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Date: **23 December 2021**

THE APPEALS CHAMBER

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

SITUATION IN UGANDA

IN THE CASE OF
THE PROSECUTOR v. Dominic Ongwen

Public Document

***Amicus curiae* observations on issues raised in the Appeals Chamber Order of 25 October 2021 inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to Rule 103 of the Rules of Procedure and Evidence)**

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Amicus curiae observations in the Case of *The Prosecutor v Dominic Ongwen*

Dr Paul Behrens[1]

1. Grounds for Excluding Criminal Responsibility

1.1 Burden of proof regarding affirmative defences

1. The burden of proof for affirmative defences has found different regulation in legal systems around the world. Civil law countries tend to place the burden of proof on the prosecution, leaving the Accused only with the burden to raise the defence.[2] Common law systems appear to presume the absence of affirmative defences: if the Defence seeks to rebut this,[3] it has to shoulder the concomitant burden. In that case, however, the standard of proof is lower: for the existence of such defences, proof on the balance of the probabilities tends to be sufficient.[4]

2. Art. 66(2) ICCSt[5] places the burden of proof regarding guilt on the Prosecution. Yet in this context, too, it is clear that not all aspects of the Accused's conduct have to be proven by the Prosecution. The Defence always has certain duties: if it wants to show that the Accused had an alibi, it has to adduce evidence for that, if it wants to show that awareness of material facts was lacking, it has to make that case as well. The presumption of innocence has never been understood to mean that the Prosecution has the burden of proving the case *against* its own position.[6]

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[2] Klamberg, *Evidence in International Criminal Trials* (Leiden, Boston 2013) 121.
[3] See, for England, *Woolmington v D.P.P.* [1935] AC 462, 475 – 476; for Scotland, s. 51A(4) Criminal Procedure (Scotland) Act 1995 and *HMA v Mitchell,* 1951 JC 53 at 55 and *Carraher v HMA,* 1946 JC 108 at 112-113; for the USA, *Patterson v. New York*, 432 U.S. 197 at 211 (1977); for Australia: Art. 7(3)(3) Criminal Code Act 1995. Klamberg (n 2) 130; Boyer 123.
[4] Klamberg (n 2) 130. See also for Canada, *R v Daviault,* [1994] 3 SCR 63; for Scotland, Criminal Procedure (Scotland) Act 1995, s. 51A(4).
[5] Articles without numbers are those of the Statute of the International Criminal Court (ICCSt).
[6] For a differentiating view, see Ambos, 'Defences in International Criminal Law' in, Bertram S Brown (ed.), *Research Handbook on International Criminal Law* (Edward Elgar 2011) 303.

3. Much of the difficulty regarding affirmative defences is owed to the understanding of the crime as a coherent whole, consisting of positive elements (actus reus and mens rea) as well as negative elements (such as affirmative defences whose existence has to be disproven).[7] While this structure may help understand the relevance of the defendant's conduct for substantive law, its usefulness for evidentiary purposes is limited. There, it risks consigning issues pertaining to guilt to the same category as those that, like affirmative defences, make the case for innocence. Yet it is not incumbent on the Prosecution to prove innocence; and limiting its burden to the positive elements is thus compatible with Art. 66(2). The burden of proof for affirmative defence, like the burden of proof for any other aspects pertaining to innocence, rests with the Defence.

4. Under Art. 66(3), the Prosecution has to prove guilt beyond reasonable doubt. The corresponding standard for the Defence is that of establishing reasonable doubt, and this has to apply to affirmative defences as well. It is, therefore, lower than proof 'on the balance of the probabilities'.[8]

5. The close relationship between evidence for affirmative defences and evidence for the absence of actus reus and mens rea lends further support to that finding. Mistake of relevant facts, for instance, is a defence under Art. 32(1), but also a circumstance negating mens rea. If affirmative defences and factors negating mens rea were split up for evidentiary purposes, it would not be clear who should bear the burden of proof: the Defence may have to prove mistake of fact regarding mens rea, the Prosecution as an affirmative defence. As both situations pertain to innocence, the more appropriate understanding is to charge the Defence with proving mistake of fact in each case, yet to accept that the standard of proof is satisfied once reasonable doubt is established.

1.2 Duress (Art. 31(1)(d) ICCSt)

6. The application of Art. 31(1)(d) requires a determination of the perspective from which duress is to be evaluated. Situations like the instant case, in which the perception of a threat is coloured by features such as an alleged belief in the 'spiritual powers' of a militia leader,[9] make it tempting to advocate a strictly objective perspective, and some national laws have opted for

[7] See on this also *The Prosecutor v Dominic Ongwen* Trial Chamber Judgment, 4 February 2021 ('TC Judgment') para 231.
[8] See also *Jayasena v R* [1970] AC 618 at 626 and *Gilmour v HMA*, 1989 SLT 881 at 882.
[9] See TC Judgment, paras 2643 – 2658.

this approach.[10] But this can lead to unduly restrictive results: there may well be situations in which both threatening and threatened party genuinely believe in the existence of an effective threat when it never objectively existed (eg, both believe in the toxic properties of a substance that was in fact harmless). In domestic laws and the literature there is therefore a tendency to adopt a 'mixed approach' combining subjective and objective parameters, as expressed by references to 'reasonable cause' for the apprehension of the harm,[11] or the existence of a threat which a 'person of reasonable firmness would have been unable to resist',[12] or the position of a 'reasonable observer from the social circle of the acting person who has the benefit of the special knowledge' of the defendant.[13] In *Ongwen*, it would be simplistic to dismiss any belief eg in Kony's 'supernatural' knowledge of Ongwen's conduct: if a credible case is made that the Accused's peer group was influenced by such beliefs, it would be appropriate to assume that, to someone in the position of the Accused, the threat appeared real enough.

7. The Trial Chamber's observation that 'imminent' in Art. 31(1)(d) has to refer to harm and not threat, was criticised by the Defence.[14] It is true that in courts and in the literature, 'threat' and 'harm' are in this context often used interchangeably.[15] The possibility of a neat differentiation is indeed doubtful; not least because 'threat' implies the prospect of harmful consequences. The Trial Chamber appears to have made that distinction to emphasise that the harm has to materialise 'sufficiently soon'.[16] That, too, invites critique. 'Imminent' is not the same as 'immediate': the Oxford English Dictionary thus provides as a meaning of 'imminent' the phrase 'hanging over one's head'.[17] The very matter had been discussed in the Court of Appeals (England and Wales) which noted that 'imminent peril of death or serious injury had to operate on the defendant', but that 'the execution of the threat need not be immediately in prospect'.[18] In German criminal law, 'Dauergefahr' ('continuous danger') has been accepted as sufficiently characterising the 'present danger' required for duress under the German criminal code: it is a situation in which such a danger can materialise at any time.[19]

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[10] See, eg, Criminal Code Act (Nigeria), s. 32. Similarly also BGHSt 4 StR 352/88 (15 September 1988), II. 1, however, with the operative word 'danger' (rather than 'threat').
[11] See Indian Penal Code, s. 94
[12] American Model Penal Code (1962), 2.09 (1).
[13] Friedrich Schaffstein, 'Der Maßstab für das Gefahrurteil beim rechtfertigenden Notstand', in Festschrift für Hans-Jürgen Bruns zum 70. Geburtstag (Heymanns 1978). 101 et seq. [tr].
[14] See TC Judgment 2582 and *The Prosecutor v Dominic Ongwen*, Defence Appeal Brief (19 October 2021) para 500 ('Appeal Brief').
[15] See Erkki Hirsnik; Marje Allikmets, 'Restraining at Care Institutions, Evaluated from the Standpoint of Penal Law' 27 (2018) *Juridica International* 147; *R. v. Hudson, R. v. Taylor* (C.A.) 1971, 206 (England); BGHSt 1 StR 483/02, Judgment of 25 March 2003 (*'Haustyrannenmord'*), at B.II.4.a.aa (Germany).
[16] TC Judgment, para 2582.
[17] OED, 'imminent, adj'.
[18] *R v Safi (Ahmed)* [2004] 1 Cr. App. R. 14 at 167 (with reference to *R v Abdul-Hussain* [1998].
[19] BGHSt 1 StR 74/79, Judgment of 15 May 1979 (*'Spannerfall'*) at I.1.c.aa. (Germany) at I.1.c.aa.

8. In the same context, the Trial Chamber also rejects a 'merely abstract danger' or 'elevated probability that a dangerous situation might occur' as sufficient. A literal interpretation of Art. 31(1)(d) does not yield that result, and a *favor rei* construction would rather militate in favour of including threats which were 'hanging over the head' of the defendant even if specific details were not conclusively identified. The assumption of a threat to life appears not unjustified if such a threat has materialised in the past for other members of the group when, for instance, orders had not been carried out.

9. Since the Trial Chamber denied the existence of a situation of duress, it did not consider the remaining elements of the defence.[20] It is, however, at that stage that particular difficulties materialise: it is questionable whether the Accused had acted 'necessarily and reasonably' to avoid the threat; the required balancing exercise and the subjective element are likewise not free from doubt.

1.3 Mental Disease or Defect (Art. 31(1)(a) ICCSt)

10. The severity of mental disease or defect appeared to be of relevance to the Trial Chamber.[21] The equivalent defence in some national laws does indeed contain a list of conditions that qualify in this regard,[22] but that does not always mean that a medically recognised condition is required:[23] the German courts, for instance, accepted states of exhaustion and overtiredness as qualifying for the 'profound disturbance of consciousness' to which German criminal law refers.[24] 'Mental disease or defect' is similarly wide: the relevant mental state borrows its significance not from a pathological character, but from the fact that such disease or defect has to lead to the destruction of a relevant capacity.

11. The significance of functionality has to be evaluated in the same context. The Trial Chamber noted that actions involving 'careful planning of complex operations' were 'incompatible with a

[20] TC Judgment, para 2585.
[21] TC Judgment, paras 2491, 2494, 2498, 2499.
[22] See Article 122-1 of the French Penal Code; Art. 121(1) of the Russian Criminal Code; s. 20 German Criminal Code (StGB).
[23] But see, for an example to the contrary, s. 2(1)(a) of the Homicide Act 1957 (England).
[24] See Schönke-Schröder-Lenckner, *Strafgesetzbuch. Kommentar* (Munich 1985) 259, § 20, marg 13.

mental disorder',[25] a view that has some support in the literature.[26] Yet the observation that mental disorder is 'incompatible' with military planning appears doubtful. History knows of military leaders whose mental state may have been questioned in some regards while their capacity for military planning was still intact: Sherman apparently suffered from depression,[27] Blücher from delusions,[28] General Patten believed that he had in another life served in Napoleon's cavalry and was described by Field Marshal Alan Brooke as an 'unbalanced leader'.[29] Functionality may well be compatible with mental abnormality; the question whether it is also compatible with the destruction of the relevant capacities is a different one. In that regard, the careful planning of campaigns (involving eg the anticipation of realistically foreseeable enemy action) may indeed make the simultaneous lack at least of the capacity to appreciate the nature of one's conduct less likely.

12. Where persons had been recruited as child soldiers, questions about the impact of the relevant traumatic experiences on their mental state have been discussed in the literature. The existence of difficult mental conditions in these cases is likely: in a 2004 study, 69 of 71 persons who had previously been abducted by the LRA reported 'PTSD reactions with clinical significance'.[30] Souris observes that former child soldiers apply moral concepts 'consistent with the notions of right and wrong' accepted inside the relevant armed groups,[31] and notes that it would be reasonable to expect that in adults who had been recruited as children, indoctrination 'has given rise to settled beliefs'.[32] These are persuasive arguments. The legal requirements for the defence, however, are narrower: what matters, is not the inability to appreciate 'moral wrongfulness', but to understand that certain acts violate international law. Where this capacity is concerned, other aspects gain relevance, such as the fact that divisions on points of policy existed even within the LRA[33] and the fact that LRA commanders were not entirely cut off from the outside world and made use of advanced technology including satellite telephones.[34] At least where higher commanders are concerned, it strains belief that they would not have had the

[25] Trial Judgment, para 2521.
[26] Massimo Scaliotti, 'Defences before the International Criminal Court: Substantive Grounds for Excluding Criminal Responsibility – Part 2,' 2:1 (2002) *International Criminal Law Review* 26.
[27] Michael Fellman, 'Why the future general […]', *The New York Times Blogs*, 9 November 2011.
[28] *Der Spiegel*, 'Narren und Nulpen', 16 April 1995.
[29] *Herald (Scotland)*, 'The Madness of General George', 6 February 2005.
[30] Renee Nicole Souris, 'Child Soldiering on Trial: An Interdisciplinary Analysis of Responsibility in the Lord's Resistance Army' 13 (2017) *International Journal of Law in Context* 323.
[31] Souris (n 30) 323.
[32] Ibid 330.
[33] See TC Judgment, paras 2609 – 2618.
[34] Alexis C. Madrigal, 'How a Ugandan Rebel Group Uses Technology', *The Atlantic*, 1 November 2010.

capacity to understand that acts such as attacks against the civilian population violated international law or that such capacity was destroyed by being in the LRA.

13. Where evidence for the destruction of such capacity is introduced, burden and standard of proof are those outlined for affirmative defences above: the burden is on the Defence, but it is discharged as soon as reasonable doubt is established.

14. The question whether persons who were around the Accused should have noticed symptoms of mental disorders[35] illustrates that point. For the concept of 'mental disease or defect', it is not only possible that such conditions go undetected, but there are indications that domestic legal systems are increasingly aware of this phenomenon.[36] Yet if neither the Accused's conduct at the material times nor observations by those around him offer indications that mental disease or defect may have existed, the conclusion suggest itself that the Defence failed to discharge its burden. While it is notoriously difficult to define 'reasonable doubt',[37] the concept requires, as a very minimum, the existence of *some* grounds on whose basis incriminating evidence can be doubted. Where that is missing, the Defence's case amounts to little more than speculation.

2. Sexual and Gender-Based Crimes

2.1 Forced Marriage (Art. 7(1)(k) ICCSt)

15. The fact that 'forced marriage' was considered under 'other inhumane acts' (Art. 7(1)(k))[38] raises questions relating to the foreseeability of the crime. Apart from human rights instruments recognising the right to enter into marriage only with free consent,[39] the 1956 Supplementary Slavery Convention already made reference to a category of forced marriage among practices which State parties resolved to abolish 'whether or not they are covered by the definition of slavery' of the 1926 Slavery Convention;[40] and in 2001, the ICTY in *Kvočka* found that 'sexual violence' (considered under persecution), would also include crimes such as forced marriage.[41] Taken together, these materials leave little doubt that foreseeability existed by 2002.

[35] See Trial Chamber Judgment, para 2556. See also ibid, paras 2498, 2545.
[36] See Emily Goddard, 'Thousands on community sentences "have undetected mental health problems"', *Independent*, 28 January 2019.
[37] See on this Henry A. Diamond, 'Reasonable Doubt: To Define, Or Not To Define' 90:6 (1990) *Columbia Law Review* 1716.
[38] See TC Judgment, paras 3026, 3071.
[39] Art 16 Universal Declaration of Human Rights (1948), Art 16(1)(b) Convention on the Elimination of All Forms of Discrimination Against Women (1979).
[40] Art. 1(c)(i) Supplementary Slavery Convention 1956.
[41] ICTY IT-98-30/1-T, *Prosecutor v Kvočka et al*, Trial Judgment 2 November 2001, para 180, fn 343.

16. As an 'other inhumane act', forced marriage also has to be 'of a character similar' to any enumerated act in Art. 7(1).[42] It is illuminating in that regard that the underlying conduct of the crime can also fulfil elements of the crime against humanity of persecution, which requires, as one of its core elements, a severe deprivation of the victim's fundamental rights.[43] In light of the importance of the human right to be married only with consent,[44] it is clear that forced marriage will regularly satisfy this requirement, and the denial of marriage rights has indeed been accepted as falling under persecution.[45] 'Similarity' further requires that the 'similar character' has to refer to the 'nature and gravity of the act',[46] a condition whose fulfilment the Defence doubts.[47] Where such concerns had previously been raised, they often related to the view that 'consent' to marriage was not always a 'core value' in traditional cultures and frequently missing in cases of arranged marriages.[48] Forced marriage, however, goes further: the participation of the victim's family is frequently excluded;[49] the marriage itself is typically conducted in a climate of fear,[50] underlining the gravity of the act. If, as seems appropriate, the definition of 'forced marriage' provided by the SCSL Appeals Chamber is followed,[51] the consequence of 'severe suffering, or physical, mental or psychological injury to the victim' is part of the concept of the crime and the remaining element of 'other inhumane acts' is *ipso facto* fulfilled.

17. On the relationship between forced marriage and sexual slavery,[52] diverging opinions are advanced, with the SCSL Trial Chamber in Brima finding that the Prosecution's evidence was 'completely subsumed' by sexual slavery and that there was 'no lacuna […] which would necessitate a separate crime of "forced marriage"[…]'.[53] It is not a convincing observation. If anything, 'sexual slavery' requires the perpetrator to cause the victim 'to engage in one or more

[42] Art. 7(1)(k) ICCSt; Elements of Crimes (EoC), Art. 7(1)(k) at 2.
[43] Art. 7(1)(h) ICCSt; EoC, Art. 7(1)(h) at 1.
[44] See above para 15.
[45] ICTY *Kvočka* (n 41) para 186.
[46] EoC Art. 7(1)(k), fn 30.
[47] ICC-02/04-01/15, *Prosecutor v Dominic Ongwen*, Defence Request for Leave to Appeal (29 March 2016) para 41. [*Ongwen* Leave to Appeal]
[48] Case No 002/19-09-2007/ECCC/TC, ICL 1901, *Co-Prosecutors v Nuon (Chea) and Khieu (Samphan),* Judgment, 16 November 2018, para 748 (with reference to the Khieu Samphan Defence) ['Case 002/02 Trial Judgment'].
[49] SCSL, Trial Chamber, *AFRC Case, Prosecutor v Brima (Alex Tamba)* and ors, Judgment, 20 June 2007, Partly Dissenting Opinion, Judge Teresa Doherty, para 27 ['Doherty Opinion'].
[50] Case 002/02 Trial Judgment, para 40.
[51] SCSL, SCSL-2004-16-A, ICL 669 Appeals Chamber, *AFRC Case, Prosecutor v Brima (Alex Tamba) and ors*, Appeal judgment 22 February 2008, para 196.
[52] *Ongwen* Leave to Appeal, para 41.
[53] SCSL, SCSL-04-16-T, SCSL-04-16-T-613, ICL 100, Trial Chamber, *AFRC Case, Prosecutor v Brima (Alex Tamba) and ors*, Judgment 20 June 2007, para 713 ['*Brima* (Trial Judgment)']

acts of a sexual nature',[54] and this is not a necessary part of 'forced marriage'.[55] Forced marriage on the other hand carries an element that is not usually found in cases of sexual slavery: the perpetrator creates a particular situation of helplessness through (ab)use of the concept of marriage which traditionally obtains societal approval and carries positive connotations. He thus proceeds through the arrogation of a normative, rather than merely factual reality – a claim which is absent from many situations of modern slavery. These considerations also mean that forced marriage fulfils the requirements of 'fair labelling':[56] it is the appropriate designation for the relevant conduct, and the conviction of its perpetrators takes into account the specific suffering that its victims had to endure.

2.2 Sexual Slavery (Art. 7(1)(g) ICCSt)

18. The Defence asserts that orders had been issued 'that girls should be distributed to men' and that such distribution could not be challenged.[57] Sexual slavery requires the exercise of 'any or all of the powers attaching to the right of ownership';[58] and the question arises whether such exercise can be assumed where the powers were imposed on the perpetrator and where he could not avail himself of all of them (eg, if he was barred from passing the victim on to another 'owner').[59] However, such a limited construction is not warranted by the EoC, which let the exercise of 'any or all' of these powers suffice.[60] Neither the 'distribution' of women and girls to Ongwen nor an asserted inability to 'pass the victims on' thus defeats a finding that the exercise of the powers had taken place.

2.3 Forced Pregnancy (Art. 7(1)(g) ICCSt; Art. 7(2)(f) ICCSt)

19. On forced pregnancy, the Defence asserts that the Trial Chamber had to assess whether its interpretation of the crime affects abortion laws of Uganda.[61] Markovic, similarly, observed that 'the ICC seems obliged to consider whether suspects have violated their own nation's abortion laws' and that Art. 7(2)(f) suggests that if the crime occurs in a State which bans

[54] EoC Art. 7(1)(g)-2, at 2.
[55] Doherty Opinion, para. 52.
[56] See also Hilmi M. Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (Oxford 2013), 33 – 35.
[57] *The Prosecutor v Dominic Ongwen*, Defence Closing Brief (13 March 2020), para 475; see also Appeal Brief, para 683.
[58] EoC Art. 7(1)(g)-2, at 1.
[59] Compare, in that regard *Brima* (Trial Judgment), para 711.
[60] EoC Art. 7(1)(g)-2, at 1. See also ICTY (IT-96-23 & 23/1), *Prosecutor v Dragoljub Kunarac et al*., Trial Chamber Judgment, 22 February 2001, para 543 for the range of powers considered.
[61] Appeal Brief, para 962.

abortion and where confinement does not violate domestic law, 'it will be impossible for the ICC to prosecute' it.[62] Yet such a reading risks bringing forced pregnancy close to legislative restrictions on abortion without giving sufficient weight to the other elements which distinguish it. The element of confinement, for one, has been given the limited intepretation of a restriction 'contrary to the standards of international law',[63] and there are other elements which set the crime apart from abortion laws: apart from the contextual element, the victim must have been 'forcibly made pregnant', and a specific intent requirement applies to the element of confinement.[64]

20. Beyond that, it is difficult to read into the ICCSt authority for such an impact assessment. It would also invite worrying consequences: perpetrators from States with strict abortion laws would be privileged over those from States whose laws permit abortion; it is only in the latter case that the ICC would be able to proceed.[65] No such interpretation is apparent from the ICCSt.

21. The Defence's objection to the Trial Chamber's reference to the crime being 'grounded in the woman's right to personal and reproductive autonomy and the right to family'[66] is relevant if it impacts on a particular element of the crime. That is the case if these rights had been used to interpret the second alternative of specific intent.[67] But the Trial Chamber did not use the stated rationale of the law in explanation of intent: on the contrary, it explained that it saw that element fulfilled through the intent 'of sustaining the continued commission of other crimes found'.[68] In light of the paragraphs following the explanation of the perceived rationale,[69] it appears that the reference to the reasons behind the law constitutes little more than an obiter dictum.

2.4 Evidentiary Issues on sexual and gender-based crimes ('SGBC')

22. The question arises whether the assessment of evidence for SGBC should be subject to specific rules – for instance, in situations in which the particular trauma witnesses suffered may have affected the consistency of testimony. In their 2019 Report for the Canadian Department

[62] Milan Markovic, 'Vessels of Reproduction: Forced Pregnancy and the ICC,' 16:2 (2007) *Michigan State Journal of International Law* 439-458.
[63] TC Judgment, para 2724.
[64] EoC, Art. 7(1)(g)-4, at 1.
[65] Markovic (n 62) 448.
[66] TC Judgment, para 2717.
[67] See para 21 above.
[68] TC Judgment, para 3061.
[69] See in particular TC Judgment, paras 2718, 2720, 2721.

of Justice, Haskell and Randall pointed out that 'stress and fear of the traumatic events' may influence the recall of particular events and noted that it was 'neither realistic, nor rational' to expect such victims to recall traumatic experiences 'with detailed accuracy from start to finish'.[70] On the other hand, in *Kajelijeli*, the ICTR placed particular weight on inconsistencies in evidence provided by a witness who testified about the rape of her daughter and took this as a basis for reasonable doubt as to the Accused's presence at the scene.[71]

23. Similar difficulties arise where the impact of emotional intensity on witness testimony is to be assessed – a point which also featured in *Kajelijeli*,[72] and which Haskell and Randall underline as well, noting that 'the primary emphasis' of a 'sexual assault police interview should […] be on the 'emotional memories that the victim has encoded', rather than expecting 'a narrative with a chronology.'[73] Yet here, too, opinions are divided: a 2018 study conducted among 240 memory experts showed divergence on the relationship between emotional experiences and memory, with experts split on the question whether emotional experiences were more accurately remembered than neutral ones.[74] Nor are traumatic experiences confined to victims of sexual crimes – the testimony for instance of children who have to recount experiences of torture can certainly be expected to be subject to similar considerations as those applying to the victims of sexual violence.

24. In light of these considerations, it does not appear indicated to vary burden or standard of proof for SGBC. At the same time, SGBC invite a sensitivity towards the traumatic nature of the experiences which witnesses are asked to recount, and can lead to a reassessment of inconsistencies on the basis of a holistic appreciation of the evidence. The result is not a departure from the standard of proof; but a detailed examination as to whether minor inconsistencies can be considered sufficient to constitute doubt of a level of 'reasonableness' that allows the wholesale dismissal of the remaining testimony, even if, in general, it proves to be coherent and accurate.

[70] Lori Haskell and Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims* (2019) 23.
[71] ICTR-98-44A-T, *The Prosecutor v Juvénal Kajelijeli*, Trial Chamber Judgment, 1 December 2003, para 680.
[72] Ibid.
[73] Haskell and Randall (n 70) 22.
[74] Shazia Akhtar et al, 'The "common sense" memory belief system and its implications', 22:3 (2018) *The International Journal of Evidence and Proof* 295, 296.

25. Three matters on which the Defence, in the context of forced pregnancy, asserts that the Trial Chamber disregarded certain evidence 'which raised reasonable doubt or was favourable to the Appellant',[75] illustrate the difficulties which the assessment of SGBC evidence causes.

26. The question as to who had control over the 'distribution' of women and girls generated significant debate between Prosecution and Defence.[76] Since witnesses gave differing testimony, inconsistency in the evidence seems to exist, and it is also true that the Trial Chamber dismissed testimony suggesting that exclusive authority lay with Kony rather than with commanders. It did, however, provide reasons, noting, eg, that one of the witnesses did not provide 'satisfactory explanation' for the basis of his knowledge about the punishment of an LRA member who 'distributed' girls without Kony's agreement.[77] In light of this, it appears that it did not deviate from standards expected of a reasonable trier of fact. Yet even if exclusive authority by Kony were accepted, it would be difficult to find that this affected the legal assessment. The relevant part of the actus reus is the confinement of the victim. How the confinement came about, is not of direct pertinence to that question.

27. The maintenance of such confinement – especially the guarding of victims – is of greater relevance. In this regard, P-0214's statement that the security guards were 'unarmed'[78] seems to introduce a contradiction to her earlier statement that the security guards were 'all armed'.[79] At the same time, P-0214 did go on to clarify at trial that the guards would take up their weapons when they had to go somewhere,[80] and that they had sticks at their disposal to give force to Ongwen's intentions, including those relating to the commission of sexual acts against the victim.[81] The Trial Chamber's observation that the women 'distributed' to Ongwen were placed under 'heavy guard'[82] would have required better substantiation: on this particular point, P-0214's evidence creates reasonable doubt that had to be resolved in favour of the defendant. However, since this question relates merely to a particular form of equipment, it is not decisive for 'confinement' as such. P-0214 made clear that the guards were 'always present',[83] that they scared her with their sticks,[84] that she obeyed Ongwen because of the security guards[85] and that

[75] Appeals Brief, para 959.
[76] TC Judgment, para 2156.
[77] Ibid, para 2166. See also ibid, paras 2167; 2159; 2169; 2170.
[78] See Appeals Brief, para 949, at fn 1222, Transcript, 11 Nov 2015, Witness UGA-OTP-P-0214, 26:3..
[79] Transcript, 11 Nov 2015, Witness UGA-OTP-P-0214, 26:12.
[80] Ibid, Witness UGA-OTP-P-0214, 26:5-6.
[81] Ibid,Witness UGA-OTP-P-0214, 22:11, 19; 24: 2 and 12-13.
[82] TC Judgment, paras 206, see also para 3023 with particular reference to P-0214.
[83] Transcript, 11 Nov 2015, Witness UGA-OTP-P-0214, 25:25.
[84] Ibid, Witness UGA-OTP-P-0214, 22:11 and 24:12-13.
[85] Ibid, 22:19 and 24:2.

she could not escape as the security guards guarded her well.[86] In light of that, P-0214's confinement is not subject to reasonable doubt.

28. The question of the witnesses' freedom of movement would have been of direct relevance to the element of confinement. Yet the relevant parts of the transcripts are not supportive of the Defence's case. Neither the observation that Ongwen 'sent all the mothers home'[87] nor his alleged promise that he would 'eventually' take a witness 'back home'[88] create a genuine contradiction to the evidence against him which indicates that attempting to escape was not possible;[89] it rather supports that case, as it indicates that the victims were not able to get home on their own and that their fate was dependent on Ongwen.

3. Cumulative Convictions

3.1 General Considerations

29. The question whether *ne bis in idem* (Art. 20) has an impact on cumulative convictions, has not received uniform treatment. The ICTR in *Akayesu* raised the possibility that such an impact existed;[90] and in *Katanga*, the ICC Trial Chamber did apply the principle to the question whether multiple convictions were permissible.[91] That is not undisputed: in *Bemba*, the ICC Appeals Chamber distinguished Art. 20(1) from situations in which 'at the end of the trial', multiple convictions for the same conduct were entered.[92] The literal interpretation of Art. 20 does not appear to favour the Defence's arguments: in instances of multiple convictions at the conclusion of a court case, the Accused is not being 'tried' following a conviction or acquittal by the court.

30. It is, in principle, possible that *ne bis in idem* enjoys wider scope under customary international law. Yet consistency of State practice in this regard is difficult to establish: while

[86] Ibid, 26:8-16.
[87] Appeals Brief, para 951, Transcript 11 Nov 2015, Witness UGA-OTP-P-0214, 30:24.
[88] Appeals Brief, para 949, Transcript, 11 Nov 2015, Witness UGA-OTP-P-0214, 25:13-14.
[89] See Transcript 11 Nov 2015, Witness UGA-OTP-P-0214, 28:15-18.
[90] ICTR-96-4-T, *The Prosecutor v Jean-Paul Akayesu*, Trial Chamber, Judgment, 2 November 1998, para. 462 (*Akayesu* (Trial Chamber)).
[91] ICC-01/04-01/07, *The Prosecutor v Germain Katanga*, Trial Chamber, Judgment 7 March 2014, para 1694 (*Katanga* (Trial Chamber)).
[92] ICC-01/05-01/13 A A2 A3 A4 A5, *The Prosecutor v Jean-Pierre Bemba Gombo et al*, Appeals Chamber, Judgment, 8 March 2018, para 748 (*Bemba* (Appeals Chamber))

some States appear to apply *ne bis in idem* to cumulative charges,[93] others are more critical in that regard, with the US Supreme Court, for instance, finding that the double jeopardy rule prohibited '*successive* prosecutions for the same criminal act'.[94] In 2009, the European Court of Human Rights adopted a similar view when it found that the aim of *ne bis in idem* was to 'prohibit the repetition of criminal proceedings that have been concluded' by a decision which had the force of *res judicata*.[95] The divergence of opinions, however, has limited effect on the consequences: where the applicability of *ne bis in idem* is supported, multiple convictions are often still allowed if the commission of 'distinct offences' through the same conduct can be established,[96] and thus the results do not appear to differ from the standard accepted by those who reject the applicability of the principle.[97]

31. The rule stipulated by the *Delalic* Appeals Chamber appears to be an accurate reading of the law: multiple convictions can be entered based on the same conduct if 'each statutory provision involved has a materially distinct element not contained in the other'.[98] Where this requirement is not fulfilled, there is room for the possibility that one offence may be completely embraced by another,[99] so that under the principle of speciality a conviction can only be entered for the more specific one.

3.2 Specific Issues of Concurrences

32. The above mentioned standards allow for a reflection on the individual concurrences which the Trial Chamber considered.[100]

33. With regard to crimes against humanity and analogous war crimes, there is no relationship of speciality:[101] the contextual element distinguishes both categories. There is reason to view this element to be of more than 'jurisdictional' relevance: the link to the perpetrator's conduct is

[93] See Portugal Informal Note on Concurrences of Offenses 3, at https://www.legal-tools.org/doc/114bb2/pdf/
[94] US Supreme Court, *Grady v. Corbin*, p 495 US 510 (emphasis added); see also Spanish Supreme Court, Sala Segunda, de lo Penal, Sentencia 1493/1999 de 21 Dic. 1999, Rec. 1174/1998. Cf Hong S Wills, 'Cumulative Convictions and the Double Jeopardy Rule: Pursuing Justice at the ICTY and the ICTR' 17 (2003) *Emory Int'l L Rev* 376.
[95] European Court of Human Rights (Grand Chamber), *Zolotukhin v Russia* (Application no 14939/03), Judgment 10 February 2009, para 107.
[96] See *Katanga* (Trial Chamber) para 1694;
[97] See *Bemba* (Appeals Chamber), para. 748.
[98] IT-96-21-A, *Prosecutor v. Delalić et al*, AC Judgment, 20 February 2001, paras. 412-13.
[99] Ibid, paras. 412-13. See also *Bemba* (Appeals Chamber), para 751.
[100] See TC Judgment, para 2797.
[101] See *Akayesu* (Trial Chamber), para 470.

made clear through the inclusion of the accompanying subjective element.[102] For the same reasons, rape under Article 7(1)(g) and under Article 8(2)(e)(vi) leads to permissible concurrences.

34. Torture and cruel treatment under Article 8(2)(c)(i) ICCSt,[103] on the other hand, are distinguished only through the purposive element of torture.[104] Torture therefore is more specific; and convictions for both crimes would be impermissible.[105] The same applies to the relationship between torture under Art. 7(1)(f) and 'other inhumane acts' (Art. 7(1)(k) where the 'other acts' refer to severe physical mistreatment.[106] The same conduct will, if the additional requirements are fulfilled,[107] also qualify as torture, allowing for only one conviction: by its very definition, torture completely embraces the other act.

35. Enslavement (Art. 7(1)(c) ICCSt) and sexual slavery (Art. 7(1)(g) ICCSt)[108] are also in a relationship of speciality: the only additional element for sexual slavery is that the perpetrator caused the victim to 'engage in one or more acts of a sexual nature'.[109] Convictions for both crimes for the same conduct would thus not be permissible.

36. Rape and sexual slavery,[110] however, have distinctive characters. Sexual slavery contains the exercise of powers attaching to the right of ownership;[111] rape requires the invasion of the body and the existence of a coercive element.[112] Both crimes thus contain an element that is materially distinct from the other, leading to permissible concurrences.

Dr Paul Behrens

Dated this 23rd day of December, 2021

At Birmingham, England (UK)

[102] See EoC, Art. 7 and EoC, Art. 8, the last element of each alternative.
[103] TC Judgment, para 2797.
[104] EoC, Art. 8(2)(c)(i)-4 at 2.
[105] See also ICTY IT-03-66-T, *Prosecutor v Limaj et al*., Trial Chamber Judgment 30 November 2005, para. 719.
[106] See IT-94-1-T *Prosecutor v Tadić,* Trial Chamber Judgment 7 May 1997, paras 737, 744, 754, 764.
[107] EoC, Art. 7(1)(f), at 1.
[108] See TC Judgment, para 2797.
[109] EoC Art. 7(1)(g)-2, at 2.
[110] Either under EoC Art. 7(1)(g)-1 and Art. 7(1)(g)-2 or under EoC Art. 8(2)(e)(vi)-1 and Art. 8(2)(e)(vi)-2.
[111] Art. 8(2)(e)(vi)-2 at 1; Art. 7(1)(g)-2 at 1.
[112] Art. 8(2)(e)(vi)-1 at 1 and 2; Art. 7(1)(g)-1 at 1 and 2.