Cour
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Criminal
Court

Original: ***English*** *No.:* ***ICC-*** ICC-02/04-01/15 A

Date: **20-12-2021**

THE APPEALS CHAMBER

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

SITUATION IN UGANDA

IN THE CASE OF
THE PROSECUTOR v. DOMINIC ONGWEN

Public Document

AMICUS BRIEF BY JUSTICE FRANCIS M. SSEKANDI

Source: **JUSTICE FRANCIS MUZINGU SSEKANDI**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
[Mr. Karim A.A.Khan Prosecutor
Ms. Helen Brady]

Counsel for the Defence
[Mr. Krispus Ayena Odongo
Chief Charles Achaleke Taku]

Legal Representatives of the Victims
[Mr Joseph Akwenyu Manoba

Legal Representatives of the Applicants
[

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims
[2 names maximum]

The Office of Public Counsel for the Defence
[2 names maximum]

States' Representatives

Amicus Curiae
Mr. Justice Francis M. Ssekandi (rtd)

REGISTRY

Registrar
M. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

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I. DIMINISHED RESPONSIBILITY AS A DEFENCE

1. This Amicus Brief is, respectfully, submitted as requested by the Appellate Chamber, essentially, to make the case that Mr. Dominic Ongwen (Ongwen) is entitled to the diminished responsibility defence based on Article 31(3), and derived from applicable law as set forth in Article 21.[1] Diminished responsibility is a well-established defence under the General Principles of International Criminal Law, part of Customary International Law, and in Common Law countries, like Uganda, of which Ongwen is a national, forms the basis to reduce the crime of murder to manslaughter. It is also recognized in Civil Law countries, where it is one of the elements to be considered to reduce the sentence of the accused. (Windell, 2017).[2]

2. This Brief will argue that diminished responsibility was adequately established in the evidence adduced by the Prosecution and the Defence, including from mental health experts. The mental health experts diagnosed Ongwen to suffer from multiple mental illnesses. The other evidence attested to the abhorrent conditions of servitude in which Ongwen was raised, following his abduction as a child of nine years old and indoctrinated into committing unspeakable crimes by the terrorist armed group, the LRA, led by the notorious Joseph Kony. There is no mistaking that Kony founded the LRA, conducted its operations and controlled everyone under him. Kony imposed a doctrine of murder and mayhem as a weapon to subjugate and arouse the civilian population of Northern Uganda, to topple the Uganda Government of the day which had, in his view, illegally seized power. He sought to install one in its place that was based on the Ten Commandments. The group committed atrocities, using children captured from the Acholi tribe to which Ongwen also belonged, to terrorize their own people. These conscripted child soldiers committed these atrocities against their own people: their fathers, mothers, and brothers. They did not do it willingly or for personal gain. They were indoctrinated, bribed with abducted girls converted into their 'wives,' offered drugs and alcohol to brave them for battle and threatened with death for insubordination or desertion, all under a brutal regime conducted by Kony.[3] They were victims. Ongwen too was a victim who was forced to perpetrate the same crimes on others as were committed on him.[4]

[1] See: C. Bassiouni, *Crimes against Humanity in International Criminal Law*, Dordrecht, Martinus Nijhoff Publishers, 1992, p.439.
[2] Northje, Page 13, at bottom "Diminished responsibility, however, is a defence under Customary International Law." See also: Zejnil Delalić et al. (Čelibilići), Case No. IT-96-21-A Appeal Judgment para.590; see also Para.839.
[3] See: https://www.hrw.org/news/2008/04/16/coercion-and-intimidation-child-soldiers-participate-violence
[4] Testimony of Professor Ovuga, under cross examination: ICC-02/04-01/15-T-251-Red-ENG WT 22-11-2019 1/97 SZ T. Page 41. Line 15. See also Child Soldiers Global Report 2001 – Uganda, Child Soldiers International.

3. As for the standard of proof, we intend to leave the detailed coverage of this question to the International Law and Policy Group in its Amicus Brief. It suffices to say here, that we support the position advocated by the Group that, where Article 31(1)(a) is pleaded, the defendant discharges its burden, if the evidence adduced raises a reasonable doubt as to his mental capacity (which goes to defendant's mental culpability), while maintaining the burden on the prosecution to prove its case beyond a reasonable doubt.[5] Equally, we will cede the detailed appraisal of the expert testimony on Ongwen's mental capacity and the Trial Chamber's treatment of this testimony, to Doctor Ronald Johannes Petrus in his Amicus Brief. We endorse his statement that:

In my experience traumatic events are more damaging to children and adolescents than to - presumably more balanced - adults. Such events can lead to a serious negative impact on basic trust, ultimately resulting in severe attachment disorder. The latter can lead to skewed personality development manifested in deteriorated cognitive abilities, emotional imbalance, and dysregulated behaviour".[6]

II. APPLICABLE LAW

4. The Insanity defence, unlike diminished responsibility, is a complete defence under the Rome Statute Article 31(1)(a) which defines grounds for excluding criminal responsibility in almost precisely the same terms as insanity. The insanity defence, recognized in both the Common Law[7] and Civil Law, is ordinarily formulated in terms of a "defect of reason" from a "disease of the mind". Thus, Article 31(1)(a) seems to introduce an even harder test by formulating the defence in terms of a "mental disease or defect that destroys" the person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.[8] (Shabas, Second Edition).[9] (Gilbert, 2006).

5. The insanity defence in England and Wales, as well as in Uganda, is based on the McNaughton Rules.[10] The Uganda Penal Code, provides:

Section 11: A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he or she is through any disease affecting his or her mind incapable of understanding what he or she is doing, or of knowing that he or she ought not to do the act or make the omission. [11] (Nsereko, 2015)

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[5] Article 66(2) Rome Statute. See Commentary on Article 66 by William Shabas: The International Criminal Court: A Commentary on the Rome Statute, Second Edition Oxford University Press, in particular his commentary on Article 66(3) Reasonable Doubt at P.1010 and the dissenting opinion of Judge Ušacka in the Lubanga case in the Appeals Chamber at P.1011, emphasizing that 'all facts material to the elements of the crimes charged must be proven beyond a reasonable doubt'. This inevitably includes facts as to the mental capacity of the accused once this defence is raised as an issue and the mental capacity of the accused becomes in doubt. See also: Prosecutor v. Mitar Vasiljevic Case No. IT-98-32-T, Judgment 29,2002 [P.7]

[6] Request for leave to submit an amicus curia by Dr. Ronald Johannes Petrus Rijnders. ICC-02/04-01/15-1913 24-11-2021 3/5 RH A dated 12/11/2021

[7] For example the McNaughton Rules (1843) 10 Cl. & Fin 200, 8.E.R. 718 also, Jérémie Gilbert: Justice not Revenge at P.5

[8] Article 31(1)(a) of Rome Statute

[9] William Shabas at P. 636.

[10] Ibid

[11] https://www.ugandalaws.com see also: Daniel David Ntanda Nsereko, Criminal Law in Uganda, page 101.

This definition replaced "wrong" in the McNaughton Rules with "knowing that he or she ought not do the act or make the omission." Wrong was also replaced with "unlawfulness" in Article 31(1)(a).[12]

6. The diminished responsibility defence, unlike the insanity defence, does not absolve the accused of criminal responsibility. It is often used to reduce the accused's culpability from murder to manslaughter or unlawful homicide. Thus, diminished responsibility acts to negate one of the elements of the crime of murder, *Mens Rea.* In Uganda it is defined in Section 194 of the Penal Code and reads:

Where a person is found guilty of the murder or of being a party to the murder of another, and the court is satisfied that he or she was suffering from such abnormality of mind, whether arising from a condition of arrested or retarded development of mind, or any inherent causes or induced by disease or injury, as substantially impaired his or her mental responsibility for his or her acts and omissions in doing or being a party to the murder, the court shall make a special finding to the effect that the accused was guilty of murder but with diminished responsibility.[13]

Diminished responsibility was introduced in the Uganda Penal Code in 1960, patterned on the English Homicide Act of 1957.[14] Although murder remains a capital offence in Uganda, it is no longer mandatory.[15] In England and Scotland murder is no longer a capital offence but diminished responsibility was still retained in subsequent law reforms.[16] In Scotland, Section 168 of the Criminal Justice and Licensing (Scotland) Act, 2010, now reads:

A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on grounds of diminished responsibility if the person's ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind. [17]

7. It is significant to note that the re-formulation of diminished responsibility in Scotland, refers to "substantially impaired" by reason of abnormality of mind, a remnant from the old formulation in England, under the Homicide Act 1957, and Uganda under Section 194 of the Penal Code. ICC Rule 145(2) (a)(i) also refers to diminished responsibility in terms of "substantially diminished mental capacity".[18] In this respect, the ICTY does not distinguish between grounds for excluding criminal responsibility, as defined in Article 31(10(a), and diminished

[12] The McNaughton Rules crated a presumption of sanity unless the defence proved "at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know he was doing was wrong. See: Insanity defence Overview at: https://www.law.connell.edu/wex/insanilty_defencse. "wrong" in this context is not clear as to moral wrong or legal wrong and has been a source of intense debate in many countries and in academic literature.
[13] https: ulii.orgakn/ug/act/ord/195012/eng@2014-05-09
[14] S.2 of the Homicide Act, 1957
[15] The Uganda Constitutional Court decided in 2005 that the mandatory death penalty was unconstitutional, a decision upheld by the Supreme Court. See: *Susan Kigula Sserembe & Anor v Uganda* (Criminal Appeal 1 of 2004) [2008] UGSC 15. https://ulii.org/ug/judgment/supreme-court-uganda/2008/15
[16] S. 52 of the Coroners and Justice Act 2009.
[17] Criminal Procedure (Scotland) Act 1995 (2020 Edition), Section 51(B(1). See also: The Modern Partial Defence of Diminished responsibility by Rudi Fortson QC, in Reed and Bohlander "Loss of Control and Diminished responsibility", Chapter 2 and Chapter 11. 'Partial Defences to Murder in Scotland: An Unlikely Tranquillity by James Chalmers.
[18] "Substantial diminished responsibility or lack of mental capacity" used in the Rule recalls the equivalent "substantially impairment" used in the Uganda and England definitions of Diminished responsibility.

responsibility, a partial defence under English Law. Rule 67 (B)(i)(b)[19] of the ICTY Rules of Procedure and Evidence which refers to diminished responsibility reads:

"*Within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 ter: (i) the defence shall notify the Prosecutor of its intent to offer: (a) the defence of alibi (..); (b) any special defence, including that of* ***diminished or lack of mental responsibility****; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.*[20]

8. In the *Celebici Camp Case,* one of the accused, Esad Landzo, pleaded diminished responsibility as a complete defence, which was rejected by the Trial Chamber, but was considered in sentencing, resulting in a reduced sentence of 15 years. The defence appeal against the decision to reject diminished responsibility as a defence was summarily dismissed, observing that Rule 67 (B)(i)(b) was a judge made rule and the ICTY Statute did not confer on the judges the power to create new defences.[21] The ICTY Appeals Chamber ruled that, unlike insanity, diminished responsibility refers only to the impairment of mental capacity,[22] and is only relevant in mitigation of a sentence.[23] (Krug, 2000).[24] In a subsequent case, however, the ICTY Trial Chamber, in *Prosecutor v. Mitar Vasiljevic,*[25] defined diminished responsibility in terms of Article 31(1)(a), [26] but proceeded to consider it as a mitigating circumstance in sentencing in line with the reasoning in the *Celebici Camp Case*.[27]As explained in this Brief, diminished responsibility under Customary International Law is a partial defence and is different from the complete defence defined under Article 32 (1(a).[28]

III. ONGWEN'S CASE

9. Ongwen has appealed his conviction and sentence following trial, during which his asserted defences under Article 31(1)(a) were rejected by the Trial Chamber IX on 4 February 2021. The Trial Chamber concluded that "Ongwen did not suffer from a mental disease or defect at the time of the conduct relevant under the charges" and, therefore, that part of the 'grounds excluding criminal responsibility' under Article 31(1)(a) of the Statute, is not applicable. The trial Chamber did not inquire or consider whether the partial defence of diminished responsibility, well known to common law countries as a separate defence and, indeed, under customary international criminal law, would be applicable in this case.

[19] The current numbering of the Rule is from the 2008 edition of the ICTY Rules of Procedure and Evidence
[20] Initial Document adopted 11 February 1994, Rules of Procedure and Evidence, Rule 67 (A)(ii). ICTR adopted the same formulation in its RPE, Rule 67 (A)(ii)(b).
[21] ICTY, Appeals Chamber *Prosecutor v Delalic, Mucic, Delic and Lanzo,(Celebici Case),* Judgment, 20 February 2001, Para 446.
[22] See Gilbert at Page 6.
[23] This is the general view adopted in the civil caw countries.
[24] Peter Krug, at P.3
[25] https://www.icty.org/x/cases/vasiljevic/tjug/en/vas021129.pdf
[26] Paras 586-592 and Footnote 677 of the Trial Chamber's Judgment in *Vasiljevic*. The equation of diminished responsibility and Article 32(1)(a) of the Rome Statute misses the point that the latter amounts to a complete defence while under General Principles of Law diminished responsibility is a partial defence.
[27] The civil law countries identified in footnote 677 are: In France: Penal Code (1992), Article 122-1. In Germany: Penal Code, Sections 20-21. In Italy: Penal Code (1930), Articles 88- 89. In the Russian Federation: Criminal Code (1996) (translated by W Butler, Criminal Code of the Russian Federation, Simmonds and Hill Publishing, London, 1997), Articles 21-22. In Turkey: Penal Code (International Encyclopaedia of Law, ed Prof Blancpain, Kluwer, vol 3), Articles 46-47. In Japan: Penal Code (1907), Article 39(2). In South Africa: Criminal Procedure Act, 1977, Section 78(7). In the former Yugoslavia: Criminal Code (1976) of the SFRY, Article 12; Croatian Penal Code (1997).
[28] See "Diminished responsibility and Loss of Control: The Perspective of International Criminal Law" Chapter 22 in Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives Edited by Alan Reed and Michael Bohlander. Ibid.

10. Article 31(1)(a), with its emphasis on a finding of "mental disease or defect that destroys that person's capacity.." is more akin to the defence of insanity than the partial defence of diminished responsibility, as defined under Section 52 of the English Coroners and Justice Act 2009[29] or s. 1684 of the Criminal Justice and Licensing (Scotland) Act 2010.[30] As stated in *R v. Clarke*[31], for a finding of insanity, the defendant must suffer from a defect of reason and a defect of reason must be caused by a disease of the mind.[32] The *travaux préparatoires* of Article 31(1)(a) reveals that the current wording was a compromise between those who wanted to define insanity/diminished responsibility as one, and many that wanted to do away with defences all together.[33] The final formulation of Article 31(1)(a) was considered sufficiently neutral enough to satisfy the common law and civil law requirements for what is generally known as the insanity defence.[34]

11. The applicable law under Article 21 includes "*general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards*." Uganda of which Ongwen is a national, is a member of the British Commonwealth and a Common Law country. Considering that the degree of mental impairment in the case of insanity is higher than diminished responsibility, there was a need for the Trial Chamber to also assess the evidence adduced by the Prosecution to determine whether such evidence also excluded diminished responsibility beyond a reasonable doubt given Ogwen's circumstances. Had the Trial Chamber done so, Ongwen would have been given a considerably lighter sentence.

12. While the insanity defence formulated in Article 31(1)(a) requires proof of a "mental disease or defect that destroys that person's capacity..," diminished responsibility as defined in Scotland,

[29] The Coroners and Justice Act 2009 revised the definition in the Homicide Act 1957 to read: 52 Persons suffering from diminished responsibility (England and Wales): (1) A person ("D") who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—
(a) arose from a recognised medical condition;
(b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A); and (c) provides an explanation for D's acts and omissions in doing or being a party to the killing. (1A) Those things are—
(a) to understand the nature of D's conduct;
(b) to form a rational judgement;
(c) to exercise self-control.

[30] s. 1684 of the Criminal Justice and Licensing (Scotland) Act 2010 which provides:
A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on grounds of diminished responsibility if the person's ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind.Legislation.gov.uk

[31] [1972] 1 All.E.R 219

[32] See also: McNaughton [1843] UKHL. 116, which laid down the basic rule for insanity in the Common Law. It required (i) a defect of reason; (ii) the defect of reason must be caused by a disease of the mind; (iii) the defect of reason must be such that the defendant did not know what he was doing or, if he did know, he did not know the act was wrong.

[33] William A. Shabas: The International Criminal Court: A Commentary on the Rome Statute. Comment on Insanity (Article 31(1)(a), at Page 640.

[34] Ibid.

for example, requires only *"substantially impaired by reason of abnormality of mind,"* and in England and Wales, the test is whether: *(1) A person ("D") " who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning" which—*

(a) arose from a recognised medical condition; (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A); and (c) provides an explanation for D's acts and omissions in doing or being a party to the killing." [35] In Uganda, a similar requirement is contained in Section 194 of the Penal Code Act, that is: *Suffering from such abnormality of mind, whether arising from a condition of arrested or retarded development of mind, or any inherent causes or induced by disease or injury, as substantially impaired his or her mental responsibility.*[36]

13. The position advanced in this brief, based on Article 31(3), is that diminished responsibility, as applied in common law countries as a partial defence, may be considered "a ground for excluding criminal responsibility," albeit partially, based on Article 21(1)(c), as part of the applicable for the Court, when considering the mental capacity of the accused to commit the crimes charged. This position is reinforced by the inclusion of diminished responsibility (a partial defence) in Rule 145(2)(a)(1), rather than insanity (which is a complete defence), together with duress which is also expressly recognized under Article 31(1)(d) as one of the grounds for excluding responsibility, but still included in the Rule as an extenuating circumstance during sentencing.

14. The inclusion of duress in Article 145(2)(a)(i) as a mitigating circumstance during sentencing is a recognition that duress defined in Article 31(1)(d) as "resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person" can still be considered, according to circumstances, when the degree of duress falls short of "resulting from a threat of imminent death" but sufficiently strong to negate *mens rea,* resulting in a reduced sentence. The inclusion of diminished responsibility in Rule 145 (2)(a)(i), as well, might be a sign that the Rule intended to address diminished responsibility, the partial defence short of grounds for excluding responsibility.

[35] Section 52 of the Coroners and Justice Act 2009.
[36] Uganda Penal Code Act - https://www.Ugandalaws.com

IV. EVIDENCE PERTAINING TO ONGWEN AS CHILD SOLDIER

15. The Trial Chamber summarized the evidence accepted from witnesses at the trial in the Judgment and will be examined here briefly to support the conclusion that based on that evidence, a finding of diminished responsibility would be justified to reduce the most serious offences of murder and wilful killing,[37] to the lesser offence of manslaughter, as in England or culpable homicide, as in Scotland.[38]

16. The Trial Chamber determined, after examining the evidence of witnesses familiar with Ongwen, that he must have been born on or around 1978 and was abducted by the Lord Resistance Army in 1987, which places his age at time of abduction at 9 years old. He was abducted with one named Joe Kakanyero (Kakanyero), who also testified at the trial as a Prosecution witness. [39] Kakanyero testified to the brutal treatment he and Ongwen endured after they were abducted by the LRA, during the three months they were together and gave vivid accounts of his own experiences before he was able to escape. When they were abducted, Kakanyero was older than Ongwen, about 17 years old.[40] The most striking accounts by Kakanyero relate to the initiation ceremonies performed on them following their abduction.

17. Kakanyero testified that the initiation ceremony was "performed on us using shea butter and they put the sign of the cross on our chest and our head, and they would say the Lord oversaw everything in the world. "The ceremony created fear, and we were frightened, and we thought something else would happen to us."[41] Asked later in his evidence to clarify what happened when he was smeared with shea butter, he stated that "the first thing that happened to me, I felt like I was lifeless. I was just feeling like I am no longer myself. Before the ceremony, I was a normal person, but after being smeared with the shea butter, I felt things were completely different."[42] When asked what he meant when he said he was almost dead, he replied that, what normally happens in the LRA, "when you were initiated for the first-time using shea butter, that will change your life immediately. The killings that are done in broad daylight will also have an impact on your life. Even the songs we sang in the yard, we say them singing in the yard, I saw as if well, the world has changed, things are happening differently." As regards Ongwen, Kakanyero stated that at home Ongwen was a good child. He was a calm child among all the children who were with them. He was a well-behaved boy.[43] Asked by the presiding Judge how

[37] See : The Charges page 17 of the Trial Chamber Judgment.
[38] See : Section 2 (3) of the Homicide Act 1957, or S. 1684 of the Criminal Justice and Licensing (Scotland) Act. Legislation.gov.uk. UK Public General Acts1957 c. 11PART I Section 2
[39] Witness UGA-D26-P-0007, Kakanyero's Statement.
[40] Kakanyero's Statement. He said he was born in 1970, Page 5 line 9 and was abducted in 1987 at Page 9, line 9.
[41] Page 6 of statement.
[42] Page 18 of the statement
[43] Page 10 of Kakanyero statement, line 2.

Ongwen reacted to the abduction during the three and half months when they were together, Kakanyero replied that what he knew is that Ongwen was really depressed, he was not feeling easy, he wasn't "by himself." He added, "if you were in the hands of a beast, you will have to follow instructions of the beast so that you can survive".

18. This account by Kakanyero, of his stay in the LRA before he escaped is confirmed by other witnesses who testified about their experience during the same initiation ceremonies in the Sinia brigade commanded by Ongwen and, afterwards, during 2002-2005 period of the charged crimes.[44] It is also reproduced in the evidence summary in the Judgment. The evidence of brutality, killings, and repression of LRA escapee soldiers, to deter any attempt to escape, is well detailed in the judgment, but only as it related to the Sinia Battalion as evidence against Ongwen as Battalion Commander, to attest to his cruelty. However, this same evidence equally serves as testimony to the conditions Ongwen himself endured as a child soldier in captivity, from the age of 9 to the age of 24 when he became a Commander. His behaviour as a Commander is clear testament of how successfully Ongwen's induction into the LRA succeeded to turn him into a monster, to execute the LRA mission of murder and utter terror in the Northern Uganda Region. The Trial Chamber summarized all that evidence, including how new recruits endured traumatic experiences, forcibly witnessing brutal killings and being unable, by training, to distinguish between civilians and combatants. Many stated that *'nobody would see it as a crime if a civilian were injured or if a civilian is shot at.'*[45]

19. The charges against Ongwen relate to just only a segment of his life in the LRA, mostly when he was already grown up and in a position of command.[46] However, the period beginning from his abduction and subsequent induction into the LRA, during which he endured traumatizing initiation ceremonies while a young boy, trained to carry out killings and live a life of debauchery, drugs and alcohol abuse to be hardened for battle, without any guidance or formation or reference as to what is right or wrong, cannot just be wished away.[47] In addition, the testimony gathered against him, to demonstrate the life other child soldiers in Sinia battalion endured, a battalion he commanded according to the tenets of the LRA - preached and enforced by its spiritual and temporal leader Joseph Kony - is clear testimony to the life Ongwen also lived throughout his childhood, adolescence, and adulthood. His actions as an adult demonstrate exactly how well he was trained and brought up to behave; all which had an impact on him. It explains the transformed Ongwen from the innocent, well behaved child that Kakanyero knew

[44] Paragraphs 916 to 977 of the Trial Chamber Judgment: ICC-02/04-01/15-1762-Red 04-02-2021 1/1077 NM T
[45] Paragraph 948 of Judgment and paragraph 977.
[46] The reason for choosing the period 2002-2005 was to bring the charges within the jurisdiction of the Rome Statute which entered into force on 1 July 2002.
[47] See paragraph 23 above (sections c and d from the Trial Chamber's evidence summary).

back home and the different Ongwen that he had become when he was an adult and a commander in the LRA, as revealed in the testimony adduced against him. He did not choose this life, unlike Joseph Kony and the adult commanders that founded the LRA, he was enslaved into it.[48]

V. ONGWEN'S MENTAL CAPACITY

20. Five expert witnesses prepared reports and gave oral testimonies before the Chamber: Dr. Catherine Abbo (P-0445), Professor Gillian Mezey (P-0446), Professor Roland Weierstall-Pust (P-0447), Dr Dickens Akena (D-0041) and Professor Emilio Ovuga (D-0042).[49] According to the Trial Chamber, mental health experts were called to testify on the issue of Ongwen's mental health at the time relevant for the charges, and "in particular the possible presence of a mental disease or defect".[50] In addition, the Chamber also engaged Professor Hoop De Jong to examine Mr. Ongwen. Professor Gillian Clare Mezey, Professor Roland Weierstall-Pust and Dr. Catherine Abbo Adito (Dr. Abbo) were called as 'Prosecution expert' witnesses and Professor Emilia Ovuga and Dr. Dickens Akena as 'Defence experts'. While the Chamber commented that this characterization did not imply any difference in the procedural status of the experts, the Prosecution was of a different mind. The Prosecution vigorously cross-examined Professor Ovuga and Dr. Akena as hostile witnesses and invited Professor Weierstall to sit in and prepare reports in rebuttal while both Doctors testified. Professor Weierstall, on his own admission, is not a psychiatrist; but this did not deter him from criticising the methodology and conclusions reached by both Defence experts. Professor Ovuga and Dr. Akena are well accomplished forensic experts in their field.[51]They were invited in their capacity as forensic experts and interviewed Ongwen in that capacity, an advantage Professor Weiershall did not have.[52]

21. At some point in the interrogation of Professor Ovuga, the Prosecutor characterised Professor Ovuga's expert opinions as 'nonsense.' Professor Ovuga pointed out that he had travelled several hundred miles to come and testify in court as forensic expert and assist the Chamber in the trial of Ongwen but not to help him get acquitted as insinuated by the Prosecution.

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[48] See Evidence of Dr. Akena on Ongwen's responses to the charges against him, at Page 119, line12. That " -- the charges I ... understand as being brought against LRA but not me, because I'm not the LRA. The LRA is a Joseph Kony who is the leader of the LRA."
[49] Paragraphs 2450-2496 of the Judgment
[50] Paragraph 593 of the Judgement,
[51] Dr Emilio Ovuga, PhD dr med, is retired Professor of Psychiatry and Mental Health, and former Dean of the Faculty of Medicine at Gulu University in northern Uganda. Dr Ovuga completed his undergraduate medical education at Makerere University in 1976, and postgraduate training in psychiatry at the same university in 1981. Dr Ovuga holds a joint PhD of Karolinska Institute, Sweden and Makerere University, Uganda, in suicidology and psychiatric epidemiology. Dr Ovuga worked at Makerere University, serving that institution in various capacities including being Head of the Department of Psychiatry, and member of several committees of Senate from 1989 to 2006. Outside his home country, Uganda, Dr Ovuga worked as a psychiatrist in Mathare Mental Hospital in Nairobi, and in Western Kenya from 1981 to 1984, and the Transkei homeland of South Africa from 1984 to 1989. Google.com
[52] Professor Weierstall, UGA-OTP-0280-0674, at 0701. It is, of course, regrettable that Professor Weiershall, Dr. Abbo and Professor Mezey for the Prosecution were not able to interview Ongwen. Ongwen was in a detention facility accessible to the Prosecution. It is a bit difficult to understand that the Prosecution could not obtain a compelling order from the court to obtain such interview.

Nevertheless, the Prosecution discredited the evidence of Professor Ovuga as tilted towards Ongwen, describing Professor Ovuga and Dr. Akena as his treating physicians, an insinuation they both denied. Professor de Jong who was tasked by the Chamber to examine Ongwen as an independent expert was not treated any better. His testimony was discounted because he examined Ongwen as to his fitness to stand trial and not opine on his mental capacity during his stay in the LRA. [53] Dr. Abbo, called by the Prosecution, was pressed by the Prosecution to opine on Ongwen's mental capacity but declined because she had not had the opportunity to interview Ongwen in person, which in her view was an essential requirement for her to do so.[54]

22. Dr. Akena and Professor Ovuga submitted joint reports. In summary, the two Experts concluded that Ongwen suffered from the following mental diseases: in the 1st Report, they identified severe depressive illness, post-traumatic stress disorder ('PTSD'), dissociative disorder (including depersonalization and multiple identity disorder) as well as severe suicidal ideation and high risk of committing suicide; in the 2nd Report, they identified dissociative amnesia and symptoms of obsessive-compulsive disorder. The Experts stated that Ongwen's mental illnesses which stemmed from his forced abduction by the LRA around 1987, continued through his years in the LRA and still plague him today. The Court-appointed expert, Professor de Jong, based on a clinical interview and using standardized psychological and psychiatric instruments, concluded that Mr. Ongwen suffered from Major Depressive Disorder (MDD); PTSD; and Other Specified Dissociative Disorder he labelled MDD and PTSD as severe. He also agreed with the two Expert Psychiatrists that Ongwen suffers from multiple mental illnesses simultaneously. [55]

23. In cross-examination Professor Ovuga vigorously denied Prosecution allegations that he diagnosed Ongwen's mental illness as a treating physician and not a forensic expert. Professor Mesey, who testified at length for the Prosecution, determined from examination of documentation on Ongwen's mental condition and other evidence that Mr. Ongwen was not mentally ill, he was 'faking bad, malingering".[56] In response to questions by the Prosecution in cross-examination on Prefessor Mezey's formed opinion that Ongwen was "malingering", Professor Ovuga countered:

"*To simply -- for a witness to come and sit and accuse someone of faking without having had contact with that person was not fair. And for that position to keep coming repeatedly is also not fair. It is not fun for an individual to feel sad, to feel there, there is someone else like him who is controlling his behaviour*."[57]

[53] See Rule 74bis of the ICTY RPE and ICTR RPE. While 135 of the ICC RPE provides for possibility of a medical examination to determine fitness to stand trial, there are no provisions that would deter the court, given the conflicting prosecution and defence evidence to order an independent medical examination.
[54] Dr Abbo's Report, UGA-OTP-0280-0732, at 0755.
[55] Professor De Jong's Report, UGA-D26-0015-0046-R01, at 0051. See also: Judgment, para.2576
[56] Professor Mezey's Report, UGA-OTP-0280-0786, at 08144-15.
[57] Witness UGA-D26-P-0042. Professor Emilio Ovuga. Q. Page 14

In relation to Professor Mezey's contention that "if Ongwen had been dissociating, or indeed was affected by any severe mental condition, he would not have been able to recall or to relate the detail of what happened or very much, in any, detail of what happened at that time", Professor Ovuga responded:

"*The presence of a disorder does not necessarily militate against careful planning, against involvement, knowingly by any hypothetical person. This because, as I explained earlier, is that a person of a senior position, a person with high ranks, whether he or she is disturbed by mental -- emotional and mental symptoms, which are regarded severe by a mental health professional, that person would still continue to function despite his or her distress and disability, mental disability."*[58]

The Trial Chamber accepted the opinion of Professor Mezey, that Mr. Ongwen did not suffer from any mental illness and rejected the findings of Professor Ovuga, Dr. Akena and Professor de Jong that Ongwen suffered from multiple mental illnesses. [59]

24. The total rejection of the defence experts' evaluation of Ongwen's mental state by the Trial Chamber, and dismissal of their testimony as not credible seems harsh in this case given the detailed and consistent testimony given by the experts under intense scrutiny by the Prosecution. In any event, the Trial Chamber's finding that, the multiple mental illnesses identified by the two Defence Psychiatric experts and the independent expert detailed by the Chamber, did not rise to the mental disease or defect requirement in Article 32(1)(a), does not exclude a finding of diminished responsibility, as a partial defence. The fact that Ongwen was raised in severely proscribed circumstances by the LRA from childhood, after his forcible abduction, and suffered intolerable treatment as a child soldier in the LRA, is sufficient corroboration of the findings of the forensic experts that due to the circumstances of his upbringing and experiences in the bush war against the Government of Uganda Armed Forces, he suffered multiple mental illnesses. On the basis such a finding it is inevitable to conclude that his mental capacity was substantially diminished when he committed the serious offences, crimes against humanity and war crimes, with which he was charged. Accordingly, the Appellate Chamber is invited to so find and reduce the sentences imposed on Ongwen to substantially lighter concurrent sentences, to permit him return home and be reintegrated in society and live in the freedom that has been denied him since childhood.

VI. DURESS

25. For economy of space and time, I will leave the full treatment of duress to the Defence team and other *Amicus Briefs*. Suffice it to say here, that there is ample authority in the General

[58] Ibid.
[59] P-0446: T-162, p. 21, lines 9-19. See also: Prof de Jong's Expert Report, UGA-D26-0015-0046-R01

Principles of Law for treating duress as a partial defence depending on the circumstances under which the accused committed the charged offences.[60] (Quenivet, 2020)Duress at common law is amply addressed in *R v. Graham*,[61]which sets out the subjective and objective elements of the offence amounting, essentially, to the same formulation of duress in Article 31(1)(d): *R v. Martin,*[62] is authority for the proposition that a recognized medical condition can be taken into account, for example, where the accused had a personality disorder like obsessive compulsive disorder diagnosed by Professor Ovuga and Dr. Akena in Ongwen's case; and *R v. Bowen,*[63] is authority for the proposition that any personal characteristics relevant to the defendant's interpretation of the threat should rightly be considered, such as age, and physical disability, provided they were not self-induced. See also *R v. Gotts*.[64]

VII. CONCLUSION

26. For the reasons outlined in this Brief, it is submitted that Ongwen should be given the benefit of the doubt, from the evidence, and convicted of the offences charged with diminished responsibility, as permitted under Uganda Law and Customary International Criminal Law, and duress, as discussed above.[65] Diminished responsibility as a special defence under Article 31(3) has been addressed by many experts writing on International Criminal Law and under the Rome Statute.[66] Nortje, in "Victim or Villain" 2017, considered diminished responsibility as a possible defence for Ongwen. (Nortje, 2017).[67] He states that:

Someone is criminally capable of committing a crime when that person is able to distinguish between right and wrong at the time of the commission of the crime and act in accordance with such understanding. (However) Youth, mental illness, intoxication, and provocation are some of the defences that might exclude the criminal capacity of the accused, as is the case in South Africa, for example. [68]

On that basis, Nortje considered, but discounted the argument that after turning 18 Ongwen could have realised that committing a criminal offence is wrong. Nortje.[69] The notion promoted by the Prosecution that Ongwen could have escaped is contrary to reality. The period 2002-2005 was the height of the war in the Northern Uganda between the Uganda Government Army and LRA. To escape, Ongwen would have had to be cognizant of the terrain, like his elder abductee Kakanyero. He had no close relatives to go to, and his parents were dead, killed by the LRA.

[60] Windell Nortje and Noëlle Quénivet: "Child Soldiers and the Defence of Duress under International Criminal Law," Palgrave Macmillan 2020. Chapter 2. See also: Gilbert at Page 22 and 24: "In conclusion, the Rome Statute is a very accomplished codification of the most equitable human justice possible. *A priori* the requirements of the statute are clear and define what is necessary to establish the good balance required for human justice. This Statute must be seen as the codification of a very ancient reflection on the defences admissible in case of criminal offences".
[61] [1982] 1 All.E.R 801
[62] [2001] EWCA Crim. 2245
[63] [1996] 4 All ER 837
[64] [1992] 2 AC 412.
[65] ibid
[66] Ibid.note 36.
[67] https ://repository.ac.uwc.ac.za.
[68] Nortje at page 12, bottom paragraph
[69] Nortje at page 13-14

27. Indeed, The trial Chamber did concede, during sentencing, that Ongwen's abduction and his growing up in the ranks of the LRA, like the other child soldiers, impacted his mental capacity.[70] The evidence of Kakanyero, with whom Ongwen was abducted and other witnesses, on the severe treatment of abducted child soldiers in the LRA as being traumatic was also accepted by the Chamber.[71] It included evidence that child soldiers who saw people being hanged by their intestines on a tree and forced to "eat beans mixed with their blood" were traumatized. It also included evidence of news received by Ongwen while in captivity that his parents had been murdered by the LRA.[72] The Chamber also concluded that "the experience of Ongwen following his abduction in 1987 was not dissimilar" from that endured by other child soldiers.[73] Even prosecution experts stated that traumatic events experienced in early life can leave lasting imprints on the individual.[74] Given all this evidence it clear that the Prosecution failed to meet its burden of proof beyond doubt that Ongwen was mentally culpable and guilty as charged.[75]

28. A reduced sentence would allow Ongwen to receive treatment for his mental illness and reintegrate in society, after undergoing the mandatory Acholi traditional reconciliation and rehabilitation mechanism.[76] (Ssekandi, 2007)

Respectfully submitted Dated this: 20 December 2021

Signed: Francis Ssekandi

Justice Francis M. Ssekandi, LL.B (Hons) London, LLM (Columbia)[77]
Attorney and Counsellor-at-Law, Admitted to the Bar in Uganda, New York State and
The Federal Court of Appeals, Second Circuit.
Justice of Appeal, Uganda Supreme Court (Rtd).
Judge, World Bank Administrative Tribunal.
530 Alosio Drive, River Vale, NJ. 07670 USA.
www.jurisafrica.org
fsseka@jurisafrica.org
1-646-662-7070

[Mr. Justice Francis M. Ssekandi, LLB.(Hons London; LLM (Columbia) Attorney-at-Law
(Uganda and New York State, USA)
on behalf of

[70] Sentencing judgment Paragraphs 72-76.
[71] Ibid.
[72] ICC-02/04-01/15-1819-Red 06-05-2021 EC T
[73] paragraph 82
[74] See Paragraph 90 of the judgment on sentencing.
[75] T-260
[76] The traditional reconciliation mechanism is described in: "The Pursuit of Transitional Justice and African Traditional Values: A Clash of Civilizations – The Case of Uganda" by Cecily Rose and Francis M. Ssekandi. At p.107
[77] Justice Francis M. Ssekandi worked in the United Nations Office of Legal Affairs 1981-1996 and was General Counsel in the African Development Bank from 1996-2000. Now works as an International Legal Consultant and was Part-time Lecturer-in Law from 2001-2019 at Columbia Law School in New York City, USA.

At [New Jersey USA]