9

The Situation in Uganda

9.1 REFLECTION: THE SITUATION IN UGANDA

Melanie O'Brien

INTRODUCTION

This reflection addresses the feminist judgments concerning the International Criminal Court (ICC) in Uganda. It provides a background to the conflict in Uganda, before delivering an overview of the ICC in Uganda. A brief background of the *Prosecutor v. Dominic Ongwen* case (*Ongwen* case) is given, which is the only current ICC case in Uganda.[1]

A reflection is then provided of each of the three rewritings of the *Ongwen* case in this collection, explaining first the relevant findings from the original decision, before outlining how each of the rewritings differs from the original decision and reflecting on how the judges have incorporated a feminist perspective into their judgments. Finally, a reflection is given on how gender justice could be delivered beyond the existing rules and structure of the ICC.

Background to the Conflict

Uganda was a British colony, declaring independence in 1962. The postcolonial period has been dominated by violence and armed conflict, starting in 1964 with violent protests against the consolidation of power by the country's first prime minister, Milton Obote.[2] In 1971, General Idi Amin Dada carried out a coup. His

[1] The case against Joseph Kony is still at pre-trial stage, with arrest warrants issued. The ICC Prosecutor is seeking to move to Confirmation of Charges stage. Available at www.icc-cpi.int/uganda/kony.

[2] A. B. K. Kasozi, *Social Origins of Violence in Uganda, 1964–1985* (Montreal: McGill-Queen's University Press, 1994), at 74–80. Kasozi notes at 17–29 that the pre-colonial and colonial periods were also violent.

eight-year regime was characterised by violence, as he tortured and murdered anyone affiliated with the opposition, those perceived as supporting Obote, particularly Acholi and Langi peoples. 'It is estimated that between 300,000 and 500,000 Ugandans were killed during this period, which earned Amin the nickname "the butcher".'[3]

After the defeat of Amin's forces in 1979, Obote eventually returned to power in 1980 and retaliated against Amin's supporters, starting his own campaign of 'rape, torture, looting and destruction of property', during which another 300,000–500,000 people were killed.[4] Obote was once again ousted by the military in July 1985, although it too was then overthrown. In January 1986, Yoweri Museveni seized power and has been President of Uganda ever since, as he abolished all political parties except his own (National Resistance Movement), and continues to perpetuate violence against any opposition.

Uganda has fifty-six ethnic groups, and this has led to opposition, armed insurgencies, and resistance against the government, which continue today. After Museveni took power, conflict began in northern (and parts of eastern) Uganda and continued between government authorities and the Lord's Resistance Army (LRA), led by Joseph Kony. The LRA has abducted children to use as child soldiers, forced wives, and sexual slaves. It has also perpetrated atrocities against civilians, such as torture and murder.

To date, the only examples of accountability for LRA members are the conviction of Dominic Ongwen at the ICC and one ongoing Ugandan domestic trial against LRA commander Thomas Kwoyelo.[5] It has been reported that some LRA soldiers 'were integrated into the Ugandan military without investigation into crimes they may have committed in the LRA', although others remain 'in the bush', waging conflict.[6] A temporary ceasefire agreement was signed by LRA negotiators in 2008 (extending previous ceasefire agreements originally signed between November 2006 to 29 February 2008), and then a Demobilisation, Disarmament, and Reintegration (DDR) agreement and an implementation protocol on 29 February 2008. Kony himself did not participate in negotiations, and ultimately the negotiations for a full peace agreement fell apart due to his erratic behaviour.[7] Kony vowed never to sign a full peace agreement until ICC arrest warrants were withdrawn. Despite a high-profile campaign to find him in 2012, his whereabouts remain unknown.[8]

[3] J. R. Quinn, 'Getting to Peace? Negotiating with the LRA in Northern Uganda' 10(1) *Human Rights Review* (2009) 55–71, at 56.

[4] *Ibid*.

[5] Human Rights Watch, *World Report 2022, Uganda* (2022), available at www.hrw.org/world-report/2022/country-chapters/uganda.

[6] *Ibid*.

[7] See M. Schomerus, *The Lord's Resistance Army: Violence and Peacemaking in Africa* (Cambridge: Cambridge University Press, 2021), for details on the 2006–2008 peace negotiations.

[8] Al Jazeera, 'LRA and Uganda sign peace pact', 2 March 2008, available at www.aljazeera.com/news/2008/3/2/lra-and-uganda-sign-peace-pact.

The ICC in Uganda

In January 2004, the government of Uganda referred its own situation to the ICC, and investigations were opened in July 2004. The ICC's focus is on crimes committed in the armed conflict between the LRA and the government authorities. Alleged crimes are war crimes (including murder, cruel treatment of civilians, pillaging, rape, enlistment and use of child soldiers) and crimes against humanity (including murder, enslavement, sexual enslavement, rape, and other inhumane acts).

In 2005, the ICC issued an arrest warrant for LRA leaders Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, and Dominic Ongwen. Kony and Otti remain at large; Lukwiya and Odhiambo are deceased (proceedings terminated). Ongwen surrendered himself to the ICC in January 2015, and, to this day, remains the only defendant to face trial at the ICC over crimes committed in Uganda. No crimes committed by Ugandan government authorities are being investigated by the ICC.

Background to the Ongwen *Case*

After surrendering himself to the ICC, Ongwen's trial began in December 2016, closing in March 2020. At the time of his surrender and arrest, Ongwen was the commander of the LRA's Sinia Brigade, with the rank of brigadier from 2004 onwards. Ongwen's history is complex. He was himself abducted by the LRA as a child, somewhere between the ages of eight and fourteen, although his exact age at abduction in the late 1980s is difficult to confirm. Ongwen was a particularly brutal leader, and was charged with over seventy counts of war crimes and crimes against humanity.[9] These included crimes of murder, attacking civilians, torture, enslavement, pillaging, other inhumane acts, persecution, destruction of property, rape, sexual slavery, forced pregnancy, outrages upon personal dignity, conscription of children into an armed group, and use of children in hostilities. These charges related to specific attacks on internally displaced persons (civilian) camps, and also to long-term and ongoing crimes (in particular, sexual and gender-based offences).

Ongwen was convicted by the ICC's Trial Chamber IX on 4 February 2021,[10] found guilty of sixty-one crimes (war crimes and crimes against humanity), and sentenced in May 2021 to twenty-five years in prison.[11] His conviction and sentencing were affirmed in the Appeal Judgment and Sentencing Appeal Judgment of 15 December 2022.[12]

[9] Decision on the Confirmation of Charges, *Ongwen* (ICC-02/04-01/15-422-Red), Pre-Trial Chamber II, 23 March 2016.

[10] Trial Judgment, *Ongwen* (ICC-02/04-01/15-1762-Red), Trial Chamber IX, 4 February 2021 (hereafter Ongwen Judgment).

[11] Sentence, *Ongwen* (ICC-02/04-01/15), Trial Chamber IX, 6 May 2021 (hereafter Ongwen Sentence).

[12] Appeal Judgment, *Ongwen* (ICC-02/04-01/15-2022-Red), Appeals Chamber, 15 December 2022.

Reflecting on the Feminist Judgments

All of the authors have reimagined aspects of the *Ongwen* Trial Judgment or Sentencing Decision, as the Appeal Judgment was released too late in this project (December 2022). Judges Kirabira, Ringin, and Grey rewrite the sentencing decision in relation to the crime of forced pregnancy; Judge Kyojiika writes a separate sentencing decision to incorporate the aggravating factor of the impact on children who were born as a result of Ongwen's sexual and gender-based crimes; and Judge Rigney looks at the defence of duress while applying the concept of abolitionism.

Sentencing for Crimes of Forced Pregnancy

Ongwen was convicted of forced pregnancy as a war crime and a crime against humanity, and sentenced to twenty years' imprisonment for each count. The forced pregnancy took place in the context of forced marriages, a systematic element of the LRA, in which girls and young women were abducted and 'given' to LRA soldiers as 'wives'. The 'wives' were regularly raped as part of their role as 'wife'. Ongwen had a number of 'wives', and the Trial Chamber found that he repeatedly raped his 'wives'. The Chamber found that two of his seven 'wives' became pregnant (P-0101 and P-0214); one birthed separately a girl and a boy, the other a girl. The Chamber found that the 'wives' were unable to escape, under threat of death, including the two pregnant 'wives', and that they were held in violent circumstances, including beatings and rape.

The Trial Chamber discussed the background to the Rome Statute definition of forced pregnancy. It then went on to detail the definition, namely when the perpetrator 'confine[s] one or more women forcibly made pregnant', with the two components of 'unlawful confinement' and 'forcibly made pregnant', and with the intent to 'affect the ethnic composition of any population or carry out other grave violations of international law'.[13] The trial judgment and sentencing judgment noted that the 'crime of forced pregnancy is grounded in the woman's right to personal and reproductive autonomy and the right to family', where forced pregnancy deprives a woman of reproductive autonomy. The sentencing judgment found the crime to be of a very high gravity, due to the forced pregnancy itself but also because the pregnancy resulted from rape. The defencelessness and multiplicity of victims was acknowledged as an aggravating factor, as was the discriminatory nature of the crime.

Judges Kirabira, Ringin, and Grey's sentencing judgment (Joint Judgment) differs from the original sentencing judgment in that it delves into the harm caused by forced pregnancy in significant detail, which the original sentencing judgment did not. The Joint Judgment explores four categories of harms. Firstly, the harms of

[13] Drawing from Articles 7(1)(g)-4 and 8(2)(e)(vi)-4 and the associated Elements of Crimes.

violation of personal and reproductive autonomy, which the judges note is a 'key aspect of human dignity'.

Next, they outline the physical harms stemming from rape, lack of medical assistance and perinatal care, birth complications, physically demanding domestic duties, and physical punishments. Here, the judges point out that insufficient evidence was collected of the physical harms experienced by the victims, which should be addressed in future cases.

Thirdly, the judges address psychological and emotional harm caused by fear and intimidation (threats of physical abuse). It was noted that the victims were still afraid of Dominic Ongwen, which diminished their willingness to fully cooperate with ICC investigators. Again, the judges noted a lack of evidence of the specific psychological harms to P-0101 and P-0214, although these could have included depression, anxiety, PTSD, shame, and more.

Finally, the Joint Judgment examines economic harms, including the 'significant economic burden' that can be placed on the victim from childcare responsibilities and the limited earning capacity due to parental responsibilities, while acknowledging that Ongwen's indigence left him unable to contribute to the welfare of the children he fathered. The judges also pointed out that the victims' education ceased once they were abducted, affecting their future earning capacity, and encouraged future Trial Chambers to pursue more detailed evidence of the socio-economic harms resulting from these crimes. A particularly feminist step in an international criminal court judgment taken here is to 'consider the provision of childcare in [the] reparations order in this case to address the financial burden'.

The judges include the same three aggravating factors that the original sentencing judgment included; however they also discuss social harms, namely the stigma attached to the victims in Uganda, which detrimentally affected their reintegration into society. As there was no evidence of this raised with regard to P-0101 and P-0214 specifically, the judges could not apply this aggravating circumstance but, again, urged this to be considered in future sentencing decisions. The judges do take cultural harms into consideration, such as the forced disconnection from cultural practices, including inheritance and land rights, as well as pregnancy rituals.

A strong feminist aspect of the Joint Judgment is to make obvious the lacunae in the evidence that results in the sentencing judges not being able to take some feminist-centred issues into account in their sentencing decision. This is an important commentary, making a critique of the trial process, which did not adequately explore how the women in this case were affected by the crimes they experienced.

A feminist approach to judging is to 'do no harm', and this is evident in the Joint Judgment. The judges are critical of the Trial Chamber for not seeking further testimony from P-0101 and P-0214 but decline to recall the witnesses so as to minimise the re-traumatisation caused by court appearances.

The judges ultimately conclude by pronouncing a sentence of life imprisonment each for the war crime and the crime against humanity of forced pregnancy, which

they reduce to thirty years due to the mitigating circumstances of Ongwen's experiences as a child soldier. This is a longer sentence than that actually awarded to Ongwen (including on appeal), which ultimately better reflects the aggravating circumstances, thereby better taking the victims' experiences into account.

Considering Children Born of Sexual Offences

Rather than rewrite an existing part of either the trial or sentencing judgments, Judge Kyobiika has added to the sentencing judgment. Judge Kyobiika considers a wide range of the sexual and gender-based crimes against girls and women that Ongwen was convicted of (Counts 50–68): forced marriage as an 'other inhumane act'; torture; rape; sexual slavery; enslavement; forced pregnancy; and outrages upon personal dignity. Judge Kyobiika's focus, however, is on 'children born as a result of these sexual and gender-based crimes'. She treats the children as both a group of victims entitled to their own reparations and an aggravating factor in sentencing; this has not been considered by international courts. She discusses the context of the LRA's systematic abduction of girls and young women to take as forced 'wives', who were regularly raped by their 'husbands' and many of whom subsequently gave birth to children born from this rape.

Judge Kyobiika discusses the relevance of children's human rights, including to children's right to special care and assistance, and recognition that 'family is a fundamental group of society'. Children's growth, well-being, and development are all influenced by their experiences and environment. Obviously, being born of rape and growing up in an armed conflict environment, while not a definite predetermination of a child's ultimate life journey, is not in the best interests of a child. Such circumstances lead to significant obstacles to that child's enjoyment of human rights, such as the right to family and the right to education. Judge Kyobiika observes 'that some of the children born as a result of war have been treated with disdain and continue to face untold suffering, rejection, discrimination, and stigmatisation in the communities'; that patriarchal societal structures contribute to 'children's contested identities'; and that children born of war have a high risk of experiencing domestic and family violence. The forced 'wives' and the children born of rape in the LRA were also exposed to conflict, witnessing and experiencing horrific violence that may lead to serious mental health concerns from trauma, such as depression.

Ultimately, the radical nature of Judge Kyobiika's judgment is the inclusion of children born of sexual offences in the sentencing. By doing so, she is not merely acknowledging them as an aggravating factor, but actually considering these children and their needs as another category of victims. Judge Kyobiika finds that 'Ongwen denied some of his children the fundamental right of being born and raised in the security of a family', with resulting 'mental, economic, social, ethical, religious effects'. Thus, in addition to terms of imprisonment, Judge Kyobiika orders reparations for children who were members of Ongwen's homestead; children that

were born as a result of forced pregnancy; children that witnessed some of the crimes; and children who were members of LRA soldiers' households.

Judge Kyobiika's judgment fills a significant gap in international criminal law jurisprudence. While 'women and children' is an oft-seen victim category, and in some cases rightly criticised for grouping these two types of people into one category, it is also the case that the plight of children is often directly connected to the plight of women, and thus it is appropriate to consider children in a sentencing decision. In particular, the children that Judge Kyobiika considers to have been very specifically impacted by the actions of Ongwen and the rest of the LRA, with their lives starting at a disadvantage. It is crucial that defendants are ordered to provide reparations to such victims, not just because they are in fact the children of Ongwen himself (which would lend itself to the traditional concept of child support) but because he brought these children into a world of violence and disadvantage, through an act of violence. The ICC has a reparations regime,[14] and it is surprising that this was not considered in the original Ongwen sentencing.

In relation to this reimagined judgment, I would like to see more detail about the reparations ordered. Certainly, financial reparations are appropriate, to assist with the rehabilitation of children, physical and mental health needs, education, living expenses, and more. What kind of reparations are appropriate for children born of war rape? Moffett discusses the need to shift 'the moral value system' of those responsible for atrocity crimes as part of reparations, which should be not just about money for victims (particularly if payments are merely symbolic) but also ensuring victims' rights.[15] Reparations for children, who have their lives ahead of them, are certainly challenging. Moffett notes that 'assessing the impact or measurable outcomes [of reparations] is complicated by the unpredictability of what will happen when societies move away from war. These issues reflect the disconnect between the idealism of rights and the reality of implementing remedies'.[16] Reparations must be feasible and secure 'adequate measures and processes to remedy victims' harm with responsible actors taking ownership to redress that harm, while at the same time not bankrupting a country, reinforcing inequalities, or humiliating responsible actors'.[17] It is a huge undertaking for a bench of judges to decide on appropriate remedies that achieve all of these, but it is necessary, as a general order for reparations may not address any of the harms suffered by children. Of course, a separate, more detailed reparations order may be made (see Articles 75 and 79 of the Rome Statute), and the

[14] L. Moffett, *Justice for Victims before the International Criminal Court* (London: Routledge, 2014).

[15] L. Moffett, *Reparations and War: Finding Balance in Repairing the Past* (Oxford: Oxford University Press, 2023), at 266, and chapter 2, 45–67. See also A. Sehmi, 'Emphasising Socio-economic Narratives of Truth, Justice and Reparations in the Prosecutor v. Dominic Ongwen' 26(6) *International Journal of Human Rights* (2022) 1083–1106.

[16] Moffett, *supra* note 15, at 287.

[17] *Ibid*, at 66.

lacunae in Article 75 'provide judges with the flexibility to determine the scope and extent of reparations'.[18] Ultimately, reparations for the children born of rape are necessary to remedy the victims' harm, and Judge Kyobiika's inclusion of these in her feminist judgment highlights a significant void in the original judgment.

Duress and Abolitionism

Part of Ongwen's defence was a claim for the defence of duress, and scholars have analysed the defence of duress in the *Ongwen* case.[19] The defence argued that Kony's control of LRA soldiers was 'allegedly maintained through a combination of strict disciplinary rules which severely punished non-compliance with orders, the tight supervision of commanders, and successful assertion of spiritual powers'.[20] The Trial Judgment considered multiple elements when analysing the duress defence: Ongwen's status in the LRA hierarchy and the applicability of the LRA disciplinary regime to him; executions of senior LRA commanders on Kony's orders; the possibility of escaping from or leaving the LRA; Kony's alleged spiritual powers; Ongwen's personal loyalty to Kony and his career advancement; and crimes committed in private.

It is outside the scope of this reflection to go through all of these elements; however, as an example, I will detail one of these elements: escape. The Trial Chamber noted that, if Ongwen engaged in the charged criminal conduct 'when escaping or leaving was possible is a strong indication that he acted on his own accord'.[21] The Chamber notes that evidence was given of other LRA soldiers, including of a high rank, who escaped, and that Ongwen was more afraid of being held accountable for the crimes he committed than of Kony. The Chamber held that Ongwen's 'high rank and position placed him in a relatively better position to escape, as compared to lower-ranking LRA members'.[22] Based on the evidence given, the Trial Chamber concluded 'that escaping from or otherwise leaving the LRA was a realistic option available to Dominic Ongwen … as it was for many others who successfully escaped'.[23]

Ultimately, the Trial Chamber found 'no basis in the evidence to hold that Dominic Ongwen was subjected to a threat of imminent death or imminent or continuing serious bodily harm to himself or another person at the time of his conduct underlying the charged crimes'. The Trial Chamber determined that, quite the opposite, Ongwen 'frequently acted independently and even contested orders received from Kony'.

[18] Moffett, *supra* note 14, at 154.
[19] For example, W. Nortje and N. Quénivet, *Child Soldiers and the Defence of Duress under International Criminal Law* (Cham: Palgrave Macmillan, 2019).
[20] Ongwen Judgment, *supra* note 10, § 2568.
[21] *Ibid*, § 2619.
[22] *Ibid*, § 2634.
[23] *Ibid*, § 2635.

Judge Rigney concurs with the majority opinion in finding that the defence of duress is not open to Ongwen, but then goes on to discuss the limits of the defence of duress. Judge Rigney ponders the agency of the accused, why they made decisions, and what structural conditions influenced their actions. Drawing from this, she asks whether international criminal law can address 'the interconnectedness between personal and political violence', and, in doing so, questions whether there are alternatives to the international criminal justice system.

The feminist aspect of Judge Rigney's piece, which goes further than others in this collection, is that it questions the entire structure of international criminal law. As other feminist judgment projects have shown, some judgments are directed towards working within the system while others seek to disrupt the legal project entirely, and it is the latter that Rigney is seeking here. She questions the act of assigning individual criminal responsibility for collective wrongdoing when it is larger political, economic, or legal structures that have created the conditions for individual criminality. As Rigney points out, international criminal legal discourse largely does not engage with these structures and the conditions they create, resulting in the de-contextualisation of a defendant's actions from the conditions that led to them.

Judge Rigney then moves on to discuss the concept of abolition, a philosophy that 'ultimately aims to eliminate [the need for] imprisonment, policing and surveillance' (connecting this system to racism, capitalism, and slavery), introducing alternatives to punishment and imprisonment. Abolitionism has a strong feminist grounding, particularly in Black feminism, and looks at the root causes of harm and violence.

Judge Rigney's piece raised many questions for me. I would have liked to see in this judgment specific suggestions for future trials. Specifically, what does Judge Rigney think that judges (and/or lawyers) in future trials should implement to adopt an abolitionist perspective in their decisions? How does an abolitionist perspective fit with international criminal law generally? How does abolitionism in the context of a discussion about international criminal law (as opposed to domestic criminal law) differ from or overlap with atrocity prevention literature and strategies, which already focus on a societal structure that seeks to address risk factors, such as a human rights-focused society?[24] How can abolitionism engage with atrocity prevention theories and practice? How could international criminal law be adjusted to adapt transformative justice responses to address the social causes of violence and move away from incarceration? How could the court have addressed these concerns in this particular case, of Dominic Ongwen's experience as a child and adult soldier living in an

[24] See, for example, the work of Barbara Harff generally; H. Nyseth Brehm, 'Re-examining Risk Factors of Genocide' 19(1) *Journal of Genocide Research* (2017) 61–87; and the Framework of Analysis for Atrocity Crimes: A tool for prevention, developed by the UN Office on Genocide Prevention and the Responsibility to Protect (2014).

environment of long-term armed conflict? While these questions remain unanswered, Judge Rigney's reimagining opens new paths for thinking about the value of feminist engagement with international law and for looking to alternatives to achieve justice for all.

Imagining Gender Justice beyond the Existing Rules

One theme that emerges from the rewritten judgments of Judges Kirabira, Ringin, and Grey, and of Kyojiika is the need in sentencing to take into greater account any aggravating circumstances related to the impact of crimes on women and children. Ongwen's sentence of twenty-five years is something that I have struggled with. The details of the experiences and harms of the girls and women who were victims of the LRA are horrific and long-term: they did not cease when the women managed to escape. Crimes such as forced marriage and forced pregnancy have a lifelong impact. I had hoped that the sentence would be increased on appeal, and was disappointed it was not. I understand that the final sentence given to Ongwen was reduced because of the mitigating factor of his background as a child soldier. However, I found it difficult to balance the length of this sentence given the evidence which detailed the enthusiasm, violence, and cruelty with which Ongwen carried out his crimes. Ongwen may have been abducted as a child, but he was quick to engage with the LRA's way of life and to rise up through the ranks as he perpetrated atrocities in a way that other child soldiers did not. In addition, as the court noted in its rejection of the duress defence, Ongwen also had opportunities to leave the LRA, but did not do so.

This is perhaps why I find the idea of abolitionism advanced in the reimaged decision by Judge Rigney so challenging. As a scholar, I am open to the idea and can comprehend the arguments such as the need to address the root causes of violence: I agree prevention is better than punishment, if we can avoid the violence. However, when violence does take place, I cannot fathom not having a system of punishment. This is no doubt due to my ingrained education and subsequent work in criminal law. However, it is also due to my extensive empirical research with atrocity survivors. I have interviewed (often mostly women) survivors in Australia, Bangladesh, Bosnia, Cambodia, and Israel. I have delved in depth into survivor testimonies (oral and written) and memoirs, as well as accessing other sources of atrocity evidence such as photographs and film, and explored atrocity sites, memorials, and museums around the world. I have interviewed women who survived rape (including in rape camps) and forced marriage (some of which produced children). I have watched an elderly Holocaust survivor deliver her regular talk about her experience, and still struggle to talk about the loss of her mother over seventy years ago. The lifelong trauma that survivors carry is an incredibly heavy burden that never leaves them. The concept of punishment for crimes has always existed, although it is true that incarceration is historically a relatively new form of

punishment, with its roots in racist and capitalist societies.[25] However, the idea that perpetrators of such horrific, deeply affecting atrocity crimes have the opportunity to 'rehabilitate' and live a free life is one I genuinely struggle with, particularly in the context of the crimes that women (and children) have experienced, and in the lifelong trauma and life disruption experienced by victims of genocide and other atrocities.[26] Thus, I want to see a stronger argument from abolitionists as to how abolitionism fits with atrocity crimes; how it would balance with the desire for justice that victims seek. To me, a gender-just outcome is one that honours the victims' wishes: what is the justice that they seek, and how can the international criminal justice system deliver that?

It would also be interesting to see how the judges in this collection would implement the *amicus curiae* contributions that were solicited by the ICC as part of the Ongwen appeal process, if these feminist judgments were at the appeal stage.[27] Some of the *amicus* briefs and oral presentations submitted to the court delivered perspectives on issues addressed here, including feminist-influenced arguments: duress, forced pregnancy, forced marriage, and, although not expressly using the word 'abolitionism', some relating to arguments about the context of violence in which Ongwen existed.[28] How would the judges in this collection have considered these *amicus* submissions? Would these submissions have contributed to or even strengthened the judges' findings? An interesting future project, perhaps.

The three *Ongwen* judgments in this book have two starkly competing feminist perspectives: one that works from inside the legal system and seeks to take the perspectives and experiences of children into account; and one that seeks to disrupt the legal system and urges it to take the context of atrocity violence into account to create new solutions. Yet all the judgments are grounded in a human rights perspective and language, always seeking to enhance and uphold the human rights of victims. Hence, this Uganda/Ongwen section of this book of feminist judgments is a microcosm of feminism, which comes in many forms and with many theories, although ultimately seeking equality, participation, non-violence, peace, and

[25] S. Bauer, *American Prison: A Reporter's Undercover Journey into the Business of Punishment* (New York: Penguin Books, 2019).

[26] M. O'Brien, *From Discrimination to Death: Genocide Process through a Human Rights Lens* (Abingdon: Routledge, 2023).

[27] Order inviting expressions of interest as *amicus curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence), *Ongwen* (ICC-02/04-01/15-1884), Appeals Chamber, 25 October 2021.

[28] For example, Amicus Curiae Observations by Public International Law & Policy Group, ICC-02/04-01/15 A, 23 December 2021, available at https://engagedscholarship.csuohio.edu/fac_briefs/28/; and Submission of Amicus Curiae Observations in the Case of the *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15 A, 23 December 2021, available at https://scholarlycommons.law.wlu.edu/wlufac/692/. See also M. O'Brien, I. Rosenthal, and R. Grey, 'Historic Feminist Intervention at the International Criminal Court – the Appeals Hearing in *Prosecutor v. Dominic Ongwen*' 28(1) *Australian Journal of Human Rights* (2022) 176–182.

justice. Which, after all, is also what international criminal justice systems should deliver.

9.2 MENTAL INCAPACITATION AND DURESS IN THE *ONGWEN* JUDGMENT

Sophie Rigney

In 2021, Trial Chamber IX convicted Mr Dominic Ongwen of sixty-one counts of war crimes and crimes against humanity.[29] In this rewritten decision, Sophie Rigney interrogates the defence of duress to place Mr Ongwen firmly in the position of perpetrator and victim, eradicating the false dichotomy between the two. Rigney considers the constraints within which Mr Ongwen was operating and links these to broader questions of culpability. Rigney links these questions to carceral abolition movements.

Ultimately, Rigney confirms the finding of the original Trial Chamber and convicts Mr Ongwen of sixty-one counts of war crimes and crimes against humanity.

No.: ICC-02/04-01/15
Date: 4 February 2021

Original: English

TRIAL CHAMBER IX(B)

Before: Judge Sophie RIGNEY

SITUATION IN UGANDA
IN THE CASE OF THE *PROSECUTOR v. DOMINIC ONGWEN*

Public

Redacted Trial Judgment – Separate and Concurring Opinion of Judge Sophie Rigney

OVERVIEW

1. The man on trial was born Dominic Okumu Savio.[30] He was born into a Uganda that already knew significant political turmoil and conflict. When he was ten years old, or perhaps slightly younger, he was taken from the side of the road, abducted, and forced to become a soldier for the Lord's Resistance Army (LRA).

[29] Trial Judgment, *Ongwen* (ICC-02/04-01/15-1762-Red), Trial Chamber IX, 4 February 2021 (hereafter Ongwen Judgment).

[30] E. K. Baines, 'Complex Political Perpetrators: Reflections on Dominic Ongwen' 47(2) *Journal of Modern African Studies* (2009) 163–191, at 163 and 169.

This was a common occurrence, and there is evidence that his family had prepared him for such a possibility, including teaching him to provide a different name to his captors. This he did, telling them that his name was Dominic Ongwen.[31] Ongwen is now the name that he is known by, and is charged by in this trial. As he grew up within the LRA, Dominic also became adept at the various methods employed by the LRA, and was promoted through the ranks to eventually become a battalion and brigade commander. During this time, he turned eighteen, and thus became of age to be criminally responsible within the jurisdiction of the International Criminal Court for his actions. He is now charged with seventy counts of war crimes and crimes against humanity, and the majority judgment finds him guilty of sixty-one of those counts.[32]

2. Ongwen is the first person to come before this Court charged with crimes that we also know he was a victim of himself. Moreover, unlike many other cases in international criminal law, Ongwen was not a high-level commander or a president, issuing orders from behind a desk or hidden away behind palace doors. This is not to deny his position of power – as a commander, he held considerable authority in the LRA. But he was located within a hierarchy of power, rather than leading the hierarchical structure; and this relative position, as well as his victimhood, makes this case an unusual one.

3. There is a powerful narrative in popular discourse that portrays those charged with international crimes as monsters. However, the case of *Ongwen* has starkly shown the complexity of victimhood and perpetration, and how lines between these categories are 'porous',[33] with individuals often being both victim and perpetrator.

4. Perhaps more so than many other cases, this case sets out the devastation and depravity of war as experienced by its soldiers and commanders – and how this leads to conditions that allow, or even encourage, criminality. There are complex interactions that can be witnessed, between individual, local, and global conditions. These include questions of childhood and trauma, mental illness, and poverty; the role of international interventions in conflict and in criminal law; and the role of global capitalism which enables the market in arms and military spending. This case shows how these intersecting conditions can both structure individual decisions and agency, and simultaneously define what behaviour is criminalised and who is held accountable for it.

[31] *Ibid*.

[32] Ongwen Judgment, *supra* note 29.

[33] M. Drumbl, 'The Ongwen Trial at the ICC: Tough Questions on Child Soldiers', *Open Democracy*, 14 April 2015, available at www.opendemocracy.net/openglobalrights/mark-drumbl/ongwen-trial-at-icc-tough-questions-on-child-soldiers. See also M. Drumbl, 'Victims Who Victimise' 4(2) *London Review of International Law* (2016) 217–246, at 217; P. Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge: Cambridge University Press, 2018), at chapter 4; S. Rigney, *Fairness and Rights in International Criminal Procedure* (Edinburgh: Edinburgh University Press, 2022), at chapter 1.

5. Acknowledging these factors does not take away from the devastation and depravity experienced by other victims too, including crimes perpetrated by soldiers and commanders. The evidence in this case is overwhelming, particularly with regard to the use of sexual violence against young women and girls.[34] In the situation in Uganda, it was common that children were victims, and perpetrators, and victim-perpetrators.

6. All of this is particularly relevant to the defence of duress, which the defence has raised in this case. For reasons I will expand upon below, applying the law compels me to concur with the majority in this case, and find that the defence of duress is not open to Mr Ongwen. Nonetheless, I want to offer some comments on the defence of duress generally. It is my opinion that, even though it was not established on the evidence in this case, the defence of duress still permits us to examine the structure of international criminal law, alternative possibilities to this carceral system, and ultimately whether we can build an abolitionist movement for international criminal law. This separate and concurring opinion, then, shows the limits of the defence of duress as defined under the Rome Statute, but also shows what the defence of duress might allow us to understand about the structure and system of international criminal law.

OPINION

The Defence of Duress

7. Article 31 of the Rome Statute permits an accused a defence against their criminal responsibility for their conduct in situations where there was a 'threat of imminent death or of continuing or imminent serious bodily harm against that person or another person'.[35]

8. I agree with the majority's statements on the elements of the defence of duress. As they have set out, duress has three elements.[36] The first is the existence of a particular type of threat: there is a requirement that the conduct which is alleged to constitute the crime must have been caused by duress which resulted from a threat of imminent death or of continuing or imminent serious bodily harm, against the accused or another person.[37] The threat may be made by other persons, or may be constituted by other circumstances beyond the accused's control, but it is to be assessed at the time of the conduct in question which is alleged to constitute the crime. The requirement of imminence relates to the nature of the threatened harm

[34] See P. Bradfield, 'Preserving Vulnerable Evidence at the International Criminal Court – the Article 56 Milestone in Ongwen' 19(3) *International Criminal Law Review* (2019) 373–411.
[35] Article 31(1)(d) Rome Statute
[36] Ongwen Judgment, *supra* note 29, §§ 2581–2584.
[37] *Ibid*, § 2582.

(rather than the threat itself).[38] Hence, the threatened harm must be to be killed immediately, or to have serious bodily harm inflicted immediately or in an ongoing way.[39] Duress is not an available defence if this requirement of immediacy is not met; and an elevated probability of harm or an abstract danger will not be sufficient.[40]

9. The second element of the defence of duress is that the accused acted necessarily and reasonably to avoid the threat.[41] They are not required to take all conceivable action to avoid the threat. A determination of what 'necessarily and reasonably' would mean under the circumstances is a decision for the Trial Chamber, and should be assessed in relation to the totality of the circumstances in which the accused found themselves. The third element is that the person does not intend to cause a greater harm than the one sought to be avoided. This is a subjective element and relates to the intention of the individual, not whether or not they actually avoided the greater harm.[42]

10. The defence argues that Ongwen was 'under a continuing threat of imminent death and serious bodily harm from [Joseph] Kony and his controlling, military apparatus'.[43] They contend that Kony maintained control over the LRA through strict rules and severe punishment for non-compliance; supervision of commanders; and assertion of spiritual powers.[44] In total, the defence have led substantial evidence about the environment of the LRA and the horrors to which LRA members were subjected.[45]

11. The defence have also led significant evidence about Ongwen's mental state, and defence expert evidence suggested that 'the coercive and violent LRA, controlled by Kony (and the Spirits), with its "do or die" rules and regulations, disrupted [Ongwen's] development of any moral values and of the Acholi culture, leaving Mr Ongwen with no free will. Every activity that Mr Ongwen participated in while in the LRA was under duress'.[46] The defence argues that Mr Ongwen's mental state 'destroyed his capacity to "act reasonably and necessarily" in his situation to avoid the LRA's threats, and made it not possible for him to formulate any intent not to cause a greater harm'.[47]

12. The prosecution argues that the defence of duress is not applicable in this case. While the prosecution acknowledges that the LRA 'sometimes inflicted severe

[38] *Ibid*.
[39] *Ibid*.
[40] *Ibid*.
[41] *Ibid*, § 2583.
[42] *Ibid*, § 2584.
[43] Public Redacted Version of Corrected Version of Defence Closing Brief, filed on 24 February 2020, *Ongwen* (ICC-02/04-01/15-1722-Corr-Red), Trial Chamber IX, 13 March 2020, § 680.
[44] Ongwen Judgment, *supra* note 29, § 2586.
[45] Public Redacted Version of Corrected Version of Defence Closing Brief, *supra* note 43, §§ 681–691.
[46] *Ibid*, § 538.
[47] *Ibid*, § 602.

punishment on its members for breaking the armed group's rules, the Chamber has heard no evidence that Mr Ongwen's conduct was caused by a threat of imminent death or imminent or continuing serious bodily harm against him or another person'.[48]

13. In this case, the majority have concluded that the accused was not 'subjected to a threat of imminent death or imminent or continuing serious bodily harm to himself or another person at the time of his conduct underlying the charged crimes'.[49] In particular, they focus on evidence that during the period of the charges, Mr Ongwen did not face any prospective punishment by death or serious bodily harm when he disobeyed orders. Moreover, although Mr Ongwen had a realistic possibility of leaving the LRA, he chose not to do so and instead ascended through the ranks and attained greater power. Indeed, Mr Ongwen occasionally contested orders, and frequently acted independently.[50] This evidence is compelling, and I agree with the view of the majority that there has not been evidence brought to satisfy the particular elements of the defence of duress, particularly the requirement of immediate threat. In this case, then, the defence of duress has not been established and cannot excuse Mr Ongwen's conduct.

14. Nonetheless, due to the contestation of the defence of duress, significant evidence was brought which cast light on the conditions under which Mr Ongwen operated. Indeed, while duress has not been made out in this case, the defence itself – and the evidence that has been adduced by virtue of raising the defence – invites consideration of particular issues of morality, responsibility, power, and violence. Duress is fundamentally concerned with choice, and the structures that constrain or motivate that choice. What decision did the accused make about their actions, and why was that decision chosen? What drives the accused's agency? What structural conditions influenced their actions?

15. In raising such questions, the defence of duress allows us to consider the structure of international criminal law, its conditions of possibility, and whether it can address the interconnectedness between personal and political violence. In so doing, we are invited to consider whether there are other alternatives to this criminal justice system. These are the issues I want to address in my remaining comments.

International Criminal Law's Structural Features and Conditions

16. As a system of law, international criminal law has emerged relatively recently: the 1990s saw a huge momentum towards building institutions, substantive laws, and procedural laws. It is no coincidence that the growth of international criminal law

[48] Public Redacted Version of Prosecution Closing Brief, *Ongwen* (ICC-02/04-01/15-1719-Red), Trial Chamber IX, 24 February 2020, § 475.
[49] Ongwen Judgment, *supra* note 29, § 2668.
[50] *Ibid.*

occurred at the same time as post-Cold War expansion of neoliberalism, with its attendant greater recourse to criminal law.[51] Neoliberalism 'often called for a strong punitive state', and 'criminal law played an important role in economic restructuring and rule of law projects throughout the world'.[52] Moreover, international criminal law's focus on individual responsibility mirrors the individualist ideologies of neoliberalism.[53]

17. Many argue that international criminal law is vulnerable: it is reliant on states for funding and logistics; it has no independent police force; and its jurisdiction is limited in many ways. Yet the suggestion that international criminal law is inherently vulnerable obscures the fact that it has some significant structural strengths. In particular, it is the powerful states and individuals that can either enforce or ignore international criminal law. Just as in domestic criminal systems, some are more criminalised than others. Far from being a flaw, the ways in which some powerful parties can flaunt international criminal law while others are captured by it is part of the design of the system.

18. There are various ways in which international criminal law structures criminality. Its relationships to global capitalism, race, and imperialism all determine who and what is criminalised.[54] International criminal law's focus on particular core crimes disregards other types of harm.[55] Its jurisdictional limitations mean that certain states and people are often concentrated on, and others escape examination. All of this means that race, nationality, class, and gender are powerful determinants

[51] K. Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights Law and Advocacy' 100(5) *Cornell Law Review* (2015) 1069–1127, at 1070 and 1076.

[52] *Ibid*.

[53] For more on international criminal law's relationships with neoliberalism, see C. Schwöbel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law* (Cambridge: Cambridge University Press, 2021); K. Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2010); T. Krever, 'International Criminal Law: An Ideology Critique' 26(3) *Leiden Journal of International Law* (2013) 701–723; S. Kendall, 'Commodifying Global Justice: Economics of Accountability at the International Criminal Court' 13(1) *Journal of International Criminal Justice* (2015) 113–134.

[54] See, e.g., A. Anghie and B. S. Chimni, 'Third World Approaches to International Law and Individual Responsibility' 2(1) *Chinese Journal of International Law* (2003) 77–103; K. Maxine Clarke, 'Refiguring the Perpetrator: Culpability, History and International Criminal Law's Impunity Gap' 19(5) *International Journal of Human Rights* (2015) 592–614; R. C. DeFalco and F. Mégret, 'The Invisibility of Race at the ICC: Lessons from the US Criminal Justice System' 7(1) *London Review of International Law* (2019) 55–87; S. Rigney, 'Distant Justice: The Impact of the International Criminal Court on African Politics (Book Review)' 31(3) *European Journal of International Law* (2020) 1157–1161.

[55] C. Schwöbel-Patel, 'The Core Crimes of International Criminal Law' in K. Heller et al. (eds.), *The Oxford Handbook of International Criminal Law* (Oxford: Oxford University Press, 2020) 768–790; J. Reynolds and S. Xavier, '"The Dark Corners of the World": TWAIL and International Criminal Justice' 14(4) *Journal of International Criminal Justice* (2016) 959–983; M. Burgis-Kasthala, 'Scholarship as Dialogue? TWAIL and the Politics of Methodology' 14(4) *Journal of International Criminal Justice* (2016) 921–937.

of who will be brought before the Court – even more so than commission of a crime.[56]

19. International criminal law is galvanised by two powerful narratives, or aims of the system of law: 'ending impunity' and providing 'justice to victims'.[57] The first of these, 'ending impunity', is undertaken through criminal trials of individuals, and holding individuals criminally responsible for collective wrongdoing and for crimes perpetrated by others (through extended modes of liability and superior responsibility).[58] But in assigning *individual* criminal responsibility to particular people for acts that are often collective, international criminal trials 'exonerate[e] … those larger (political, economic, even legal) structures within which the conditions for individual criminality have been created'.[59] Those structures, and the conditions they create – including 'poverty, discrimination, marginalization, and social exclusion' – are 'lost from sight' in international criminal legal discourse.[60] Thus, international criminal trials often decontextualise the actions of the accused, and refuse to examine these actions within the conditions that give rise to them.

20. A further structural feature of international criminal law is how this legal system addresses victimhood and perpetration. As mentioned, 'justice for victims' is a pre-eminent aim of international criminal law. Victims are seen as the ones in whose name criminal justice is dispensed. Yet they are also frequently 'feminized, infantilized and racialized'[61] in the process, and are made into a 'deity-like

[56] I am inspired here by the phrasing in the domestic abolition literature, 'race, gender, class, and sexuality (are) more important determinants of who goes to prison than simply the commission of a crime' (A. Y. Davis, G. Dent, E. R. Meiners, and B. E. Richie, *Abolition. Feminism. Now* (Chicago: Haymarket, 2022) at 47–48).

[57] See S. Rigney, 'Postcard from the ICTY: Examining International Criminal Law's Narratives' in D. Joyce and J. Hohmann (eds.), *International Law's Objects* (Oxford: Oxford University Press, 2018) 366.

[58] Art. 7 ICTY Statute; Art. 25 and Art. 28 Rome Statute.

[59] M. Koskenniemi, 'Between Impunity and Show Trials' 6(1) *Max Planck Yearbook of United Nations Law* (2002) 1–35, at 14; Krever, *supra* note 53, at 701; I. Tallgren, 'Sensibility and Sense of International Criminal Law' 13(3) *European Journal of International Law* (2002) 561–595, at 594; K. Maxine Clarke, 'We Ask for Justice, You Give Us Law: The Rule of Law, Economic Markets, and the Reconfiguration of Victimhood' in C. De Vos, S. Kendall, and C. Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015) 272–301; Burgis-Kasthala, *supra* note 55; Reynolds and Xavier, *supra* note 55.

Krever, *supra* note 53, at 719–720.

[60] *Ibid*.

[61] C. Schwöbel-Patel, 'The "Ideal" Victim of International Criminal Law' 29(3) *European Journal of International Law* (2018) 703–724, at 703. See also C. Schwöbel, 'The Market and Marketing Culture of International Criminal Law' in C. Schwöbel (ed.), *Critical Approaches to International Criminal Law* (London: Routledge, 2014) 279; L. Fletcher, 'Refracted Justice: The Imagined Victim and the International Criminal Court' in C. De Vos, S. Kendall, and C. Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015) 302–325.

abstraction' rather than a real person with their own needs and opinions.[62] Perpetrators (and alleged perpetrators) are similarly reduced. Ultimately, victimhood and perpetration are separated in international criminal law – presented as a dichotomy.[63]

21. Alongside this general dichotomy of victim and perpetrator, there is a more particular 'legal fiction' that paints child soldiers as 'faultless passive victim(s)'.[64] The reality is 'not so simple', with child soldiers often exercising agency and sometimes perpetrating crimes.[65] Indeed, Ongwen has become a personification of these issues: a small boy, vulnerable and victimised, who grew up to be a man accused of committing heinous crimes; accused himself of victimising others.

22. To summarise, we see that international criminal law, as a system of law, has particular structural features. These features are a consequence of its ideological underpinnings, which are linked to neoliberalism, as well as the relationships between international criminal law and race, global capital, and imperialism. The structural features include substantive and procedural laws that criminalise some and exonerate others. As a result, some wars (or 'situations'), and therefore some individuals, are brought into the realm of 'international criminal justice' while others are not. Even further, within these situations some are labelled as criminals and others are labelled as victims – and these binaries have an additional gloss when we consider the example of child soldiers, as in the current case. I now want to consider these structural features of international criminal law against the arguments of abolitionist movements.

Abolition

23. Abolition, as it refers to more modern understandings of the carceral system, is defined 'as a tradition, a philosophy, and a theory of change, [which] moves away from a myopic focus on the distinct institution of the prison toward a more expansive vision of the social, political, and economic processes that defined the context within which imprisonment came to be viewed as the legitimate hand of justice'.[66] Abolition ultimately aims to eliminate imprisonment, policing, and surveillance, and to create 'lasting alternatives to punishment and imprisonment'.[67]

[62] S. Nouwen, 'Justifying Justice' in J. Crawford and M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012) 327–351, at 340.

[63] See Rigney, *supra* note 57. See also W. Nortje and N. Quénivet, *Child Soldiers and the Defence of Duress under International Criminal Law* (Cham: Palgrave Macmillan, 2020).

[64] M. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford: Oxford University Press, 2012), at 19. See also Nortje and Quénivet, *supra* note 63.

[65] Drumbl, *supra* note 64.

[66] Davis et al., *supra* note 56, at 50.

[67] *Ibid*.

24. Abolitionist movements are guided by a philosophy which typically holds three central tenets:[68]

1. That the modern carceral punishment system has its origins in 'slavery and the racial capitalist regime it relied on and sustained';
2. That the carceral system 'functions to oppress black people and other politically marginalized groups in order to maintain a racial capitalist regime'; and
3. That 'we can imagine and build a more humane and democratic society that no longer relies on caging people to meet human needs and solve social problems'.[69]

25. Thus, abolitionist philosophy and movements aim to understand what is (in particular, the links between carceral systems and racial capitalism), and envisage what might be (imagining and building a better approach to complex social problems).

26. Abolition has been grounded in feminism, particularly the work of Black feminists and feminists that oppose racial capitalism. Indeed, it has been said that 'abolition is unimaginable without feminism … feminism is unimaginable without abolition, and … this dialogue is imperative'.[70]

27. In recent years, we have seen an uprising in domestic police and prison abolition movements in domestic jurisdictions. Increasingly, people are coming to better understand the causes of deviance and the links between capitalism, race, imperialism, and criminal 'justice'. While not seeking to detract from the experience of racialised carceral systems experienced in the United States of America, we can, I would argue, apply abolitionist theory and praxis to international criminal law. We can do so as follows.

28. First, we can understand the origins of international criminal law. As I have outlined above, these are linked to neoliberalism, capitalism, racism, and imperialism. Second, we can examine how these origins work to structure criminality. As I have also outlined above, international criminal law, by design, criminalises some – disproportionately those who are Black, and from the Global South – more than others. This, together with its steadfast refusal to engage with the causes of criminality, has meant that international criminal law has not shown itself to be capable of addressing the causes of mass violence.

29. This brings us to our final consideration: can we 'imagine and build a more humane (international) society that no longer relies on caging people to meet human needs and solve social problems'?[71] I believe we can, and I will return to

[68] D. E. Roberts, 'Abolition Constitutionalism' 133(1) *Harvard Law Review* (2019) 3–122, at 7–8.
[69] *Ibid.*
[70] Davis et al., *supra* note 56, at 10.
[71] Roberts, *supra* note 68, at 45.

this point in the conclusions. However, I first want to draw out why the defence of duress is particularly helpful for building an abolitionist movement.

The Defence of Duress and an Abolitionist Movement for International Criminal Law?

30. The defence of duress provides an important opportunity to understand several issues that are at the heart of abolitionist movements. These are (1) the factors that led to criminality; (2) the complexity of being both victim and perpetrator; and, relatedly, (3) the interconnectedness between personal and political violence, or between individual and state violence.

31. First, the defence of duress, as we have already seen, allows a conversation about *why* an individual acted in a particular way. What caused this person's criminality? In Mr Ongwen's case, the defence has emphasised the abduction of young Dominic and the crimes suffered by him, as well as the LRA's practices of harm and threat against its own soldiers. This may not be sufficient to excuse the criminal conduct alleged; the facts of the case may not satisfy the requirements of duress, particularly the need for 'imminence' of the threat.[72] Nonetheless, raising the defence of duress allows us to situate the accused and the reasons for his conduct. We can, and should, also look more broadly – to the political, legal, and economic causes of the situation of conflict (which includes considering who is benefiting financially from the war – arms manufacturers, particular individuals, and certain states and companies).

32. This broader examination is also at the heart of the abolitionist movement. Abolitionists 'address the root causes of harm by investing in people's basic needs and addressing the causes of interpersonal violence'.[73] In seeking to understand what causes criminality – those political, legal, and economic systems that lead to poverty, racism, and systems that criminalise some more than others – abolition also attempts to build solutions to those root causes. It is 'about presence, not absence. It's about building life-affirming initiatives'.[74]

33. Secondly, the defence of duress permits us a more nuanced and sophisticated understanding of victimhood and perpetration. The current case of Mr Ongwen has particularly highlighted the challenges for international criminal law accounting for 'victims who victimise',[75] or individuals who are both victim and perpetrator. As we have seen, international criminal law is structurally inept at understanding such

[72] See Article 31(1)(d) Rome Statute.
[73] Roberts, *supra* note 68, at 45.
[74] R. Wilson Gilmore, 'Making and Unmaking Mass Incarceration Conference', University of Mississippi, December 2019.
[75] Drumbl, 'Victims Who Victimise', *supra* note 33.

victim-perpetrators. But when an individual raises a defence of duress, we often hear evidence about their own victimhood. While they may even admit to the commission of the crime, they also explain how they were victims of the actions of another person and, perhaps, of particular systems and structures.[76] In Ongwen's case, and in other cases where duress is raised, perpetration and victimhood are entangled.

34. This interconnection between victimhood and perpetration might be difficult for international criminal law to accept, but in contrast, an abolitionist movement is concerned with contradictions 'which are often the spark for change'.[77] Contradictions – such as 'perpetrator' and 'victim' – are instead held onto as 'both/and'.[78] This allows the abolitionist movement to recognise 'the relationality of state and individual violence and thus frame our resistance accordingly: supporting survivors and holding perpetrators accountable … sometimes messy and risky, these collective practices of creativity and reflection shape new visions of safety'.[79]

35. This brings us to the third area in which duress permits an understanding, which is also important to abolitionist movements – this interconnectivity between personal and political violences. An easy – yet false – critique of abolitionist movements would be that victims are forgotten; not provided with 'justice'. If we do not have a carceral system designed for retribution, what will happen to the victims?

36. It is worth recalling the crimes and victims in this particular case. Mr Ongwen is charged with committing acts of murder, attempted murder, torture, enslavement, outrages upon personal dignity, pillaging, destruction of property, persecution; the recruitment of child soldiers; and sexual and gender-based crimes including forced marriage, torture, rape, sexual slavery, enslavement, forced pregnancy, and outrages upon personal dignity. These acts and crimes all have victims.

37. It is not that abolitionists just want the end of the carceral system: they want the end of the need for the carceral system. Abolition feminists remember that 'to render prisons and policing obsolete we must also build movements demanding that society be reshaped with the goal of eliminating gender and sexual violence and their enabling of racist and heteropatriarchal structures'.[80] Moreover, abolition feminists point out that 'while it is critical to hold those who use violence accountable, advocating for greater involvement by the criminal legal system is counterproductive at best, and can actually further endanger some survivors'.[81]

[76] See the guilty plea of Dražen Erdemović at the ICTY.
[77] Davis et al., *supra* note 56, at 5.
[78] *Ibid*, at 3.
[79] *Ibid*.
[80] *Ibid*, at 59.
[81] *Ibid*, at 82.

38. Indeed, we see some of these problems in international criminal law. While it is a system that is galvanised by victims, there are significant issues with how victims are treated in international criminal law. At this Court, victim participation in trials has meant that some victims of crimes are granted participation status while other victims are not. This has the effect of creating a hierarchy of victimisation, and narrowing types of victimhood.[82] This system, then, can be challenging for victims.

39. In contrast, abolition practices ask, 'what does it mean … to fight violence against women while simultaneously addressing the structural violence faced by the larger community?'[83] Or, put another way, 'how to acknowledge the structural character of gender violence alongside its intersections with violences generated by racism and capitalism'.[84] Thus, abolition of carceral justice attempts to prioritise victims by building a world where crimes do not occur in the first place.

Imagining a Different World

40. What would it have meant if Dominic Savio was born in a safe place? What if he was able to walk by the road without being kidnapped? What if he – and all other children in his community – had been able to go to school, had full bellies, safe beds, and high-quality universal healthcare? What if all children had been free from fear of violence, including sexual and gender-based violence?

41. It is my belief that we need to turn our attention from the 'ending impunity' rhetoric of international criminal law (which is already partial and skewed towards impunity for some and criminalisation of others), to instead focus on ending atrocities and the conditions that give rise to them.

42. Abolitionists work towards 'community-based transformative justice responses that address the social causes of violence and hold people accountable without exposing them to police violence and state incarceration'.[85] These practices might include community-building, properly funded education, robust healthcare, and rehabilitation. In a similar way, international criminal law needs to consider more

[82] See S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' 76 *Law and Contemporary Problems* (2013) 235–262. See also E. Haslam and R. Edmunds, 'Whose Number Is It Anyway? Common Legal Representation, Consultations, and the "Statistical Victim"' 15(5) *Journal of International Criminal Justice* (2017) 931–952; S. Vasiliev, 'Victim Participation Revisited – What the ICC Is Learning about Itself' in C. Stahn (ed.), *The Law and Practice of the International Criminal Court: A Critical Account of Challenges and Achievements* (Oxford: Oxford University Press, 2015) 1133; F. Mégret, 'The Strange Case of the Victim Who Did Not Want Justice' 12(3) *International Journal of Transitional Justice* (2018) 444–463, at 445; Maxine Clarke, *supra* note 53, at 276.

[83] Davis et al., *supra* note 56, at 109.

[84] *Ibid*.

[85] Roberts, *supra* note 68, at 46.

deeply what a world could look like without any need for international criminal law, and what strategies might be used to achieve this alternative world.

43. In this case, I concur with the majority, and find that the defence of duress is not satisfied. I feel some regret at this conclusion, because it is likely – subject to the separate sentencing judgment – that Dominic Ongwen will be imprisoned. However, we remain operating within the penal system of international criminal law, with its defences set out under the Rome Statute. In the case of duress, the defence is strictly defined, and limited to instances where the elements are satisfied. In this case, it has not been met.

44. But nevertheless, at a more abstract level, duress permits us to understand the limitations of international criminal law, its structural features, and what else might be possible. I hope we can work together to envisage this alternative reality where we have a safer, better, world for all – and then to form a movement to undertake the work to bring this world into being.

Judge Sophie Rigney

9.3 VIOLATION OF REPRODUCTIVE AUTONOMY IN THE ONGWEN SENTENCE

Tonny Raymond Kirabira, Adrienne Ringin, and Rosemary Grey

In 2021, an ICC Trial Chamber convicted Dominic Ongwen, one of the top commanders of the Lord's Resistance Army (LRA), of sixty-one counts of war crimes and crimes against humanity committed in northern Uganda.[86] This was the first ICC case to result in a conviction for the crime of 'forced pregnancy' as a war crime and crime against humanity under the Rome Statute.[87] The Trial Chamber sentenced Ongwen to terms of imprisonment ranging from eight to twenty years for each count, including twenty years for forced pregnancy as a war crime and twenty years for forced pregnancy as a crime against humanity, resulting in a total joint sentence of twenty-five years' imprisonment, taking into account mitigating circumstances concerning his abduction by the LRA as a child. In 2022, that sentence was confirmed on appeal.

The Trial Chamber's original sentencing decision provided only a fleeting analysis of the harms caused by forced pregnancy in this case. In their reimagining of that decision, Judges Kirabira, Ringin, and Grey revisit the available evidence to make detailed findings on these harms, including the violation of reproductive autonomy, and the physical, psychological, economic, and social harms suffered by the two survivors of forced pregnancy in this case.

[86] Trial Judgment, *Ongwen* (ICC-02/04-01/15-1762-Red), Trial Chamber IX, 4 February 2021.
[87] Sentence, *Ongwen* (ICC-02/04-01/15-1819-Red), Trial Chamber IX, 6 May 2021.

No.: ICC-02/04-01/15
Date: 6 May 2021

Original: English

TRIAL CHAMBER IX(B)

Before: Judge Tonny KIRABIRA, Presiding Judge (Uganda)

Judge Adrienne RINGIN (Australia)
Judge Rosemary GREY (Australia)[88]

SITUATION IN UGANDA
IN THE CASE OF THE *PROSECUTOR v. DOMINIC ONGWEN*

Public

Redacted Sentencing Decision

PROCEDURAL HISTORY

1. On 4 February 2021, Trial Chamber IX delivered its judgment in Mr Dominic Ongwen's case. It convicted him on sixty-one counts of war crimes and crimes against humanity committed in Uganda between 1 July 2002 and 31 December 2005, during an armed conflict between the Lord's Resistance Army and the Ugandan armed forces.

2. The conviction encompassed war crimes (intentionally attacking the civilian population; rape; sexual slavery; forced pregnancy; murder and attempted murder; torture; pillage; outrages on personal dignity; conscripting children under the age of fifteen into an armed group and using them to participate actively in hostilities; pillage; and destruction of property) and crimes against humanity (rape; sexual slavery; forced pregnancy; murder and attempted murder; torture; enslavement; persecution on political grounds; and inhumane acts including forced marriage).

3. Following conviction by Trial Chamber IX, the sentencing proceedings were assigned to this Chamber, Trial Chamber IX(B).

[88] The ideas in this brief were informed by the *amicius curiae* brief filed in the *Ongwen* case on behalf of the Global Justice Center, Women's Initiatives for Gender Justice, Amnesty International, and Rosemary Grey. We acknowledge, in particular, the intellectual contributions to that brief by Akila Radhakrishnan, Alix Vuillemin and Matthew Cannock. *Ongwen*, Amici Curiae Observations on the Rome Statute's definition of 'forced pregnancy' by Dr Rosemary Grey, Global Justice Center, Women's Initiatives for Gender Justice and Amnesty International (ICC-02/04-01/15-1938), Appeals Chamber, 23 February 2021; *Ongwen*, Transcript of Appeal Hearing (ICC-02/04-01/15-T-264-ENG), 15 February 2022, 68–73 and 94. The authors also acknowledge the input received from other editors and contributors to this book, including other authors in the 'Uganda' section.

SENTENCING RATIONALES

4. As in previous ICC sentencing decisions, the Chamber will offer observations on the rationales for sentencing. In this Chamber's view, the strongest rationale for imposing penal sanctions on individuals who have been convicted of one or more crimes under the Rome Statute (the Statute) is to express the international community's condemnation of these crimes. Rather than a means of exacting revenge, penal sanctions recognise the specific ways in which the perpetrator wronged the victims, their families, and their communities.[89] In this way, the sentence provides access to truth and justice as well as a unified international denunciation of such crimes.[90] The process of calculating the sentence must therefore include recognising the specific harms that resulted from each of the perpetrator's crimes.[91]

5. As recognised in the Statute's preamble, the prosecution and sentencing of individuals may also contribute to the prevention of crimes. At the specific level, the sentence may discourage the convicted person from recidivism. Access to rehabilitative services such as education and healthcare, particularly if such services have been inaccessible to the individual prior to ICC custody, may assist in decreasing the likelihood of recidivism. At the general level, sentencing aims to dissuade prospective perpetrators from committing similar crimes.[92]

6. The Chamber acknowledges that prosecuting and sentencing individual actors does not ameliorate the structural factors that contribute to the commission of crimes, including economic inequalities, postcolonial legacies, and entrenched beliefs about the inferiority of 'others' along ethnic, racialised and gendered lines. Sentencing is therefore not an effective deterrent in isolation; the structural causes of violence must also be addressed.

SENTENCING PRINCIPLES

7. In determining an appropriate penalty, the Chamber is directed by Articles 76–78 of the Statute and Rules 145–148 of the Rules of Procedure and Evidence (the Rules).[93] These provisions direct the Chamber to examine the gravity of a crime and

[89] For a similar view, see Decision on Sentence pursuant to Article 76 of the Statute, *Katanga* (ICC-01/04-01/07-3484-tENG-Corr), Trial Chamber II, 23 May 2014, § 38 (hereafter Katanga Sentencing Decision).

[90] Sentencing Judgment, *Ntaganda* (ICC-01/04-02/06-2442), Trial Chamber VI, 7 November 2019, §10(hereafter Ntaganda Sentencing Decision).

[91] For a similar view, see Katanga Sentencing Decision, *supra* note 89, § 38.

[92] Ntaganda Sentencing Decision, *supra* note 90, § 10.

[93] The Chamber notes that Art. 77(2) and Rules 146–148 of the Rules of Procedure and Evidence, which allow for fines and orders of forfeiture, do not apply in this case due to the indigence of Mr Ongwen.

the personal circumstances of the accused,[94] and then any mitigating and/or aggravating factors present.[95] The Chamber notes that factors used to determine the gravity of the crime will not be 'double counted' as aggravating factors.[96] Discretion is granted to the Chamber in determining the scope and weight of the relevant factors.[97]

8. The available penalties include imprisonment for a maximum of thirty years, or for life 'when justified by the extreme gravity of the crime and the individual circumstances of the convicted person'.[98] Capital or corporal punishment are impermissible under the Statute.

9. In the present decision, the Chamber will first summarise the parties' submissions, and then analyse *each specific crime* of which Mr Ongwen was convicted, before turning to those aggravating and mitigating circumstances that apply to the *totality* of his crimes.

THE PARTIES' SUBMISSIONS

10. Trial Chamber IX granted 4,095 victims standing to participate in Mr Ongwen's trial. Their legal representatives jointly argued that the crimes attributed to Mr Ongwen are 'extremely grave' and warrant a sentence of life imprisonment.[99] In relation to sexual and gender-based crimes, the victims' legal representatives submit that the 'particularly repugnant circumstances in which acts of rape; sexual slavery; torture, outrages upon personal dignity and enslavement considered under the ambit of sexual violence; forced marriage; and forced pregnancy … carry a specific high threshold of gravity'.[100]

11. In particular, some victims were 'satisfied and relieved' that forced pregnancy and forced marriage – neither of which had previously been prosecuted in the ICC – were recognised in this case.[101] In their view, forced pregnancy and forced marriage are 'very serious crimes worthy of life imprisonment in light of the

[94] Art. 78(1) ICCst.

[95] *Ibid*; Rule 145(2) ICC RPE.

[96] Judgment and Sentence, *Al Mahdi* (ICC-01/12-01/15-171), Trial Chamber VIII, 27 September 2016, § 70; Katanga Sentencing Judgment, *supra* note 89, § 35; Ntaganda Sentencing Judgment, *supra* note 90, § 13.

[97] Rule 145(2)(b)(vi) ICC RPE allows the Chamber to consider as aggravating circumstances 'other circumstances which, although not enumerated [in the same Rule], by virtue of their nature are similar to those mentioned'. *See* also Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the 'Decision on Sentence pursuant to Article 76 of the Statute', *Lubanga* (ICC-01/04-01/06-3122), Appeals Chamber, 1 December 2014, § 43.

[98] Art. 77(1) ICCst.

[99] Victims' Joint Submissions on sentencing, *Ongwen* (ICC-02/04-01/15-1808), Trial Chamber IX, 1 April 2021, §§ 40, 116 (hereafter Victims' Sentencing Brief).

[100] *Ibid*, § 43.

[101] *Ibid*, § 104.

tremendous harm suffered by the victims, especially the harm suffered through the children born out of rape'.[102] The victims emphasise the 'immensely challenging' situation of these children, as well as 'the difficult situation their mothers are confronted with, facing rejection from their families and communities', many of whom 'now live on the margins of the society with all the associated psychological, material and financial difficulties'.[103]

12. The prosecution submits that the crimes committed by Mr Ongwen would ordinarily warrant a sentence at the 'highest range available' under the Statute.[104] For sexual and gender-based crimes, the prosecution proposes a sentence of thirty years for each crime (to be served concurrently).[105] This proposal stems from the 'inherent gravity' and 'long-lasting' effect of the crimes perpetrated against Mr Ongwen's so-called wives as well as the indirect victims within his brigade.[106] However, considering the defendant's personal circumstances, particularly his status as both a victim and a perpetrator,[107] it recommends a one-third reduction in the total joint sentence, resulting in twenty years' imprisonment.[108]

13. The defence submits that Mr Ongwen's 'unique' circumstances warrant a sentence of no longer than ten years (if, indeed, their client is not acquitted on appeal).[109] These circumstances, according to the defence, include Mr Ongwen's mental defect, the harms suffered by him as an abducted child soldier, his willingness to undergo traditional justice mechanisms in Uganda, his family situation, and good deeds with the LRA.[110] The defence asks the Chamber to consider rehabilitation and reconciliation above retribution, arguing that deterrence should not be considered in this case.[111]

14. Informed by these submissions, the Chamber will now analyse the gravity and relevant circumstances of each specific crime.

SPECIFIC CRIMES

[Author note: Here, the judgment would consider each crime of which Mr Ongwen was convicted, but for the purposes of this reimagined judgment, only the analysis of the crime of forced pregnancy is shown.]

[102] *Ibid*, § 104.
[103] *Ibid*, § 44.
[104] Prosecution's Sentencing Brief, *Ongwen* (ICC-02/04-01/15-1806), Trial Chamber IX, 1 April 2021, § 1.
[105] *Ibid*, § 158.
[106] *Ibid*, §§ 10–12, 21, 26.
[107] *Ibid*, § 156.
[108] *Ibid*.
[109] Public Redacted Version of Corrected Version of Defence Brief on Sentencing, filed on 1 April 2021, *Ongwen* (ICC-02/04-01/15-1890-Corr-Red), Trial Chamber IX, 4 April 2021, §§ 18, 183.
[110] *Ibid*, §§ 29, 52, 85, 112–128, 183.
[111] *Ibid*, §§ 4–5, 14–21.

Forced Pregnancy

Evidentiary Considerations

15. Article 7(2)(f) of the Statute defines 'forced pregnancy' as the unlawful confinement of a victim who has been made forcibly pregnant with one of two specific intents: to affect the ethnic composition of any population, or to carry out other grave violations of international law. We note that this article refers to the victim of forced pregnancy as a 'woman'. However, the Statute's drafting history reveals no intention to exclude other victims who are capable of pregnancy, including girls of any age, or non-binary, intersex, or trans people. Moreover, Article 21(3) requires that the Statute must be applied and interpreted in accordance with 'internationally recognised human rights' and without any adverse distinction founded on grounds including age, gender identity, or intersex status. For these reasons, the Chamber will describe a person subjected to forced pregnancy using the gender-neutral term 'victim'.

16. The Chamber recalls that Mr Ongwen was convicted of forced pregnancy based on evidence that he impregnated and unlawfully confined two women who had been assigned to him as 'wives'. To protect their privacy, these two women are identified as P-0101 and P-0214 in the Court records.

17. Neither witness testified at trial, as would ordinarily happen for key witnesses in the ICC. Rather, Trial Chamber IX viewed a video-recording of the testimony that Mr Ongwen's forced 'wives' (including P-0101 and P-0214) had provided during the pre-trial proceedings. This measure was taken at the request of Prosecutor, in order to preserve the evidence and to limit the risk of re-traumatising the witnesses by reducing the number of times they had to testify.[112]

18. This is the first conviction of forced pregnancy by an international court. This Chamber recognises the value in a careful analysis of the many harms that can and did occur as a result of this crime. The copious evidence of harms proffered throughout the case records, including the testimony of P-0101 and P-0214, greatly enables this endeavour.

19. Notwithstanding this wealth of evidence, certain questions about P-0101 and P-0214's experiences of forced pregnancy remain unanswered. To fill that information gap, it would have been apt to seek further testimony from these two witnesses earlier in the proceedings.[113] However, mindful of our duty to protect the well-being

[112] Public Redacted Version of Second Prosecution application to the Pre-Trial Chamber to preserve evidence and take measures under Article 56 of the Rome Statute, *Ongwen* (ICC-02/04-01/15-310-Red), Trial Chamber IX, 27 May 2016; Decision on Request to Admit Evidence Preserved under Article 56 of the Statute, *Ongwen* (ICC-02/04-01/15-520), Trial Chamber IX, 10 August 2016.

[113] Article 69(3) of the Statute gives the Chamber the authority to request the submission of additional evidence that is considered necessary for the determination of the relevant facts.

of victims and witnesses,[114] and noting that calling P-0101 and P-0214 back to answer further questions about sexual violence might cause them distress,[115] this Chamber decided *not* to recall these witnesses to give further evidence at the sentencing phase. Instead, we will respond to the gaps in the evidence by raising questions that merit further consideration in subsequent cases where the crime of forced pregnancy is charged.

The Forced Pregnancies in This Case

20. Mr Ongwen was convicted of forced pregnancy as both a war crime and a crime against humanity on the basis that between July 2002 and December 2005 he confined P-0101 and P-0214, both whom he had impregnated, with the intent of continuing to subject them to grave violations of international law (forced marriage, torture, rape, and sexual slavery).[116] The charges of forced pregnancy were limited to three pregnancies within the temporal scope of the charges: P-0101's two pregnancies between 2002 and 2004, which resulted in the birth of a daughter and a son, and P-0214's pregnancy in 2002, which resulted in the birth of a daughter.[117]

21. Both women endured extreme violence in connection to their pregnancies. P-0101 was abducted in August 1996 by Mr Ongwen when she was aged fifteen.[118] He immediately claimed her as his 'wife' and raped her that night.[119] This initial rape is illustrative of the circumstances by which P-0101 later became forcibly pregnant. In her words, 'immediately the escorts held my hands and they forced me … He [Mr Ongwen] held me forcefully and he slept with me'[120] and 'He told me if I'm still resisting, can't I see the – what is there beside me, the gun?'[121]

22. P-0101 remained with Mr Ongwen for eight years.[122] Her duties as Mr Ongwen's 'wife' included cooking as well as enduring his repeated sexual assaults. P-0101 was under threat of death if she tried to escape. She explained: 'if you're caught when you're trying to escape, if you are not properly prepared for your

[114] Article 68(1) ICCst.
[115] Public Redacted Version of Decision on the Second Prosecution application to the Pre-Trial Chamber to preserve evidence and take measures under Article 56 of the Rome Statute, *Ongwen* (ICC-02/04-01/15-316-Red), Pre-Trial Chamber II, 12 October 2015 (public redacted version dated 23 March 2016), § 12.
[116] Trial Judgment, *Ongwen* (ICC-02/04-01/15-1762-Red), Trial Chamber IX, 4 February 2021, § 3116 (hereafter Ongwen Judgment).
[117] *Ibid*, § 2069.
[118] T-13, www.icc-cpi.int/sites/default/files/Transcripts/CR2020_00648.PDF, at 16 (hereafter T-13).
[119] *Ibid*, at 16–18.
[120] *Ibid*, at 18.
[121] *Ibid*, at 50–51.
[122] *Ibid*, at 8–9. The Chamber notes that there is conjecture as to whether P-0101 was released or escaped but does not consider this debate to be important for the current discussion in this section.

escape, you would be killed without mercy, and for these reasons I was scared. People who tried to escape and were killed, I saw this'.[123]

23. During her eight years in Mr Ongwen's household, P-0101 conceived three children as a result of sexual assault by him: a daughter in 1999, another daughter between 2002 and 2004, and a son in 2004, shortly after her return from the bush when her second daughter was shot and taken during an assault from government armed forces.[124]

24. P-0214 was abducted by LRA forces in June 2000 when she was aged seventeen.[125] She was assigned as a 'wife' to Mr Ongwen by LRA leader Joseph Kony.[126] Thereafter, P-0214 endured repeated sexual assaults by Mr Ongwen under threat of physical force. In her words, this sexual activity 'wasn't my choice'.[127] Escape was virtually impossible. P-2014 explained: 'I could not escape as his [Mr Ongwen's] security guards guarded me well. They were all armed. And even if you escaped from the LRA, the Dinka and the Lutugu [other groups] in Sudan would kill you. I heard that they had killed people who fled the LRA.'[128] P-0214's chance at freedom eventually came in 2010, when she escaped with another of Mr Ongwen's 'wives'.[129]

25. During her ten years in Mr Ongwen's household, P-0214 conceived four times: in 2005 she delivered a child (sex unspecified); in 2007 she delivered a daughter, who died after a month; in 2007 her third pregnancy ended by miscarriage; and in 2009 she gave birth to a son.[130]

Harms Caused by the Crimes

26. The Chamber is cognisant that for some people, it is difficult to conceive of a pregnancy that results in a new life as a source of harm, even if that pregnancy was forced. Yet as the following analysis shows, forced pregnancy can result in serious and extensive harms. As well as being a grave violation of the victim's dignity and autonomy, this crime can cause serious physical, psychological, social, cultural, economic, and legal harms. The fact that it can *also* result in a new life – a life which is inherently valuable – does not erase those harms. Nor does it relieve this Court of its responsibility to punish the perpetrator. The fact that a victim of forced pregnancy may love the resultant child in no way dilutes the wrongdoing by the perpetrator.

[123] *Ibid*, at 44.
[124] *Ibid*, at 16; Ongwen Judgment, *supra* note 116, § 2088.
[125] Ongwen Judgment, *supra* note 116, § 2014.
[126] T-15, www.icc-cpi.int/sites/default/files/Transcripts/CR2016_25114.PDF, at 36 (hereafter T-15).
[127] *Ibid*, at 25.
[128] *Ibid*, at 26.
[129] Ongwen Judgment, *supra* note 116, at 211.
[130] T-15, *supra* note 126, at 29–30.

THE HARM OF VIOLATION OF PERSONAL AND REPRODUCTIVE AUTONOMY

27. Trial Chamber IX observed that the crime of forced pregnancy is grounded in the right to 'personal and reproductive autonomy'.[131] This statement is correct. The criminalisation of forced pregnancy protects the right of every individual to exercise agency over their body, their fertility, and their sexuality. The protection of reproductive autonomy was the rationale for the inclusion of the crime in the Statute. The recognition of this crime in the Statute and other international instruments,[132] and the ratification of the Statute by numerous states including Uganda, signals the importance placed on rights to reproductive autonomy by the international community.

28. Reproductive autonomy is a key aspect of human dignity. Rights pertaining to reproductive health and reproductive autonomy are protected in a range of international and regional human rights instruments,[133] and are the birthright of every individual regardless of their sex, gender, nationality, or culture. The distinctive violation of reproductive autonomy is reflected in the articulation of the crime of forced pregnancy as a crime in and of itself; it is not subsumed by rape or 'any other form of sexual violence'.[134] This violation has extensive and intergenerational implications. By subjecting P-0101 and P-0214 to forced pregnancy, Mr Ongwen violated their rights to personal and reproductive autonomy. As P-0101 explained, 'When I became pregnant with my three children to Ongwen, I did not think I had a choice as to whether I would become pregnant or not'.[135]

29. The state of pregnancy was used as a control mechanism by Mr Ongwen.[136] It was 'understood that pregnancy made it more difficult for women to escape'.[137] Whilst pregnant, P-0101 and P-0214 were physically confined and

[131] Ongwen Judgment, *supra* note 116, § 2717.

[132] See *Vienna Declaration and Programme of Action 1993*, UN Doc. A/CONF.157/23, 12 July 1993, § 38; *Draft Articles on Prevention and Punishment of Crimes against Humanity 2019*, International Law Commission A/74/10, 2019, Art. 2(g).

[133] General Comment No. 36 – Article 6: Right to Life, Human Rights Committee UN Doc. CCPR/C/GC/36, 3 September 2019, § 8; Proclamation of Teheran: Final Act of the International Conference on Human Rights, UN Doc. A/CONF.32/41, 13 May 1968, Art. 16; Convention on the Elimination of All Forms of Discrimination Against Women, UN Treaty Series, vol. 1249, 18 December 1979, Art. 10 and 16(1)(e); General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), Committee on Economic, Social and Cultural Rights UN Doc, E/C.12/GC/22, 2 May 2016, § 1; General Comment No. 20 on the Implementation of the Rights of the Child during Adolescence, UN Committee on the Rights of the Child UN Doc. CRC/C/GC/20, 6 December 2016, §§ 60, 63; General Recommendation No. 21:Equality in Marriage and Family Relations, CEDAW UN Doc. A/49/38(SUPP), 1994, § 22; 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, African Union, 11 July 2003, Art. 14.

[134] Ongwen Judgment, *supra* note 116, § 2722.

[135] T-13, *supra* note 118, at 21.

[136] Public Redacted Version of Prosecution Closing Brief, *Ongwen* (ICC-02/04-01/15-1719-Red), Trial Chamber IX, 24 February 2020, § 167 (hereafter Prosecution Closing Brief).

[137] *Ibid*, § 174.

monitored.[138] They were 'placed under heavy guard' and were unable to leave, and they were 'told or came to understand that if they tried to escaped they would be killed'.[139] There was no access to family planning or contraceptives and abortive attempts and successes were severely punished.[140]

PHYSICAL HARMS

30. P-0101 and P-0214 endured severe and prolonged physical harm as a result of forced pregnancy. The relevant pregnancies were achieved through sexual assault.[141] During and after these pregnancies, critical medical assistance and perinatal care was limited. P-0214 experienced pre-birth complications close to her due date and had to endure these in the bush with only the support of the other 'wives' and Mr Ongwen.[142] During the delivery, P-0214 stated that 'on that day that I had my baby there was no doctor, I was only with the girls in his household'.[143]

31. While pregnant, P-0101 and P-0214 were subjected to physically demanding domestic duties[144] as well as the constant threat and use of physical punishments for perceived failures.[145] P-0214 was beaten with a machete while pregnant for being 'too slow to bring' the bathing water.[146] While P-0214 was pregnant, Mr Ongwen continued to 'rape her, torture her, sexually enslave her, and enslave her for domestic purposes'.[147]

32. The available evidence does not divulge whether P-0101 or P-0214 experienced other pregnancy-related health issues disclosed by other victims, including birth-related complications, infertility, painful intercourse, and chronic pain,[148] although we are aware that P-0214 endured a miscarriage outside the charged period.[149] In future cases, we urge the parties and the Chamber to ask victims of forced pregnancy further questions about physical harms, so that these harms can be addressed in the sentencing decision.

[138] T-27, www.icc-cpi.int/sites/default/files/Transcripts/CR2016_25803.PDF, at 16 (hereafter T-27); Ongwen Judgment, *supra* note 116, §§ 3058–3059.
[139] Ongwen Judgment, *supra* note 116, § 3058.
[140] Prosecution Closing Brief, *supra* note 136, § 174.
[141] T-259, www.icc-cpi.int/sites/default/files/Transcripts/CR2021_01038.PDF, at 21–22; Public Redacted Version of Common Legal Representative of Victims' Closing Brief (ICC-02/04-01/15-1720-Conf), *Ongwen* (ICC-02/04-01/15-1720-Red), Trial Chamber IX, 28 February 2020, § 101 (hereafter Victims' Closing Brief).
[142] T-15, *supra* note 126, at 34–35.
[143] *Ibid*, at 29.
[144] Ongwen Judgment, *supra* note 116, § 208. Tasks included cooking, fetching laundry, chopping wood, and working in the garden.
[145] T-27, *supra* note 138, at 22; Ongwen Judgment, *supra* note 116, §§ 208, 3033.
[146] T-27, *supra* note 138, at 22.
[147] *Ibid*, at 22–23.
[148] Victims' Closing Brief, *supra* note 141, at 111, footnote 557.
[149] T-15, *supra* note 126, at 29–30.

PSYCHOLOGICAL AND EMOTIONAL HARM

33. Testimony provided by P-0101 and P-0214 reveals that they experienced serious psychological and emotional harm during their captivity, including during their pregnancies. Fear and intimidation were employed to keep them compliant.[150] P-0214 described being threatened when she refused to have sexual intercourse with Mr Ongwen: 'He told his security guards to get the sticks. The security guards scared me with the sticks so I went to Ongwen's place."[151] This threatening environment was described by P-0101 as extending even when Mr Dominic Ongwen was physically injured: 'even if he was still weak physically, he could still use his mouth to give instructions or orders because if a superior gives instructions, you have to go and follow what he says'.[152]

34. The continuation of psychological trauma once the victim is released is evidenced by P-0101's concern about speaking with ICC investigators. She stated: 'During the last interview the reason that I did not want to answer questions about Ongwen is because I fear him and thought he might kill me if he came to learn what I was saying."[153]

35. We note that the psychological burden on the victims of forced pregnancy can extend 'beyond the obvious physical effects of pregnancy and childbearing'.[154] The continual use of the word 'wife' to denote P-0101, P-0214, and the other women who were assigned to Mr Ongwen further perpetuates the continuing bond between the defendant and victims.[155] The situation can be even more complex in cases of forced pregnancy, when the perpetrator is the father of the resultant child and continues to be present in the victims' lives, as is the case with P-0101 and P-0214.[156] For example, the Chamber is aware that Mr Ongwen attempted to make financial payments to P-0214,[157] and the defence, prosecution, registry, and victims' legal representative have facilitated contact between Mr Ongwen and his children, with the consent of their mothers.[158] The victim may even express a degree of affection for the perpetrator, as P-0214 did at points in her testimony.[159]

[150] Ongwen Judgment, *supra* note 116, § 3029.
[151] T-15, *supra* note 126, at 22.
[152] Ongwen Judgment, *supra* note 116, § 1039.
[153] T-13, *supra* note 118, at 46.
[154] Ongwen Judgment, *supra* note 116, § 2748.
[155] Authors' note: This sentence is adapted from the real Ongwen sentencing decision, at § 292, although in the imaginative world in which this feminist judgment occurs, the real sentence does not yet exist.
[156] T-27, *supra* note 138, at 13.
[157] Public Redacted Version of Defence Response to the Prosecution Filing ICC-02/04-01/15-482-Conf, filed on 4 July 2016, *Ongwen* (ICC-02/04-01/15-490-Red), Trial Chamber IX, 7 July 2016, § 42 (hereafter Defence Response).
[158] T-261, www.icc-cpi.int/sites/default/files/Transcripts/CR2021_03573.PDF, at 39; CLRV's Response to Defence Request to Lift Communication Restrictions Placed Upon Mr Ongwen, *Ongwen* (ICC-02/04-01/15-1631-Red), Trial Chamber IX, 23 October 2019, § 23(iv).
[159] T-27, *supra* note 138, at 13. See also T-15, *supra* note 126, at 41; Ongwen Judgment, *supra* note 116, at 2519.

36. Expert testimony in the case further indicated that victims of sexual and gender-based crimes perpetrated by the LRA often experienced 'PTSD, depression, anxiety and dissociation, loss of perceived control, shame, increased sexual risk/vulnerability'[160] and that 'When an individual does not perceive that she or he is safe, basic daily activities such as feeding, sleeping, and self-care are undermined and dysregulated … higher level pursuits such as taking care of others, gaining employment, and pursuing an education are also threated and rendered more challenging, if not impossible'.[161] The available evidence does not confirm whether P-0101 or P-0214 experienced these specific harms. In future cases, further evidence on the psychological impact of forced pregnancy on the victims would assist in sentencing.

37. There was also extensive evidence in this trial about the experience of *cen*, which in Acholi culture is a 'malevolent emanation that comes from those who have experienced or perpetrated violent acts'.[162] The Chamber did not receive evidence that P-0101 and P-0214 experienced this psychological harm. We suggest that in future cases there is a fuller examination of psychological harms resulting from forced pregnancy, including harms that are experienced in the victims' particular spiritual context.

ECONOMIC HARMS

38. Where forced pregnancy results in a child, and therefore caring responsibilities, a significant economic burden can be placed on the victim. Not only do parental responsibilities limit the victims' earning capacity, they also generate additional costs.

39. For example, according to the defence, almost all of Mr Dominic Ongwen's children are of school-going age or are quickly approaching this age.[163] Ugandan primary school costs are on average around Ugandan shillings (UGX) 100,000 per school quarter (€25.27) and this cost increases as the children advance through the school system.[164] UGX 100,00 in education costs is relatively expensive for the average household in the Acholi region of Uganda.

40. The Chamber is aware that in March 2016, while in ICC custody, Mr Ongwen attempted to contribute financially to some of his 'wives'.[165]

[160] Victims' Closing Brief, *supra* note 141, at § 109.
[161] *Ibid*, § 210.
[162] T-29, www.icc-cpi.int/sites/default/files/Transcripts/CR2017_00281.PDF, at 29–30.
[163] Public Redacted Version of Corrected Version of Defence Brief on Sentencing, filed on 1 April 2021, *Ongwen* (ICC-02/04-01/15-1809-Corr-Red), Trial Chamber XI, 4 April 2021, § 143 (hereafter Defence Sentencing Brief).
[164] *Ibid*, § 144.
[165] Defence Response, *supra* note 157, § 38; Decision on Prosecution Request for an order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen, *Ongwen* (ICC-02/04-01/15-521), Trial Chamber XI, 10 August 2016, § 17, in which the single judge ordered the payments to stop in case they tainted witnesses.

However, any such future contribution will be limited. At the commencement of ICC proceedings he was indigent.[166] His current income in detention stands at €25 per week.[167] In this context, the Chamber is concerned that the financial burden of raising and educating the children that resulted from forced pregnancy may fall primarily on P-0101 and P-0214. The Chamber will further consider the provision of childcare in its reparations order in this case to address this financial burden and to assist in removing further barriers to employment in the immediate future.

41. When assessing the economic consequences of forced pregnancy, it is also relevant to consider how this crime affected the victims' education. In Uganda, educational attainment is associated with economic success, better health, and employment opportunities. P-0101 and P-0214 did not have these privileges. As this Chamber is aware, formal education commences for children in Uganda between the ages of six and eight, with seven years of primary school and six years of secondary school.[168] P-0101 was abducted when she was in primary 4,[169] and P-0214 in primary 7.[170]

42. The Chamber did not hear evidence as to how P-0101 and P-0214's lost educational opportunities affected their economic status, aside from the fact that P-0214 has been able to 'find work and survive, but not thrive'.[171] However, we were presented with evidence that, in general, time spent 'in the bush' placed victims in a worse economic position than their peers who were not abducted, and were therefore able to finish their education and gain employment without mental and physical trauma.[172] Regardless, the abduction and confinement of P-0101 and P-0214 immediately severed their educational opportunities. In future cases, we suggest that evidence is led on the impact of forced pregnancy on the victims' education, and subsequent earning capacity, noting that in some countries, education is legally and/or practically inaccessible during and after pregnancy.[173]

[166] Confidential ex parte Defence Only Defence Request for the Interim Release of Dominic Ongwen, *Ongwen* (ICC-02/04-01/15-332), Pre-Trial Chamber II, 29 October 2015, § 12.

[167] Defence Response, *supra* note 157, § 37.

[168] T-247, www.icc-cpi.int/sites/default/files/Transcripts/CR2019_06626.PDF, at 78 (hereafter T-247).

[169] T-13, *supra* note 118, at 16.

[170] T-15, *supra* note 121, at 5.

[171] Defence Response, *supra* note 157, § 42, noting that P-0214 was also designated D26-0010.

[172] See statement from P-0236, who was abducted for thirteen years, in Ongwen Judgment, *supra* note 116, at 2093.

[173] For example the Chamber is aware that in Tanzania, female students who become pregnant are legally unable to return to formal education after the child is born. Some other nations have similar bans for its female students. There are also barriers to return so that even if there is a technical right to return, in practice it is not possible. The Chamber notes that Uganda previously had such a law, but repealed it and in 2020 introduced new guidelines on pregnancy prevention and management in schools, see *Revised Guidelines for the Prevention and Management of Teenage Pregnancy in School Settings in Uganda*, 2020, available at www.ungei.org/sites/default/files/2021-02/Revised-Guidelines-Prevention-Management%20-Teenage-Pregnancy-School-Settings-Uganda-2020-eng.pdf.

43. As a final note in respect to the gravity of the crimes, the Chamber would like to make some recommendations regarding future forced pregnancy cases. There needs to be more detailed examination and specific evidence regarding physical, socio-economic, cultural, and psychological harms that are experienced by the victims of forced pregnancy.

Degree of Participation by Mr Ongwen

44. Mr Ongwen was convicted as the direct perpetrator of forced pregnancy. He personally confined the victims, with the intent of continuing to subject them to sexual and gender-based crimes. He was also the person responsible for forcibly impregnating the victims.[174]. As such, his direct involvement in the crime points in favour of a high sentence.

Aggravating Circumstances

45. The Chamber considers three aggravating factors in respect to Mr Ongwen's conviction of forced pregnancy, under Rule 145(2)(b).

COMMISSION OF A CRIME WHERE THE VICTIM IS PARTICULARLY DEFENCELESS

46. The Chamber heard evidence that within the LRA, young girls were targeted for rape and other sexual crimes because they were believed to be 'free from HIV/AIDS and sexually transmitted diseases'.[175] Mr Ongwen himself was frequently involved in the sexual assault of young girls.[176] These observations apply to P-0101 and P-0214, as detailed above. The victims' youth and gender, and the fact that they faced the threat of punishment or execution for escape, made them 'particularly defenceless'.[177]

COMMISSION OF A CRIME WITH PARTICULAR CRUELTY OR WITH MULTIPLE VICTIMS

47. Three pregnancies were imposed on two separate victims, utilising physical and psychological methods. The multiplicity of victims and the inherently cruel methods (use of force and threat of force, including death threats) used to perform the crime leads this to be a highly significant aggravating factor.[178]

48. We note that while Mr Ongwen's conviction of forced pregnancy is restricted to three incidents that occurred between 1 July 2002 and 31 December 2005, DNA

[174] This is not always the case with forced pregnancy. To establish this crime, it will suffice if the perpetrator confined the victim with the necessary intent and knowledge. The initial act of forcibly impregnating the victim can be done by a third party.
[175] T-247, *supra* note 168, at 62.
[176] *Ibid*; T-14, www.icc-cpi.int/sites/default/files/Transcripts/CR2016_25141.PDF, at 3.
[177] Rule 145(2)(b)(iii) ICC RPE.
[178] Rule 145(2)(b)(iv) ICC RPE.

evidence links Mr Ongwen to nine additional children delivered by his forced 'wives'.[179] These nine additional pregnancies were not charged, and therefore do not affect the sentence, but are recognised here as part of the Court's truth-telling role.

COMMISSION OF THE CRIME WITH DISCRIMINATORY MOTIVES

49. The systemic abduction of girls and women by Mr Ongwen, coupled with the forced pregnancy and other sexual crimes, illustrates a discriminatory motive, on the grounds of gender. This discriminatory motive constitutes another aggravating factor.

ADDITIONAL AGGRAVATING CIRCUMSTANCES

50. Cognisant of the non-exclusive list of aggravating factors under Rule 145(2)(b), the Chamber uses its discretion to consider additional aggravating circumstances,[180] in order to capture the full extent of damage caused by the crime of forced pregnancy.[181]

51. The first element worth considering relates to the social harms. Forced pregnancy results in a particular social stigma in Uganda.[182] Like others who returned from captivity with the LRA, victims of forced pregnancy were referred to as '*dwog cen paco*' (a derogatory term for 'somebody who has come back home').[183] Reintegration was detrimentally affected due to the violations inflicted upon them.

52. The Chamber does not have evidence that these social harms were experienced by P-0101 or P-0214. We urge these potential social consequences of forced pregnancy to be considered as additional aggravating circumstances in future sentencing decisions.

53. The second aspect worth considering relates to the resultant cultural harms to the victims. As many other victims of the LRA, P-0101 and P-0214 were unable to practise Acholi pregnancy rituals such as observing role changes and the preparation and consumption of specific food.[184] During labour, a traditional midwife called the *lacele* was not present to supervise and guide them through processes such as breastfeeding, nor was there a communal birthing ceremony.[185]

[179] These include the child delivered by P-0101 in 1999; the two children delivered by P-0214 in 2007 and 2009; the child delivered by P-0999 in 2002; the child delivered by P-0227 between 2005 and 2010; the three children delivered by P-0235 in 2007, 2010. and 2014; the child delivered by P-0236 in 2014.

[180] Under Rule 145(2)(b)(vi) of the Rules of Evidence and Procedure, the Chamber may consider as aggravating circumstances 'other circumstances which, although not enumerated [in the same Rule], by virtue of their nature are similar to those mentioned'.

[181] Rule 145(2)(b)(vi) ICC RPE.

[182] Victims' Closing Brief, *supra* note 141, § 105.

[183] T-247, *supra* note 168, at 36.

[184] Victims' Closing Brief, *supra* note 141, § 88.

[185] *Ibid*.

54. Expert evidence from Professor Musisi explained the consequences of the disconnection from cultural practices. Due to the Acholi culture being patrilineal, the mothers and children are unlikely to receive familial claims such as inheritance and fractal rights, which secure the land for Acholi women to work and provide for their family on.[186]

55. In its discretion, the Chamber considers the aggravating factor of cultural harms as relevant within the context of this case. This consideration does not amount to 'double counting' as social and cultural circumstances have not been considered for gravity purposes.

Sentencing Determination for Forced Pregnancy

56. As the above analysis shows, forced pregnancy is a crime of the most serious gravity. It violates a person's dignity, their body, and their reproductive autonomy. The impacts can reverberate through every facet of the victim's life.

57. In addition, the crime can result in a child, which even if welcomed, can place a heavy economic burden and caring responsibility on the victim. Forced pregnancy, therefore, resonates well after the pregnancy itself. It is a crime whose effects can endure for the duration of the victim's life, as well as there being intergenerational impacts felt by the child. [Editors' note: see below, Winfred Naigaga Kyobiika's reimagined judgment in this collection on the impact on children born of sexual violence (Chapter 9.4).]

58. Taking into account the damage caused by the crime, the direct role of Mr Ongwen, and the other aggravating factors noted above, and in keeping with previous sentences by this Court for analogous crimes,[187] it is appropriate to sentence Mr Ongwen to life imprisonment for the crime against humanity of forced pregnancy (Count 58) and the war crime of forced pregnancy (Count 59), to be served concurrently with his sentence for other crimes.

59. However, this sentence is to be reduced to thirty years taking into account the impact of Mr Ongwen's childhood experiences in the LRA on his moral and psychological development (see next section).

MITIGATING FACTORS

[Editors' note: save for the reference to mitigation in paragraph 59, the analysis of mitigating factors is omitted for the purpose of this reimaged judgment on forced pregnancy.]

[186] T-177, www.icc-cpi.int/sites/default/files/Transcripts/CR2018_02682.PDF, at 24.

[187] Ntaganda Sentencing Decision, *supra* note 90; Public with annexes I and II Decision on Sentence pursuant to Article 76 of the Statute, *Bemba* (ICC-01/05-01/08-3399), Trial Chamber III, 21 June 2016.

DISPOSITION

The Chamber pronounces the following sentences for each of the crimes committed by Dominic Ongwen:

For the crime against humanity of forced pregnancy (Count 58): life imprisonment;

For the war crime of forced pregnancy (Count 59): life imprisonment;

Mr Ongwen's total joint sentence would ordinarily be for life. However considering his mitigating circumstances, a reduced sentence of thirty years' imprisonment is justified in this case. Time spent in ICC custody will be deducted from this thirty-year sentence.

Judge Tonny Raymond Kirabira, Judge Adrienne Ringin, and Judge Rosemary Grey

9.4 CHILDREN BORN OF RAPE IN THE ONGWEN SENTENCE

W. Naigaga Kyobiika

In 2021, Trial Chamber IX convicted Mr Dominic Ongwen of sixty-one counts of war crimes and crimes against humanity.[188] In determining an appropriate sentence, the Chamber canvassed a number of aggravating and mitigating factors.[189]

In this rewritten sentencing decision, W. Naigaga Kyobiika inserts an additional aggravating circumstance, namely children born of war. In including this additional factor, Naigaga focuses in particular on the social and cultural experiences of these children, both during and after the war, noting the continuing nature of their harm due to the circumstances of their birth. Naigaga utilises the evidence provided at trial by experts to reframe the sentencing decision away from the perpetrator to the victims themselves, highlighting their voices and providing an avenue for closure denied in the original decision.

No.: ICC-02/04-01/15
Date: 6 May 2021

Original: English

TRIAL CHAMBER IX(B)

Before: Judge Winifred Naigaga KYOBIIKA

SITUATION IN UGANDA

IN THE CASE OF THE *PROSECUTOR v. DOMINIC ONGWEN*

Public

Redacted Sentencing Decision
Separate and Concurring Opinion of Judge Winifred Naigaga Kyobiika

[188] Trial Judgment, *Ongwen* (ICC-02/04-01/15-1762-Red), Trial Chamber IX, 4 February 2021.
[189] Sentence, *Ongwen* (ICC-02/04-01/15-1819-Red), Trial Chamber IX, 6 May 2021.

1. I agree with the final decision of the Trial Chamber as regards the individual criminal responsibility of Mr Dominic Ongwen. However, I respectfully wish to add to the conclusions of the majority of the Chamber as regards as an aggravating factor: the impact on children who were born as a result of the sexual and gender-based crimes for which Mr Ongwen has been convicted.

2. While sentencing Mr Ongwen for the crime of sexual and gender-based crimes directly and not directly perpetuated by Dominic Ongwen (Counts 50–68), the majority of the Trial Chamber states, and I agree, that there was a presence of aggravating circumstances of: a multiplicity of victims; victims being particularly defenceless; and a discriminatory motive as regards gender within the meaning of Rule 145(2)(b) of the Rules.

3. However, I wish to add another element: the concept of 'children born as a result of these sexual and gender-based crimes' as an aggravating factor. This element may be read into those circumstances covered by Rule 145(2)(b)(VI), which, although not enumerated in the Rules, is by its nature similar to the aggravating factors mentioned. Consequently, I consider it necessary to evaluate this factor.

4. It is important to note that the Rome Statute's provisions are applied and interpreted concerning specific charges brought against individuals. However, the Chamber must not disregard or shy away from discussing issues or interests that may arise while adjudicating a case. In the present case, it is an agreed fact that children were born as a result of sexual and gender-based crimes for which Mr Ongwen was convicted. It is therefore permissible for the Chamber to give a wide interpretation of the victims of crime to include those victims that arose as a result of far-reaching effects of charges with which Mr Ongwen was charged. Such an interpretation nurtures growth in the jurisprudence of the court and marks a step forward in the progressive development of international law in the area of a victim-centred approach.

5. I find that the majority of the Chamber addresses the purpose of the ICC trial proceedings: to decide on the guilt or innocence of an accused person. However, having regard to Article 75 of the Rome Statute, Rule 97 of the Rules of Procedure and Evidence of the Court, ICC trial proceedings through victim participation also attend to the effects embedded in the crimes of which one is charged that may become relevant during the determination of reparations. In our case, we have evidence of the existence of children born of war, some of whom may be indirect victims of the crime of which Dominic Ongwen is charged.

6. To analyse this additional aggravating factor, it is important to (a) discuss the legal framework that governs children in international law; and (b) expound on the complexity of children born as a result of the crimes Mr Ongwen has been convicted of.

7. The concept of 'children born as a result of war' is a relatively emerging area of law that has not previously been dealt with by this court or by any other international court in our present times. While hearing and deciding cases, the Chamber is compelled to use applicable treaties and the principles and rules of international

law; national laws of legal systems of the world; and principles and rules of law as interpreted in its previous decisions.[190]

8. International law on children, especially the 1989 UN Convention on the Rights of the Child, its Optional Protocols, and the African Charter on the Rights and Welfare of the Child, recognises that due to their physical and mental immaturity, children require special safeguards and care. The provisions for the special protection are guided by four general principles: non-discrimination; the best interests of the child; the right to life, survival, and development; and the right to express one's views and have them considered.[191] The protections include that a child has a right to: know and be cared for by his/her parents;[192] an identity including family relations;[193] be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment, or exploitation;[194] highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health[195] and education;[196] and protection against child abuse and torture;[197] among others. These safeguards seek to protect children from the multiple and different risks as they develop into adulthood, including in any context such as that of armed conflict

9. It is universally recognised that childhood is entitled to special care and assistance. The Chamber recognises that a family is a fundamental group in society and the natural environment for the growth and well-being of all its members particularly include children. It also notes that children have a right to be afforded the necessary protection and assistance in a family so that they can be prepared to fully assume their responsibilities within the community in adulthood. For the full and harmonious development of a child, that child should grow up in a family environment, in an atmosphere of happiness, love, and understanding. In the Inter-American Court's decision, in the case of *Gelman v. Uruguay*,[198] it was stated, in regard to enforced disappearance, that it is a violation of both the mental and psychological rights of a child if the mental state is a direct consequence of the enforced disappearance of the mother. The Court stated that this link was drawn because the enforced disappearance of one's mother meant a denial of identity and protection of a family, a right to a name and to a nationality. This further was a denial of the right to self-determination and a choice of one's preferred existence.

[190] Article 21(3) the Rome Statute.
[191] Articles 2, 3, 6, and 12 UN Convention on the Right of the Child; Articles 3, 4, and 5 African Charter on the Rights and Welfare of the Child.
[192] Article 7(1) UN Convention on the Right of the Child; Article 19 African Charter on the Rights and Welfare of the Child.
[193] Article 8(1) UN Convention on the Right of the Child; Article 6 African Charter on the Rights and Welfare of the Child.
[194] Article 19 UN Convention on the Right of the Child.
[195] Article 24 UN Convention on the Right of the Child.
[196] Article 28 UN Convention on the Right of the Child.
[197] Article 16 African Charter on the Rights and Welfare of the Child.
[198] *Gelman v. Uruguay*, Merits and Reparations, Inter-Am Ct. H.R., Series C No. 221 (24 February 2011).

The court emphasised that the denial of all these rights could be a result of the denial of protection to the mother.

10. I will now move to expound on the complexity surrounding children born of war. Mr Ongwen has been convicted of sexual and gender-based violence offences directly committed by him: forced marriage as another inhumane act and as a crime against humanity (Count 50); torture as a crime against humanity and as a war crime (Counts 51–52); rape as a crime against humanity and as a war crime (Counts 53–54); sexual slavery as a crime against humanity and as a war crime (Counts 55–56); enslavement as a crime against humanity (Count 57); forced pregnancy as a crime against humanity and as a war crime (Counts 58–59); and outrages upon personal dignity (Count 60).

11. Mr Ongwen has also been convicted of eight sexual and gender-based crimes not directly perpetrated by Dominic Ongwen which he committed – within the meaning of Article 25(3)(a) of the Statute – in the context of a coordinated and methodical effort in Sinia Brigade during the relevant period: forced marriage as an inhumane act and as a crime against humanity (Count 61); torture as a crime against humanity and as a war crime (Counts 62–63); rape as a crime against humanity and as a war crime (Counts 64–65); sexual slavery as a crime against humanity and as a war crime (Counts 66–67); and enslavement as a crime against humanity (Count 68).

12. This was a complex situation that went beyond the individual acts of Ongwen but, further, those perpetrated on his command. I take judicial notice of the proposals that the Lord's Resistance Army had a political agenda. Reports such as that of the Justice and Reconciliation project[199] have argued that there was a systematic plan to abduct young girls in part to develop a 'new moral order', a forceful purification of the old, and the birth of a 'new Acholi'. Forced marriage was a political project in which Acholi men and women, boys and girls were forced to 'marry' and bear children as 'families' in an effort to expand this new Acholi population.[200]

13. As a result of the forced marriages, some of the victims were mothers to children fathered by Mr Ongwen and his soldiers in the Sinia Brigade. To be precise, though Mr Ongwen had thirteen children at the time of the trial, ten of the thirteen children were fathered by him outside the period relevant to the charges. The three children who were fathered by Mr Ongwen during the period relevant to the charges were born to P-0101 and P-0214. Mr Ongwen also played a vital role in coordinating the Sinia Brigade to commit the offence of forced marriage which led to the fathering of many children. While precise findings as to the

[199] Justice and Reconciliation Project, 'We Are All the Same: Experiences of Children Born into LRA Captivity' (2015) 2, available at www.researchgate.net/publication/337158547_%27We_Are_All_the_Same%27_Experiences_of_Children_Born_into_LRA_Captivity.

[200] Article 5 of the UN Convention on the Rights of the Child.

number of children were not possible, the Chamber found in the Trial Judgment that at any time between 1 July 2002 and 31 December 2005 many children were conceived and born as a result of the rampant sexual abuse that took place during this time

14. Studies on children born of war, such as Brigitte Rohwerder's 2019 study,[201] generally observe that children born of wartime rape, and their mothers, are often stigmatised by their own communities due to their associations with political, ethnic, or religious enemies. She added that their identity and sense of belonging are contested, which creates dangers for their physical security and emotional well-being. She found that children born of wartime rape are at risk of violence, abuse, abandonment, discrimination, and marginalisation, at the hands of both families and communities. They often have less access to community resources, family protection, and education or livelihood activities, and are likely to grow up in poverty. They can face challenges in registering their birth and their right to citizenship. The experiences of children born of wartime rape can result in a lifetime of detrimental consequences, and the stigmatisation they experience continues long into the post-war period.

15. It is important to remind ourselves that being born as a result of war does not predetermine how a child will experience life's journey. Children's capacities and vulnerabilities do change according to time and contexts such as gender, perceived ethnicity, social and economic status, as well as structural gender discrimination, especially in patriarchal and patrilineal societies. Diane Amann[202] writes that 'children as persons with individual rights, as members of families and as constituents of multigenerational communities, may be impacted differently by crimes based on their sex, gender, or other status or identities'. She states that age and birth may give rise to multiple forms of discrimination and social inequalities, either alone or as they intersect with other factors, such as race, ability, or disability; religion or belief; political or another opinion; national, ethnic, or social origin; gender, sex, or other status or identity.

16. Indeed, the listing of child rights in the international human rights regime does not presume that all children always are vulnerable but instead requires attention to be paid to the evolving capacities of the child.

17. The discussion of experiences of children born as a result of rapes during war does not in any way suggest that I am lumping together the realities of children born as a result of war. I am aware that different children had different experiences. After the war, some relocated with their mothers from their ancestral villages to towns,

[201] B. Rohwerder, 'Reintegration of Children Born of Wartime Rape' (2019) 7–8, available at https://assets.publishing.service.gov.uk/media/5d431080ed915d09d7280ce4/628_Reintegration_of_Children_Born_of_Wartime_Rape.pdf.

[202] D. M. Amann, 'International Child Law and the Settlement of Ukraine-Russia and Other Conflicts' 99 *International Law Studies* (2022) 599–601, available at https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=3022&context=ils.

where there was greater anonymity and people were less likely to know about their experiences in captivity, which contributed to reduced stigmatisation; others had a privileged social class and families that paid for their therapy and education in cities including Kampala; while others were welcomed back in their ancestral home and went on to have a loving family experience. However, I focus on those unfortunate children who were stripped of the protections of family life due to their status of being born because of rape.

18. It is a fact that forced marriages produce complex emotional and psychological effects on the victims and their children beyond the obvious physical effects of pregnancy and child-bearing. For example, I observe that some of the children born as a result of war have been treated with disdain and continue to face untold suffering, rejection, discrimination, and stigmatisation in the communities. On the maternal side, a majority of the children face discrimination because they were born outside the norms since their father never paid the dowry when he forcefully married their mothers. This fact in a way disrupted the social fabric – the belief in and sanctity of marriage. It should be noted that in northern Uganda having children out of wedlock is a practice that is generally frowned upon among the communities.[203] Secondly, some of these children and their mothers[204] have come to be identified as perpetrators or enablers of the conflict since the evidence in the Trial Chamber shows that they served as wives, cleaners, cooks, and actively took part in the conflict, among others.[205]

19. Joanne Neenan[206] and Mahlet Woldetsadik[207] report that the influence of patriarchy in Acholi communities contributes to children's contested identities, as paternal clan membership determines access to identity and belonging, social status, land and resources. They propose that contested clan membership reduces one's access to inherited family land and resources, leading to potential poverty, homelessness, and reduced prospects for marriage. They conclude that this is especially problematic for young men as, without a way to provide for spouses and families, they will experience greater social rejection than young women. It should be noted that some of these children face far more complex difficulties that are not comparable to those of other children born out of unsanctioned unions. For example, a situation where children are born as a result of elopement in peaceful times can be

[203] N. Mukasa, 'War-Child Mothers in Northern Uganda: The Civil War Forgotten Legacy' 27 *Development in Practice* (2017) 354–367, at 360.

[204] Mothers served as wives, cleaners, and cooks but at times were engaged in fighting.

[205] J. Neenan, 'Closing the Protection Gap for Children Born of War – Addressing Stigmatisation and the Intergenerational Impact of Sexual Violence in Conflict' LSE & FCO (2017), available at www.lse.ac.uk/women-peace-security/assets/documents/2018/LSE-WPS-Children-Born-ofWar.pdf.

[206] *Ibid*.

[207] M. A. Woldetsadik, 'Lessons from Northern Uganda: Post-Conflict Integration of "Children Born of War"', The RAND blog (2017), available at www.rand.org/blog/2017/04/lessons-from-northern-uganda-post-conflict-integration.html.

corrected with paying of dowry but the situation at hand cannot be corrected in the same way. Since the children of P-0099, P-0101, P-0214, and P-0227 fathered by Mr Ongwen were born out of an unsanctioned union, the chances that some of them may experience the rejections described above should not be disregarded.

20. Living outside the protection of family means that some of these children continue to be denied not only a sense of identity and belonging which correlates with inheritance and possession of land but also the provision of basic needs that are necessary to the full development of the child. It is important to note that the four witnesses mentioned above were aged between approximately nineteen and twenty-one at the time relevant to the crimes committed against them of which Dominic Ongwen has been found guilty. In a normal setting, these witnesses would have acquired skills at school during those formative years. The effect of the wasted years can be seen from the evidence of P-0236. When she was asked by the Trial Chamber to compare herself to her schoolmates now that she had returned home, she responded as follows:

> There is no comparison because right now they are much better off than I am. I'm back home. I've got – I have injuries. I'm weak. Maybe if I had not been abducted I would have not been shot at, I would have not been injured, I would have not had any – I would not be suffering. Most of the people that – my peers are okay. They are not injured. They're working. Some of them have finished their education. So they're in a much better off position than I am.[208]

21. Without skills, the victims are not a great fit for the labour market and unless supported may continue to be disadvantaged in giving their children the best chances in life.

22. If children born of war have been accepted with their mothers to live in their maternal home, in some extreme cases they stand a high chance of being victims of abuse in these maternal homes. Joanne Neenan[209] writes that such children are 'generally perceived as proxy members of the LRA, symbols of misfortune, and stereotyped as violent, unproductive, unequal members of society' and, as a result, they are discriminated against in everyday life. For example, some children shared that they were not allowed to share bedding with other children, and others were denied an opportunity to attend school and instead turned into casual labourers, among others. This is further exacerbated by the patrilineal culture where their mothers have no right to land, meaning the children have nothing to inherit apart from the segregation that their mothers suffer.[210]

[208] Judgment, *Ongwen* (ICC-01/04-01/15), Trial Chamber IX, 4 February 2021, § 2093.
[209] Neenan, *supra* note 205.
[210] V. Ladisch, 'From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda', ICTJ (2015) 17–19, available at www.ictj.org/sites/default/files/ICTJ-Report-Uganda-Children-2015.pdf.

23. I now turn to discuss the effect of the offences of torture, rape, sexual slavery, enslavement, forced pregnancy, and outrages upon personal dignity on the children born of war.

24. Mr Ongwen's children and those of his soldiers in the Sinia Brigade were conceived, born, and raised in difficult circumstances. For example, P-0099 testified that in September 2002, while she was sick, she went to collect food with her three-month-old child. She successfully escaped and was taken to the government barracks where her baby started being fed on formula until she recovered. P-0101 testified that her group came under fire from two government gunships in July 2004. She stated that she was injured and her one-year-old daughter was shot and taken by government soldiers. P-0372 testified that abducted women and girls could occasionally be released after giving birth if they could not move with the group because of having to take care of the baby. The mothers and their children lacked proper medical attention, adequate food, accommodation, clothes, clean water, and education.

25. The evidence from the Trial Chamber also shows that as a result of the rape during the relevant period, P-0101 and P-0214 gave birth to children fathered by Dominic Ongwen, and other women who experienced sexual violence from the soldiers of the Sinia Brigade also gave birth. These children were born and conceived in violent circumstances and they grew up witnessing the rape of their mothers and other women by Mr Ongwen and his soldiers over a protracted period. It is important to note that other older children in Mr Ongwen's homestead and those who lived in the homestead of other members of the Sinia Brigade also witnessed this protracted violence perpetrated on their mothers.

26. Additionally, some of the children born of war witnessed and experienced violent events. The record of the Trial Chamber shows that Mr Ongwen and his soldiers often used violent acts such as beatings, rape, sexual slavery, and executions to discipline his army in his homestead. For example, P-0101 told the court about her first sexual encounter with Mr Ongwen. She stated that he threatened her with a gun before forcefully having sex with her while his escorts held her hands. She stated that she was fifteen years old at the time and in her own words she felt 'he violated my rights, I was young and there was absolutely nothing that I could say about it'. P-0099 testified that she and another woman refused to cook for Mr Ongwen or go to the garden. Mr Ongwen called his escorts and instructed them to beat them. P-0101 confirmed to the trial chamber that she was beaten by Mr Ongwen multiple times for refusing to have sex with him. P-0235 recalls an incident in Uganda when P-0214 was beaten when two months pregnant. Given that P-0214's evidence indicates that she was only in Uganda while pregnant for the first time, while all her other pregnancies occurred outside Uganda, the Trial Chamber concluded that the incident described by P-0235 took place during P-0214's first pregnancy in 2005, a time that falls within the period of the charges. P-0227 testified that at one time, when Mr Ongwen thought she was cunning and intended to escape, he ordered his

soldiers to beat her. She stated that the beating continued for a long time until her body was swollen and it was difficult for her to walk. P-0352 described being forced, on Dominic Ongwen's orders, to take part in the killing of another girl who had been accused of witchcraft, while P-0351 similarly stated that she was forced to kick to death a boy who had tried to escape but was caught.

27. From the above, I find that some of Mr Ongwen's children were conceived because of rape and were raised in a largely violent homestead. Professor Weierstall-Pust explained to the Court that when someone is exposed to traumatic events, it may lead to a trauma spectrum disorder. Professor Mezey's report gave the Trial Chamber a comprehensive description of the effect of a traumatic event on a person's mental health. It stated that victims of trauma may experience severe depressive illness, post-traumatic stress disorder (PTSD) and dissociative disorder (including depersonalisation and multiple identity disorder) as well as severe suicidal ideation and high risk of committing suicide, and from dissociative amnesia and symptoms of obsessive-compulsive disorder.

28. In his report, Professor Mezey described that a depressive disorder is characterised by a persistent severe lowering of mood, feelings of sadness, hopelessness, despair, often associated with an inability to see any future or to feel hopeless about the future. He added that this disorder is often associated with a high risk of suicidal tendencies. He stated that the more severe conditions will be associated with disruptions in the individual's physical health and functioning and will include symptoms such as a reduction of appetite, loss of weight, disruption to sleep, particularly inability to get to sleep, and waking early in the morning. Professor Mezey stated that the condition can result in an individual becoming socially withdrawn and disruption of the individual's cognitions so that they are unable to concentrate well. He stated that people who have undergone traumatic experiences may become retarded, so that the person's speech and their movements are slowed down; they may lack spontaneity in terms of expressing themselves, but also in terms of their facial expressions or ability to verbalise or vocalise. He also stated that they often express unreasonable feelings of worthlessness, low self-esteem, and guilt, sometimes to an extreme extent, so that they feel guilty about the war and things they cannot possibly be held responsible for.

29. Professor Mezey also noted in his report that PTSD is significant clinical distress associated with symptoms that are so severe and so intrusive that they stop the individual from being able to carry on with their normal day-to-day functioning. For example, children may fail to study, help with household chores, or interact with friends.

30. Concerning dissociative identity disorder, Professor Mezey explained that dissociation is a disruption to the person's identity, their sense of self, and their sense of agency. He stated that this disorder is characterised by two or more distinct personalities operating, essentially, side by side and neither personality knows of the other person's existence. He added that this is an enduring condition that does not remit or relapse in the way that other illnesses might do.

31. The Chamber also called Ms Elisabeth Schauer as an expert witness on the topic of children with trauma, particularly post-traumatic stress disorder. During her testimony, Ms Schauer stated that the trauma suffered by child soldiers has intellectual and cognitive consequences for the children. Children who have suffered trauma have problems with their memory and may have learning difficulties, particularly as regards reading and writing comprehension. She also affirmed that this trauma never goes away. The expert further stated that although persons with PTSD may recall events that occurred in the past, their ability to answer and remember these events will depend on the way questions are asked, and if they are asked chronologically. She stated, 'you probably have a hard time just wanting to know – jumping and wanting to know little details here and there'.

32. I find the evidence of these medical experts entirely convincing and do believe that some of Mr Ongwen's children and some of the other children born to his soldiers in the Sinia Brigade stand a high risk of suffering from the mental disorders discussed by the medical experts.

33. I find that Mr Ongwen denied some of his children the fundamental right of being born and raised in the security of a family. The central element and underlying act for children born of war is the imposition of this status on the victim. Such a status, as seen above, has mental economic, social, ethical, and religious effects, among others.

34. I recall that Dominic Ongwen himself had in the past been a victim of war, having been abducted as a child and integrated as a fighter into the LRA ranks. He described the great suffering of the children abducted by the LRA when providing an account of his own experience. It cannot go unnoticed that Dominic Ongwen, despite being well aware of such suffering, which he had been subjected to several years earlier and fully appreciating its wrongfulness, did nothing to spare similar experiences to other children after him, but, on the contrary, wilfully sustained and contributed to perpetuating the systemic, methodical, and widespread fathering of children for the LRA.

35. From the foregoing, I thus sentence as follows:

- For the crime against humanity of forced marriage as another inhumane act of P-0099, P-0101, P-0214, P-0226, and P-0227 (Count 50) a term of twenty years of imprisonment; and in addition I order reparations for any of the children that were members of Mr Ongwen's homestead during the period relevant to this offence.
- For the crime against humanity of torture of P-0101, P-0214, P-0226, and P0227 (Count 51) a term of twenty years of imprisonment; and in addition I order reparations for any of the children that were members of Mr Ongwen's homestead during the period relevant to this offence.
- For the war crime of torture of P-0101, P-0214, P-0226, and P-0227 (Count 52) a term of twenty years of imprisonment; and in addition I order

reparations for any of the children that were members of Mr Ongwen's homestead during the period relevant to this offence.

- For the crime against humanity of rape of P-0101, P-0214, P-0226, and P-0227 (Count 53) a term of twenty years of imprisonment; and in addition, I order reparations for any of the children that were members of Mr Ongwen's homestead during the period relevant to this offence.
- For the war crime of rape of P-0101, P-0214, P-0226, and P-0227 (Count 54) a term of twenty years of imprisonment; and in addition, I order reparations for any of the children that were members of Mr Ongwen's homestead during the period relevant to this offence.
- For the crime against humanity of sexual slavery of P-0101, P-0214, P-0226, and P-0227 (Count 55) a term of twenty years of imprisonment; and in addition, I order reparations for any of the children that were members of Mr Ongwen's homestead during the period relevant to this offence.
- For the war crime of sexual slavery of P-0101, P-0214, P-0226, and P-0227 (Count 56) a term of twenty years of imprisonment; and in addition I order reparations for any of the children that were members of Mr Ongwen's homestead during the period relevant to this offence.
- For the crime against humanity of enslavement of P-0099, P-0235, and P-0236 (Count 57) a term of twenty years of imprisonment; and in addition, I order reparations for any of the children that were members of Mr Ongwen's homestead during the period relevant to this offence.
- For the crime against humanity of forced pregnancy of P-0101 and P-0214 (Count 58) a term of twenty years of imprisonment; and in addition, I order reparations for the children that were born as a result of this offence.
- For the war crime of forced pregnancy of P-0101 and P-0214 (Count 59) a term of twenty years of imprisonment; and in addition, I order reparations for any of the children that were members of Mr Ongwen's homestead during the period relevant to this offence.
- For the war crime of outrages upon personal dignity of P-0226 and P-0235 (Count 60) a term of fourteen years of imprisonment; and in addition, I order reparations for any of the children that witnessed this crime while it was happening.
- For the crime against humanity of forced marriage as another inhumane act, from at least 1 July 2002 until 31 December 2005 (Count 61), a term of twenty years of imprisonment; and in addition, I order reparations for any of the children that were members of the Sania Brigade soldiers' homesteads during the period relevant to this offence.
- For the crime against humanity of torture, from at least 1 July 2002 until 31 December 2005 (Count 62), a term of twenty years of imprisonment; and in addition, I order reparations for any of the children that were

members of the soldiers' homesteads during the period relevant to this offence.

- For the war crime of torture, from at least 1 July 2002 until 31 December 2005 (Count 63), a term of twenty years of imprisonment; and in addition, I order reparations for any of the children that were members of the soldiers' homesteads during the period relevant to this offence.
- For the crime against humanity of rape, from at least 1 July 2002 until 31 December 2005 (Count 64), a term of twenty years of imprisonment; and in addition, I order reparations for any of the children that were members of the soldiers' homesteads during the period relevant to this offence.
- For the war crime of rape, from at least 1 July 2002 until 31 December 2005 (Count 65), a term of twenty years of imprisonment; and in addition, I order reparations for any of the children that were members of the soldiers' homesteads during the period relevant to this offence.
- For the crime against humanity of sexual slavery, from at least 1 July 2002 until 31 December 2005 (Count 66), a term of twenty years of imprisonment; and in addition, I order reparations for any of the children that were members of the soldiers' homesteads during the period relevant to this offence.
- For the war crime of sexual slavery, from at least 1 July 2002 until 31 December 2005 (Count 67), a term of twenty years of imprisonment; and in addition, I order reparations for any of the children that were members of the soldiers' homesteads during the period relevant to this offence.
- For the crime against humanity of enslavement, from at least 1 July 2002 until 31 December 2005 (Count 68), a term of twenty years of imprisonment; and in addition, I order reparations for any of the children that were members of the soldiers' homesteads during the period relevant to this offence.

Judge W. Naigaga Kyobiika