

Partly Dissenting Opinion of Judge Raul C. Pangalangan

1. I had earlier joined the unanimous verdict of 4 February 2021 pursuant to Article 74 of the Statute finding Dominic Ongwen guilty beyond reasonable doubt of 61 crimes against humanity and war crimes, and with the findings underlying this decision.¹ I also join the Majority in today's decision under Article 76 of the Statute as regards the *individual* sentences set by the Chamber. However, for the reasons further outlined below, I consider that a higher *joint* sentence would be more appropriate in the context of the current case. It is solely in this regard that I differ with the majority.

2. Article 78(3) of the Statute provides as follows:

When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a *joint sentence* specifying the total period of imprisonment. This period shall be *no less* than the highest individual sentence pronounced and shall *not exceed* 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).²

3. The plain text of Article 78(3) reveals that while a Chamber may pronounce a joint sentence which equals (but is no less than) the highest individual sentence, it may also impose a joint sentence *higher than* the highest individual sentence, as long as it does not exceed 30 years of imprisonment or a sentence of life imprisonment in conformity with Article 77(1)(b) of the Statute.³

4. Rule 145(1)(b) of the Rules of Procedure and Evidence (the 'Rules') enjoins a Chamber to balance all relevant factors and consider circumstances of both convicted person and

¹ [Trial Judgment](#), 4 February 2021, ICC-02/04-01/15-1762-Conf (public redacted version notified the same day, see ICC-02/04-01/15-1762-Red).

² Emphasis added.

³ See Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute"](#), 8 March 2018, ICC-01/05-01/13-2276-Red (hereinafter: '*Bemba et al.* Appeal Judgment on Sentencing'), para. 57: '[...] at no point did the Trial Chamber state that the joint sentence imposed on Mr Bemba ought to correspond to the highest individual sentence. No such principle exists otherwise in the legal framework of the Court. To the contrary, according to article 78 (3) of the Statute, the highest individual sentence constitutes the *minimum* possible joint sentence'. See also K. A. A. Khan, 'Article 78: Determination of the sentence' in K. Ambos/O. Triffterer (eds), *The Rome Statute of the International Criminal Court. A Commentary* (3rd edition 2016), p. 1899.

crime. Rule 145(1)(c) and (2) list a number of factors as well as mitigating and aggravating circumstances which the Chamber shall take into account.⁴

5. As aptly outlined in the Chamber's decision, a complex interplay of the various factors and circumstances influences a Chamber's exercise of discretion when determining a sentence. This includes both the fact that a careful balancing exercise must take place bearing in mind the provisions of Rule 145 of the Rules, as well as the fact that, within this balancing exercise, certain factors may overlap.⁵
6. Importantly, Rule 145(1)(a) provides that the Chamber, when determining a sentence pursuant to Article 78(1) of the Statute, must '[b]ear in mind that the totality of any sentence of imprisonment and fine, as the case may be, imposed under article 77 must reflect the culpability of the convicted person'.⁶
7. The Appeals Chamber has recognised that the Court 'will have to balance all factors it considers relevant', and that doing so 'involves an exercise of discretion with the aim to impose a proportionate sentence that reflects the culpability of the convicted person'.⁷ Indeed, as it further pointed out in another case, 'the determination of the total culpability [...] must indeed be reflected in the ultimate joint sentence'.⁸
8. It is in this specific regard, namely with a view to reflecting the total culpability in the ultimate joint sentence to be imposed pursuant to Article 78(3) of the Statute, that I reach the conclusion that Dominic Ongwen should be sentenced to a term of imprisonment of 30 years.
9. The Chamber declares in today's decision, and with this I fully concur, that imposing a joint sentence which corresponds to the highest individual sentence pronounced, as proposed by the Office of the Prosecutor,⁹ 'is manifestly incapable of reflecting Dominic Ongwen's total culpability for all the numerous crimes that he committed',¹⁰ and that '[a]ll

⁴ See also Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute"](#), 1 December 2014, ICC-01/04-01/06-3122 (hereinafter: '*Lubanga Appeal Judgment on Sentence*'), n. 66.

⁵ See Sentence, paras 375-378.

⁶ See [Lubanga Appeal Judgment on Sentence](#), para. 33.

⁷ [Lubanga Appeal Judgment on Sentence](#), para. 34.

⁸ [Bemba et al. Appeal Judgment on Sentencing](#), para. 57.

⁹ [Prosecution's Sentencing Brief](#), 1 April 2021, ICC-02/04-01/15-1806, para. 159.

¹⁰ Sentence, para. 382.

things considered, from the perspective of the extreme gravity of the crimes committed by Dominic Ongwen, including the degree of his culpable conduct, a joint sentence of life imprisonment would surely be in order in the present case'.¹¹

10. However, the Majority then proceeds to analyse the impact which the unique individual circumstances of Dominic Ongwen – himself abducted as a child and as such not initially having chosen to be part of the LRA – ought to have, in its view, on the Chamber's determination of an appropriate joint sentence.¹² The Majority then arrives at the conclusion that the appropriate joint sentence in the present case is imprisonment for a total of 25 years.¹³
11. Indeed we must take into account Dominic Ongwen's circumstance as former child soldier whose life might have taken a different turn altogether had it not been for that fateful morning of his abduction. The Court is required, under Article 78 and Rule 145, to take into account the individual circumstances of the convicted person.
12. However, the Court must weigh those individual circumstances against the 'gravity of the crime' under Article 78 and other factors, among them, "the extent of the damage caused, in particular *the harm caused to the victims and their families* (Rule 145(1)(c)).
13. It is exactly because of the extreme gravity of the crimes, including the degree of Dominic Ongwen's culpable conduct¹⁴ and, in particular, the deep and permanent physical and psychological harm caused to the victims and their families, that I find that the 'adequate, proportionate and just joint sentence in light of all relevant circumstances of the present case'¹⁵ is a sentence of imprisonment for 30 years.
14. Article 77(1)(b) provides that the Court may impose a 'term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person'. The Majority finds that the 'extreme gravity' threshold required to mete out a term of life imprisonment has been met. That is most significant especially considering that the Court's jurisdiction covers not ordinary crimes tried in national jurisdictions, but 'the most serious crimes of concern to the international community as a

¹¹ Sentence, paras 383-386.

¹² Sentence, paras 387-391.

¹³ Sentence, para. 392.

¹⁴ *See* Sentence, para. 386.

¹⁵ Sentence, para. 393.

whole’ (Preamble and Article 5) and recognises the suffering of ‘victims of unimaginable atrocities that deeply shock the conscience of humanity’ (Preamble). That means that, even within the grim calculus of the most egregious wrongdoing, the crimes for which Dominic Ongwen has been found guilty are considered to be of ‘extreme gravity’. I fully concur with this conclusion.

15. Thus in my opinion, the mere fact of not imposing a life sentence pursuant to Article 77(1)(b) of the Statute and Rule 145(3) of the Rules already takes into account the truly unfortunate personal situation of Dominic Ongwen.
16. Setting the joint sentence at 25 years, rather than at the statutory maximum of 30 years, would, in my view, fail to give due weight to the victims’ suffering, which, in the context of mass atrocity crimes, is certainly no less than if crimes such as murder, rape, torture are committed as ‘ordinary’ crimes. The scale and cruelty with which these crimes were committed in this case are not outweighed by the sad twist of fate of Dominic Ongwen’s abduction and conscription as a child soldier. Indeed, as adequately observed by the Majority, ‘[b]y no means does Dominic Ongwen’s personal background overshadow his culpable conduct and the suffering of the victims’.¹⁶
17. I am of the view that imposing a joint sentence of 30 years of imprisonment would not amount to ‘put[ting] aside’ the specificity of Dominic Ongwen’s personal history.¹⁷ Rather, it would guard against the Court giving such weight to the individual circumstances of the convicted person that the extreme gravity of the crimes of which Dominic Ongwen was found guilty pales in comparison.
18. Also, it is my view that imposing a total term of imprisonment of 30 years does not, in and of itself, undermine a potential ‘prospect of a successful social rehabilitation and [...] the concrete possibility of future re-integration into society’.¹⁸

¹⁶ Sentence, para. 389.

¹⁷ See Sentence, para. 389.

¹⁸ Sentence, para. 396. In this context, I also note that ‘the desire to ease that person’s reintegration into society [...] in particular in the case of international criminal law [...] cannot be considered to be primordial and should therefore not be given any undue weight’; see Trial Chamber VIII, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, 27 September 2016, [ICC-01/12-01/15-171](#) (hereinafter: ‘*Al Mahdi Judgment and Sentence*’), para. 67. See also Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on Sentence pursuant to Article 76 of the Statute](#), 21 June 2016, ICC-01/05-01/08-3399 (hereinafter: ‘*Bemba Sentence*’), para. 11 (‘Rehabilitation is also a relevant purpose. However, in cases concerning “the most serious

19. Accordingly, I consider that in order to ‘reflect[] the strongest condemnation by the international community of the crimes committed by Dominic Ongwen and acknowledge[] the great harm and suffering caused to the victims’,¹⁹ as well as bearing in mind another main purpose of sentencing – general and specific deterrence –,²⁰ a total term of 25 years of imprisonment is not adequate. Instead, in my view, the facts of the case warrant a sentence of 30 years of imprisonment.



Judge Raul C. Pangalangan

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At The Hague, The Netherlands

crimes of concern to the international community as a whole”, rehabilitation should not be given undue weight’ (footnotes omitted).

¹⁹ Sentence, para. 396.

²⁰ See [Al Mahdi Judgment and Sentence](#), para. 67: ‘In respect of deterrence, the Chamber considers that a sentence should be adequate to discourage a convicted person from recidivism (specific deterrence), as well as to ensure that those who would consider committing similar crimes will be dissuaded from doing so (general deterrence)’. See also Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, [Sentencing judgment](#), 7 November 2019, ICC-01/04-02/06-2442, para. 10; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on Sentence pursuant to Article 76 of the Statute](#), 22 March 2017, ICC-01/05-01/13-2123-Corr, para. 19; [Bemba Sentence](#), para. 11.