disposition thereof. Therefore, the Appeals Chamber rejects grounds of appeal 60, 64, 65, 68, 28 (in part), 69, 70, and 74 to 86. The Appeals Chamber concludes that the Defence has not demonstrated any error in the Trial Chamber's findings on Mr Ongwen's individual criminal responsibility as an indirect perpetrator and indirect co-perpetrator for crimes committed in the course of the attacks on the four IDP camps and for the conscription and use in hostilities of children below the age of 15 years.

ALLEGED ERRORS CONCERNING SEXUAL AND GENDER-BASED CRIMES

40. Under grounds of appeal 66 and 87 to 90, the Defence challenges a number of the Trial Chamber's findings underpinning Mr Ongwen's conviction of sexual and gender-based crimes, including the crime of forced marriage as a form of other inhumane acts and forced pregnancy.

41. Under grounds of appeal 90 and 66 in.part, the Defence submits that forced marriage is not a crime under the Statute and that the Trial Chamber's legal interpretation of forced marriage violates the principle of *nullum crimen sine lege*. The Defence also submits that the facts of the present case do not support the Trial Chamber's finding that Mr Ongwen's conduct amounts to forced marriage as a form of other inhumane acts under article 7(1)(k) of the Statute.

42. For the reasons that are fully set out in the judgment, the Appeals Chamber finds that convicting an accused of forced marriage as a form of other inhumane acts under article 7(1)(k) of the Statute is not *ultra vires* and does not violate the principle of *nullum crimen sine lege*. In this regard, the Appeals Chamber notes that article 7(1)(k) of the Statute provides for the category of crimes called "other inhumane acts", which is designed to criminalise an act that

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does not specifically qualify as any of the crimes under article 7(1) of the Statute. The Appeals Chamber finds that the scope of "other inhumane acts" as prescribed under article 7(1)(k) of the Statute and the Elements of Crimes is sufficiently clear and precise to satisfy the principle of *nullum crimen sine lege*. In addition, since it is an open provision – meaning that different types of conduct may amount to other inhumane acts as long as they satisfy the elements of article 7(1)(k) of the Statute– the Appeals Chamber considers that in order to determine whether a specific conduct may qualify as a form of other inhumane acts, a chamber may have recourse to any relevant international instruments, such as conventions and treaties.

43. The Appeals Chamber also concurs with the Trial Chamber's finding that the central element of forced marriage is the imposition of a conjugal union and the resulting spousal status on the victim. In this regard, the Appeals Chamber notes that the notion of "conjugal union" is associated with the imposition of duties and expectations generally associated with "marriage", which may be established on the facts of the case. After a careful review of the Trial Chamber's findings and the evidence relied upon, the Appeal Chamber concludes that the Trial Chamber did not err by convicting Mr Ongwen of forced marriage as a form of other inhumane acts pursuant to article 7(1)(k) of the Statute.

44. Under ground of appeal 88, the Defence challenges the Trial Chamber's finding that the crime of forced pregnancy is grounded in the woman's right to personal and reproductive autonomy and the right to family. The Defence also submits that the Trial Chamber failed to consider whether its interpretation of this crime affects the national law of Uganda on abortion, which, in its view, is required under article 7(2)(f) of the Statute. Furthermore, the Defence challenges the Trial Chamber's factual findings concerning forced pregnancy.

45. For the reasons that are fully set out in the judgment, the Appeals Chamber finds that the crime of forced pregnancy seeks to protect, among others, the woman's reproductive health and autonomy and the right to family planning. The Appeals Chamber therefore finds no error in the Trial Chamber's finding with respect to the protected interests of forced pregnancy. Regarding the Defence's argument that the Trial Chamber failed to consider the national law of Uganda on abortion in accordance with article 7(2)(f) of the Statute, the Appeals Chamber finds that this provision was inserted to alleviate the concerns raised by some States that the forced pregnancy provision might be interpreted as interfering with the States' approach to abortion. The Appeals Chamber concurs with the Trial Chamber that article 7(2)(f) of the Statute does not impose a new element to the crime of forced pregnancy. Therefore, the Appeals Chamber concludes that the Trial Chamber was not required to consider Ugandan law on abortion in its assessment of this crime.

46. Moreover, after a careful review of the evidence underlying the Trial Chamber's factual findings, the Appeals Chamber finds that the Defence has not shown any error in the Trial Chamber's factual findings on forced pregnancy.

47. In addition, under grounds of appeal 87, 89 and 66 in.part, the Defence challenges the Trial Chamber's finding that Mr Ongwen was one of the commanders who developed and implemented the LRA policy of abduction and abuse of civilian women and girls. After a careful review of the Trial Chamber's findings and the evidence relied upon, the Appeals Chamber finds that the Trial Chamber was reasonable in finding that Mr Ongwen was among the persons who helped define and, through their actions over a protracted period, sustained the system of abduction and victimisation of civilian women and girls in the LRA and that his role within Sinia was crucial and indispensable. The Appeals Chamber therefore rejects all the Defence's arguments under grounds of appeal 87, 89 and 66 in part.

ALLEGED ERRORS REGARDING GROUNDS FOR EXCLUDING CRIMINAL RESPONSIBILITY

48. At trial, the Defence alleged two grounds for excluding Mr Ongwen's criminal responsibility, namely, that he suffered from a mental disease or disorder during the period relevant to the charges and that he committed the crimes under duress. The Trial Chamber rejected the ground for excluding criminal responsibility by way of mental disease, due to a lack of evidence which would corroborate a historical diagnosis and based on the expert opinion of mental health professionals who did not identify any mental disease or defect in Mr Ongwen during the period of the charges. Likewise, the Trial Chamber rejected the ground for excluding criminal responsibility by way of duress on the basis that there was no evidence at all to hold that Mr Ongwen was subjected to a threat of imminent death or imminent or continuing serious bodily harm to himself or another person at the time of his conduct underlying the charged crimes. Consequently, the Trial Chamber found that Mr Ongwen's guilt had been established beyond any reasonable doubt.

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49. On appeal, the Defence challenges these findings of the Trial Chamber which the Appeals Chamber will address in turn.

50. With respect to the ground for excluding criminal responsibility by way of mental disease or defect, the Defence raises four main arguments under several grounds of appeal. *First*, it argues that the Trial Chamber erred in its assessment of the reliability of the evidence of the mental health experts called by the Defence. *Second*, the Defence argues that the Trial Chamber erred in failing to rely on the evidence of the court appointed expert, Professor de Jong for its assessment. *Third*, the Defence contends that the Trial Chamber erred by disregarding cultural factors when assessing Mr Ongwen's mental health. *Fourth*, the Defence argues that the Trial Chamber erred in its assessment of the evidence of Dr Abbo, a prosecution mental health expert.

51. As to the first argument, the Defence essentially takes issue with the Trial Chamber's findings concerning the methodology employed by the Defence's mental health experts who found, that at the time material to the charges, Mr Ongwen suffered from numerous mental disorders, such as, severe depressive illness, post-traumatic stress disorder and dissociative disorder. For the reasons fully explained in the judgment, the Appeals Chamber finds that the Trial Chamber did not err in concluding that it could not rely on the Defence Experts' evidence given concerns it had over the Defence Experts' failure, *inter alia*: (i) to apply scientifically valid methods, (ii) to take into account other sources of information about Mr Ongwen which were readily available to them and (iii) to properly test for malingering in Mr Ongwen. Moreover, the Appeals Chamber finds no error in the Trial Chamber's assessment of contradictions in the evidence of the Defence Experts, in particular, contradictions between the various statements and observations made, or between such statements and observations and the conclusions finally drawn. Therefore, the Appeals Chamber confirms the Trial Chamber's findings concerning the methodology and the consequent unreliability of the evidence of the Defence's mental health experts.

52. As to the second argument, the Defence argues that the Trial Chamber erred in concluding that the observations of the court appointed expert, Professor de Jong, had no relevance for its assessment as to whether Mr Ongwen suffered from a mental disease at the relevant time. In particular, the Defence contends that Professor de Jong's observations concerning Mr Ongwen's clinical history, dating back to his childhood, and his cultural context were significant. As explained in more detail in the judgment, the Appeals Chamber is not persuaded by this argument given the distinct purpose for which Professor de Jong's observations were requested and the abundance of other evidence in the record concerning Mr Ongwen's clinical and social history, dating back to his childhood, and his cultural context which were discussed at length by other experts including the Defence's own mental health experts. The Appeals Chamber thus rejects this argument and confirms the Trial Chamber's decision not to rely on Professor de Jong's evidence for its assessment of whether Mr Ongwen suffered from a mental disease at the time relevant to the charged crimes.

53. As to the third argument, the Defence contends, *inter alia*, that the Trial Chamber disregarded cultural factors when assessing Mr Ongwen's mental health. In particular, the Defence argues that the evidence of Professor Musisi on the trauma suffered by the victimised population of Northern Uganda and the resultant mental health problems documented amongst LRA traumatized individuals, should not have been ignored by the Trial Chamber. Contrary to the Defence's argument, the Appeals Chamber finds, for the reasons more fully elaborated on in the judgment, that it was reasonable for the Trial Chamber not to rely on the evidence of Professor Musisi since he did not provide specific information in relation to whether Mr Ongwen suffered from a mental disease during the charged period.

54. As to the fourth argument, the Defence argues, in particular, that Dr Abbo's potentially exculpatory evidence relating to the adverse environment of the LRA and its impact on Mr Ongwen's moral development and 'child-like' personality, even as an adult, was disregarded by the Trial Chamber and resulted in the Trial Chamber unreasonably ascribing criminal responsibility to Mr Ongwen as an adult. The Appeals Chamber is not persuaded by these arguments. First, the Appeals Chamber notes that Dr Abbo's evidence about the adverse environment within the LRA and its negative impact on the development of a child was not in dispute during the trial. Second, while P-0445's holistic assessment of the evidence concerning Mr Ongwen's childhood development included the impact of his abduction and his lack of control, as an adolescent, over the adverse environment within the LRA, she, nevertheless, acknowledged that these factors did not absolve Mr Ongwen of criminal responsibility, as an adult, for the crimes charged. Indeed, the Appeals Chamber notes that her characterisation of these factors as important mitigating factors may be viewed as significant for the purposes of sentencing but not for the Trial Chamber's determination as to whether

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Mr Ongwen suffered from a mental disease at the times relevant to the charges. The Appeals Chamber considers that Dr Abbo's evidence concerning Mr Ongwen's lack of control over the LRA environment as an adolescent was not exculpatory of his criminal responsibility for the crimes he was found to have committed as an adult.

55. The Appeals Chamber concludes that the Defence has not demonstrated any error that would warrant the Appeals Chamber's intervention in relation to the Trial Chamber's findings on mental disease as a ground for excluding criminal responsibility pursuant to article 31(1)(a) of the Statute. Accordingly, the Appeals Chamber finds no merit in the arguments raised and, rejects grounds of appeal 19, 27, 29 to 34 and 36 to 43.

56. With respect to the ground for excluding criminal responsibility by way of duress, the Defence challenges under several grounds of appeal, a number of the Trial Chamber's findings underpinning its conclusion that Mr Ongwen was not subject to a "threat of imminent death or of continuing or imminent serious bodily harm" at the time of his conduct underlying the charged crimes, and that therefore duress, as a ground for excluding criminal responsibility pursuant to article 31(1)(d) of the Statute, was not applicable to him.

57. In relation to the Defence's challenge to the Trial Chamber's interpretation of duress (ground of appeal 44), the Appeals Chamber finds that the Trial Chamber properly interpreted article 31(1)(d) of the Statute, when it held that the terms "imminent" and "continuing" refer to the nature of the threatened harm, and that the threatened harm in question is either to be killed immediately or to suffer serious bodily harm immediately or in an ongoing manner. The Appeals Chamber further considers that the timing of the materialisation of the threat is one of the criteria to take into account when assessing the existence of a threat. Regardless of whether the threatened harm occurs immediately or at a later point in time, for a person to be compelled to commit a crime under the jurisdiction of the Court, the threat must be "present" and real at the time of the charged conduct. The Appeals Chamber also considers that the existence of a threat must be objectively assessed. Any prior experiences of an accused person that may have an impact on him or her at the time relevant to the charges, which does not satisfy the threshold required for excluding the criminal responsibility of the accused under article 31(1)(d) of the Statute, may nonetheless be relevant for the purposes of sentencing, in the event of a conviction.

58. The Defence further challenges a number of factual findings which the Trial Chamber relied on to conclude that the defence of duress was not applicable to Mr Ongwen. These include the findings: (i) on Mr Ongwen's status in the LRA hierarchy and the applicability of the LRA disciplinary regime to him (mainly raised under grounds of appeal 46 and 48); (ii) on Mr Ongwen's abduction, indoctrination and life and service in the LRA (grounds of appeal 26, 28 and 47); (iii) on the possibility of escaping from, or otherwise leaving, the LRA (grounds of appeal 52 to 54); and (iv) on Joseph Kony's alleged spiritual powers (ground of appeal 55).

59. As an example among the several challenges raised, under grounds of appeal 26, 28 and 47, the Defence alleges that had the Trial Chamber "correctly considered the impact" of the evidence on Mr Ongwen's abduction, indoctrination and life and service within the LRA from his childhood onwards, and the enduring impact of these experiences on his mental health and his free will as an adult, it would have reached a different conclusion, namely that the defences pursuant to article 31(1)(a) and (d) were applicable in the present case.

60. In particular, the Defence takes issue with the Trial Chamber's finding that in its assessment, the Chamber focused on the situation of Mr Ongwen as battalion and brigade commander during the period of the charges, and that Mr Ongwen's childhood experience in the LRA was not central to the issue.

61. The Appeals Chamber first notes that the confirmed charges against Mr Ongwen concerned crimes he allegedly committed as an adult between 1 July 2002 and 31 December 2005. Therefore, any finding about Mr Ongwen's experiences prior to this period cannot in itself be determinative of the central issues of the case. In this context, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber's to consider that Mr Ongwen's childhood experience in the LRA was "not central to the issue".

62. In any event, the Appeals Chamber notes that the Trial Chamber did take into account evidence of Mr Ongwen's early childhood. It considered in particular, evidence about Mr Ongwen's age and abduction. It also considered his childhood experiences in its holistic assessment of the evidence relevant to the ground for excluding criminal responsibility by way of mental disease or defect.

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63. Furthermore, at the end of its analysis on the applicability of article 31(1)(d) of the Statute, the Trial Chamber explicitly noted the Defence's submissions emphasising that Mr Ongwen was himself a victim of crimes, on account of his abduction at a young age by the LRA. The Trial Chamber recalled that it had duly considered the facts underlying these submissions, and also noted the potential relevance of these facts to both grounds excluding criminal responsibility. While acknowledging that Mr Ongwen had been abducted at a young age by the LRA, the Trial Chamber noted that the accused committed the relevant crimes when he was an adult and, importantly, that, in any case, the fact of having been (or being) a victim of a crime does not constitute, in and of itself, a justification of any sort for the commission of similar or other crimes.

64. In light of the above, the Appeals Chamber finds that the Trial Chamber did not disregard the evidence referred to by the Defence, nor did it err in its determination to focus on the situation of Mr Ongwen as battalion and brigade commander during the period of the charges, finding that his childhood experience in the LRA was not central to the issue. Accordingly, the Defence's arguments are rejected.

65. As a further example, under ground of appeal 55, the Defence challenges the Trial Chamber's findings about Joseph Kony's purported spiritual powers and its effects on Mr Ongwen. In particular, it submits that the Trial Chamber disregarded, or failed to give due regard to relevant evidence and that it erred in concluding that LRA spirituality is not a factor contributing to a threat pursuant to article 31(1)(d) of the Statute. The Defence refers to the testimony of certain witnesses, that was allegedly disregarded.

66. The Appeals Chamber, as set out in more detail in the judgment, notes that the Trial Chamber in fact assessed evidence from a number of former LRA members who testified about the effect of LRA spiritualism on them, and found that while there was evidence that some persons did believe in the spiritual powers of Joseph Kony, the evidence consistently showed that for many persons who stayed in the LRA longer their belief followed a pattern. It was stronger in the young and new abductees and then disappeared in those who stayed in the LRA longer. The Trial Chamber also noted that LRA members with some experience in the organisation did not generally believe that Joseph Kony possessed spiritual powers and that there was no evidence indicating that the belief in Joseph Kony's spiritual powers played a role for Mr Ongwen. In fact, it noted, the evidence of Mr Ongwen defying Joseph Kony speaks clearly against any such influence. The Trial Chamber ultimately concluded that the issue of LRA spirituality was not a factor contributing to a threat relevant under article 31(1)(d) of the Statute. The Appeals Chamber finds, as explained in the judgment, that the Defence fails to show that the Trial Chamber disregarded relevant evidence nor does it show any error in the Trial Chamber's approach and conclusions. Its arguments are therefore rejected.

67. Furthermore, for the reasons set out in the judgment, the Appeals Chamber rejects all the remaining arguments raised and, accordingly, rejects grounds 26, 28 (in part), 44, 46 to 56, 58, and 60 to 63 of the appeal. The Appeals Chamber concludes that the Defence has not demonstrated any error in relation to the Trial Chamber's findings on duress as a ground for excluding criminal responsibility pursuant to article 31(1)(d) of the Statute.

ALLEGED ERRORS REGARDING CUMULATIVE CONVICTIONS

68. Finally, the Defence challenges the Trial Chamber's findings regarding cumulative convictions under grounds of appeal 20, 21, and 22.

69. First, the Defence argues that the Trial Chamber erred in rejecting its contention on the relevance of article 20 of the Statute in its assessment of cumulative convictions. The Appeals Chamber finds that the Trial Chamber correctly determined that the *ne bis in idem* principle as formulated in article 20(1) of the Statute, serves to prevent a retrial of a person, who has been convicted or acquitted on the basis of the same conduct before this Court. It follows that, contrary to the Defence's contention, this provision is not concerned with the question of whether a trial chamber can impose cumulative convictions on a person for the same underlying conduct in one and the same trial proceedings.

70. With respect to the test applicable to cumulative convictions, the Defence contends that the Trial Chamber correctly adopted a "conduct-based approach" but misapplied it in relation to some specific crimes, such as the crime against humanity of forced marriage as a form of other inhumane acts. By reference to the language in the *Bemba et al*. Appeal Judgment, the Defence identifies the principles of specialty, consumption and subsidiarity, as forming the core analysis of concurrences in civil law systems.

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71. The Appeals Chamber considers that the test for cumulative convictions finds its *rationale* in the need to reflect the full culpability of an accused person, given that each provision which has a "materially distinct" element protects different legal interests. What the legal interests protected by each crime are, can only be discerned by reference to the elements of that specific crime. If these elements require proof of a fact not required by the other, cumulative convictions are permissible. Any remaining concerns arising from overlapping facts can be addressed in the determination of the sentence. The Appeals Chamber considers that this approach strikes a careful balance between the need to reflect the full culpability of an accused person while safeguarding his or her rights and ensuring that the person is not being unlawfully punished.

72. The Appeals Chamber also rejects the Defence's allegation that war crimes and crimes against humanity based on the same underlying conduct are impermissible concurrences. As the Trial Chamber correctly stated in the Conviction Decision, crimes against humanity and war crimes reflect (partly) different forms of criminality, in that they complement, in terms of protected interests, the incrimination of the individual specific crimes – which, in turn, are therefore distinct depending (also) on the relevant contextual elements. For instance, in relation to murder both as a crime against humanity and as a war crime, while some of the legal interests protected may coincide (*e.g.* the right to life), the protected interests discerned from the contextual elements do reflect different forms of criminality, and consequently, distinct crimes. As explained in the determination of ground of appeal 20, the legal interests protected by a given criminal provision can only be discerned by reference to the elements of the crimes.

73. Furthermore, the Appeals Chamber rejects the Defence's claim that cumulative convictions for the crimes of rape and sexual slavery, and for the crimes of forced marriage, as a form of other inhumane acts, and sexual slavery are not permissible. As explained in the judgment, these crimes have materially distinct elements, resulting from the fact that they protect different interests.

74. The Appeals Chamber considers that while the protected interests may overlap to a certain degree, the fundamental nature of the crime of sexual slavery is reducing a person to a servile status, and depriving him or her of his or her liberty and sexual autonomy while for the crime of rape, it is the invasion of a sexual nature of a person's body and the attack on his or her sexual autonomy. In addition, the interest protected by forced marriage as a form of other inhumane acts is not necessarily violence against physical integrity and deprivation of liberty, but crucially, a person's right to freely choose one's spouse and consensually establish a family.

CONCLUSION

75. In concluding the summary of this judgment, and given that the relevant findings of the Trial Chamber have been confirmed, the Appeals Chamber wishes to recognise the extreme suffering experienced by the victims of the crimes committed by Mr Ongwen during the time relevant to the charges.

APPROPRIATE RELIEF

76. For the reasons set out in detail in the judgment, the Appeals Chamber rejects all the Defence's grounds of appeal and confirms unanimously the Conviction Decision.

Appeal against sentence

BACKGROUND

77. By way of background, on 6 May 2021, the Trial Chamber rendered the Sentencing Decision. It pronounced individual sentences for each of the 61 crimes of which Mr Ongwen was convicted. The individual sentences ranged from 8 to 20 years of imprisonment. The Trial Chamber also pronounced, by majority, a joint sentence of 25 years of imprisonment. It deduced from the joint sentence the time that Mr Ongwen spent in detention between 4 January 2015 and the pronouncement of the sentence.

78. On 26 August 2021, the Defence filed its Appeal Brief, in which it raised 11 grounds of appeal. Although initially, in its Notice of Appeal, the Defence had raised 12 grounds of appeal, it subsequently withdrew ground of appeal 9.

79. The Appeals Chamber shall now present its findings on the grounds of appeal.

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ACHOLI TRANSLATION OF THE CONVICTION DECISION (GROUND OF APPEAL 1)

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

81. The Appeals Chamber considers that, generally, when circumstances permit, translation of relevant parts of a conviction decision can be provided to the convicted person in the course of the sentencing proceedings. However, as a matter of law, the right to receive a translation of a conviction decision under the Statute and the Rules is not, in principle, absolute for the purposes of sentencing, as long as the convicted person, assisted by his or her counsel, is able to understand the conviction decision sufficiently for those purposes. The Appeals Chamber recalls in this respect that an accused person's right to translations under article 67(1)(f) of the Statute and rule 144 of the Rules is circumscribed by the requirement of fairness.

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

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

84. The Appeals Chamber therefore rejects the first ground of appeal.

"TESTIMONIAL EVIDENCE" FROM VICTIMS (GROUND OF APPEAL 2)

85. Under the second ground of appeal, the Defence submits that the Trial Chamber erred in admitting and using in the Sentencing Decision "testimonial evidence" submitted by the legal representatives of victims.

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

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

ACHOLI TRADITIONAL JUSTICE SYSTEM (GROUND OF APPEAL 3)

88. Under the third ground of appeal, the Defence submits that the Trial Chamber erred when it rejected and failed to objectively consider in this case the Acholi Traditional Justice System, in particular the Acholi ritual of *mato oput*.

89. In considering the Defence's submissions on this issue, the Trial Chamber noted that article 23 of the Statute provides that a person convicted by the Court may be punished only in accordance with the Statute. It also took note of article 77 of the Statute, which stipulates – exhaustively – the penalties to be imposed for the commission of crimes within the jurisdiction of the Court. In light of these provisions, the Trial Chamber found that any Defence submission to incorporate traditional justice mechanisms into the sentence imposed on the convicted person must fail directly as a result of the principle of *nulla poena sine lege*.

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

91. The Defence also challenges the Trial Chamber's alleged failure to apply the principle of complementarity to the Acholi traditional justice system. While respectful of the cultural beliefs advanced by the Defence and mindful of their significance, the Appeals Chamber considers that the question of the incorporation of the Acholi traditional judicial system into the Court's statutory framework has no bearing on complementarity or admissibility matters.

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92. The Defence further contends that the Trial Chamber held a biased view of the Acholi traditional justice system because it relied on the testimony of non- Acholi persons and refused to hear witnesses, who, the Defence submits, were "well placed to inform conclusions" on that justice system. It also submits that the Trial Chamber disregarded its submissions on social rehabilitation and reintegration and failed to appreciate correctly the "relevant cultural beliefs and practices" of Mr Ongwen as a personal circumstance. The Appeals Chamber finds no merit in these submissions.

93. For the reasons that were outlined above and for other reasons set out in the judgment, the Appeals Chamber rejects the third ground of appeal.

CUMULATIVE SENTENCING (GROUND OF APPEAL 4)

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

95. The Appeals Chamber notes that the Trial Chamber was aware of the factual overlap and the need to take it into account in the determination of the joint sentence. The Defence does not point to any finding of the Trial Chamber that would suggest the contrary. The Appeals Chamber finds no error in the Trial Chamber's approach and, therefore, rejects this ground of appeal.

FACTORS OUTSIDE THE TEMPORAL SCOPE (GROUND OF APPEAL 5)

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

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

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

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

FAMILY CIRCUMSTANCES (GROUND OF APPEAL 6)

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

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

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

MENTAL CAPACITY (GROUNDS OF APPEAL 7 AND 10)

103. As the subject matters of grounds of appeal 7 and 10 are related, the Appeals Chamber will address them together. Under the seventh ground of appeal, the Defence raises two issues regarding Mr Ongwen's mental state. Firstly, the Defence submits that the Trial Chamber erred when it found that Mr Ongwen did not suffer from a substantially diminished mental capacity at the time of the crimes. Secondly, the Defence argues that the Trial Chamber erred in finding that Mr Ongwen's current mental health could not be taken into account as a personal circumstance.

104. The Appeals Chamber notes that when determining the sentence and after having concluded that the ground for exclusion of criminal responsibility under article 31(1)(a) of the Statute is not made out, a trial chamber, if it relies

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on the same evidence upon which it relied for its findings under article 31(1)(a), must determine whether the same evidence may be sufficient to meet the threshold of rule 145(2)(a)(i) of the Rules.

105. The Defence challenges, *inter alia*, the Trial Chamber's reliance on the evidence of the Prosecution experts. The Appeals Chamber notes that in the Conviction Decision, the Trial Chamber considered the experts' evidence related to Mr Ongwen's abduction and possible disorders. The Trial Chamber also considered the experts' evidence that it was "highly unlikely that [Mr Ongwen's] level of functioning was severely impaired". The Appeals Chamber finds that the unambiguous findings of those experts do not support the proposition that Mr Ongwen suffered from substantially diminished mental capacity. It was therefore not unreasonable for the Trial Chamber to conclude, under the standard of a balance of probabilities, that the results of the analysis of the possibility of a mental disease or defect were incompatible with any consideration of substantially diminished mental capacity.

106. The Defence also challenges the Trial Chamber's rejection of Mr Ongwen's current mental state as a mitigating factor. The Trial Chamber set out the standard of "exceptional cases" for accepting poor health as a mitigating factor. It considered the Defence's submissions on this issue and concluded that Mr Ongwen's current mental health could not be taken into account as a mitigating circumstance. The Appeals Chamber notes that the Defence does not expressly argue, nor is it readily apparent from the quoted sources recording Mr Ongwen's condition, that his alleged disabilities are such as to constitute an "exceptional case", within the meaning adopted by the Trial Chamber.

107. Under the tenth ground of appeal, the Defence submits that the Trial Chamber erred by using Mr Ongwen's unsworn statement, which he made in court, against him. In the Sentencing Decision, the Trial Chamber referred to its own impressions of Mr Ongwen's personal statement in court, to conclude that his current mental health could not be taken into account as a mitigating circumstance.

108. The Appeals Chamber notes that a trial chamber has broad discretion in determining what constitutes a mitigating factor, and the weight, if any, to attribute to it. A trial chamber may, for instance, rely on the person's conduct during trial proceedings, ascertained primarily through the trial judges' perception of that person. The Appeals Chamber is of the view that the Trial Chamber's reliance on its impressions of Mr Ongwen's personal statement was permissible.

109. For these reasons, the Appeals Chamber rejects the seventh and tenth grounds of appeal.

DURESS (GROUND OF APPEAL 8)

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

111. The Trial Chamber found that "duress is not applicable in the present case as a mitigating circumstance pursuant to Rule 145(2)(a)(i) of the Rules". The Appeals Chamber has already considered and rejected in its Conviction Appeal Judgment, arguments raised by the Defence in relation to the Trial Chamber's conclusion that duress was not applicable as a ground for excluding criminal responsibility. The Appeals Chamber notes in this regard that, in arguing that relevant evidence was ignored or disregarded, the Defence appears to raise identical issues in its sentencing appeal brief.

112. The Appeals Chamber rejects this ground of appeal.

AGGRAVATING CIRCUMSTANCES (GROUND OF APPEAL 11)

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

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

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

DOUBLE-COUNTING (GROUND OF APPEAL 12)

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

117. For the reasons set out in the Sentencing Judgment, the Appeals Chamber finds no merit in the arguments raised by the Defence in relation to the alleged double-counting of the following factors: (i) discriminatory intent as a factor of the gravity of the crime and as an aggravating factor; (ii) the "defencelessness of children recruited into the LRA as an aggravating factor"; and (iii) essential elements of the modes of liability as aggravating factors.

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

119. As is set out in more detail below, Judge Ibáñez Carranza disagrees with the Majority on this last point. Noting the Trial Chamber's reasoning, she is of the view that the Trial Chamber took into account and attached weight to the factor of multiplicity of victims twice and therefore committed an error of law that materially affected the individual sentences for 20 counts and, consequently, the joint sentence.

120. For these reasons, the majority of the Appeals Chamber, Judge Ibáñez Carranza dissenting, rejects the twelfth ground of appeal.

PARTLY DISSENTING OPINION OF JUDGE IBÁÑEZ CARRANZA

121. As mentioned above, Judge Ibáñez Carranza is unable to agree with the Majority on the issue of double-counting the factor of the high number of victims, which raises a serious issue as regards the reasoning of the Trial Chamber and which materially affects 20 out of the 61 crimes, and thus almost one third of the individual sentences imposed. In particular, the individual sentences for the following crimes are affected: the crimes of murder and attempted murder (counts 2-3, 12-13, 14-15, 25-26, 27-28, 38-39, and 40-41), torture (counts 4-5) and enslavement (counts 8, 20, 33 and 46). As a consequence, this error materially affects the joint sentence of 25 years. In her view, this issue cannot be overlooked, because it has an impact on the fairness of the sentencing proceedings, causing prejudice to the convicted person. Indeed, the rationale behind the prohibition against double-counting is to prevent a convicted person from being punished twice in relation to the same factor.

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

123. Judge Ibáñez Carranza also wishes to use this opportunity to emphasise the importance of Mr Ongwen's particular individual circumstances in mitigation. In this regard, it is significant that this is the first time that the Court is called upon to address the unique issue of victim-perpetrator and its relevance to the determination of sentence. It must be pointed out that, in the circumstances of this case, the status of victim-perpetrator is not a consideration relevant to a determination of an accused person's guilt or innocence pursuant to article 74 of the Statute. Rather, these matters inform the appropriate sentence to be imposed in case of a conviction under article 76 of the Statute.

124. At this stage, the appropriate sentence is not only informed by the facts of the case but also, and importantly, by the personal circumstances of the convicted person. In particular, in this case it is of crucial importance to consider the impact that Mr Ongwen's abduction, conscription, violent indoctrination, being forced to carry out and participate in criminal acts, when he was still a defenceless child of about nine years of age, and his upbringing in the

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coercive environment of the LRA had on his personality, the development of his brain and moral values, and future opportunities. A determination of the appropriate sentence requires thus a holistic analysis that takes into consideration both the blameworthiness of the convicted person and his or her individual circumstances. Mr Ongwen's condition as a victim did not cease when he turned 18 years old.

125. For the reasons fully developed in her partly dissenting opinion, Judge Ibáñez Carranza is of the view that the significant legal error of double-counting had a material impact on 20 out of the 61 individual sentences concerned (thus almost one third), affecting the fairness of the sentencing proceedings and, ultimately, leading to an incorrect exercise of discretion by the Trial Chamber as a consequence of which the Trial Chamber imposed a disproportionate joint sentence of 25 years of imprisonment. Therefore, in the dissenting judge's view, the joint sentence must be reversed and the matter remanded to the Trial Chamber for it to determine a new sentence. In its new determination, the Trial Chamber should also consider the weight that ought to be afforded in mitigation to Mr Ongwen's personal circumstances, in particular the impact that the traumatic experiences which he underwent, had on his personality, as explained above.

126. Judge Ibáñez Carranza further considers that, given the expressive nature of judicial decisions, and specifically of international criminal judgments, recognising in this case the crimes of which Mr Ongwen was a victim provides the means to acknowledge his victim status and re-instate the dignity that was taken away from him when he was only a defenceless child.

127. In determining a new sentence, the object and purpose of sentencing ought to be considered. In this regard, Judge Ibáñez Carranza firmly believes that, in the context of international criminal law sentencing serves various purposes, including notably retribution and prevention in all its variants (special and general). In relation to the general preventive purpose, all its aspects ought to be considered, and because of the nature and the context of the crimes, in particular the positive aspect of general prevention is of relevance. This includes, according to the jurisprudence of the Court and other international tribunals and as illustrated in the recent developments before the Assembly of States Parties, contributions to the promotion of restorative justice and reconciliation as a way to advance the enforcement of the rule of law and therefore sustainable peace.

128. While she considers that the error of double-counting should certainly result in an appropriate reduction of the joint sentence of 25 years of imprisonment, Judge Ibáñez Carranza is of the view that the Trial Chamber would be better placed to determine the appropriate sentence, taking into account the findings made in this partly dissenting opinion.

129. Importantly, Judge Ibáñez Carranza would also like to emphasise that nothing in her partly dissenting opinion should be interpreted as negating the great suffering of the victims of the very serious crimes of which Mr Ongwen has been convicted, in particular that suffered by the victims of sexual and gender- based crimes and the victimised children. This suffering has been duly and unanimously acknowledged in the Conviction Decision and Sentencing Decision, as confirmed by the Appeals Chamber in today's judgments. Judge Ibáñez Carranza also wishes to point out that she is convinced that Mr Ongwen must be sentenced for the crimes which he committed. Judge Ibáñez Carranza is of the view that only through the imposition of an adequate, proportionate and fair sentence will justice for both the victims and the convicted person be achieved.

APPROPRIATE RELIEF

130. The Appeals Chamber has unanimously rejected 10 of the 11 grounds of appeal on sentencing. It confirms these aspects of the Sentencing Decision. Regarding ground of appeal 12, the Appeals Chamber rejects it by majority and, as discussed above, Judge Ibáñez Carranza partly dissents only with respect to the allegation of double counting of the factor of multiplicity of victims. While the Majority confirms the Sentencing Decision in this respect, Judge Ibáñez Carranza would reverse the joint sentence of 25 years of imprisonment and remand the matter to the Trial Chamber for it to determine a new sentence.

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