

1 International Criminal Court
2 Appeals Chamber
3 Situation: Republic of Uganda
4 In the case of The Prosecutor v. Dominic Ongwen - ICC-02/04-01/15
5 Presiding Judge Luz del Carmen Ibáñez Carranza, Judge Piotr Hofmański,
6 Judge Solomy Balungi Bossa, Judge Reine Alapini-Gansou and
7 Judge Gocha Lordkipanidze
8 Appeals Chamber Judgment (Conviction) - Courtroom 3
9 Thursday, 15 December 2022
10 (The hearing starts in open session at 11.35 a.m.)
11 THE COURT USHER: [11:35:00] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:36:17] Good morning, *bonjour à tous*.
15 Could the court officer please call the case.
16 THE COURT OFFICER: [11:36:41] Thank you, Madam President.
17 The situation in Uganda, in the case of The Prosecutor versus Dominic Ongwen,
18 case reference ICC-02/04-01/15.
19 And for the record, we are in open session.
20 PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:36:57] My name is Judge Luz
21 del Carmen Ibáñez Carranza. I am the Presiding Judge in the appeals arising from
22 the case The Prosecutor versus Dominic Ongwen. My fellow judges comprising the
23 full Bench in this appeal are Judge Piotr Hofmański, Judge Solomy Balungi Bossa,
24 Judge Reine Alapini-Gansou and Judge Gocha Lordkipanidze.
25 The hearing will be held in the presence of four of the judges of the Bench due to

1 unexpected health issues of Judge Piotr Hofmański, who is unable to join us today.

2 Nevertheless, the full Bench has unanimously decided in the interest of justice and the
3 interest of the parties to proceed with the delivery of its judgment as scheduled.

4 May I ask the parties and participants to introduce themselves for the record, please,
5 starting with the Defence.

6 MR TAKU: [11:38:05] Good morning, your Honours. My name is Chief Charles

7 Achaleke Taku, appearing today with Thomas Obhof, who is present here;

8 Gordon Kifudde, who is present; remotely, my distinguished friend Beth Lyons,

9 Abigail Bridgman, and Morganne Ashley. And Mr Ongwen is present in court, your

10 Honours.

11 PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:38:37] Thank you.

12 The Office of the Prosecutor, please.

13 MR NIANG: [11:38:41] (Microphone not activated)

14 THE INTERPRETER: [11:38:45] Microphone, please.

15 MR NIANG: [11:38:52] (Interpretation) Represented today -- the Office of the

16 Prosecutor is represented today by myself, Mame Niang, I am a senior Prosecutor.

17 And I have Helen Brady with me also, Prosecutor, Reinhold Gallmetzer,

18 George Mugwanya, Priya Narayanan, Matthew Cross, Matteo Costi, Nivedha Thiru.

19 Now, as regards those who actually presented the case, Ms Meritxell Regué was on

20 that team and she would like to express her apologies for not being able to attend

21 today.

22 Now, your Honour, I would like to take advantage of this opportunity also to greet

23 the Defence, Mr Taku, notably, who has been a colleague at the international courts

24 and tribunals for some 20 years now. I would like to greet the representatives for the

25 victims.

1 PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:40:13] Thank you very much.

2 Now the Legal Representatives of Victims, please.

3 MS MASSIDDA: [11:40:19] Good morning, Madam President, your Honours. In
4 this proceeding victims are represented in two groups. I am the Common Legal
5 Representative, my name is Paolina Massidda and I am the only one attending the
6 hearing for the team of the Common Legal Representative.

7 MR COX: [11:40:40] Good morning, Madam President, your Honours. With me in
8 court, James Mawira, Joseph Manoba from Kampala, Atto Listowel from Gulu, and
9 Priscilla Aling from Kampala. And myself, Francisco Cox.

10 PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:40:54] Thank you very much.

11 And for the record, I note that Mr Ongwen is also present in the courtroom.

12 The Appeals Chamber is delivering its judgment today on the appeal of Mr Ongwen
13 against the decision of Trial Chamber IX on 4 February 2021 by which he was
14 convicted of 61 crimes comprising war crimes and crimes against humanity. I will
15 refer to this decision on the Trial Chamber as the Conviction Decision.

16 Before summarising the Appeals Chamber's findings on the appeal against the
17 Conviction Decision, please note that only the written judgment, and not this
18 summary, is authoritative. The judgment will be notified to the parties and
19 participants shortly after this hearing.

20 I will now begin with a brief account of the procedural background of this appeal.

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

25 As noted by the Trial Chamber, while the evidence presented during the trial and the

1 factual findings made in the Conviction Decision focussed on events which took place
2 in Northern Uganda between 1 July 2002 and 31 December 2005, the LRA had been
3 active since the 1980s, and the related conflict in Northern Uganda has spanned over
4 four decades.

5 The LRA, including Mr Ongwen, perceived the civilians living in Northern Uganda as
6 being associated with the government of Uganda, in particular those who lived in the
7 government established internally displaced persons camps (hereinafter: "IDP
8 camps"). The IDP camps were the result of an anti-insurgency strategy adopted by
9 the Ugandan government to remove the population from rural areas where it might
10 assist the rebels. A significant number of crimes committed by the accused relate to
11 attacks carried out against some of these camps, in particular, the Lukodi, Abok,
12 Pajule and Odek IDP camps.

13 As acknowledged by the Trial Chamber, Mr Ongwen himself was abducted by the
14 LRA in 1987 as a young child and experienced much suffering in his childhood and
15 youth. However, based on the charges, the Trial Chamber focussed on crimes
16 committed by Mr Ongwen as an adult and as a battalion commander of the Sinia
17 brigade in the LRA.

18 On 4 February 2021, Mr Ongwen was found criminally responsible and convicted of
19 61 crimes, comprising both crimes against humanity and war crimes. In particular,
20 he was found responsible as an indirect perpetrator of crimes committed in the
21 context of the attacks carried out on the Lukodi IDP camp on or about 19 May 2004
22 and the Abok IDP camp on or about 8 June 2004. He was also found criminally
23 responsible as an indirect co-perpetrator of crimes committed in the context of the
24 attacks on the Pajule IDP camp on or about 10 October 2003 and the Odek IDP camp
25 on or about 29 April 2004.

1 The crimes committed within these four attacks included attacks against the civilian
2 population, murder, torture, enslavement, pillaging, destruction of property and
3 persecution. Mr Ongwen was also convicted as an indirect co-perpetrator for sexual
4 and gender-based crimes (including the crimes of forced marriage as a form of other
5 inhumane acts, torture, rape, sexual slavery and enslavement) and the crime of
6 conscription of children under the age 15 years and their use in armed hostilities.
7 Furthermore, Mr Ongwen was found to be criminally responsible as a direct
8 perpetrator of a number of sexual and gender-based crimes (including the crimes of
9 forced marriage as a form of other inhumane acts, torture, rape, sexual slavery,
10 enslavement, forced pregnancy and outrages upon personal dignity).
11 For these crimes, the Trial Chamber imposed a joint sentence of 25 years of
12 imprisonment.

13 On 21 May 2021, the Defence filed its notice of appeal and on 21 July 2021, its appeal
14 brief.

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

19 The present appeal contains novel and at times complex issues, which the Appeals
20 Chamber has been required to address for the first time. These include the
21 assessment of grounds of excluding criminal responsibility (namely, the affirmative
22 defences of mental disease or defect and duress) and the interpretation of the
23 elements of certain sexual and gender-based crimes, in particular forced marriage and
24 forced pregnancy.

25 Furthermore, this case concerns an accused person who was abducted by the LRA at

1 the age of nine years, indoctrinated, trained and forced to carry out and participate in
2 criminal acts in the LRA. Mr Ongwen's abduction as a young child and his early
3 years spent in the adverse and extremely violent environment of LRA brought to him
4 great suffering.

5 (Interpretation) The Appeals Chamber decided to invite 19 *amici curiae* to participate
6 in these proceedings in light of their expertise and high qualifications on some of the
7 novel issues arising in the appeal and in addition to the submissions which the
8 Chamber had received from the parties and the Legal Representative of the Victims.

9 At a hearing of the Appeals Chamber convened in February 2022, the parties and
10 participants, including certain invited *amici curiae*, were afforded an opportunity to
11 make oral submissions on the issues at stake.

12 (Speaks English) Considering the Defence's many grounds of appeal and taking into
13 account their presentation and the overlap between them, the Appeals Chamber has
14 decided to structure its analysis in its judgment and group the grounds of appeal as
15 follows:

16 The Appeals Chamber has first addressed the grounds of appeal raising a number of
17 alleged violations of Mr Ongwen's right to a fair trial and "other human rights
18 violations" and those challenging specific evidentiary assessments and findings made
19 by the Trial Chamber. It has then addressed the Defence's challenges to the Trial
20 Chamber's findings of Mr Ongwen's individual criminal responsibility as an indirect
21 perpetrator and as an indirect co-perpetrator with respect to the crimes committed
22 during the attacks carried out on the four IDP camps that were mentioned earlier, and
23 the crime of conscription of children under the age of 15.

24 The Appeals Chamber has then addressed the Defence's submissions related to the
25 Trial Chamber's findings concerning sexual and gender-based crimes, followed by

1 those concerning the grounds of excluding criminal responsibility, i.e. mental disease
2 or defect and duress, pursuant to Article 31(1)(a) and (d) of the Statute respectively.
3 Finally, the Defence's submissions concerning the issue of cumulative convictions are
4 addressed.

5 First, alleged errors concerning Mr Ongwen's right to a fair trial and "other human
6 rights violations" and other alleged evidentiary errors.

7 In the first part of its appeal brief, the Defence raises under several grounds of appeal
8 a number of alleged violations of Mr Ongwen's rights which, in its view, were
9 committed throughout the proceedings. In its submissions, these violations made a
10 fair trial impossible and resulted in the legitimacy of the judgment in this case being
11 compromised.

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

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

24 Under grounds of appeal 1 to 3, the Defence raises procedural, legal evidentiary
25 issues with respect to the Article 56 proceedings before the Single Judge of the

1 Pre-Trial Chamber. The purpose of these proceedings was to elicit testimony of
2 several witnesses in the context of a "unique investigative opportunity". With regard
3 to the main issue raised by the Defence concerning the propriety of the judge's
4 concurrent involvement in the taking of testimony under Article 56 of the Statute and
5 the conduct of confirmation proceedings, the Appeals Chamber finds that there is
6 nothing in the applicable law to suggest that a judge of the Pre-Trial Chamber who
7 has participated in a unique investigative opportunity should be excluded from
8 subsequent proceedings in the pre-trial phase. On the contrary, all these procedural
9 steps are part of the same pre-trial phase, of which the same Pre-Trial Chamber is in
10 charge.

11 Under its fourth ground of appeal, the Defence contends that Mr Ongwen's fair trial
12 rights were violated by the Trial Chamber's failure to ensure, pursuant to Article
13 64(8)(a) of the Statute, that he understood the nature of the charges against him and
14 proceeded to trial on an "illegal plea" of not guilty. The Defence asserts, inter alia,
15 the lack of a full Acholi translation of the confirmation decision at the time of the plea
16 contributed to his lack of understanding of the nature of the charges at the time of
17 entering a plea.

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

1 64(8)(a) of the Statute.

2 One of the main arguments raised under grounds of appeal 7, 8, 10 (in part), 25 and
3 45, concerns the alleged erroneous application of the burden and standard of proof
4 for grounds excluding Mr Ongwen's criminal liability. The Appeals Chamber finds
5 that in the absence of a specific provision in the Statute regulating the burden and the
6 standard of proof with respect to grounds excluding criminal responsibility, the
7 general provisions of Article 66 of the Statute apply. The Appeals Chamber
8 considers that, generally, the Prosecutor does not bear the burden per se to "disprove
9 each element" of a ground excluding an accused's criminal responsibility. However,
10 he or she must establish the guilt of the accused beyond reason doubt even when the
11 Defence alleges a ground for excluding criminal responsibility.

12 The Appeals Chamber also finds that when raising grounds purporting to exclude an
13 accused's criminal responsibility, it is not enough to merely give notice of such an
14 intention. The Defence must also present evidence to substantiate its allegations.
15 This so-called "evidentiary burden" on the part of the Defence does not equate to a
16 shift in the burden of proof as the Prosecutor is not absolved of his or her burden to
17 establish the elements of the crimes, such as the mental element, and the modes of
18 liability beyond reasonable doubt.

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

23 In this respect, the Appeals Chamber notes that the Trial Chamber in this case
24 considered the relevance and probative value of the evidence submitted at trial
25 holistically when deciding on Mr Ongwen's guilt or innocence. It was not per se

1 erroneous for the Trial Chamber not to include in the Conviction Decision evidentiary
2 rulings with respect to each item of evidence submitted at trial. However, the
3 Appeals Chamber notes that in light of the requirement of a reasoned statement
4 under Article 74(5) of the Statute, the Trial Chamber must explain with sufficient
5 clarity the basis of its determination.

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

14 The Defence has also raised other alleged evidentiary errors. For instance, errors in
15 the Trial Chamber's assessment of intercept evidence, grounds of appeal 60, 72 and 73.

16 In that regard, the Defence submits a number of arguments concerning the Trial
17 Chamber's assessment of intercept evidence. In particular, the Defence submits that
18 the Trial Chamber erred in making a general assessment of the reliability of logbooks
19 based on a limited sample of intercepted communications. After a review, the
20 Pre-Trial Chamber's findings and the evidence relied upon, the Appeals Chamber
21 finds that the Trial Chamber assessed the reliability of logbooks by first providing its
22 overall understanding of the voluminous intercept evidence submitted in this case,
23 including the procedures employed to produce them, and further, by referring to all
24 the relevant parts of logbooks which reflect each intercepted communication it relied
25 upon in the Conviction Decision. The Appeals Chamber also reviewed the Trial

1 Chamber's use of intercept evidence in the specific charges such as persecution and
2 sexual and gender-based crimes and finds no error in its findings.

3 Accordingly, the Appeals Chamber rejects grounds of appeal 72, 73 and 60.

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

6 Under grounds of appeal 60, 64, 65, 68, 28 (in part), 69, 70 and 74 to 86 the Defence
7 challenges some of the Trial Chamber's findings underpinning its determination that
8 Mr Ongwen is criminally responsible as an indirect perpetrator through an organised
9 power apparatus for crimes committed in the context of the attacks on Lukodi IDP
10 camp on or about 19 May 2004 and on the Abok IDP camp on or about 8 June 2004,
11 and as an indirect co-perpetrator through an organised power apparatus for crimes
12 committed (i) in the context of the attacks in the Pajule IDP camp on or about
13 10 October 2003 and in the Odek camp on or about 29 April 2004; (ii) for sexual and
14 gender-based crimes not directly perpetrated by Mr Ongwen; and (iii) for the
15 conscription of children under the age of 15 years and their use in armed hostilities.

16 The Appeals Chamber notes that the arguments raised on appeal by the Defence are
17 to a large extent premised either on a misunderstanding or a disagreement with
18 indirect perpetration and indirect co-perpetration as modes of liability provided for in
19 Article 25(3)(a) of the Statute. The Appeals Chamber therefore finds it important for
20 this and further cases to set out the parameters of these modes of liability.

21 The wording of Article 25(3)(a) of the Statute is clear in that a person is considered a
22 perpetrator when he or she, (i) directly commits a crime as an individual (direct
23 perpetration); (ii) commits a crime jointly with another person (co-perpetration); and
24 (iii) indirectly commits a crime (indirect perpetration) this is through other persons.

25 While the direct perpetrators are those who physically execute the elements of the

1 crimes, indirect perpetrators have control over the crime through controlling the
2 actions of the direct perpetrators. In such cases, the direct perpetrators are
3 instruments used for the commission of crimes.

4 Generally, indirect perpetrators control the actions of the direct perpetrators in
5 different ways, including when the direct perpetrator is not responsible - for example,
6 because he or she is a minor, when the direct perpetrator is mentally disabled, or
7 when the direct perpetrator is coerced - and through controlling their will through the
8 use of an organised power structure.

9 Whether an indirect perpetrator retains control over the actions of the physical
10 perpetrators by virtue of controlling their will through the functioning of an
11 organised hierarchical organisation is a factual consideration. Consequently, the use
12 of an organised power apparatus is not a legal requirement for establishing this
13 specific mode of responsibility.

14 Generally, the following features of an organised power apparatus may be of
15 assistance in determining whether the indirect perpetrator retained control over the
16 crimes by virtue of controlling the will of the physical perpetrators: The hierarchical
17 organisation of the apparatus; its functional automatism; the replaceable nature of its
18 members; and the fact that the criminal acts of the direct perpetrator are to the benefit
19 of the organisation. Therefore, in an organised power apparatus, typically those at
20 the top of the organisation retain functional control over the crimes committed and
21 the low-level members are interchangeable, let's say fungible.

22 As to the proximity or remoteness of the indirect perpetrator to the criminal act, it is
23 correct that, as a general rule, in cases of direct perpetration, the further removed the
24 person is from the criminal act, the more he or she is pushed to the margins of the
25 events and excluded from control over the acts. However, in cases of indirect

1 perpetration through the use of an organised power apparatus, the converse is
2 generally true. In such cases, the loss of proximity to the act is compensated by an
3 increasing degree of organisational control by the leadership positions in the
4 apparatus.

5 In this case, the Defence appears to question the existence of indirect co-perpetration
6 as a mode of liability under the Statute. The Appeals Chamber notes that indirect
7 co-perpetration constitutes an integrated mode of liability provided for in the Statute
8 that combines the constitutive elements of indirect perpetration and co-perpetration
9 and is therefore compatible with the principle of legality and the rights of the accused.

10 The main elements of indirect co-perpetration are: (i) the control over the crime by
11 indirect co-perpetrators which, in cases of the commission through an organised
12 power apparatus, occurs by virtue of controlling the will of the direct perpetrators
13 through the automatic functioning of the apparatus; and (ii) the existence of an
14 agreement or common plan between those who carry out the elements of the crime
15 through another individual or other individuals, including when those persons form
16 part of an organised power apparatus.

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

21 The Defence also alleges under grounds of appeal 60, 69, 70, 74, 75, 76, 77, 78, 79, 85,
22 81, 82, 83, 84, 85 and 86 several errors in the factual findings regarding the structure of
23 the LRA, Mr Ongwen's control over the crimes, the required mens rea, the common
24 plans, the age of determination of the children conscripted and used in the hostilities,
25 and the Trial Chamber's assessment of the evidence. In particular, the Defence

1 alleges that the Trial Chamber: Incorrectly assessed the evidence provided by
2 several Prosecution witnesses; failed to rely on documentary evidence submitted by
3 the Defence; failed to properly assess intercept evidence; that its conclusions
4 regarding Mr Ongwen's degree of involvement in the attacks of the four camps and
5 its rejection of the likelihood of civilian deaths by crossfire were unreasonable; that it
6 failed to consider that the policy of conscripting children below the age of 15 years
7 predates the time frame relevant to the charges; and that it failed to consider that
8 Mr Ongwen only became commander of the Sinia brigade on 4 March 2004.

9 Given the number of factual errors alleged, I will summarise the Appeals Chamber's
10 determination of one of the challenges brought by the Defence under grounds of
11 appeal 60 and 70. This is done merely to illustrate the approach that the Appeals
12 Chamber has taken when addressing the numerous alleged factual errors raised by
13 the Defence.

14 With regard to the Trial Chamber's finding that Mr Ongwen ordered the attack on
15 Odek IDP camp, the Defence submits that it is possible to make a literal interpretation
16 of the evidence elicited from witnesses P-0054, P-0265, P-0142, P-0314, P-0340, P-0372
17 and P-0314 that the instructions primarily related to collecting food as there was a
18 genuine hunger problem at the time. Contrary to the Defence's argument, the Trial
19 Chamber did not find that the witnesses contradicted each other on the point or that
20 their evidence was otherwise inconsistent. It considered that the evidence before it
21 justified and necessitated the finding that Mr Ongwen, as well as other commanders,
22 ordered LRA fighters to target everyone they find at Odek, including civilians, noting
23 that this is plainly the content of the testimony of P-0205 and P-0410, who stated,
24 respectively, that the order was to "destroy Odek" and to "exterminate everything"
25 and who are corroborated by P-0054 and recalling that there is consistent evidence

1 from multiple witnesses that the orders included looting food and abducting civilians.
2 With respect to the instruction to collect food, the Trial Chamber recalled the
3 testimony of P-0340 as to the meaning of this expression. The witness stated that
4 "when you go there, you have to fight, you have to shoot at them, and they shoot at
5 you because they are the people who protect that food" and further indicated that
6 collecting food means that "when we reached there, other people went to the barracks
7 and other people went to the camp." From these passages, it is clear that the Trial
8 Chamber's finding was not based on an impermissible inference that fails to reflect
9 the evidence on trial record as suggested by the Defence. Rather, it was supported
10 by the evidence on the record. The Appeals Chamber notes that P-0142, P-0314,
11 P-0340 and P-0372 confirmed that the order involved the looting of food.
12 Furthermore, the Trial Chamber noted P-0314's mention of an instruction from
13 Mr Ongwen to abduct children. As the Trial Chamber correctly found, this evidence
14 is consistent with that provided by P-0410, P-0205, P-0054 and P-0264.
15 Based on the foregoing, the Appeals Chamber considers that the Defence failed to
16 identify any error in the Trial Chamber's finding that the evidence before it justifies
17 and necessitates the finding that Mr Ongwen, as well as other commanders, ordered
18 LRA fighters to target everyone they find at Odek, including civilians. The Defence's
19 argument is accordingly rejected.
20 In relation to all the remaining arguments alleging errors for reasons fully set out in
21 the judgment, the Appeals Chamber considers that the Defence fails to identify any
22 error in the Trial Chamber's reasoning and conclusions, often repeating arguments
23 raised before the Trial Chamber without disclosing any error in the Trial Chamber's
24 disposition thereof. Therefore, the Appeals Chamber rejects ground of appeal 60, 64,
25 65, 68, 28 (in part) 69, 70 and 74 to 86. The Appeals Chamber concludes that the

1 Defence has not demonstrated any error in the Trial Chamber's findings on
2 Mr Ongwen's individual criminal responsibility as an indirect perpetrator and
3 indirect co-perpetrator for crimes committed in the course of the attacks on the four
4 IDP camps and for the conscription and use in hostilities of children below the age of
5 15 years.

6 Alleged errors concerning sexual and gender-based crimes (hereinafter: "SGBC").

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

11 Under grounds of appeal 90 and 66 (in part), the Defence submits that forced
12 marriage is not a crime under the Statute and that the Trial Chamber's legal
13 interpretation of forced marriage violates the principle of *nullum crimen sine lege*.

14 The Defence also submits that the facts of the present case do not support the Trial
15 Chamber's finding that Mr Ongwen's conduct amounts to forced marriage as a form
16 of other inhumane acts under Article 7(1)(k) of the Statute.

17 For the reasons that are fully set out in the judgment, the Appeals Chamber finds that
18 convicting an accused of forced marriage as a form of other inhumane acts under
19 Article 7(1)(k) of the Statute is not *ultra vires* and does not violate the principle of
20 *nullum crimen sine lege*.

21 In this regard, the Appeals Chamber notes that Article 7(1)(k) of the Statute provides
22 for the category of crimes called "other inhumane acts", which is designed to
23 criminalise an act that does not specifically qualify as any of the other crimes under
24 Article 7(1) of the Statute. The Appeals Chamber finds that the scope of other
25 inhumane acts as prescribed under Article 7(1)(k) of the Statute and the elements of

1 the crimes is sufficiently clear and precise to satisfy the principle of *nullum crimen*
2 *sine lege*.

3 In addition, since it is an open provision, meaning that different types of conduct may
4 amount to other inhumane acts as long as they satisfy the elements of Article 7(1)(k)
5 of the Statute, the Appeals Chamber considers that in order to determine whether a
6 specific conduct may qualify as a form of other inhumane acts, a Chamber may have
7 recourse to any relevant international instruments, such as conventions and treaties.

8 The Appeals Chamber also concurs with the Trial Chamber's finding that the central
9 element of forced marriage is the imposition of conjugal union and the resulting
10 spousal status of the victim. In this regard, the Appeals Chamber notes that the
11 notion of "conjugal union" is associated with the imposition of duties and
12 expectations generally associated with "marriage", which may be established on the
13 facts of the case.

14 After a careful review of the Trial Chamber's findings and the evidence relied upon,
15 the Appeals Chamber concludes that the Trial Chamber did not err by convicting
16 Mr Ongwen of forced marriage as a form of other inhumane acts pursuant to
17 Article 7(1)(k) of the Statute.

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

25 For the reasons that are fully set out in the judgment, the Appeals Chamber finds that

1 the crime of forced pregnancy seeks to protect, among others, the woman's
2 reproductive health and autonomy and the right to family planning. The
3 Appeals Chamber, therefore, finds no error in the Trial Chamber's finding with
4 respect to the protected interest of forced pregnancy.

5 Regarding the Defence's argument that the Trial Chamber failed to consider the
6 national law of Uganda on abortion in accordance with Article 7(2)(f) of the Statute,
7 the Appeals Chamber finds that this provision was inserted to alleviate the concerns
8 raised by some States that the forced pregnancy provision might be interpreted as
9 interfering with the State's approach to abortion.

10 The Appeals Chamber concurs with the Trial Chamber that Article 7(2)(f) of the
11 Statute does not impose a new element to the crime of forced pregnancy. Therefore,
12 the Appeals Chamber concludes that the Trial Chamber was not required to consider
13 Ugandan law on abortion in its assessment of this crime.

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

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

1 Defence's arguments under grounds of appeal 87, 89 and 66 (in part).
2 Alleged errors regarding grounds for excluding criminal responsibility.
3 At trial, the Defence alleged two grounds for excluding Mr Ongwen's criminal
4 responsibility, namely, that he suffered from a mental disease or disorder during the
5 period relevant to the charges and that he committed the crimes under duress. The
6 Trial Chamber rejected the ground for excluding criminal responsibility by way of
7 mental disease due to the lack of evidence which would corroborate a historical
8 diagnosis and based on the expert opinion of mental health professionals who did not
9 identify any mental disease or defect in Mr Ongwen during the period of the charges.
10 Likewise, the Trial Chamber rejected the ground for excluding criminal responsibility
11 by way of duress on the basis that there was no evidence at all to hold that
12 Mr Ongwen was subjected to a threat of imminent death or imminent or continuing
13 serious bodily harm to himself or another person at the time of his conduct
14 underlying the charged crimes. Consequently, the Trial Chamber found that
15 Mr Ongwen's guilt had been established beyond any reasonable doubt.
16 On appeal, the Defence challenges these findings of the Trial Chamber which the
17 Appeals Chamber will address in turn.
18 With respect to the ground of excluding criminal responsibility by way of mental
19 disease or defect, the Defence raises four main arguments under several grounds of
20 appeal. First, it argues that the Trial Chamber erred in its assessment of the
21 reliability of the evidence of mental health experts called by the Defence. Second,
22 the Defence argues that the Trial Chamber erred in failing to rely on the evidence of
23 the Court appointed expert, Professor de Jong, for its assessment. Third, the Defence
24 contends that the Trial Chamber erred by disregarding cultural factors when
25 assessing Mr Ongwen's mental health. Fourth, the Defence argues that the

1 Trial Chamber erred in its assessment of the evidence of Dr Abbo, a Prosecution
2 mental health expert.

3 As to the first argument, the Defence essentially takes issue with the Trial Chamber's
4 findings concerning the methodology employed by the Defence's mental health
5 expert, who found that, at the time material to the charges, Mr Ongwen suffered from
6 numerous mental disorders such as severe depressive illness, post-traumatic stress
7 disorder and dissociative disorder.

8 For the reasons fully explained in the judgement, the Appeals Chamber finds that the
9 Trial Chamber did not err in concluding that it could not rely on the Defence experts'
10 evidence given concerns it had over the Defence experts' failure, inter alia: (i) to apply
11 scientifically valid methods; (ii) to take into account other sources of information
12 about Mr Ongwen which were readily available to them; and (iii) to properly test for
13 malingering in Mr Ongwen. Moreover, the Appeals Chamber finds no error in the
14 Trial Chamber's assessment of contradictions in the evidence of the Defence experts,
15 in particular, contradictions between the various statements and observations made
16 or between such statements and observations and the conclusions finally drawn.

17 Therefore, the Appeals Chamber confirms the Trial Chamber's findings concerning
18 the methodology and the consequent unreliability of the evidence of the Defence's
19 mental health experts.

20 As to the second argument, the Defence argues that the Trial Chamber erred in
21 concluding that the observations of the Court appointed expert, Professor de Jong,
22 had no relevance for its assessment as to whether Mr Ongwen suffered from mental
23 disease at the relevant time. In particular, the Defence contends that Professor
24 de Jong's observations concerning Mr Ongwen's clinical history, dating back to his
25 childhood, and his cultural context were significant.

1 As explained in more detail in the judgment, the Appeals Chamber is not persuaded
2 by this argument given the distinct purpose for which Professor de Jong's
3 observations were requested and the abundance of other evidence in the record
4 concerning Mr Ongwen's clinical and social history, dating back to his childhood and
5 his cultural context, which were discussed at length by other experts, including the
6 Defence's own mental health experts.

7 The Appeals Chamber thus rejects this argument and confirms the Trial Chamber's
8 decision not to rely on Professor de Jong's evidence for its assessment of whether
9 Mr Ongwen suffered from mental disease at the time relevant to the charged crimes.

10 As to the third argument, the Defence contends, inter alia, that the Trial Chamber
11 disregarded cultural factors when assessing Mr Ongwen's mental health. In
12 particular, the Defence argues that the evidence of Professor Musisi on the trauma
13 suffered by the victimised population of Northern Uganda and the resultant mental
14 health problems documented amongst LRA traumatised individuals should not have
15 been ignored by the Trial Chamber.

16 Contrary to the Defence's argument, the Appeals Chamber finds, for the reasons more
17 fully elaborated on in the judgment, that it was reasonable for the Trial Chamber not
18 to rely on the evidence of Professor Musisi since he did not provide specific
19 information in relation to whether Mr Ongwen suffered from a mental disease during
20 the charged period.

21 As for the fourth argument, the Defence argues, in particular, that Dr Abbo's
22 potentially exculpatory evidence relating to the adverse environment of the LRA and
23 its impact on Mr Ongwen's moral development and child-like personality, even as an
24 adult, was disregarded by the Trial Chamber and resulted in the Trial Chamber
25 unreasonably ascribing criminal responsibility to Mr Ongwen as an adult.

1 The Appeals Chamber is not persuaded by these arguments. First, the Appeals
2 Chamber notes that Dr Abbo's evidence about the adverse environment within the
3 LRA and its negative impact on the development of a child was not in dispute during
4 the trial. Second, while Dr Abbo's holistic assessment of the evidence concerning
5 Mr Ongwen's childhood development included the impact of his abduction and his
6 lack of control as an adolescent over the adverse environment within the LRA, she
7 nevertheless acknowledged that these factors did not absolve Mr Ongwen of criminal
8 responsibility as an adult for the crimes charged. Indeed, the Appeals Chamber
9 notes that her characterisation of these factors as important mitigating factors may be
10 viewed as significant for the purposes of sentencing but not for the Trial Chamber's
11 determination as to whether Mr Ongwen suffered from a mental disease at the time
12 relevant to the charges.

13 The Appeals Chamber considers that Dr Abbo's evidence concerning Mr Ongwen's
14 lack of control over the LRA environment as an adolescent was not exculpatory of his
15 criminal responsibility for the crimes he was found to have committed as an adult.

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

22 With respect to the ground for excluding criminal responsibility by way of duress, the
23 Defence challenges under several grounds of appeal a number of the Trial Chamber's
24 findings underpinning its conclusion that Mr Ongwen was not subject to a "threat of
25 imminent death or continuing or imminent serious bodily harm" at the time of his

1 conduct underlying the charged crimes and that therefore duress as a ground of
2 excluding criminal responsibility pursuant to Article 31(1)(d) of the Statute was not
3 applicable to him.

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

20 The Defence further challenges a number of factual findings which the Trial Chamber
21 relied on to conclude that the Defence of duress was not applicable to Mr Ongwen.
22 These include the findings: (i) on Mr Ongwen's status in the LRA hierarchy and the
23 applicability of the LRA disciplinary regime to him (mainly raised under grounds of
24 appeal 46 and 48); (ii) on Mr Ongwen's abduction, indoctrination and life and service
25 in the LRA (grounds of appeal 26, 28 and 47); and (iii) on the possibility of escaping

1 from or otherwise leaving the LRA (grounds of appeal 52 to 54); and (iv) on
2 Joseph Kony's alleged spiritual powers (ground of appeal 55).

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

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

14 The Appeals Chamber first notes that the confirmed charges against Mr Ongwen
15 concerned crimes he allegedly committed as an adult between 1 July 2002 and
16 31 December 2005. Therefore, any findings about Mr Ongwen's experiences prior to
17 this period cannot in itself be determinative of the central issues of the case. In this
18 context, the Appeals Chamber finds that it was not unreasonable for the Trial
19 Chamber to consider that Mr Ongwen's childhood experience in the LRA was "not
20 central to the issue".

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

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

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

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

25 The Appeals Chamber, as set out in more detail in the judgment, notes that the Trial

1 Chamber in fact assessed evidence from a number of former LRA members who
2 testified about the effect of LRA spiritualism on them and found that while there was
3 evidence that some persons did believe in the spiritual powers of Joseph Kony, the
4 evidence consistently showed that for many persons who stayed in the LRA longer,
5 their belief followed a pattern. It was stronger in the young and the new abductees
6 and then disappeared in those who stayed in the LRA longer. The Trial Chamber
7 also noted that the LRA members with some experience in the organisation did not
8 generally believe that Joseph Kony possessed spiritual powers and that there was no
9 evidence indicating that the belief in Joseph Kony's purported spiritual powers
10 played a role for Mr Ongwen. In fact, it noted, the evidence of Mr Ongwen's defying
11 Joseph Kony speaks clearly against any such influence. The Trial Chamber
12 ultimately concluded that the issue of LRA spirituality was not a factor contributing
13 to a threat relevant under Article 31(1)(d) of the Statute.

14 The Appeals Chamber finds, as explained in the judgment, that the Defence fails to
15 show that the Trial Chamber disregarded relevant evidence nor does it show any
16 error in the Trial Chamber's approach and conclusions. Its arguments are therefore
17 rejected.

18 Furthermore, for the reasons set out in the judgment, the Appeals Chamber rejects all
19 the remaining arguments raised and, accordingly, rejects grounds 26, 28 (in part), 44,
20 46 to 56, 58, and 60 to 63 of the appeal. The Appeals Chamber concludes that the
21 Defence has not demonstrated any error in relation to the Trial Chamber's findings on
22 duress as a ground of excluding criminal responsibility pursuant to Article 31(1)(d) of
23 the Statute.

24 Alleged errors regarding cumulative convictions.

25 Finally, the Defence challenges the Trial Chamber's findings regarding cumulative

1 convictions under grounds of appeal 20, 21 and 22.

2 First, the Defence argues that the Trial Chamber erred in rejecting its contention on
3 the relevance of Article 20 of the Statute in its assessment of cumulative convictions.

4 The Appeals Chamber finds that the Trial Chamber correctly determined that the
5 *ne bis in idem* principle as formulated in Article 20(1) of the Statute serves to prevent a
6 retrial of a person who has been convicted or acquitted on the basis of the same
7 conduct before this Court. It follows that, contrary to the Defence's contention, this
8 provision is not concerned with the question of whether a trial chamber can impose
9 cumulative convictions on a person for the same underlying conduct in the same trial.

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

17 The Appeals Chamber considers that the test for cumulative convictions finds its
18 rationale in the need to reflect the full culpability of an accused person given that each
19 provision which has a "materially distinct" element protects different legal interests.

20 What the legal interests protected by each crime are can only be discerned by
21 reference to the elements of that specific crime. If these elements require proof of a
22 fact not required by the other, cumulative convictions are permissible. Any
23 remaining concerns arising from overlapping facts can be addressed in the
24 determination of the sentence. The Appeals Chamber considers that this approach
25 strikes a careful balance between the need to reflect the full culpability of an accused

1 person while safeguarding his or her rights and ensuring that the person is not being
2 unlawfully punished.

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

16 Furthermore, the Appeals Chamber rejects the Defence's claim that cumulative
17 convictions for the crimes of rape and sexual slavery and for the crimes of forced
18 marriage as a form of other inhumane acts and sexual slavery are not permissible.

19 As explained in the judgment, these crimes have materially distinct elements,
20 resulting from the fact that they protect different interests.

21 The Appeals Chamber considers that while the protected interests may overlap to a
22 certain degree, the fundamental nature of the crime of sexual slavery is reducing a
23 person to a servile status and depriving him or her of his or her liberty and sexual
24 autonomy, while for the crime of rape, it is the invasion of a sexual nature of a
25 person's body and the attack on his or her sexual autonomy. In addition, the interest

1 protected by forced marriage as a form of other inhumane acts is not necessarily
2 violence against physical integrity and deprivation of liberty, but crucially, a person's
3 right to freely choose one's spouse and consensually establish a family.

4 Conclusion.

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

9 I will repeat this in French: (No Interpretation)

10 Appropriate relief.

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

13 This concludes the delivery of its judgment with respect to the appeal against the
14 Conviction Decision.

15 We shall now adjourn until 1430 for the delivery of the judgment on the appeal
16 against the Sentencing Decision.

17 THE COURT USHER: [13:02:15] All rise.

18 (The hearing ends in open session at 1.02 p.m.)