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Date: **21 DECEMBER 2021**

THE APPEALS CHAMBER

Before: **JudgeLuz del Carmen Ibáñez Carranza**
Judge Piotr HofmańskiTitle
Judge Solomy Balungi BossaTitle
Judge Reine Alapini-GansouTitle
Judge Gocha LordkipanidzeTitle

SITUATION IN UGANDA

IN THE CASE OF
THE PROSECUTOR v.DOMINIC ONGWEN

Public Document

AMICUS CURIAE OBSERVATION

Source: **By Felicity Gerry QC, Wayne Jordash QC and Ben Douglas-Jones QC, Anna McNeil, Dr Beatrice Krebs, Jennifer Keene-McCann and Philippa Southwell.**

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I. Summary

In summary, we observe that the Appeals Chamber in Mr Ongwen's case can recognize that 'non-punishment' of victims of modern slavery / human trafficking includes the non-liability of former child soldiers who commit crimes when they continue to suffer the effects of their victimhood through compromised mental health. We suggest workable mechanisms for defining criminal responsibility and approaching sentencing in this complex context, and methods for interpreting the Rome Statute.

II. Introduction

1. The following is an amicus curiae observation in the form of a written brief pursuant to Rule 103(1) of the Rules of Procedure and Evidence ("the Rules") on the legal interpretation of Article 31of the Rome Statute and the application of the 'non-punishment' principle in the case of Mr Dominic Ongwen (ICC-02/04/-01/15 A). The observation is designed to assist the Appeals Chamber in the legal principles applicable to former child soldiers and the assessment of Mr Ongwen's criminal responsibility and sentencing.

2. For the purposes of this observation, we use the term child soldier to include 'forced participant' and 'conscript'.

3. On 4 February 2021, Trial Chamber IX convicted Mr Ongwen of 61 counts of war crimes and crimes against humanity. In doing so, the Trial Chamber rejected Mr Ongwen's two affirmative defences: 1) that he suffered from a mental disease or defect and criminal responsibility was thus excluded under Article 31(1)(a) of the Statute;[1] and 2) that he was acting under continuing duress related to the threat of imminent death and serious bodily harm and that criminal responsibility was thereby negated under Article 31(1)(d) of the Statute.[2]

4. The Trial Chamber declined to engage in any of the discussion as to legal principle as to the approach to Mr Ongwen's experience as a former child soldier. While acknowledging Mr Ongwen's victimhood, it did not discuss whether this had a bearing on his subsequent offending; the Chamber simply commented that this did not constitute 'justification' for the

[1] Judgment [121]-[122].
[2] Judgment [123]-[124].

commission of similar or other crimes,[3] and that his victimhood 'might' be evaluated at sentencing.[4]

5. At sentence, Mr Ongwen's childhood was considered, per Rule 145 of the ICC Rules of Procedure and Evidence.[5] Again, the Chamber did not consider or express any legal principles for evaluating the effect of being a child soldier nor the mental health nexus.

6. This observation focuses on the authors' particular expertise in modern slavery law and criminal responsibility. This expertise is relevant regarding determination of Mr Ongwen's Appeal particularly with reference to his experience as a child soldier and child soldiering as a form of exploitation related to modern slavery. Thus, these observations respectfully indicate:

    a. The need to recognise the long-term effects of being a child soldier.
    b. The relevance of modern slavery jurisprudence, particularly the 'non punishment' principle, compulsion and causation; and
    c. The need to maintain a distinction between justificatory and excusatory defences in interpretation of Article 31of the Statute.

III. Identifying the long-term effects of being a child soldier.

7. Under the Rome Statute, 'enslavement' is deemed a crime against humanity under Article 7(1)(c) and defined at Article 7(2)(c). This is the starting point for considering child soldiers. They are a victim group which routinely suffers extreme physical and mental harm as the result of their experiences of forced participation in conflict and a range of associated gross human rights violations they endure and are inevitably forced to perpetrate upon others.[6] Consequently, victims remain victimized long after the criminalized harm was inflicted.

[3] *Prosecutor v Ongwen (Judgment)* (International Criminal Court, Trial Chamber IX, ICC-02/04-01/15, 4 February 2021) [2672]. ('*Trial Judgment*')
[4] *Prosecutor v Ongwen (Summary of the verdict)* (International Criminal Court, Trial Chamber IX, ICC-02/04-01/15, 4 February 2021) [6] <https://www.icc-cpi.int/itemsDocuments/ongwen-verdict/2021.02.03-Ongwen-judgment-Summary.pdf>.
[5] International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) r 145.
[6] Marco Sassòli, Antoine A. Bouvier, Anne Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (ICRC, 3rd ed, 2011) vol 1, 1.

8. International criminal law can and should provide some assistance to victims on this difficult and potentially endless journey, including through opportunities to have harms recorded in formal, authorized contexts and taken into account.[7]

9. We recognize that Mr Ongwen was not tried for any event when he was under the age of 18 but we submit that the recognition of the 'special protection' for children in armed conflict following *Ntaganda* is relevant:[8] It was recognized that Ntaganda's actions, or omissions, *made* the children into members of the armed group. The Appeals Chamber was persuaded that International Humanitarian Law (IHL) broadly 'concerns itself with protecting vulnerable persons during armed conflict' and found that IHL 'does not contain a general rule that categorically excludes members of an armed group from protection against crimes committed by members of the same armed group.'[9] In a nod to the potential upset in IHL scholarship the decision could cause, the Chamber added that it 'appreciates the seemingly unprecedented nature of this conclusion.'[10] While not explicitly addressing membership, the Chamber seemed to suggest that whether a child was considered a 'member' of an armed group was irrelevant—what matters was whether she or he was protected under IHL—as non-combatants are traditionally until such time as they directly participate in hostilities—at the time of the alleged violence. The Chamber left open whether the scope of the decision will be limited to child soldiers or can be applied to adults—forcibly or voluntarily recruited into a party to a conflict.

10. The question that Mr Ongwen's case raises in relation to criminal responsibility is that having been *made* into a child soldier by the means and purposes of others and suffered as a consequence, a factual matrix recognized in modern slavery / human trafficking jurisprudence (including child soldiers), where and when does his individual responsibility lie and what is the applicable legal framework to assess, not only the fact of responsibility, but also the degree, if any? That he had reached the age of 18 leaves many relevant questions untouched and provides little by way of assistance in relation to legal principle.

11. As the criminal law at the international and domestic levels gradually develops a more sophisticated appreciation of mental harm, greater clarity is required to draw international

[7] For a large-scale survey of victim attitudes towards international criminal justice and the purpose and form of perpetrator sanctions, see Ernesto Kiza, Corene Rathgeber, Holger-C. Rohne, *Victims of War: An Empirical Study on War-Victimization and Victims' Attitudes Towards Addressing Atrocities* (Hamburger Edition, 2006).
[8] *Prosecutor v Ntaganda (Judgment on the Appeal of Mr Bosco Ntaganda against the "Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9"*) (Trial Chamber, International Criminal Court, Case No. ICC-01/04-02/06, 15 June 2017)
[9] Ibid [63].
[10] Ibid [67].

criminal law in line with contemporary knowledge and attitudes. The first step is to acknowledge that child soldiers are a group suffering from variants of the most serious crimes of concern to the international community.

12. Logically, Mr Ongwen's case provides an opportunity to acknowledge the import of crimes committed against him as a child and to ensure that the lasting effects of such criminality are taken into consideration consistent with the principle of culpability.

13. In the Trial Chamber, whilst it was apparently accepted that Mr Ongwen had both witnessed and participated in atrocities as a child, no clear findings were made as to that harm and no clear meaning given to when the effects of his victimhood dissipated, save for identifying his 18th birthday.

14. It is our observation that in such cases there should be a fact-finding exercise as to the experiences suffered by those such as Mr Ongwen and any continuing effects.

15. The need for a factual enquiry and findings is important as the effects continue long after the age of 18 and beyond the specific mental health impacts considered by the Chamber in Mr Ongwen's case.[11]

IV. The relevance of modern slavery jurisprudence, particularly the 'non punishment' principle, compulsion and causation.

16. To-date, the appropriateness of 'non-punishment' models to interpretation of *Rome Statute* remain unexplored, despite the relevance of the 'non-punishment' principle to autonomy[12] and criminal responsibility.[13] Becoming a child soldier constitutes a type of victimhood that occurs through slavery or slavery-like practices, including being trafficked for relevant exploitation. We refer to this herein as 'modern slavery/human trafficking'. This section of our observation seeks to inform the Appeal Chamber of the -non punishment' principle and how it can be considered in relation to former child soldiers suffering long term effects.

[11] Para. 2450 TJ
[12] In English law, for example, this has been defined as 'free, informed and deliberate': See *R v Rebelo (No 1)* [2019] EWCA Crim 633; *R v Rebelo (No 2)* [2021] EWVA Crim 306.
[13] Julia Maria Muraszkiewicz, *Protecting Victims of Human Trafficking from Liability: The European Approach* (Palgrave Macmillan, 2019). See also UNODC Female Victims of Trafficking for Sexual Exploitation as Defendants (2020).

17. 'Modern slavery/human trafficking' has been defined widely by the U.N. Trafficking Protocol (2000), known as the 'Palermo Protocol' ('the protocol') [14] which was adopted by the U.N. General Assembly resolution 55/25. It entered into force on 25 December 2003. [15] It is "the first global legally binding instrument with an agreed definition on trafficking in persons".[16] The intention was "to facilitate convergence in national approaches with regard to the establishment of domestic criminal offences that would support efficient international cooperation in investigating and prosecuting trafficking in persons cases.[17] The international objective is to protect and assist the victims of 'modern slavery/human trafficking'with full respect for their human rights and the context is not limited.

18. Article 2 of the Protocol provides the statement of purpose to:

    (a) to prevent and combat trafficking in persons, paying particular attention to women and children.
    (b) to protect and assist the victims of such trafficking, with full respect for their human rights; and
    (c) to promote cooperation among States Parties in order to meet those objectives.

19. Protection includes the 'non-punishment' of those trafficked persons who commit crime through the 'means and purposes' of others. There are a series of communications from the U.N. as to the importance of 'non-punishment'. This is reinforced by the International Labour Organisation (ILO) Protocol of June 2014 (updating the existing ILO Convention 29 on Forced Labour). Article 4(2) of the ILO Protocol (2014) requires states to:

> *… take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour.*

20. International frameworks in this context do not *require* non-prosecution or non-punishment

[14] *United Nations Convention against Transnational Organised Crime and the Protocols Thereto,* GA Res 55/25 (15 November 2000).
[15] Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or removal of organs.
[16] *United Nations Convention against Transnational Organised Crime and the Protocols Thereto,* GA Res 55/25 (15 November 2000).
[17] *Council of Europe Convention Against Trafficking in Human Beings* (Explanatory Report, COETSER 3, 16 May 2005) <http://www.worldlii.org/int/other/COETSER/2005/3.html>.

but allow for implementation by the provision of systems to recognise the possibility of not imposing any penalty where people act pursuant to the means and purposes of others. United Nations High Commissioner for Human Rights Trafficking Principles and Guidelines (2002), at Principle 7 states:

> *Trafficked Persons shall not be detained, charged, or prosecuted for their illegal entry into or residence in countries of transit or destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.*

21. These are complex issues giving rise to complex questions as to how a criminal justice system can be both prosecutor and protector, how systems can identify worthy cases for an alternative approach and how differing levels of responsibility can be safely accommodated. Implementation has progressed globally through domestic responses and regional instruments including EU and ASEAN Conventions Against Trafficking in Persons. The importance is to distinguish victims from perpetrators and to reinforce the need to ensure that the dignity and human rights of genuine victims are respected.[18]

Applying the Principle of Non-Punishment as Non -Liability for former child soldiers

22. Recent armed conflicts in the past decade or so reveal a pattern of using 'modern slavery/human trafficking' as a war tactic, especially by insurgent/rebel groups and terrorist organisations to advance their strategic aims and expand their military capabilities. Modern day conflicts are rife with conduct that involves the forcible recruitment of civilians for the purpose of exploitation in forced labour, slavery, and slavery-like practice, as well as the trafficking of women and children more generally. [19] Victims of 'modern slavery/human trafficking'are often forced, compelled or coerced to work as combatants, spies, suicide bombers and other such extremes of exploitation.[20] This harm leads to long term consequences and gives rise to questions of capacity, duress and ongoing duress of circumstances / necessity.

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[18] Association of Southeast Asian Nations, *ASEAN Declaration Against Trafficking in Persons Particularly Women and Children*, adopted 29 November 2004, available at: < https://asean.org/asean-declaration-againsttrafficking-in-persons-particularly-women-and-children-4/>.
[19] UNODC, Global report on trafficking in persons (2016), 64-66 available at: < https://www.unodc.org/documents/data-and-analysis/glotip/2016_Global_Report_on_Trafficking_in_Persons.pdf>.
[20] Jamile Bigid, 'Human Trafficking Helps Terrorists Earn Money and Strategic Advantage', Foreign Policy (31 January 2020) available at: <https://foreignpolicy.com/2020/01/31/human-trafficking-helps-terrorists-earn-money-and-strategic-advantage/>.

23. However, whilst the 'non-punishment' principle is gradually moving towards greater recognition and acceptability as largely a question of non-liability,[21] there is little to indicate that international law is grappling effectively with the most salient questions concerning how the 'modern slavery/human trafficking' experience should be addressed, particularly in relation to child soldiers and former child soldiers. Mr Ongwen's appeal gives the opportunity to consider the most appropriate, measured and victim centred approach.

24. Moreover, of particular concern, is the lack of agreement concerning how the principle of 'non-punishment' can operate as a principle of non-liability in relation to crimes that are not the direct consequence of the trafficking but are merely *linked* to the trafficking experience by a more remote chain of causation. Mr Ongwen's trial is a textbook case of this unfortunate disregard. Both the parties and the Trial Chamber appeared to have focused exclusively on the narrowest questions arising pursuant to Article 31(1)(d), leaving many of the most challenging causation and agency questions relevant to conviction and sentencing almost entirely untouched. Whilst this was a feature of the cases being advanced by the parties pursuant to Article 31(1)(d), it was not inevitable or likely to be an approach that respected the principle of culpability.

25. Currently, there are two principal approaches to 'non-punishment': the causation-based approach and the compulsion-based approach.[22] Both concern the correlation between the victim's criminal offence and the 'modern slavery/human trafficking' experience and require engaging with the questions of causation, coercion, and lack of agency.

26. Compulsion necessitates a degree of pressure such that the victim is essentially compelled by the perpetrator to commit the crime.[23] This model is premised on the acceptance that threats, use of force, abduction, fraud, deception, abuse of power or of a position of vulnerability or other forms of coercion may so severely impair the capacity for acting that the individual lacks true autonomy and is derived and developed from the well-established defence of duress under criminal law.[24] This is similar to the rationale that underpins Article

[21] Julia Maria Muraszkiewicz, *Protecting Victims of Human Trafficking from Liability: The European Approach* (Palgrave Macmillan, 2019). See also UNODC Female Victims of Trafficking for Sexual Exploitation as Defendants (2020).
[22] Bijan Hoshi, 'The Trafficking Defence: A Proposed Model for the Non- Criminalisation of Trafficked Persons in International Law' (2013) 1(2) *Groningen Journal of International Law* 54, 55.
[23] UN Working Group of Trafficking in Persons, 'Background Paper on Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking', (December 2009) CTOC/COP/WG.4/2010/4, para 11; Also see: Hoshi (2013), 55.
[24] UN Working Group of Trafficking in Persons, CTOC/COP/WG.4/2010/4, paras 11, 17. Also see, Schloenhardt & Markey-Towler (2016), 35.

31.

27. The compulsion model has taken central stage at the international level: For example, the UNHCR Recommended Principles and Guidelines and the UN Model Law contain a number of express, compulsion-based provisions that, for the first time, expressly provide for non-liability upon a showing that the unlawful acts were the "direct consequence" of the trafficked situation.[25] Similarly, the principle has been expounded in a series of UN General Assembly Resolutions.[26] Further, the principle has been recognised in a series of reports by the UN Secretary-General, the UN Committee on the Rights of the Child and the UN Committee on the Elimination of Discrimination Against Women, major international and regional policy documents and soft-law instruments and national anti-trafficking laws.[27] An examination of the European legal framework also suggests that the principle of non-criminalization in the European context is compulsion-based.[28]

28. Despite this emerging consensus, the compulsion-based model can be criticised for its failure to recognize that, even in the absence of any threat or force or coercion, a victim may be left with no real choice but to commit a criminal offence to evade the consequences of their 'modern slavery/human trafficking' experience. For example, in England and Wales through policy guidance for victims of modern slavery / human trafficking who commit criminal acts, the caselaw which has focussed on the application of the guidance and s.45 of the Modern Slavery Act 2015, there has been recognition that in order for the compulsion model to work compliantly with the international and regional instruments, first it must include compulsion from circumstances surrounding trafficking (including, for example,

[25] For example, Principle 7 of the UNHCR Recommended Principles and Guidelines provides: 'Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons'. Similar provisions can be found in Guideline 2 and Guideline 4.5 of the UNHCR Recommended Principles and Guidelines.

[26] UN General Assembly Resolution 63/156 (30 January 2009) para 12. See also UN General Assembly Resolutions: 61/144 (1 February 2007) para 18; 59/166 (10 February 2005) paras 8 & 18; 57/176 (30 January 2003) para 8; 55/67 (31 January 2001) paras 6 and 13; 52/98 (6 February 1998) para 4; and 51/66 (31 January 1997) para 7.

[27] UNHCR Recommended Principles and Guidelines, 132 notes 264-269; Gallagher (2010) 286-287.

[28] For example, Article 26 of the EU Trafficking Convention, 2005 is entitled 'Non-punishment provision' and provides for the possibility of protection from criminal sanction: Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so; See also: Article 8 of the III.2. The EU Trafficking Directive 2011 is entitled 'Non-prosecution or non-application of penalties to the victim' and provides: Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.

steps taken to avoid the possibility of being re-trafficked); and, second, it includes historical trafficking.[29] As Hoshi rightly argues, compulsion as an excuse alone "fails to grasp the subtle and nefarious methods by which traffickers can exert total dominance over trafficked persons, such that even in the absence of a high degree of pressure (or, indeed, any overt pressure at all), the trafficked person may, in reality, have little choice but to commit the criminal act".[30] Accordingly, Hoshi defends the causation based model as more accurately and fairly encompassing the criminal acts committed by the victim through the means and purposes of the perpetrators.[31]

29. The causation model provides much more scope for understanding the 'modern slavery/human trafficking' experience which may have elements of duress and necessity. We observe that this appears to be the rationale behind the compulsion model being broadly construed in England and Wales. Recognising the causative responsibility of perpetrators, including those who 'make' child soldiers can more broadly fulfill the obligation to protect and assist victims of 'modern slavery/human trafficking'. We observe that this may raise some tricky questions in practice concerning the precise causal relationship between the 'modern slavery/human trafficking' situation and the criminal acts but that is what makes the development of legal principle and the fact-finding exercise important.

30. In the context of child soldiers and former child soldiers suffering long term effects, the causation-based approach provides a broader protection to include all criminal acts performed through the means and purposes of others and it is more focused on a broader view of the causal relationship between the perpetrator and the victim.[32] This model extends non-liability, non-prosecution or non-punishment to offences committed 'as a direct consequence' of being a victim of trafficking. The interpretation of 'direct' may depend on the circumstances, to include the direct effect of mental harm.

31. Reference to the causation model can be found in the UN Working Group on Trafficking in Persons, the UNODC Model Law, and the UNHCR Recommended Principles and Guidelines, which all refer to offences committed 'as a direct consequence' of the 'modern slavery/human trafficking' situation. The reference to 'a direct result of them having been

[29] See A in *R v VSJ and others* [2017] EWCA Crim 36 as an example.
[30] Hoshi (2013), 55.
[31] Hoshi (2013), 55. Also see, Peter Carter and Parosha Chandran, 'Protecting against the Criminalisation of Victims of Trafficking: Representing the Rights of Victims of Trafficking as Defendants in the Criminal Justice System', *in:* Peter Carter and Parosha Chandran, eds, *Human Trafficking Handbook: Recognizing Trafficking and Modern-Day Slavery in the UK*, (London, LexisNexis, 2011), 425.
[32] Schloenhardt & Markey-Towler (2016), 36.

trafficked' in the OSCE *Action Plan* can be understood in the same way.

32. Unlike the compulsion model, this approach does not require the *nexus* to any force, coercion or duress exercised by the perpetrators. It does not require a proof of coercion or duress or a lack of choice as an excuse. The causal connection between the 'modern slavery/human trafficking' situation and the offending are the principal focus of the means and purposes of the perpetrators. A victim may resort to these offences while still under the influence of the traffickers, or to break free from them. The causation model has been followed in national modern slavery /human trafficking frameworks, including in Argentina,[33] Kosovo,[34] Philippines[35] and United States.[36] As may be correctly surmised, the causation-based approach takes a more liberal approach to linkage, requiring only that the criminal act that results is the direct result of the 'modern slavery/human trafficking' situation, rather than the result of compulsion: In cases of former child soldiers such as Mr Ongwen, this allows for a consideration of whether a person's mental health was so compromised by those who made them a child soldier that they bear the responsibility for their subsequent actions.

33. This appeal, we observe, provides an opportunity to consider whether an evidential 'nexus' is insufficiently precise and an element of causal connection for a non-liability principle can be framed. Such a discussion is consistent with the separation of justification and excuse and removes the limitation suggested in Mr Ongwen's case that the consequences of being a child soldier should only be considered as a mitigating factor on sentence.

34. We observe that trial chambers should be able to take a broader approach to both the gateway questions of what might amount to mental disease or defect and how a more comprehensive assessment of the causal link between the 'modern slavery / human trafficking experience' and the alleged crimes can be considered as an issue of loss of agency.

35. This in turn allows for more rounded and human rights compliant approach not constrained by the respective cases for the parties. Adopting an approach to Article 31 that regards more than certain mental health conditions as relevant to the question of "mental disease or defect" and using a causation rather than 'nexus' test can accommodate the long-term

[33] Article 5 of the Prevention and Criminalization of Trafficking in Persons and Assistance to Victims of Trafficking (Argentina: 26.364, 2008).
[34] Section 8 of the Regulation 2001/14 on the Prohibition of Trafficking in Persons in Kosovo, United Nations Interim Administrative Mission in Kosovo.
[35] Section 17 of the Anti-Trafficking in Persons Act, RA No. 9208, (Philippines, 2003).
[36] Section 112 of the Victims of Trafficking and Violence Protection Act (United States, 2000).

effects of 'modern slavery /human trafficking' as a matter of law, enabling differentiation between complete non-liability for conviction purposes or recognition of the 'modern slavery/ human trafficking' experience, if liable, on sentence.

36. Put another way, this appeal can lay down legal principles applicable to a factual matrix where a victim becomes a perpetrator and identifying when that person is acting autonomously, to include how the harms suffered by a child soldier are linked to the harm s/he subsequently causes. Mere criminalisation without principles of non-liability or non-punishment in this context 'may be viewed as the antithesis of the victim-centred approach, inevitably operating to deny victims of 'modern slavery/human trafficking' the rights to which they are entitled under international law'.[37]

37. Accordingly, it is observed that the error in the Trial Chamber was to ignore the relevant 'modern slavery / human trafficking' harm and how it affects criminal responsibility because it concluded that it had not manifested into one of the five recognisable conditions under consideration.[38]

38. The practical reality is that some former child soldiers lack criminal responsibility because the crimes they commit are caused by the harms inflicted upon them by the means and purposes of others. The level of harm can be so severe that it creates a long-term lack of capacity, it may amount to continuing duress or create a justification through continuing circumstances. This is the moral conundrum that can be recognised through the mechanisms of Article 31 and the recognition of 'non-punishment' including non-liability.

V. The need to maintain a distinction between justificatory and excusatory defences in interpretation of Article 31(1)(a) and (d) of the Rome Statute

39. At first sight, the *Rome Statute* eschews the civilian classification of 'bars to responsibility', 'justifications' and 'excuses'. However, on closer inspection it becomes clear that this classification does underlie the system and we observe that there is a workable taxonomy

[37] Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) 283; Mohammed Y Mattar, 'Incorporating the Five Basic Elements of a Model Anti-trafficking In Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention' (2006) 14(2) *Tulane Journal of International and Comparative Law* 357, 380. The principle is known as the non-punishment principle or the non-liability principle (e.g. United Nations Office on Drugs and Crime, *Model Law against Trafficking in Persons* (5 August 2009) ('*UNODC Model Law against Trafficking in Persons*') <https://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf> or 'non-criminalisation principle' (UNHCR, Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary (2010) ('*UN Trafficking Principles and Guidelines – Commentary'*)).
[38] TJ para. 2580.

for interpretation of Art 31(1)(d) and Art 31(3).[39]

40. A child soldier may suffer to the point of incapacity (a bar), may act under duress (an excuse) or under duress of circumstances (a justification), depending on the factual matrix.

41. In classifying defences, 'the [analytical] model of the common law prevails in the design of the substantive law applicable in the International Criminal Court (ICC).'[40] However, the drafters of the Rome Statute chose 'neutral' terminology which avoids the language of either excuse or justification,[41] thus not appearing to favor common law rather than the civil law legal tradition. It is open to the Appeals Chamber in Mr Ongwen's case to adopt such distinctions for interpretive clarification of Article 31(1) of the Rome Statute. This enables the Appeals Chamber to distinguish between defences that exclude the Accused's legal responsibility: (a) because of an incapacity to act autonomously (or creating a bar to responsibility); (b) those that challenge the wrongfulness of the act (justification); and (c) those that negate the blameworthiness of the wrongdoing where the Accused's capacity to act autonomously remains intact (excuse). This distinction is vital to a workable taxonomy of Article 31(1). It also provides valuable insight into the correct interpretation of the particularly troublesome 'formula compromise' in Article 31(1)(d) which lays down a pressure-related defence, generally understood to represent an amalgamation of (justificatory) necessity and (excusatory) duress.

42. The prosecution recognized Mr Ongwen's victimhood but argued that it did not nullify his criminal responsibility, and that this should only be considered during sentencing. Mr Ongwen's case was that he denied all responsibility. Mr Ongwen raised two affirmative defences:

- The first was that he suffered from mental disease or defect and criminal responsibility was thus excluded under Article 31(1)(a) of the Rome Statute, which applies when a defendant *'suffers from a mental disease or defect that destroys the person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of the law.'*

[39] Krebs, B., *Justification and excuse in article 31(1) of the Rome Statute* C.J.I.C.L. 2013, 2(3), 382-410
[40] G. P. Fletcher, *The Grammar of Criminal Law – American, Comparative, and International, Volume I: Foundations* (OUP, 2007) 46.
[41] C. K. Hall, 'The Jurisdiction of the Permanent International Criminal Court over Violations of Humanitarian Law' in F. Lattanzi (ed), *The International Criminal Court – Comments on the Draft Statute* (Editoriale Scientifica, 1998) 19, 46.

- The second was that he was acting under continuing duress related to the threat of imminent death and serious bodily harm by Kony, and that criminal responsibility was thereby negated under Art 31(1)(d), which refers to acts *'caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person'.*

43. In addition, the 'victim/perpetrator' label was explicitly rejected by his Defence, which stressed in its Closing Brief that Mr Ongwen was a victim only, and not a victim/perpetrator.[42]

44. It seems the focus was on mental health diagnosis and not legal criteria.

45. The Trial Chamber, faced with two extremes – full responsibility or no responsibility at all, failed to consider the operation of the Rome Statute in circumstances where the issues plainly gave rise to consideration of capacity, duress and necessity and the intersection of all three in the context of child soldiers and those suffering the continued effects of such harms.

46. In relation to mental disease or defect, the Chamber found that the picture painted by witnesses was of a fully responsible adult of sound mental capacity. Regarding duress, the Chamber found no basis to hold that Mr Ongwen was subject to any threat of death or serious injury at the time he committed the crimes charged. The most frequently cited phrase is Judge Bertram Schmitt's comment in the oral summary that Ongwen was not *"a puppet on a string"*.[43]

47. However, the Chamber considered only 5 mental health issues and did not consider lasting effects as a question of duress of circumstances, nor when the effects of the harm he suffered as a child had dissipated. The judgment refers to *'the relevant period'* as the period covered by the charges, underscoring that the Chamber considered Mr Ongwen's childhood suffering to be a period discrete from his actions as an adult, in which he was imbued not only with agency but significant hierarchical authority. The identification of only one mitigating factor (of suffering as a child) exposes the limitation of the Trial Chamber

[42] Ongwen Defence Closing Brief at [20]: https://www.icc-cpi.int/CourtRecords/CR2020_00998.PDF
[43] ICC Summary of Verdict at [123]: https://www.icc-cpi.int/itemsDocuments/ongwen-verdict/2021.02.03-Ongwen-judgment-Summary.pdf

approach in Mr Ongwen's case and for future cases with similar issues.

48. The Trial Chamber also declined the defence request to engage in discussion whether Mr Ongwen's experience as a former child soldier significantly impaired his capacity for moral perception, such that this should form the basis of an 'excuse' for criminal offending.[44] Thus, whilst acknowledging Ongwen's victimhood, the Trial Chamber did not discuss whether this had a bearing on his subsequent offending; the Chamber simply commented that this did not constitute 'justification' for the commission of similar or other crimes,[45] and that his victimhood 'might' be evaluated at sentencing.[46]

49. This Appeal is therefore an opportunity to consider both the operation of the defences in the Rome Statute and how that jurisprudence can be applied in future to those who continue to suffer effects of victimhood long term through compromised mental health.

Mental Incapacity as a Bar

50. The 'mental incapacity' ground in Art. 31 (1) (a) comprises two requirements: first, a 'mental disease or defect' which, secondly, 'destroys [the] capacity to appreciate the unlawfulness or nature of [one's] conduct, or [the] capacity to control [one's] conduct to conform to the requirements of law'. The word 'capacity' is key. It is reminiscent of the German *Schuldauschließungsgrund*, i.e. the idea that the insane person is neither justified nor excused, but simply not capable of culpable conduct. If one considers the context in which trials at the ICC take place, the signaling effect of this wording cannot be overestimated: the accused's acquittal is not a judgment about the act itself, but about the accused's capacity, at the time of the relevant conduct, to take responsibility for it.

51. This is reinforced by the fact that Art. 31 (1) (a), in contrast to the common law 'M'Naghten Rules' which speak solely in terms of a 'defect of reason', thus in focusing on the accused's cognitive abilities, the Rome Statute also takes account of impairments on the volitional level: the destruction of the capacity 'to control [one's] conduct' may also lead to the exclusion of criminal responsibility. In doing so, the Rome Statute reflects the broader German approach which takes onboard the idea of an incapacity to act in a rule-conformant

[44] See for example, Renee Nicole Souris, 'Virtue Ethics, Criminal Responsibility, and Dominic Ongwen' (2019) 19(3) International Criminal Law Review 475 https://bit.ly/3hsbhIw
[45] Trial judgment at [2672].
[46] ICC Summary of Verdict at [6].

way.

52. Neither the Rome Statute nor the Rules of Procedure and Evidence foresee detention because of a successful plea under Art. 31 (1) (a). Professor Ambos has suggested that the uncertain consequences of a successful plea, coupled with the practical difficulties of adducing reliable medical evidence many years after the fact, may explain why defendants are reluctant to invoke this defence before the ICC.[47] This seems plausible and would conform with research done in the domestic context in England and Wales which has found insanity to be an unpopular defence,[48] as well as the stigma attached to being labelled 'insane'.[49] Treating capacity as a preliminary issue rather than a defence can contribute to resolving questions of responsibility: The consideration of capacity places a burden on the Trial Chamber to understand the constraints imposed on the prosecution and defence and to ensure that the Trial Chamber is not limited by arguments by the parties but works to ensure that the Rome Statute is interpreted in the broadest possible way to ensure fair trials for the unwell.

Duress as an excuse and justification as a separate defence

53. Although necessity and duress are the defences with the greatest practical relevance in international criminal law,[50] they do not seem to have been relied on in ICC proceedings to date. One possible explanation is the aim of the ICC to bring to justice top- or mid-level perpetrators who tend to be the ones coercing rather than being coerced. As Professor Ambos has observed: '[t]he general structure of the defence (...) implies, on a factual level, pressure or coercion from "top to bottom". In other words, the people at the top cannot invoke duress because they cannot be coerced'.[51]

54. A further reason might lie in evidentiary problems. Conceptual uncertainties seem not to have in the past stopped those accused of atrocities from defending themselves with reference to notions of coercion and/or necessity. In addition, there is evidence to suggest that tribunals presiding over crimes against humanity have tended to conflate the two

[47] *Ibid*, 323-324.
[48] D. Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP, 2011) 294; R. D. Mackay, 'Fact and Fiction About the Insanity Defence' [1990] *Crim LR* 247; R. D. Mackay and G. Kearns, 'The Continued Underuse of Unfitness to Plead and the Insanity Defence' [1994] *Crim LR* 546; R. D. Mackay and G. Kearns, 'More Fact(s) about the Insanity Defence' [1999] *Crim LR* 714.
[49] Ormerod, above **Error! Bookmark not defined.**, 294-295.
[50] *Ibid*, 348.
[51] *Ibid*, 360.

defences throughout the history of international criminal law.[52] That the ICC perpetuates such a conflation has been called unfortunate,[53] and rightly so, for it is difficult to construct a coherent whole out of a mix of justificatory and excusatory elements. [54]

55. Mixing up justification and excuse does not sit well with the structure of Art. 31 (1). We observe that a possible (and preferable) interpretation of Art. 31 (1) (d) is that it relates to (excusatory) duress only, which leaves a (justificatory) necessity defence to be subsumed under Art. 31 (3).

56. Art. 31 (1) (d) of the Rome Statute is framed in terms of 'duress', but it also appears to blend requirements of duress with elements more typically associated with necessity. In this respect, the provision is reminiscent of the common law approach which tends to conflate the two concepts to some extent.[55] This may reflect an underlying view that fair labelling is not as important in the classification of defences as it is in the classification of offences. Professor Clarkson, writing on the English law, has suggested that self-defence, necessity and duress could, without losing much, be unified under the heading of a single defence of 'necessary action'; he argues that the principle of fair labelling is of little relevance in the context of defences.[56] However, there *are* signaling concerns which point in favour of differentiation: surely it is better for a defendant to be acquitted on the basis that he did what others would have done (necessity) than on the basis that he gave in to pressure so that his conduct can be understood though not condoned (duress)? The nature of a defence by reason of which a defendant is acquitted reflects on his attitude towards the law and may well influence the way he is regarded by the public. In this sense, there is a hierarchy of defences; some reflect more favorably on the defendant than others.[57] Distinguishing exculpatory and justificatory defences, thus, is fundamental to fair labelling.

57. It has been suggested that Art. 31 (1) (d), even though it speaks solely in terms of 'duress', consists of elements of (justifying) necessity and (excusing) duress,[58] thus seemingly

[52] See Ambos, *Treatise*, above **Error! Bookmark not defined.**, 348-351, identifying elements of necessity/duress defences in Nuremberg and Post-Nuremberg case law.
[53] Ambos, *Treatise*, above n **Error! Bookmark not defined.**, 356.
[54] Ambos, *Treatise*, above n **Error! Bookmark not defined.**, 359.
[55] See e.g. W. Wilson, Criminal Law (Pearson Longman, 2008) 278. For an exception see: J. Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship' (1998) 11 *Canadian Journal of Law and Jurisprudence* 143.
[56] C. M. V. Clarkson, 'Necessary Action: a New Defence' (2004) *Crim LR* 81, 94.
[57] M. Baron, 'Justifications and Excuses' (2005) 2 *Ohio State Journal of Criminal Law* 387, 389; Gardner, 'In Defence of Defences' in *Offences and Defences*, above, 87-89; Horder, above.
[58] Ambos, *Defences*, above n **Error! Bookmark not defined.**, 311; Eser, above [49].

following the common law model. The provision has been compared to the approach suggested by Judge Antonio Cassese (in his dissenting opinion) in *Erdemovic*.[59] Here, Judge Cassese's opinion was that, in the context of crimes against humanity, a defendant should theoretically be able to avail himself of the duress defence, but only if his giving in to the threat was a proportional response, in the sense that it reflected a choice for the lesser of two evils.[60] In doing so, he presented duress as a variant of the necessity defence.[61]

58. As explained above, however, conflating necessity and duress in this way is highly problematic, because the person aiming to avail himself of a justification is making a very different claim from the person who hopes to escape punishment by virtue of an excuse: the former essentially asserts that what he did was *not wrong*; that, in fact, he had a right to act in the manner he did: in the case of former child soldiers like Mr Ongwen because he was so severely harmed by the means and purposes of others. By contrast, the person who relies on an excuse is conceding that he did indeed commit a legal wrong, but at the same time is claiming that his act was understandable under the circumstances and that he therefore should not be blamed for it: in Mr Ongwen's case this may be operative for crimes closer to the age of 18 than later.

59. The wording of Art. 31 (1) (d) has much in common with traditional defences of pressure, and can be interpreted so as to give rise to a duress defence alone (excluding necessity), and that it is best perceived of as an excuse.[62] Notably, the provision is not restricted to threats 'made by other persons' (Art. 31 (1) (d) (i)) but also encompasses threats 'constituted by other circumstances beyond that person's control' (Art. 31 (1) (d) (ii)). That Art. 31 (1) (d) excuses rather than justifies is reinforced by the fact that this provision is, at least on its face, generous in that it does not require any special relationship between the defendant and the person to be protected.

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[59] *Prosecutor v Erdemovic*, Separate and Dissenting Opinion of Judge Cassese, IT-96-22T, 7 October 1997. Erdemovic was a member of the Bosnian Serb army. He was charged with having killed several civilian Muslims in 1995. At trial, he claimed that his superiors had threatened to kill him if he did not participate in the shootings. The question before the ICTY Appeals Chamber was whether duress was available as a defence in these circumstances. The majority of the justices concluded that according to customary international law, duress was not a defence to murder. The dissenters, by contrast, asserted that duress could theoretically exonerate a defendant in this context, but they were adamant that such a defence would be subject to strict proportionality requirements and that because of the gravity of harm typically caused in crimes against humanity, it would be almost impossible for a defendant to establish the requisite proportionality.

[60] *Prosecutor v Erdemovic*, Separate and Dissenting Opinion of Judge Cassese, IT-96-22T, 7 October 1997, [41-42].

[61] L. E. Chiesa, 'Duress, Demanding Heroism and Proportionality: The Erdemovic Case and Beyond' (2008) 42 Vand. J. Transnat'l 741, *Pace Law Faculty Publications* (2007) Paper 404, 14, *available at* http://digitalcommons.pace.edu/lawfaculty/404/ [last accessed 21 May 2013].

[62] *Cassese's International Criminal Law*, 216.

60. Moreover, Art. 31 (1) (d) seems to envisage the availability of the defence also in cases of murder: It appears to apply to *all* crimes within the jurisdiction of the ICC. The provision also entails elements that one might expect to find in a necessity defence. Notably, the provision envisages that 'the person acts necessarily and reasonably to avoid this threat'. This requirement has been described as belonging to necessity,[63] and could be taken as proof that the provision mixes up duress and necessity, creating a hybrid which is difficult to categorise as either excuse or justification.

61. We observe that an approach ensuring fair labelling is to be preferred because it provides coherence within Article 31(1). The Trial Chamber did not consider these issues and by not considering the matters we raise herein conflated Art. 31 (1) (d) as relates to excusatory duress only, and Art. 31(3) as a justificatory necessity defence. The Appeal Chamber has an opportunity to develop the jurisprudence in international criminal law for Mr Ongwen's appeal and for future trials in the vital context of child soldiers and those suffering long term effects of being harmed as child soldiers.

VI. Sentencing

62. At the ICC, as recognized by the Trial Chamber[64], sentence is determined mainly according to Article 78(1) of the Statute, which includes obligations to take into account such factors as the gravity of the crime and the individual, and Rule 145(1)(b) of the Rules that provides that the Court shall balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime.

63. In Mr Ongwen's case, the Court also purported to take into account, Rule 145(1)(c) of the Rules that provides that the Court shall, in addition to the factors mentioned in article 78, paragraph 1, give consideration, inter alia, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person. As discussed above, the Trial Chamber also purported to take into account, Rule 145(2) of the Rules states that in addition, the Court shall take into account, as appropriate, mitigating circumstances, such as circumstances falling short of constituting grounds for exclusion of criminal

[63] Ambos, *Treatise*, above n **Error! Bookmark not defined.**, 356.
[64] SJ para. 46, 47 and 48.;

responsibility, such as *inter alia*, substantially diminished mental capacity or duress.[65]

64. Mr Ongwen's childhood was considered, per Rule 145 of the ICC Rules of Procedure and Evidence.[66] In assessing the impact of Ongwen's own victimhood, the Chamber stated:

> [370] …the Chamber recalls that Dominic Ongwen himself had in the past been a victim of the same crime, having been abducted as a child and integrated as a fighter into the LRA ranks. He himself described the great suffering of the children abducted by the LRA, when providing an account of his own experience – an experience which the Chamber, as explained, has in fact acknowledged and significantly taken into account as a relevant mitigating circumstance for the purpose of the entirety of this decision … At the same time, in discussing specifically the crime under Counts 69 and 70, it cannot go unnoticed that Dominic Ongwen, despite well aware of such suffering which he himself had been subjected to several years earlier and fully appreciating its wrongfulness, did nothing to spare similar experiences to other children after him, but, on the contrary, willfully sustained and contributed to perpetuate the systemic, methodical and widespread abduction, integration and use as fighters of large number of children by the LRA.

65. The Trial Chamber unnecessarily limited itself to the narrow party driven approach taken at trial. A broader approach is supported by reparation principles alongside the broader legal and policy framework relating to the rights of child soldier victims and victim-perpetrators. This reveals that complex and largely unresolved issues are potentially obscured by contrasting viewpoints on faultless passive victim narrative versus active agency.

66. A lack of clear frameworks can serve to undermine the recovery and reintegration of child soldiers and to ensure that child soldiers are given the opportunity to participate fully in transitional justice process that affect their lives. These rights are compromised if reparations measures are employed that either impede reintegration — by fueling divisions, heightening tensions, and avoiding the truth-telling and other process that would facilitate reconciliation — or impair mental recovery.

67. To deliver a reparations model that accords with rights obligations and international norms and at the same time recognizes the victim/perpetrator paradigm has a consequential effect on sentencing and requires difficult decisions to be addressed rather than avoided. The inconvenient truth of certain child soldiers being perpetrators as well as victims, including

[65] Para. 49 TJ
[66] ICC Rules of Procedure and Evidence, ICC-ASP/1/3, r 145 https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf

as adults suffering continuing effects needs to be tackled if international justice and the bundle of rights that underpin reparations are to be accepted into the future, as durable normative frameworks capable of reconciling competing interests.

68. It is reasonable for the Appeals Chamber to carefully consider the way in which any sentencing orders complement or otherwise interact with broader transitional justice efforts, including reparations. Mr Ongwen's appeal provides the necessary platform to formulate principles in accordance with best practices of transitional justice actors and child specialists with insight into the issues confronting former child soldiers requiring mental and physical recovery and social reintegration.

69. To develop and deliver sentences and reparations that recognise the broader harms suffered by the phenomenon of child soldiering — including the harms inflicted by child soldiers upon others is a task which requires astute consideration of the challenges and to deliver child soldiers a future that respects the very rights the International Criminal Court seeks to uphold.

70. We observe that impaired functioning of an affected former child soldier, whether temporary or permanent, may be relevant not merely to moral culpability of the offending but also to the weight of a sentence of the kind imposed. General deterrence may be moderated where the past acts of others has affected a person's mental health, even where that person remains criminally responsible. Progress to former child soldier may also eliminate specific deterrence.

71. Acknowledging such factors enables the Court to balance other sentencing principles when determining sentences to ensure it is a balanced and appropriate outcome. The result is not an automatic mitigation of sentence simply because an offender suffers/has suffered a mental illness through the means and purposes of others who placed them as children in a modern slavery / human trafficking situation. Sentencing principles which acknowledge factual realities can demonstrably balance the right to health and life of an individual as against the need to publicly acknowledge their crimes.

VII. CONCLUSION

72. Recognising 'non- punishment' to include non-liability for some former child soldiers

necessitates workable legal frameworks and an exercise in fact finding that publicly explains the true circumstances of an accused person tried in an international criminal court. Only by formulating such mechanisms can the Appeals Chamber ensure that the Trial Chamber will workably and fairly differentiate between perpetrators, victims, and victim perpetrators. This in turn enables a principled separation between those who carry criminal responsibility and thus fall to be sentenced, and those who can be properly identified as not liable. In the context of child soldiers this also enables a division between those who deserve reparations that include compensating long-term effects and those who do not.

73. We conclude our amicus curiae observation with the hope that it assists the Appeals Chamber in the formulation of legal principles to be applied and the factual assessment of Mr Ongwen's criminal responsibility.

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Dated this 21 DECEMBER 2021 United Kingdom

At [place, country]