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THE APPEALS CHAMBER

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

SITUATION IN UGANDA

IN THE CASE OF THE PROSECUTOR v. DOMINIC ONGWEN

Public

***Amici Curiae* Observations on Duress and the Standards Applicable to Assessing Evidence of Sexual Violence**

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I. INTRODUCTION

1. Pursuant to the Appeals Chamber's decision of 24 November 2021,[1] Louise Arimatsu, Adejoké Babington-Ashaye, Danya Chaikel, Christine Chinkin, Carolyn Edgerton, Angela Mudukuti, and Cynthia T. Tai ("*amici*")[2] hereby submit the following observations on the legal interpretation of article 31(1)(d) of the Rome Statute ("Statute") and the standards to apply when assessing evidence of sexual violence.

II. SUMMARY OF OBSERVATIONS

2. Article 31(1)(d) of the Statute should be interpreted holistically and contextually through the application of a gender analysis to guard against adverse gender discrimination. A gender analysis would consider, *inter alia*, the ways positions of authority may have been used by an accused to promote a social order that maintained discrimination and inequalities contributing to the perpetuation of crimes prohibited by the Statute. A gender analysis would further enable the trier of fact to determine, by relying on article 31(2) of the Statute, the applicability of the defences provided in the Statute to a particular case. The *amici* submit that the *Ongwen* Trial Chamber correctly interpreted article 31(1)(d) of the Statute. Its decision to reject the defence in this case is grounded in well-established law.

3. The standards applicable to assessing evidence of sexual violence do not differ from other crimes. As with all evidence relevant to crimes in the Statute, evidence of sexual violence must be assessed in accordance with the Statute and Rules of Procedure and Evidence ("RPE") which include specific provisions to ensure sexual violence evidence is not treated differently due to discriminatory presumptions.[3] The evidentiary standards contained in the Statute and RPE must be interpreted and applied through a gender analysis that ensures: (1) the application of non-discriminatory standards; (2) a contextual evaluation of the evidence; and (3) consideration of appropriate principles and factors that prevent stereotypes and prejudice in the evaluation of sexual violence evidence. The *amici* submit that the *Ongwen* Trial Chamber correctly applied the aforementioned principles in its assessment of the sexual violence evidence presented in the case.

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[1] Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, para. 18.

[2] The views expressed herein are those of individual *amici* and do not necessarily reflect the views of their respective institutions. The *amici* are grateful to Kirsten Campbell, Maxine Marcus, Priya Gopalan, Kathleen Roberts, Magali Maystre, Anousheh Haghdadi, Cecilia Kustermann, Ellie Halodik, Stella Pizzato, Arwa Hleihel, and Kenza Mena for their assistance in the preparation of this submission.

[3] See rules 70-71 of the RPE.

III. OBSERVATIONS

A. Grounds for Excluding Criminal Responsibility under Article 31(1)(d) of the Statute

1. Legal interpretation of article 31(1)(d) of the Statute must be conducted through a gender analysis

4. Since its adoption, article 31(1)(d) of the Statute has been the subject of considerable criticism by international criminal law experts for, *inter alia*, combining the legal defences of necessity and duress, and leaving no distinction between justification and excuse. A review of the drafting history of the Statute and the *travaux préparatoires* reveals the unresolved legal issues at the time the final text was adopted, including the failure to reach an agreement on the precise wording for the international law doctrine of prior fault.

5. In interpreting and applying article 31(1)(d) of the Statute, a gender analysis can assist the Court to guard against any adverse gender discrimination. A gender analysis helps expose the gendered assumptions upon which the law – substantive or procedural – is constructed, interpreted, and applied. It ensures against inadvertently maintaining hierarchies founded on discrimination, on gender and otherwise, and thereby perpetuating and normalising relations of domination, oppression, and exploitation. A gender analysis is also of critical importance in drawing attention to the law's blind spots including, for example, the failure to prosecute sexual and gender-based crimes, especially those committed at the intersection with racial discrimination. Failure to apply a gender analysis leaves the Court with an incomplete picture of what crimes occurred, how they occurred, and why they occurred, which ultimately leads to an unjust result for both the accused and the victims/survivors. The *amici* therefore propose the following gender analysis of the factors set forth in article 31(1)(d) of the Statute.

6. First, any interpretation of article 31(1) cannot be divorced from article 31(2) of the Statute[4] since the latter enables the Court to determine the applicability of the defences provided in the Statute. It empowers the Court to elaborate on and clarify the scope and content of the listed defences subject to article 21 of the Statute and its object and purpose. In particular, article 21(3) of the Statute requires that the application and interpretation of the law "must

[4] Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, para. 33. The Appeals Chamber held that: "[t]he rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety."

be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender."[5] The practical implication of this provision is the need to undertake a gender analysis when applying procedural and substantive law concerning both offences and defences in the Statute.

7. Second, while article 21(1)(c) of the Statute permits the Court to apply general principles of law derived from laws of legal systems of the world, the reasoning underpinning the availability of duress in domestic law does not necessarily apply to international law and thus merits additional reflection.[6]

8. Third, article 31(1)(d) of the Statute is sandwiched in history between pivotal decisions by the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the Extraordinary Chambers in the Court of Cambodia ("ECCC") on the legal elements of duress and its availability as a defence to international crimes. In *Erdemović*, the ICTY Appeals Chamber held that "duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings."[7] Judge Cassese's dissenting opinion, which itemized the conditions required by international criminal law to prove duress, formed the bedrock of article 31(1)(d) of the Statute. Two observations are merited. Although Judge Cassese considered that there may be rare circumstances where duress could amount to a complete defence,[8] he found that "it is extremely difficult to meet the requirements for duress where the offence involves killing of innocent human beings" given the criterion of proportionality.[9] Significantly, Judge Cassese identified four strict conditions including the doctrine of prior fault and drew attention to "its particular relevance to war-like situations."[10] In *Duch*, the ECCC Trial Chamber held that "[d]uress cannot however be invoked when the perceived threat results from the implementation of a policy of terror in which [the accused] has willingly and

[5] Article 21(3) of the Statute. The Appeals Chamber affirmed that every article in the Statute must be interpreted and applied according to article 21(3) of the Statute. See Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, para. 38.
[6] See *Lubanga Dyilo* Trial Judgment, Separate Opinion of Judge Fulford, para. 10. Judge Fulford characterized an approach to general principles of law under article 21(1)(c) of the Statute as follows: "a Chamber should undertake a careful assessment as to whether the policy considerations underlying the domestic legal doctrine are applicable at this Court, and it should investigate the doctrine's compatibility with the Rome Statute framework. This applies whether the domestic and the ICC provisions mirror each other in their formulation."
[7] *Erdemović* Sentencing Appeal Judgment, para. 19.
[8] *Erdemović* Sentencing Appeal Judgment, Dissenting Opinion of Judge Cassese, para. 47.
[9] *Erdemović* Sentencing Appeal Judgment, Dissenting Opinion of Judge Cassese, para. 43.
[10] *Erdemović* Sentencing Appeal Judgment, Dissenting Opinion of Judge Cassese, paras 16-17. Judge Cassese highlighted the doctrine of prior fault as one of four requirements for duress, stating: "the situation leading to duress must not have been voluntarily brought about by the person coerced". See *ibidem*.

actively participated."[11] This finding was not challenged by the defence and was not overturned on appeal.[12]

9. While these judgments were not issued by this Court, the Appeals Chamber should be guided by both judgments as they are instructive on the development of duress in international criminal law. Furthermore, both judgments are consistent with the views of the drafters of the Statute that "if the person has voluntarily exposed himself or herself to a situation which was likely to lead to the threat [made by other persons], the person shall remain responsible."[13]

10. Article 31(1)(d) of the Statute should be analysed with the aforementioned points in mind. This article provides that, exclusion of criminal responsibility on the grounds of duress, three cumulative elements must be met:
    a) The person's conduct was "cause[d] by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against [them] or another person"; and
    b) The "person act[ed] necessarily and reasonably to avoid this threat"; and
    c) The person did "not intend to cause a greater harm that the one sought to be avoided."

11. With respect to (a), the *Ongwen* Trial Chamber correctly found that the threat must be both serious and imminent.[14] This requires: (1) the existence of a threat; and (2) a nexus between the threat and the crime. It is insufficient for an accused to assert that they faced a general or blanket threat to their life. There must be evidence that a threat of imminent death or continuing or imminent serious bodily harm existed, and the accused committed the crimes charged to avoid the implementation of the threat against them or another person. This interpretation is supported by the plain reading of article 31(1)(d) of the Statute which states that the accused's conduct is "caused by duress resulting from a threat". Thus, there is a requirement not only of imminence but also direct causation, and the Defence's reliance on a general coercive environment is misplaced given that it is unsupported by law and jurisprudence.

[11] *Duch* Trial Judgment, para. 557.
[12] *Duch* Appeal Judgment, paras 364.
[13] Working Paper on article 31 prepared by the Working Group on General Principles of Criminal Law, p. 250.
[14] *Ongwen* Trial Judgment, paras 2581-2582.

12. As to (b), the requirement that an accused acted necessarily and reasonably to avoid the threat referenced in (a) necessitates the absence of objectively reasonable and necessary alternatives to avoid the threat. Conduct is considered necessary for this sub-section when there is no alternative avenue by which to avoid the threat. The threat must be "not otherwise avoidable."[15] Additionally, the harm caused by an accused should not cause greater harm than the one sought to be avoided. As the *Ongwen* Trial Chamber correctly noted, "what the person should have done must be assessed under the totality of the circumstances in which the person found themselves."[16]

13. The third element (c) requires that the act must be proportionate to the harm threatened against the individual. It is not explicitly required that the individual causes less harm *in fact* but rather that, subjectively, the person intended to cause no greater harm.[17] The *amici* recognise that the text is unsatisfactory in that it combines necessity and duress thereby erasing the distinction between justification and excuse.[18] This problem aside, *the amici* maintain that, given their gravity, the proportionality requirement is not satisfied in the case of sexual and gender-based crimes for which Ongwen was charged and convicted. In other words, it is not the typology but rather the gravity of the offence that matters.

14. The normative, ethical, and political challenges posed by the defence of duress are complex. While international criminal law might be prepared to recognise the defence, it does so only within narrowly defined parameters because the accused has chosen to commit the said offence and remains morally culpable. With the adoption of the Statute, the international community has unambiguously recognised that sexual and gender-based crimes, whether perpetrated within the context of armed conflict or not, are crimes of the utmost gravity. Notwithstanding the availability of the defence of duress in the Statute, a lesser harms test or a reasonableness test should fail in the context of this specific case.

[15] *Ongwen* Prosecution Closing Brief, para. 502.
[16] *Ongwen* Trial Judgment, para. 2583.
[17] *Ongwen* Trial Judgment, para. 2584.
[18] The Chamber considers that the "assessment of whether one intended harm is 'greater' than another depends on the character of the harms under comparison." *Ongwen* Trial Judgment, para. 2584.

2. The doctrine of prior fault: a gender analysis must be applied to the defence of duress as it reveals the culpability of Ongwen for the sexual and gender-based crimes with which he was charged and convicted

15. Although the doctrine of prior fault was not expressly incorporated into the text of article 31(1)(d) of the Statute, prior fault is well established in comparative criminal law and in international criminal law as demonstrated by Judge Cassese in *Erdemović*.[19] As such, a full and comprehensive interpretation of duress requires that a trial chamber consider the accused's conduct up until the materialisation of the threat giving rise to duress. This extension of the temporal scope of judgment allows the Court to determine whether the accused "freely and knowingly chose to become a member of a unit, organisation or group institutionally intent upon actions contrary to international humanitarian law."[20]

16. During the material time, the evidence indicates that Ongwen played an active role in creating, contributing to, and maintaining an environment in which serious international crimes were sustained and/or normalized.[21] As the *Ongwen* Trial Chamber found, Ongwen was a "self-confident commander who took his own decisions on the basis of what he thought right or wrong."[22] For these reasons alone, he would be precluded from relying on duress as a ground for excluding criminal responsibility.[23] To illustrate, in *Duch*, the ECCC supreme court chamber found that duress was unavailable to the Accused to preclude criminal responsibility due to the Accused's contribution and participation in the organisation's policy and the coercive environment was minimally relevant in mitigation of his sentencing.[24]

17. Duress, as set forth in article 31(1)(d) of the Statute, is inapplicable to sexual and gender-based crimes where, as in this case, an accused created an environment where such crimes were sustained and/or normalised. Accordingly, it would be warranted for any chamber to inquire into the broader gendered context in which the sexual and gender-based crimes took

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[19] See *Erdemović* Sentencing Appeal Judgment, Dissenting Opinion of Judge Cassese.
[20] *Erdemović* Sentencing Appeal Judgment, Dissenting Opinion of Judge Cassese, para. 17. Judge Cassese found that "duress or necessity cannot excuse from criminal responsibility the person who intends to avail himself of such defence if he freely and knowingly chose to become a member of a unit, organisation or group institutionally intent upon actions contrary to international humanitarian law." The post war crimes tribunals inquired into whether the defendants questioned, challenged or distanced themselves from the criminal group.
[21] See, *e.g.*, *Ongwen* Trial Judgment, paras 206-210, 2028-2085, 2591, 2666-2667.
[22] *Ongwen* Trial Judgment, para. 2602.
[23] See *Duch* Trial Judgment, paras 555-558.
[24] The Supreme Court Chamber held that the "mitigation on account of the 'coercive climate' in [Democratic Kampuchea] is thus of a minimal degree." See *Duch* Appeal Judgment, para. 364; *Duch* Trial Judgment, para. 558.

place, including an accused's role in creating and sustaining a discriminatory environment founded on coercion and violence. A gender analysis would consider the ways an accused, through force, used their position of authority and power to promote a social order committed to maintaining inequalities including between, *inter alia*, women, men, girls, boys, lesbian, gay, bisexual, non-binary, and gender non-conforming persons.[25] This would include, for example, the measures taken by an accused to forcibly limit the freedom of movement of those over whom they had control through threats of death or violence. A gender analysis would be attentive to the ways in which relationships of domination, oppression, and exploitation were normalised by an accused through, for example, the imposition of gender roles and stereotypes making sexual and gender-based violence inevitable.

18. Applying the doctrine of prior fault to the present case, Ongwen was a male living in a patriarchal society and held the position as a Brigade Commander after rising through the ranks. He led, for some time, a relatively improved life and commanded attacks against civilians, including committing crimes against those he forcefully married and the underaged girls that he exploited for forced domestic labour.[26] Applying a gender lens to this illustrative fact pattern requires that the Court consider the Accused's stature, his gender and corresponding superiority in the patriarchal society in which he belonged and personally promoted, and the role of women and underaged girls who were stripped of power. As a result, the *amici* submit that, consonant with the Trial Chamber's findings, duress is unavailable to Ongwen as a defence.

3. The Ongwen Trial Chamber correctly applied the requisite burden and standard of proof to the defence of duress

19. Pursuant to article 66(2)-(3) of the Statute, the burden of proof rests on the Prosecution to prove the guilt of the accused beyond a reasonable doubt. The *Ongwen* Trial Chamber did not err in stating that the aforementioned provisions equally apply "[w]hen a finding of the guilt of the accused also depends on a negative finding with respect to the existence of grounds excluding criminal responsibility under Article 31 of the Statute."[27] This position is consonant with the Prosecutor's obligation to investigate potentially exculpatory information set forth in article 54(1)(a) of the Statute. In the absence of sufficient evidence

[25] See, *e.g.*, *Ongwen* Trial Judgment, paras 212-214.
[26] See, *e.g.*, *Ongwen* Trial Judgment, paras 2009-2085.
[27] *Ongwen* Trial Judgment, para. 231.

to meet each element of article 31(1)(d) of the Statute, the defence of duress fails and cannot be inferred simply because an accused asserts it. In the present case, there was no evidence that Ongwen was personally threatened to commit the crimes of which he was convicted or that the other elements of duress were met.

B. The Standards Applicable to Assessing Evidence of Sexual Violence

20. The *amici* submit that the following standards apply to the assessment of sexual violence evidence. [28]

1. **A chamber's discretion to evaluate evidence presented at trial is subject to that evaluation being conducted in a non-discriminatory manner consistent with the Statute and RPE**: the Trial Chamber has the power to determine the admissibility or relevance of evidence presented,[29] and the authority and discretion to assess all evidence submitted to determine its relevance or admissibility.[30]
2. **The principle of non-discrimination must apply to the assessment of sexual violence evidence:** evidence of sexual violence must be assessed in a manner that is consistent with internationally recognised human rights, without any adverse distinction on discriminatory grounds, in accordance with article 21(3) of the Statute.
3. **In conformity with the principle of non-discrimination, the same evidentiary standards apply to evidence of sexual violence as to evidence of other crimes:** assessment of evidence of sexual violence should be subject to the same standards – reliability, credibility, admissibility, and probative value – that apply to evidence relating to non-sexual violence crimes and not higher standards and adverse evidentiary requirements. The interpretation and application of these standards must be framed by the principle of non-discrimination.
4. **Evidence of sexual violence must be assessed individually and holistically as part of the totality of the evidence received at trial:** evidence of sexual violence should be assessed on a case-by-case basis as well as in the context of the totality of the evidence presented throughout the entire proceedings at trial as required by article

[28] *Ongwen* Trial Judgment, paras 255-260. It should be noted that the standards identified do not represent an exhaustive list given the evolving jurisprudence of the Court.
[29] Article 64(9)(a) of the Statute ("The Trial Chamber shall have, *inter alia*, the power on application of a party or on its own motion to: (a) Rule on the admissibility or relevance of evidence".).
[30] Rule 63(2) of the RPE ("A Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69.").

74(2) of the Statute.[31]

5. **There is no requirement of corroboration:** pursuant to rule 63(4) of the RPE, a "Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the court, in particular, crimes of sexual violence."
6. **A contextual evaluation of sexual violence evidence is required to prevent prejudicial evaluation of such evidence:** sexual violence evidence should be assessed within the temporal and geographical scope of the charges and the wider campaign to prevent prejudicial evaluation.

21. The *amici* advance that a rigorous gender analysis of evidentiary standards will help ensure that discriminatory norms, stereotypes, and inequalities are not inadvertently perpetuated in legal proceedings. The *amici*'s position is that the *Ongwen* Trial Chamber's evaluation of the evidence of sexual violence was consistent with international criminal law and jurisprudence as discussed below.

1. A Chamber's discretion to evaluate evidence presented at trial is subject to that evaluation being conducted in a non-discriminatory manner consistent with the Statute and RPE

22. Article 64(9) of the Statute and rule 63 of the RPE provide a trial chamber with the authority[32] and discretion to determine the relevance or admissibility of evidence in accordance with article 69 of the Statute and the *amici* submit that the *Ongwen* Trial Chamber appropriately exercised its discretion in its evaluation of evidence of sexual violence. The Trial Chamber may evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the "fundamental features" of the evidence.[33] In other words, the presence of inconsistencies in the evidence does not, *per se*, require a reasonable trial chamber to reject it as being unreliable.[34] The Appeals Chamber has affirmed that it "must *a priori* lend some credibility to the Trial Chamber's assessment of the evidence proffered at trial."[35] Intervention is required when

[31] Article 74(2) of the Statute ("The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings.").
[32] This has been elaborated upon by the Appeals Chamber. *Ngudjolo* Appeal Judgment, para. 168; *Lubanga* Appeal Judgment, paras 23 -27.
[33] *Kupreškić et al.* Appeal Judgment, para. 31.
[34] *Ntaganda* Appeal Judgment, para. 774, quoting *Ntaganda* Trial Judgment, para. 80. See also *Ntaganda* Appeal Judgment, paras 599, 806, 835-836; *Bemba et al.* Appeal Judgment, para. 95, *Lubanga Dyilo* Appeal Judgment, para. 23, quoting *Kupreškić et al.* Appeal Judgment, para. 31.
[35] *Lubanga Dyilo* Appeal Judgment, para. 25.

"an unreasonable assessment of the facts of the case" carried out by the trial chamber "may have occasioned a miscarriage of justice" which constitutes a factual error.[36] The *amici* submit that the *Ongwen* Trial Chamber appropriately exercised its discretion in its evaluation of sexual violence evidence.

2. Article 21(3) of the Statute supports the application and interpretation of internationally recognised human rights standards and principles of non-discrimination to assess sexual violence evidence

23. Evidence of sexual violence must be assessed in a manner that is consistent with internationally recognised human rights, without any adverse distinction on discriminatory grounds in accordance with article 21(3) of the Statute. The *amici* submit that the Convention on the Elimination of Discrimination Against Women (CEDAW), is a critical source of law within the meaning of article 21(3), which can provide guidance on preventing discrimination while supporting an intersectional gender analysis of sexual violence evidence.[37] Such a gender analysis avoids discriminatory outcomes such as those relating to, *inter alia*, gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth, or other status.[38] This list is non-exhaustive and the Court should recognise the intersecting status of witnesses and the potential harms and marginalisation they may experience.[39]

24. A gender analysis of evidentiary standards avoids common discriminatory presumptions such as that: (1) sexual violence is less serious than other international crimes; (2) sexual violence crimes must meet higher evidentiary requirements for gravity and systematicity to be considered international crimes; (3) sexual violence only affects women and girls, and therefore the primary evidentiary value of their testimony concerns sexual violence; (4) other persons are not victims of, or witnesses to, sexual violence; and (5) consequently, evidence of sexual violence has less probative value in establishing international crimes. Such presumptions often give rise to adverse distinction on other intersecting grounds in the treatment of persons, and infringe their right to equal treatment under internationally

[36] *Lubanga Dyilo* Appeal Judgment, para. 25, quoting *Gotovina and Markač* Appeal Judgment, para. 50, referring to *Kayishema and Ruzindana* Appeal Judgment, para. 119.
[37] CEDAW, para. 2(c), together with General Recommendations nos. 19 (para. 7(c),(e)), 28 (paras. 3, 5, 11, 18), 30 (para. 23), 35 (para. 12).
[38] See article 21(3) of the Statute.
[39] See *Ntaganda* Reparations Order, paras 60 (affirming that "[a] gender-inclusive and sensitive perspective should include intersectionality as a core component"), 61-67.

recognized human rights law.[40] Such discriminatory presumptions may prevent or interfere with a trial chamber's core truth-finding functions.[41]

3. In conformity with the principle of non-discrimination, the same evidentiary standards apply to evidence of sexual violence as to evidence of other crimes

25. Sexual violence crimes should not be subject to higher standards and adverse evidentiary requirements[42] and must be evaluated according to the same standards – reliability, credibility, admissibility, and probative value – that apply to evidence relating to non-sexual violence crimes. [43] The interpretation and application of these standards must be framed by the principle of non-discrimination. To this end, the *amici* make the following observations regarding the evaluation of testimonial evidence of sexual violence.

26. In evaluating the probative value of testimonial evidence, a trial chamber is required to assess the credibility of the witness and the reliability of their testimony.[44] Avoiding a prejudicial evaluation of witness testimony requires acknowledging the intersecting status of witnesses and the harms they may experience, and assessing their testimony in light of the "individual circumstances of the witness."[45] The *amici* consider that the Trial Chamber in Ongwen correctly and in a non-discriminatory manner considered factors such as trauma, the age of the witness at the time of the offence, and the lapse of time since the offence or a combination thereof.[46] It is established in international criminal law jurisprudence that inconsistencies in and of themselves are insufficient to undermine a victim's account of

[40] M. Jarvis and K. Vigneswaran, 'Challenges to Successful Outcomes in Sexual Violence Cases', in S. Brammertz and M. Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, 2016, Oxford: OUP, pp. 34-40. See Appendix.
[41] *Katanga* Appeal Judgment, para. 104.
[42] See, *e.g.*, *Đorđević* Appeal Judgment, para. 887 (the ICTY Appeals Chamber held that with respect to sexual assault as a crime of persecution, personal motive does not preclude a perpetrator from also having the requisite specific intent. The ICTY Appeals Chamber emphasised that "the same applies to sexual crimes, which in this regard must not be treated differently from other violent acts simply because of their sexual component. Thus, a perpetrator may be motivated by sexual desire but at the same time also possess the intent to discriminate against his or her victim on political, racial, or religious grounds.").
[43] On established standards of evidential evaluation see: *Lubanga* Trial Judgment paras 102-106, *Katanga* Trial Judgment paras 82-87, *Ngudjolo* Trial Judgment paras 48-53, *Bemba* Trial Judgment paras 228-233 , *Bemba et al.* Trial Judgment, paras 202-205, *Ntaganda* Trial Judgment (paras 77-80, 88). The *Gbagbo and Blé Goudé* Appeal Judgment should not be considered as a challenge to the principle that sexual violence evidence should not be subject to higher evidential evaluation, as the issue of sexual violence evidence was not judicially considered. In this regard, the Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza should be regarded as more persuasive, as it fully considers this issue and does not depart from this principle (see paras 48-51).
[44] *Lubanga Dyilo* Appeal Judgment, para. 239.
[45] *Ongwen* Trial Judgment, paras 258. As established in *Akayesu* Trial Judgment para. 143.
[46] *Ongwen* Trial Judgment, para. 258. As established in *Akayesu* Trial Judgment, paras 142-143. On the principle that PTSD raises no inherent assumption as to the reliability of evidence, see *Simić* Appeal Judgment, para. 229; *Kupreškić et al.* Appeal Judgment, para. 171.

sexual violence.[47] Accordingly, "no witness is *per se* unreliable […]. Instead, each statement made by a witness must be assessed individually."[48]

27. Reliability and credibility of sexual violence evidence and witnesses is generally assessed by the Court according to a range of factors.[49] However, such factors may risk gender-based prejudicial evaluation of witnesses in contravention of article 21(3) of the Statute, particularly in relation to behavioural criteria, such as demeanour, spontaneity, or willingness to respond to questions. It should be noted that patriarchal norms of society and language may influence the presentation of sexual violence evidence as well as its evaluation. As such, the risk of gender-based prejudicial evaluation – particularly in cases of sexual violence – must be avoided.[50]

28. With respect to the present case, the *amici* consider that the *Ongwen* Trial Chamber's assessment of the testimonial evidence of sexual violence was carried out in a manner consistent with well-established principles of international criminal law.[51] The *amici* support the *Ongwen* Trial Chamber's finding that inconsistencies linked to the nature and impact of sexual violence are insufficient to undermine a victim's account,[52] and that minor inconsistencies are "the normal variances expected from independent recollections and go to show that their testimonies were not rehearsed or coordinated."[53] In sum, the *Ongwen* Trial Chamber applied the same standard to assess all evidence including evidence of sexual violence and did so in a non-prejudicial manner.

[47] On recognition of trauma and recall, see *Kunarac* Appeal Judgment (n 116) para. 267; P. Gopalan, D. Kravetz, and A. Menon, 'Proving Crimes of Sexual Violence', in S. Brammertz and M. Jarvis (eds.), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, 2016, Oxford: Oxford University Press p.140. See Appendix.
[48] *Bemba et al.* Trial Judgment, para. 202, affirmed on appeal (see *Bemba et al.* Appeal Judgment, para 1019). See also *Ongwen* Trial Judgment, paras 255-259.
[49] As set out in the *Ongwen* Trial Judgment, paras 255-259.
[50] See *Gbagbo and Blé Goudé* Appeal Judgment, Dissenting Opinion of Judge Ibáñez Carranza, para. 403.
[51] *Furundžija* Trial Judgment, para. 113. See also *Akayesu* Trial Judgment, para. 143; *Muhimana* Appeal Judgment, para. 58, referring to *Niyetegeka* Appeal Judgment, para. 95. It may appear that in practice the ICC addresses trauma in a sensitive manner. In *Lubanga Dyilo*, the judges noted that trauma may explain incoherence in the witnesses' testimonies. Therefore, the Chamber "made appropriate allowance for any instances of imprecision, implausibility or inconsistency". See *Lubanga Dyilo* Trial Judgment, para. 103. The latter approach had been echoed in subsequent trial judgments (see, *e.g.*, *Bemba* Trial Judgment, para. 230; *Katanga* Trial Judgment, para. 83; *Ngudjolo* Trial Judgment, para. 49; *Ntaganda* Trial Judgment, para. 79) and confirmed by the Appeals Chamber. See *Ntaganda* Appeal Judgment, para. 774.
[52] See, *e.g.*, *Ongwen* Trial Judgment, para. 483.
[53] *Ongwen* Trial Judgment, para. 1581.

4. Evidence of sexual violence must be assessed individually and holistically as part of the totality of the evidence received at trial

29. Evidence of sexual violence should be assessed on a case-by-case basis as elaborated in paragraph 26 above. Additionally, as held by the Appeals Chamber in *Lubanga*, a trial chamber is required to "carry out a holistic evaluation and weighing of all the evidence taken together in relation to the facts at issue."[54] Such a requirement is consistent with article 74(2) of the Statute which requires a trial chamber to base its decision on its "evaluation of the evidence and the entire proceedings." Therefore, the evaluation of sexual violence evidence, testimonial or otherwise, like evidence of other crimes, must be assessed in terms of its coherence with other evidence, and on the basis of the total evidence submitted in the entire proceedings.[55] Treating sexual violence crimes as an exception to this principle by requiring more evidence than other crimes reaffirms the discriminatory presumptions outlined above, and on its face creates a prejudicial environment that diminishes the gravity of sexual violence crimes.

30. The *amici* submit that the *Ongwen* Trial Chamber assessed the sexual violence evidence in conformity with well-established principles of international criminal law, including that all testimonial evidence must be assessed on a case-by-case basis, taking account of the entirety of their testimony and in light of the "individual circumstances of the witness."[56] The *amici* also submit that the *Ongwen* Trial Chamber evaluated the evidence of sexual violence holistically and in a manner consistent with the aforementioned principles.

5. There is no requirement of corroboration

31. The principle of the holistic assessment of individual pieces of evidence does not reintroduce a requirement of corroboration of sexual violence evidence. Rule 63(4) of the RPE expressly states that there is no legal requirement of corroborative evidence to prove a crime before the Court and specifies that this principle applies to sexual violence evidence. This rule is particularly important for the fair evaluation of sexual violence evidence, given that it is a "crime that often occurs without witnesses."[57] That proof of a crime can be established by a single witness without corroboration is a well-established principle of

[54] See *Lubanga Dyilo* Appeal Judgment, para. 22. See also *Ntaganda* Appeal Judgment, para. 38.
[55] See *Ntagerura et al.* Appeal Judgment, para. 174.
[56] *Ongwen* Trial Judgment, paras 258, 260.
[57] P. Gopalan, D. Kravetz, and A. Menon, 'Proving Crimes of Sexual Violence', in S. Brammertz and M. Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, 2016, Oxford: OUP, p. 136. See Appendix.

international criminal law.[58] Accordingly, the weight of the evidence of an uncorroborated survivor of sexual violence should not be adversely affected by the absence of corroborating evidence. Evaluation of such evidence is "dependent on the issue in question and the strength of the evidence"[59] and accordingly, as stated above, must be assessed on a case-by-case basis. There is no reason to depart from this principle in the assessment of sexual violence evidence. The *amici* submit that the manner in which the *Ongwen* Trial Chamber evaluated the evidence of sexual violence was consistent with the above principle enshrined in rule 63(4) of the RPE.

6. A contextual evaluation of sexual violence evidence is required to prevent prejudicial evaluation of such evidence

32. The relevance of sexual violence evidence to the charges alleged, and its probative value in proving those charges, as with other evidence, should be contextually evaluated.[60] Thus, the relevance of sexual violence evidence to the charges should be considered within the full temporal and geographical scope of the charges and wider criminal campaign. This is required to prevent the prejudicial evaluation of such evidence based on discriminatory presumptions. One such prejudicial presumption is that sexual violence is a personal or opportunistic crime, and hence is an isolated act not connected to the conflict. Another presumption is that sexual violence is an individual sexual act not connected to conflict and that sexual violence itself must be "systematic/widespread or committed pursuant to orders" to establish the international criminality of the conduct.[61]

33. Applying a contextual approach acknowledges that international crimes of sexual violence often involve multiple acts against a single victim or multiple victims, can be committed across lengthy periods of time, and frequently occur over wide geographical areas. International criminal law jurisprudence also acknowledges that sexual violence is often committed in the context of a widespread or systematic attack involving multiple other acts of violence of similar gravity. The highly prejudicial nature of allegations of consent and

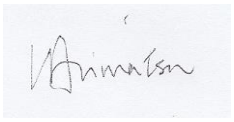
[58] *Lubanga Dyilo* Trial Judgment, para. 110, confirmed in *Ntaganda* Appeal Judgment, para. 690. Principle established in relation to sexual violence evidence in the *Tadić* Trial Judgment, paras 535-539 (confirmed in *Tadić* Appeal Judgment, para. 65). No corroboration requirement established in *Delalić et al.* Appeal Judgment, para. 506. See also *Aleksovski* Appeal Judgment, para. 62; *Kupreškić et al.* Appeal Judgment, para. 220.
[59] *Lubanga Dyilo* Trial Judgment, para. 110.
[60] On contextual evaluation see: *Ntaganda* Appeal Judgment, para. 425. On contextual evaluation of sexual violence evidence, see: *Brđanin* Appeal Judgment paras 256-257. On evidence outside the scope of charges: *Nahimana et al.* Appeal Judgment, para. 315; *Dordević* Appeal Judgment para. 295.
[61] M. Jarvis and K. Vigneswaran, 'Challenges to Successful Outcomes in Sexual Violence Cases' in S. Brammertz and M. Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence*, 2016, Oxford: OUP, pp. 37-40. See Appendix.

prior sexual conduct in the context of international crimes is reflected in rules 70 and 72 of the RPE. Accordingly, these rules must be stringently applied in trial proceedings. For instance, focusing on coercive circumstances in which sexual violence occurs,[62] rather than the consent of an individual victim,[63] shifts the focus away from the conduct of the victim to, appropriately, the actions of the accused.

34. The *amici* consider that the *Ongwen* Trial Chamber appropriately considered the coercive contexts of the crimes in assessing the evidence of sexual violence and correctly evaluated the evidence of sexual violence in a manner consistent with the aforementioned principles.[64]

IV. CONCLUSION

35. The *amici* respectfully submit these views for consideration by the Appeals Chamber in the proper determination of the case.[65]



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At The Hague, The Netherlands

[62] *Kunarac et al.* Appeal Judgment, para. 130 (The ICTY Appeals Chamber held that "the circumstances giving rise to the instant appeal and that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible."). See also *Kvočka* Trial Judgment, para. 178; *Ngirumpatse* Trial Judgment, paras 1676-1677; *Karadžić* Trial Judgment, paras 511-512.

[63] *Milutinović et al.* Trial Judgment, para. 200 (holding that "[a]ny form of coercion, including acts or threats of violence, detention, and generally oppressive surrounding circumstances, is simply evidence that goes to proof of lack of consent.").

[64] *Ongwen* Trial Judgment, paras 2028-2093.

[65] The *amici* remain at the Appeals Chamber's disposal should it want elaboration on the aforementioned matters and other connected legal issues such as the relevance or probative value of sexual violence in establishing the material facts.