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Court

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No.: **ICC-02/04-01/15**
Date: **19 October 2021**

APPEALS CHAMBER

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

SITUATION IN UGANDA

IN THE CASE OF
THE PROSECUTOR v. DOMINIC ONGWEN

PUBLIC
with public Annexes A-B, D and confidential Annex C

Public Redacted Version of "Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021", filed on 21 July 2021 as ICC-02/04-01/15-1866-Conf

Source: **Defence for Dominic Ongwen**

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

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I. INTRODUCTION

> "…I'm not the LRA. The LRA is Joseph Kony who is the leader of the LRA… It is the LRA who abducted people in northern Uganda. The LRA killed people in northern Uganda. LRA committed atrocities in northern Uganda, and I'm one of the people against whom the LRA committed atrocities. But it's not me, Dominic Ongwen, personally, who is the LRA."[1]

1. These words of Mr Dominic Ongwen (the "Appellant") capture the essence of this case: it is a case about the LRA. The then-ICC Chief Prosecutor Bensouda, in her opening remarks on 6 December 2016 confirmed this: she stated, "Mr President, Honourable Judges, this trial is about violence and misery that blighted the lives of millions of people living in northern Uganda… violent attacks on civilian targets by an armed group calling itself the Lord's Resistance Army, had resulted in those ordinary people being forced into camps for internally displaced persons (IDPS)…"[2]

2. But the person in the dock is not the leader of the Lord's Resistance Army ("LRA"), Joseph Kony ("Kony") – who founded the LRA and established the rules and its regime of violence – but a victim, Dominic Ongwen, who was abducted by the LRA on his way to school in 1987, at the age of 8 or 9. Kony remains unapprehended; he has escaped the tentacles of various States – indicating the absence of affirmative political will to bring him to justice and hold him accountable. The Appellant is in the dock only because he surrendered in 2015.[3]

3. This trial was a proxy prosecution – a prosecution of the LRA using the Appellant, a child soldier, as a scapegoat. "Justice can only be done when the right person is held responsible for the right charges, after a fair trial and on the basis of robust evidence."[4]

4. No justice has been done in this case. The Judgment is replete with errors, based in law, fact and procedure. Most of these errors are rooted in the denial of the Appellant's fair trial rights and the failure of Trial Chamber IX (the "Chamber") to apply the burden of proof to the Prosecution, in respect to the Defence's affirmative defences, and in its assessments and conclusions about other evidence.

5. The Judgment erroneously carves out the "Dominic Ongwen exception" to the deleterious effects of the LRA on Kony's abductees. The Judgment references evidence of initiation rituals, standing

[1] T-26, p. 17, lns 6, 10-14.
[2] T-26, p. 22, ln. 19 – p. 23, ln. 1.
[3] Three others on the original arrest warrant in 2005 are dead, including Vincent Otti, who the Prosecution stipulated was killed on order of Joseph Kony.
[4] *Bemba* case, Appeals Chamber, *Separate opinion Judge Christine Van den Wyngaert and Judge Howard Morrison*, ICC-01/05-01/08-3636-Anx2, para. 78.

rules, indoctrination and Kony's brutal disciplinary regime,[5] but is silent on how these rituals and practices affected the conduct of the Appellant. Similarly, there are references to Kony's spiritual power over others in the LRA,[6] but the Chamber concludes that spirituality was not a factor which contributed to the threat relevant to duress for the Appellant.[7]

6. This also a case of many "firsts". This is the "first" prosecution of a mentally disabled defendant who is asserting an affirmative defence under Article 31(1)(a) and (d) as complete defences. It is the first case in which culture and spiritualism play a prominent role in the duress defence. And, it is the first time a single defendant is convicted of 61 crimes and two modes of liability in a Judgment of 1077 pages – the longest in ICC history.

7. The convictions entered against the Appellant are convictions against a victim. Technically, it is a judgment against the Appellant, but the reality is that it is a judgment against all child soldiers. Justice was not done. Thus, the Defence requests reversal of all convictions and that acquittals be entered.

II. GROUNDS OF APPEAL

THE CHAMBER VIOLATED APPELLANT'S FAIR TRIAL RIGHTS UNDER THE ROME STATUTE AND INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

The Chamber erred in finding that no fundamental rights of the Appellant were breached during the arrest and surrender[8]

8. In the surrender and arrest process, which initiated the ICC proceedings against the Appellant, two fundamental rights were violated: the right to counsel and the right to remain silent.[9]

9. The Judgment, at paragraphs 50-51, states that Article 55(2) rights only apply when a person is questioned in the context of an ICC investigation. Hence, ICC protections did not apply to the Appellant while he was in the custody of Uganda or of the Central African Republic; once he was in ICC custody, duty counsel was appointed.

10. The legal problem is that conduct of Ugandan and Central African Republic authorities, including questioning the Appellant and asking him to sign documents, took place based on an ICC arrest

[5] Trial Chamber IX, *Trial Judgment*, ICC-02/04-01/15-1762-Red, ('Judgment'), para 906-930.
[6] Judgment, para 2643 et seq.
[7] Judgment, para. 2658.
[8] Judgment, para 46-61; Defence Closing Brief, para 43-61.
[9] Articles 67(1)(d) and (g). Note, the Defence amends it filed Notice of Appeal to include these two violations a ground of appeal.

warrant. And, as graphically explained on a chart annexed to the Defence Closing Brief, this conduct took place before the Appellant was asked if he wanted legal assistance.[10] As a result his right to counsel was violated.

11. As to the Appellant's right to remain silent, the Defence appeals the Chamber's finding that the Defence arguments on a violation of Article 69(7) are without merit.[11] The Defence argued the video was obtained in violation of the Statute, and of the Appellant's international recognised human rights. It requested that the video evidence, which was part of the materials Prosecution Expert P-0446 relied upon to reach her conclusion that the Appellant suffered from no mental illness, be deemed inadmissible and excluded.

A. Grounds 1, 2 & 3: Errors regarding the Article 56 hearings

a) Introduction

12. The Appellant argues Grounds 1, 2 and 3 together. These grounds raise procedural, legal and evidentiary errors which invalidate the judgment or occasion a miscarriage of justice.

13. Two decisions in the *Ongwen* interlocutory appeals judgment[12] are relevant to the procedural, legal and evidentiary violations which occurred in the unique investigative Article 56 proceedings. The same errors are replicated in the confirmation of charges proceedings, the trial and judgment. These violations alone or in aggregate violated the fairness and integrity of the trial and conviction of the Appellant.

14. The Appeals Chamber recalled that "having regard to the need to ensure the fair conduct of proceedings, the Appeals Chamber finds it important to note that in the Impugned Decision, the Trial Chamber recalled that 'no evidence will be used against the accused in a manner which would exceed the scope of the charges or could not have been reasonably anticipated".[13] The Appeals Chamber recalled that "the right of the accused person to be informed of the charges is firmly grounded in the Statute' and it has already highlighted 'the strong link between the right to be informed in detail of the nature, cause and content of the charges and the right to prepare one's

[10] Trial Chamber IX, *Public Annex A*, ICC-02/04-01/15-1722-AnxA , ('Defence Closing Brief Annex A').
[11] Judgment, paras 56-61; Defence Closing Brief, paras 57-60.
[12] Appeals Chamber, *Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision'*, ICC-02/04-015-1562, ('*Ongwen* OA4 Judgment'), at para. 159.
[13] *Ongwen* OA4 Judgment, at para. 159.

defence".[14] The Defence submits that these procedural and fair trial rights were recurrent in the Article 56 proceedings, as well as the confirmation, trial proceedings and judgment in this case.

15. The Appellant incorporates his submissions in the Defence closing brief.[15]

b) The conduct of the proceedings compounded the violation of the Appellant's right to notice and the fundamental fairness of the proceedings

16. Concurrent orders made by the Single Judge in his capacity as the Single Pre-Trial Judge in the pre-trial proceedings and as the Single Judge of the Article 56 procedings, compounded the violation of the Appellant's right to notice. His right to adequate time and resources to prepare his defence was violated. The procedural history of the Article 56 and the pre-trial proceedings highlights these violations.

17. The Prosecution applied for the Pre-Trial Chamber to preserve evidence and take measures under Article 56 of the Rome Statute on 26 June 2015.[16] This application was granted on 26 June 2015.[17] The Defence application for leave to appeal was denied.[18]

18. On 18 September 2015, the Prosecution gave notice of intended charges against the Appellant, extending the charges to 67 counts.[19] The Appellant was provided a concise statement of facts but was not given notice of the charges which were the subject of the unique investigative procedure.

19. The Single Judge heard evidence from P-0277 on the 18 and 19 September 2015.[20] On 2 October 2015, the Prosecution filed a second application to preserve evidence.[21] On 5 October 2015, the Prosecution filed a request to supplement the notice of intended charges, to effectively bring new charges against the Appellant.[22] A decision on the second Prosecution application to preserve

[14] *Ongwen* OA4 Judgment, para. 69.
[15] Trial Chamber IX, *Defence Closing Brief*, ICC-02/04-01/15-1722-Corr-Red, ('Defence Closing Brief'), para 42, 61-72.
[16] Trial Chamber IX, *Prosecution application for the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute*, ICC-02/04-01/15-256-Conf, (ICC-02/04-01/15-256-Red).
[17] Trial Chamber IX, *Decision on the "Prosecution application for the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute"*, ICC-02/04-01/15-277-Conf, (ICC-02/04-01/15-277-Red).
[18] Trial Chamber IX, *Decision on the "Defence Request for Leave to Appeal Decision ICC-02/04-01/15-277"*, ICC-02/04-01/15-287.
[19] Pre-Trial Chamber II, *Notice of intended charges against Dominic Ongwen*, ICC-02/04-01/15-305-Conf, (ICC-02/04-01/15-305-Red2).
[20] T-10, T-11.
[21] Pre-Trial Chamber II, *Second Prosecution application to the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute*, ICC-02/04-01/15-310-Conf, (ICC-02/04-01/15-310-Red).
[22] Pre-Trial Chamber II, *Request for permission to supplement the 'Notice of intended charges against Dominic Ongwen' filed on 18 September 2015*, ICC-02/04-01/15-311-Conf, (ICC-02/04-01/15-311-Red).

evidence was delivered on 12 October 2015,[23] followed by a decision on the Prosecutor's request for permission to supplement the notice of intended charges.

20. The Prosecution transmitted to the Defence the reports relating to witnesses P-0235, P-0099, P-0101, P-0198, and P-0214 on 27 October 2015.[24] The Single Judge conducted the hearing of the evidence of witnesses P-0235, P-0099, P-0101, P-0198 and P-0214 from 9 to 23 November 2015.

c) The Article 56 proceedings violated the procedural and the fair trial rights of the Appellant

21. During the proceedings, the Single Judge went beyond the scope of making recommendations or orders regarding the procedures to be followed and observing and making recommendations or orders regarding the collection and preservation of evidence and the questioning of persons. The Single judge actively participated in the collection of evidence for the confirmation of charges proceedings, which the Single Judge also presided. By conducting both proceedings almost concurrently and actively participating in the Prosecution investigation, the Single Judge violated Article 56(2)(b) of the Statute and the fair trial rights of the Appellant. The prejudice caused is demonstrated by the purposes for which the Article 56 transcripts were used during the pre-trial[25] and trial proceedings as demonstrated further in this brief.

22. On 12 November 2015, the Prosecution Counsel Ben Gumpert informed the Counsel Support Section through an email, that one persecution charge will now be four, and copies were sent to Tom Obhof, Assistant to Counsel, as a courtesy. This brought the charges to 70.[26]

23. On 21 December 2015, the Prosecution submitted the document containing the charges, the pre-confirmation brief, and the list of evidence.[27]

24. On 18 January 2016, the Defence filed Confidential Defence Brief for the Confirmation of Charges Hearing.[28]

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[23] Pre-Trial Chamber II, *Decision on the "Second Prosecution application to the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute"*, ICC-02/04-01/15-316-Conf, (ICC-02/04-01/15-316-Red).
[24] Pre-Trial Chamber II, *Prosecution's Transmission of Investigators' Reports*, ICC-02/04-01/15-329.
[25] Pre-Trial Chamber II, Annex 1 to Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15-422-Anx1; *See also*, Pre-Trial Chamber II, *Decision on the confirmation of charges against Dominic Ongwen*, ICC-02/04-01/15-422-Red, ('CoC Decision'), paras 34-45.
[26] CoC Decision, pp 71-104.
[27] Pre-Trial Chamber II, *Prosecution's submission of the document containing the charges, the pre-confirmation brief, and the list of evidence*, ICC-02/04-01/15-375.
[28] Pre-Trial Chamber II, *Defence Brief for the Confirmation of Charges Hearing*, ICC-02/04-01/15-404-Red4, paras 11-16, 36-42.

25. On 26 March 2016, Pre-Trial Chamber II delivered its Decision on the confirmation of charges against Dominic Ongwen (the "CoC Decision").[29]

d) The role of the Pre-Trial Chamber

26. The functions and powers of the Pre-Trial Chamber are stated in Article 57 of the Statute. Article 61 of the Statute established the confirmation of charges procedure, by which a suspect before the Court may be committed to trial. Article 61(4) of the Statute permits the Prosecutor to continue investigations and to amend or withdraw charges on the condition that the suspect is provided reasonable notice before the hearing of any amendment.[30]

27. Whereas Article 56 of the Statute additionally grants the power to preside over a unique investigation opportunity to a Single Judge appointed for the purpose by the Pre-Trial Chamber,[31] the activation of the unique investigation procedure in this case was done by the Prosecutor for the purpose of preserving evidence for trial.

28. In the *Yekatom* case, Pre-Trial Chamber II cautioned that it would continue to exercise the utmost vigilance to avoid that the Prosecutor's statutory prerogatives are exercised in such a way as not to unduly detrimentally affect the fundamental rights of the Defence, or to making it more burdensome to exercise those rights effectively.[32] In the exercise of his dual mandate of Single Judge for the Article 56 investigative procedure and the confirmation of charges proceedings, Judge Tarfusser did not demonstrate the utmost vigilance required to avoid the exercise of the Prosecutor's prerogatives in ways which unduly affected the rights of the Appellant to fundamental fairness of both proceedings which he oversaw and actively participated in.

e) The role of the Single Judge of the Pre-Trial Chamber in the Article 56 proceedings

29. Article 56(2)(e) of the Statute empowers the Pre-Trial Chamber to name one of its members or another available judge of the Pre-Trial or Trial Divisions to observe and make recommendations or orders regarding the collection and preservation of evidence and questioning of persons and "taking such other actions as may be necessary to collect or preserve evidence."[33] The Pre-Trial Chamber named Judge Tarfusser, the Presiding Judge of the confirmation panel in this case, as the

[29] CoC Decision.
[30] Article 61(4) of the Statute.
[31] Article 56 of the Statue.
[32] *Yekatom* case, Pre-Trial Chamber, *Decision on the 'Prosecution's Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges'*, ICC-01/14-01/18-517, at para. 36
[33] Artilce 56(2)(e) and (f) of the Statute.

Single Judge to oversee the collection and preservation of evidence pursuant to Article 56 of the Statute.

30. The Pre-Trial Chamber did not provide a reasoned statement providing a legal basis for the appointment of one judge to oversee both proceedings. The active involvement of Judge Tarfusser in in both proceedings created a strong perception of a conflict of interest and lack of independence and neutrality. The Chamber sidestepped this violation, which was raised in the Defence closing brief, and did not provide a reasoned statement on this fundamental fair trial issue which impacted the integrity of the proceedings.[34]

31. When the said evidence was submitted to the Chamber for the purpose of the trial, the Single Judge of the Chamber, over the objections of the Defence, decided that the Defence did not demonstrate any statutory violation in the collection of the evidence under Article 56 of the Statute. This was the primary legal basis relied upon by the Pre-Trial Chamber Single Judge to admit the records of the Article 56 proceedings into the trial records.[35]

f) Violations of the Statute

32. During the Article 56 proceedings, the Single Judge imposed a procedural bar to objections on the nature, scope and purpose of the Article 56 proceedings.[36] The oral decision effectively prevented the Appellant from raising procedural challenges to the procedural and fair trial violations which he suffered in the conduct of the Article 56 proceedings; in particular, the nature, scope and purpose of the said proceedings.[37] This effectively prevented the Appellant from raising timely objections to the introduction of the Article 56 evidence which the Single Judge actively participated in the collection of, for the amendment and confirmation of charges proceedings which were presided by him.

33. The Chamber rejected the Defence submission on this violation by stating that the Defence objection was "based on a false interpretation of the statement of the Single Judge" without providing a reasoned statement stating the correct interpretation.[38]

[34] Judgment, paras 62, 65.
[35] Trial Chamber IX, *Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute*, ICC-02/04-01/15-520, paras 12-16.
[36] T-8, p.4, lns 7-8, where the Single Judge ordered: "I expect no preliminary procedural issues as to the nature, scope, and purpose of this hearing".
[37] T-8, p. 3, ln. 9 – p.4, ln. 8.
[38] Judgment, para. 66.

34. The Statute affords accused persons before the ICC a guarantee of fair trials in all equality and establishes minimum thresholds for the guarantee of the fairness of trial proceedings before the Court.[39] The Statute also states that the interpretation of the Statute must be consistent with internationally protected and guaranteed human rights.[40] The failure by the Chamber to sanction the violation and to provide a reasoned statement were clear violations of the statutory mandate of fundamental fairness.[41]

g) The decision of the Single Judge on the purpose of Article 56 proceedings was inconsistent and prejudicial to the Appellant

35. The Single Judge decided that it was irrelevant to determine the purpose for the preservation of evidence through Article 56 proceedings[42] He also determined the purpose of the Article 56 proceedings. The Single Judge stated that the "present decision is therefore, taken with the view to making it possible for the eventual Trial Chamber to consider not calling the two witnesses to testify in person".[43] The Appellant, by this decision, understood that the purpose of the unique investigative procedure was to preserve evidence for trial, not for the confirmation of charges against him.

36. The Single Judge, in the same decision, also decided that "the evidence provided during these testimonies, taken and videotaped for the purposes of the trial is also relied upon by the Prosecutor for the purposes of the hearing on the Confirmation of charges".[44] This was an invitation to the Prosecution to submit the evidence for the confirmation proceedings over which the Single Judge presided.

37. The propriety of the participation of Judge Tarfusser in the Confirmation of Charges proceedings committing the Appellant to trial based on evidence which he actively participated in collecting and preserving for trial must be called into question. The Single Judge did not come to the confirmation proceedings with an untainted independent predisposition. The roles of an investigative judge, actively participating in the questioning of witnesses, making orders and intervening on the attribution of witnesses created a strong appearance of incompatibility in being

[39] Article 67 of the Statute.
[40] Article 21 of the Statute.
[41] Article 67(1) of the Statute.
[42] Pre-Trial Chamber II, *Decision on the "Prosecution application for the Pre-Trial Chamber to preserve evidence and take measures under Article 56 of the Rome Statute"*, ICC-02/04-01/15-277-Red, para. 4.
[43] Pre-Trial Chamber II, *Decision on the "Prosecution application for the Pre-Trial Chamber to preserve evidence and take measures under Article 56 of the Rome Statute"*, ICC-02/04-01/15-277-Red, para. 10.
[44] CoC Decision, para. 102.

judge and party in the confirmation proceedings. This significantly compromised the integrity of the pretrial and trial proceedings and violated the right of the Appellant to a fair trial.[45]

h) Prejudice caused by the active involvement of the Single Judge in both proceedings

38. There was a conflict between the evidence preservation role of the Single Judge and his participation in the confirmation proceedings. His participation in the Article 56 proceedings went beyond the observing and making recommendations or orders regarding the collection and preservation of evidence and questioning of persons mandated by Article 56(2)(e) of the Statute.

39. For example, during the testimony of P-101, the date of a charged attack was in issue. The Single Judge interrupted the witness and said, "Excuse me. Before the next question, I just want to raise a question I have. You were talking about... asked about 1994 and I think it's about ten years earlier."[46]

40. Also, during the testimony of P-0214, the date of when a charged act was committed was in issue. The Single Judge, over concerns raised by the Prosecutor, intervened: "I just want to put the picture clear. […] The problem about the dates 2002 or 2004 because I think there is some discrepancy because if Pajule was in 2003 and it was insisted this morning that the witness was given to Ongwen in 2004, but it seems that it's 2002, so I would just ask the parties may be to put some questions in relation to the witness in order to clarify what happened. Otherwise, I will do it".[47]

41. During the testimony of P-226, the Single Judge said, "I think I said that it's quite evident that she was under --- far under 18 years old at that time."[48] He also stated, "You may rest assured, counsel, that we do appreciate this. But I think all these statements have to be also seen as… all these things have been lived by a small girl, seven, eight, nine years old. Now about 15 years have passed. I mean they have been… they must be read also a little bit we would say in Latin cum garno salis, with a little bit of salt. So, this is the only thing I… it's not literally one week or two weeks."[49]

42. These statements made by the Single Judge were prejudicial to the Appellant. These statements, as many others in the transcripts of the proceedings, establish that the degree of involvement of the Single Judge went beyond overseeing the collection and preservation of evidence for trial. He

[45] Articles 21 and 67 of the Statute; *See also*, Article 14 of the International Covenant on Civil and Political Rights (ICCPR).
[46] T-13, p. 29, lns 9-10.
[47] T-15, p. 42, lns 5-11.
[48] T-8, p. 60, lns 22-24.
[49] T-9, p. 40, lns 5-10.

made substantive interventions and decisions which greatly influenced the confirmation and trial proceedings, causing significant prejudice and compromising the integrity of the trial.

i) Procedural and fair trial violations by the Chamber

43. In its 10 August 2016 decision,[50] the Chamber failed to provide a reasoned statement on the following procedural objections to the admissibility of the Article 56 transcripts: the irregular status of the evidence, the prejudice of admission, and failing to exclude the evidence pursuant to Article 69(7) of the Statute.[51] More significantly, the Chamber failed to consider and provide a reasoned statement on the procedural violations by the non-compliance with Article 56(1)(a) and (2)(a) and (e) of the Statute by the Single Judge of the Pre-Trial Chamber.

44. The Chamber also failed to provide a reasoned statement on the status of witnesses, whose evidence the Article 56 proceedings intended to preserve and some of whom opted to testify as witnesses for the Appellant but were denied the opportunity.[52]

j) The prejudicial use of the Article 56 evidence by the Chamber to convict or support multiple convictions

45. The CoC Decision charged the Appellant for sexual and gender-based crimes committed by him (counts 50-60) and not directly committed by him (counts 61-68), as part of a common plan with Kony and Sinia leadership in Northern Uganda from 1 July 2002 to 31 December 2005.

46. At the end of the trial, the Prosecutor submitted that "although the rape and sexual enslavement of some of the victim witnesses occurred outside of the charged period (and in some cases, beyond the Court's temporal jurisdiction), that evidence provides vital context for the Chamber's understanding of the coercive environment that existed during Mr Ongwen's commission of the crimes during the charged period".[53] The Chamber did not provide a reasoned statement on this Prosecution request and proceeded prejudicially to impermissibly rely on the evidence of Article 56 witnesses and other witnesses whom it found to be outside the charges as corroborating evidence to convict the Appellant. Rather, the Chamber decided to refer to evidence of conduct outside the parameters of the charges and made "the necessary corresponding findings as part of

[50] Trial Chamber IX, *Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute*, ICC-02/04-01/15-520.
[51] Trial Chamber IX, *Defence Response to "Prosecution's request to admit evidence preserved under Article 56 of the Statute"*, ICC-02/04-01/15-492, para. 1; *See also*, Annex A, Annex B, and Annex C.
[52] Judgment, para. 67.
[53] Trial Chamber IX, *Prosecution Closing Brief*, ICC-02/04-01/15-1719-Red, ('Prosecution Closing Brief'), para. 160.

its determination on the facts described in the charges as underlying the crimes with which Dominic Ongwen is charged."[54] This caused significant prejudice.

47. The prejudice caused by relying on evidence of crimes in which the Appellant was charged as a direct perpetrator,[55] as an indirect co-perpetrator in a common plan and by association with Kony and the LRA, as corroboration to convict the Appellant in multiple crimes outweighed the probative value of the evidence.

48. This significantly blurred the lines between the confirmed charges under Article 25(3)(a) of the Statute as a direct perpetrator, indirect perpetration and indirect co-perpetration, due to fungible use of the evidence on which the Appellant was convicted as a direct perpetrator, as corroboration or evidence out of the temporal scope of the charges[56] as corroboration to convict in crimes for which he was charged as an indirect co- perpetrator.

49. Besides, the use, as corroboration, of evidence of crimes for which the Appellant was convicted, as well as impermissible inferences, violated the principle of *ne bis idem*, Article 20 of the Statute, and the internationally protected fair trial rights of the Appellant under Article 21(3) of the Statute.

B. Ground 4: The Chamber violated the Appellant's fair trial right by proceeding to trial on an illegal plea[57]

a) The Statute is silent for legal criteria for a plea of not guilty

50. Article 64(8)(a) of the Statute provides for the possibility of a plea of not guilty, but it does not articulate the legal criteria for a not guilty plea as applied to the defendant. It states the obligations of the Trial Chamber: a) to read the charges previously confirmed by the Pre-Trial Chamber; and b) to be satisfied that the Accused understands the nature of the charges. The Trial Chamber's provision of an opportunity to an Accused to plead guilty or not guilty is treated as a third obligation, under Article 64(8)(c).

[54] Judgment, paras 2009, 2040, 2216-2247.
[55] Judgment, paras 61-68.
[56] Judgment, paras 205, 206, 3023, 3025. P-099 was abducted in 1998 (T-14, p. 30, lns 15-25; p 57, ln. 18 – p.48, ln. 1; p.62, lns 2-11). P-0214 was abducted in 2002 and taken to Kony in Sudan (T-15, p. 16, ln. 18 – p. 17, ln. 18).
[57] This section refers to Ground 4 in NOA, Judgment, para 73-82. The Defence incorporates its arguments and footnote references in the Defence Closing Brief at para 73-82. The Defence makes two typographical corrections here: para. 74 should read "…the standard for a not guilty plea should be the same…"; para. 77 should read "…fundamental fair trial violation that permeates the proceedings from the outset."

51. In Article 65, the Statute states that on proceedings on an admission of guilt, an accused's understanding and voluntariness entering the plea are the first two criteria.[58]

52. The legal standards for a plea have been articulated in many jurisdictions in the context of a guilty plea (probably because litigation has occurred in the context of the validity of guilty pleas).

53. These standards are that a plea must be: a) voluntary; b) knowing or informed; and c) unequivocal. For example, these three criteria are found in the ICTY Rules of Procedure and Evidence, Article 62*bis*[59] (guilty pleas). Knowing or informed means understanding the charges and the modes of liability, and the consequences of pleading.[60] Understanding the charges refers to the competency of the person, and whether s/he, based on his/her medical status, can meaningfully exercise his or her fair trial rights. This includes understanding the charges and the proceedings and being able to instruct counsel accordingly.[61]

54. The Judgment states that the "standards for a not guilty plea are not equivalent to the standards required for an admission of guilt under Article 65… A non-unequivocal 'not guilty' plea results simply in the proceeding with the trial."[62] The Chamber fails to explain its reasons for this conclusion. Its statement that "a non-equivocal 'not guilty' plea results simply in the proceedings with the trial" misses the point: what legal standards or criteria apply to a not guilty plea? Simply put, it is illogical to have criteria for a guilty plea, but then to have no criteria for a not guilty plea.

55. Lastly, the Judgment's conclusion, at paragraph 82, that the Appellant was not prejudiced by this is erroneous. It is the Defence's view that, as a matter of law, the Chamber erred by accepting an "illegal plea" of not guilty, which prejudiced the Appellant's fair trial rights, and triggered the trial proceedings which ultimately resulted in his conviction on 61 counts and multiple modes of liability.

b) The Appellant's not guilty plea did not satisfy the criteria of voluntary, knowing or informed and unequivocal

56. Article 68(a) of the Statute states that at the commencement of the trial, the Trial Chamber "shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber." As pointed

[58] Article 65(1)(a) and (b) of the Statute.
[59] 2016 Commentary on the Rome Statute, paras 11-12.
[60] While plea procedures may differ in common-law and civil law jurisdictions, the court must verify that the person pleading guilty is doing so freely, and that her or his admission to having committed the crimes is genuine (*see*, Conseil constitutionnel, Cons. Const.. 2 mars 2004, n. 2004-492 DC, para. 111).
[61] 2016 Commentary on the Rome Statute, Article 64, sections 40 – 41 and its case citations.
[62] Judgment, para. 74.

out in the 2016 Commentary of the Rome Statute, what constitutes the reading of the charges is inconsistent among trial chambers.[63]

57. However, the Appeals Chamber has held "there can be no doubt that the decision on the confirmation of the charges defines the parameters of the charges at trial."[64]

58. As noted in previous Defence pleadings, the Chamber read out only part of the confirmed charges on 6 December 2016: the charged crimes in each count. It specifically did not read the charged mode of participation. This was an error as to notice: it impossible for the Appellant – especially in the context of the Chamber's other errors – to be informed of the charges, and of his alleged participation. Yet, the Judge was asking the Appellant to respond to this incomplete information about the charges.

59. First, the Appellant was not provided with a full translation of the 104-page CoC Decision in Acholi at the time of the plea proceeding on 6 December 2016. Only pieces of the CoC Decision had been translated (up to paragraph 145, which was approximately at page 64), and there was no translation of the Separate Opinion.[65] The Appellant received a full translation of the CoC Decision on 13 December 2017, approximately a year after the 6 December 2016 proceeding. This delay violated his fair trial rights under Article 67(1) and (f). It was therefore, impossible for the Appellant to have been informed, in a language he speaks and understands, of the charges against him on the day the Chamber asked him to enter a plea.[66]

Dates of Translation of CoC into Acholi

CoC – English Version	CoC – Acholi Version
23 March 2016	13 December 2017[67]
Delay: 630 days; or 1 year, 8 months, and 20 days	

Separate Opinion - English Version	Separate Opinion – Acholi Version
6 June 2016	19 February 2018
Delay: 623 days; or 1 year, 8 months, and 13 days	

[63] 2016 Commentary, Section on Article 64, section 39.
[64] *Lubanga* case, Appeals Chamber, *Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction*, ICC-01/04-01/06-3121-Red, ('Lubanga Appeals Judgment'), para. 124.
[65] The Separate Opinion (52 pages) of Judge Marc Perrin de Brichambaut, was not translated until 19 February 2018.
[66] T-26, p. 20, lns 6-7.
[67] The Defence was not notified about the translation until after 8 January 2018; See, Trial Chamber IX, *Addendum to 'Defence Request for Findings on Fair Trial Violations and Remedy, Pursuant to Articles 67 and 64 of the Rome Statute' (ICC-02/04-01/15-1127), filed 8 January 2018*, ICC-02/04-01/15-1129.

60. Second, the CoC Decision – which includes both allegations of crimes and modes of liability – was not read out in its entirety to the Appellant. One sentence was read out for each count: it included the name of the crime, approximate date and approximate place. However, it did not include any alleged mode of liability. As a result, even if the Appellant was informed he was accused of a crime, he had no information as to what his role was alleged to be in the crime. He could not be fully informed in this situation.

61. The Chamber – after hearing the Appellant's statements, did not ask him if he understood the charges and modes of liability or if any further reading was necessary, in contradiction to its own Initial Directions on Conduct of Proceedings.[68]

62. Third, the Presiding Judge erroneously relied not on the CoC Decision, filed in March 2016, but on the Document Containing the Charges ('DCC') which had been given to the Appellant in December 2015 and used in the Confirmation of Charges hearing in January 2016. The December 2015 DCC was not identical to the DCC incorporated into the Confirmation of Charges Decision of March 2016. There were modifications, as detailed in the CoC Decision, at paragraph 158. At least one of them is a modification in terms of the dates of charged crimes, which is a specific element of the notice requirement.

63. Fourth, most importantly, the Chamber's questioning of the Appellant about his understanding of the charges was based on the 21 January 2016 hearing (using the December 2015 DCC), not on the CoC Decision from March 2016.[69]

64. The Appellant recalled the January hearing, and being asked if he were fully aware of the charges. The Appellant responded: "I do recall being asked that question and I do recall answering that I do not understand the charges against me."[70] The Chamber asked again, and the Appellant gave the same answer: "I did understand the document containing the charges – the charges I do understand as being brought against LRA but not me, because I'm not the LRA. The LRA is Joseph Kony who is the leader of the LRA… LRA committed atrocities in Northern Uganda, and I'm one of the people against whom the LRA committed atrocities. But it's not me, Dominic Ongwen,

[68] Trial Chamber IX, *Initial Directions on the Conduct of the Proceedings*, ICC-02/04-01/15-497, para. 6.
[69] T-26, p. 16, ln. 11 – p. 17, ln. 14.
[70] T-26, p. 16, lns 18-22.

personally, who is the LRA."[71] Consistently, the Appellant stated that he did not understand the charges as being brought against him, but against the LRA.[72]

65. Fifth, at the time of the Confirmation of Charges hearing in January 2016, there were no confirmed charges. So, the Appellant certainly could not have understood the confirmed charges in December 2016, based on statements he made in a January 2016 hearing.

66. The Chamber**,** at paragraph 78, erroneously rejects the Defence argument as "untenable" that the Appellant's position ("I am not the LRA") means he did not understand the CoC Decision. The Chamber held that the Appellant's remarks should be interpreted as a dispute on criminal responsibility.[73] The Appellant had explicitly stated on the record twice that he does not understand the charges as being against him. The Chamber factually erred in rejecting the evidence it heard from the Appellant, which resulted in the legal error of proceeding on the plea.

67. In light of the record, it cannot be held that the plea satisfied the criterion of being unequivocal. Even the Chamber acknowledged that "[a]t the conclusion of the exchange, Mr. Ongwen did not give an unqualified affirmation that he understood the charges."[74]

68. Thus, the Chamber accepted a plea of not guilty from the Appellant which failed to meet the legal criteria, and therefore was an "illegal plea."

c) The Appellant's mental disability compounded the Chamber's fair trial violations in the plea proceeding

69. At paragraphs 79-80, the Judgment essentially disputes that it ignored the Appellant's mental disability in reaching the determination that he understood the charges and contends that the Defence misstates the facts.

70. First, the Defence did not misstate the facts. The Defence presented its request that the Chamber order a Rule 135 examination of the Appellant, based on information it had available at the time. As indicated in its pleading,[75] the Defence had received a preliminary report from its Experts,

[71] T-26, p. 17, lns 2-14.
[72] T-26, p. 16, ln. 18 – p. 17, ln. 6.
[73] Judgment, para. 78.
[74] Trial Chamber IX, *Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision*, ICC-02/04-01/15-1147, para. 9 (iii).
[75] Trial Chamber IX, *Second Public Redacted Version of "Defence Request for a Stay of the Proceedings and Examination Pursuant to Rule 135 of the Rules of Procedure Evidence, filed 5 December 2016*, ICC-02/04-01/15-620-Red2, (Defence Request for Stay of Proceedings).

Professor Ovuga and Dr Akena, stating that the Appellant does not understand the charges and was not aware of the wrongfulness of any actions during his time in the bush.[76]

71. The Defence indicated it had not yet received the final report of the Experts and would disclose same within 24 hours of receiving it.[77] The Expert Report was provided to the Chamber the same day – in the afternoon of 6 December 2016.[78]

72. Thus, the Defence provided the information it had available at the time of the 5 December 2016 filing. This included detailed background, which discussed the Appellant's situation, dates of meetings between the Appellant and the Experts and the efforts of the Experts to obtain material from the ICC Detention Centre (the "ICC-DC") and to meet with the ICC-DC medical officer and clinical psychologist, which was refused on 24 June 2016.[79]

73. There is no doubt that the Chamber was put on notice prior to the 6 December 2016 proceedings, of the Appellant's mental health issues, and of the Defence request for an examination and a postponement of the opening of the trial. [80] The Chamber, nevertheless, denied the Defence requests. Instead, it proceeded with "business as usual" on 6 December. At the proceeding, the Chamber stated it "will determine for itself whether Mr Ongwen understands the nature of the charges later this morning."[81]

74. The Chamber did order a psychiatric examination of the Appellant in its Decision on 16 December 2016, to be conducted by Professor de Jong.[82] The examination was ordered under Rule 135, but its purpose did not include fitness to stand trial.[83]

75. But, this examination took place after the plea on 6 December 2016. The Chamber had already decided that the Appellant was fit to stand trial.

76. In sum, the Appellant's not guilty plea was elicited and accepted by the Chamber, in violation of his fair trial rights. The plea did not meet the required legal standards, and the Chamber erred by concluding that a mentally disabled defendant could act in a "knowing or informed manner" and

[76] Defence Request for Stay of Proceedings, paras 1(4), 41.
[77] Defence Request for Stay of Proceedings, para. 42.
[78] Trial Chamber IX, *Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen*, ICC-02/04-01/15-637-Red, para. 14.
[79] *See*, Defence Request for Stay of Proceedings, paras 5-43.
[80] T-26, p. 3, ln. 5 – p. 4, ln. 18.
[81] T-26, p. 6, lns 18-19.
[82] *See*, Judgment, para. 2576.
[83] Trial Chamber IX, *Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen*, ICC-02/04-01/15-637-Red, para. 31.

in respect to a document which was not fully translated into Acholi, the language he speaks and understands. The "illegal plea" is, therefore, a fair trial violation.

C. Ground 5: The Chamber erred in law by proceeding to trial and convicting the Appellant based on a defective CoC Decision, in violation of his fair trial rights under Article 67(1)(a)

a) Introduction

77. The Chamber erred by conducting proceedings based on a CoC Decision which was facially defective because it failed to provide notice pursuant to Article 67(1)(a) of the Statute.[84] This resulted not only in violation of the Appellant's fair trial right under Article 67(e) to present a defence, but in his conviction for 61 counts and two modes of liability, based on this defective charging instrument. Both violations prejudiced the Appellant, and the Defence seeks reversal of his convictions.

78. The Defence incorporates its arguments in its Defects Series I through IV in arguments before this Appeals Chamber, as well as pleadings related to the Interlocutory Appeal Judgment,[85] and also sections of its Closing Brief, at paragraphs 61-63, 83-85, and 180-202.

79. In addition, the Defence seeks leave, pursuant to the same Appeals Decision, to incorporate the 5th Defects Motion, "Motion on Defects in Confirmation Decision Regarding SGBC," dated 14 October 2019 into the "Defects Series" and requests a decision on its issues by the Appeals Chamber.[86]

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[84] This section refers to Grounds 2 (in respect to the notice violation) and 5 in the Notice of Appeal, and to Judgment, paras 64, 37-41, 83-84.

[85] *See*, Trial Chamber IX, *Defence Motion on Defects in the Confirmation Decision: Decision in Notice and Violations of Fair* Trial (Part I of the Defects Series), ICC-02/04-01/15-1430 ('Defects Series Part I'); Trial Chamber IX, *Defence Motion on Defects in the Confirmation of Charges: Defects in the Modes of Liability (Part II of the Defects Series)*, ICC-02/04-01/15-1431, ('Defects Series Part II') ; Trial Chamber IX, *Defence Motion on Defects in the Confirmation of Charges Decision: Defects in Notice in Pleading of Command Responsibility under Article 28(a) and Defects in Pleading of Common Purpose Liability under Article 25(3)(d)(i) or (ii) (Part III of the Defects Series)*, ICC-02/04-01/15-1432, ('Defects Series Part III'); Trial Chamber IX, *Defence Motion on Defects in the Confirmation of Charges Decision: Defects in the Charged Crimes (Part IV of the Defects Series)*, ICC-02/04-01/15-1433, ('Defects Series Part IV'); Trial Chamber IX, *Motions on Defects in the Confirmation Decision Regarding SGBC*, ICC-02/04-01/15-1603-Red ('SGBC Defects'). *See also*, Trial Chamber IX, *Defence Request for Leave to Appeal 'Decision on Defence Motions Alleging Defects in the Confirmation Decision*, ICC-02/04-01/15-1480, ('LTA Defects Series I-IV'), and Trial Chamber IX, *Defence Request for Leave to Appeal 'Decision on Further Defence Motion Alleging Defects in the Confirmation Decision*, ICC-02/04-01/15-1636 ('LTA SGBC Defects'). See also, Appeals Chamber, *Defence's appeal against the 'Decision on Defence Motions Alleging Defects in the Confirmation Decision'*, ICC02/04-01/15-1496-Corr, ('Ongwen Appeal Brief'); Appeals Chamber, *Corrected Version of 'Defence's Further Submissions' (ICC-02/04-01/15-1536)*, ICC-02/04-01/15-1536-Corr ('Ongwen Further Submissions').

[86] Trial Chamber IX, *The Motion on Defects in the Confirmation Decision regarding SGBC*, ICC-02/04-01/15-1603-Red, argues, *inter alia*, that the notice in respect to SGBC was defective because the SGBC counts in the CoC did not provide specific geopraphic notice to the Appellant as to whether crimes occurred in Uganda or in Sudan. This defect was not

b) The Appellant is raising again fair trial violations of lack of notice at the appeal stage based on the Appeals Decision decision

80. The Appeals Chamber affirmed the Chamber's dismissal of the "Defects Series" *in limine*. However, pursuant to its *Interlocutory Appeal Judgment*,[87] it allowed the Appellant to come back to the Appeals Chamber, if convicted.[88] The Defence highlights the key issues in the Defects Series.

c) General principles of fair trial and notice

81. The cornerstone of fair trial is the right to notice. It is a fundamental, common principle within the international courts and tribunals that an accused has the "right to be informed promptly and in detail of the nature, cause and content of the charges […]".[89] This right to notice, embodied in Article 67(1)(a) of the Statute, is also found in Article 61(3) of the Statute,[90] and in the Rules of Procedure and Evidence ("RPE").[91]

82. The remaining fair trial rights, especially Article 67(1)(e) of the Statute – the right to raise defences and to examine witnesses, including direct and cross-examination – all emanate from the initial right to be informed of the charges, as enshrined in Article 67(1)(a) of the Statute. In addition, all these fair trial rights are interdependent.

83. An accused's right to a fair trial and to the presumption of innocence are principles embodied in a number of international instruments.[92] These provisions, in the Statutes for the ICC, ICTY, ICTR, and other judicial entities, mirrors the language of the ICCPR, and other international instruments.

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cured by either the Prosecution Pre-Confirmation Brief or the Pros Pre Trial Brief. On the basis of these arguments, the Defence requested that the SGBC charges in counts 50 to 60 be dismissed.

[87] *Ongwen* OA4 Judgment, at para. 160*; See also,* Lubanga Appeals Judgment, para 114-137; *Bemba* case, Appeals Chamber, *Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute"*, ICC-01/05-01/08-3636-Red, ('Bemba Appeals Judgment'), para 74-119. See also, *Prosecutor v. Kupreškić*, Appeal Judgment, paras 114, 124, 246; Prosecutor v. *Ntagerura et al.*, ICTR-99-46-T, *Judgement and Sentence*, (judgment affirmed by the Appeals Chamber, 7 July 2006), paras 28-39. (Where the allegations are "grossly deficient" and violate a defendant's right to fair trial, defects in the indictment are post-trial issues).

[88] The request for leave to appeal the Chamber's Decision on the Defects Series was the only leave to appeal granted to the Defence during trial.

[89] Article 67(1)(a) of the Statute.

[90] Article 61(3) of the Statute establishes that "within a reasonable time before the hearing, the person shall: (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and (b) be informed of the evidence on which the Prosecutor intends to rely at the hearing."

[91] Rule 121(3) of the Rules of Procedure and Evidence: The Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.

[92] Articles 66 and 67 of the Statute, Article 20 of the ICTR Statute. *See also*, Article 11 of the Universal Declaration of Human Rights ('UDHR'), Article 14(3)(a) of the International Covenant on Civil and Political Rights ('ICCPR'), Article 8(2)(b) of the African Charter on Human and Peoples' Rights ('ACHR'), Article 6(3)(a) and 7 of the European Convention on Human Rights ('ECHR').

84. The Appeals Chamber in the *Lubanga* case held that the right to notice is a fundamental right and "[t]he right to be informed in detail of the 'nature and cause' of the charges" is embodied in the ICCPR, the ECHR, and the ACHR.[93] It further stated that the facts "must be identified with sufficient clarity and detail."[94] Moreover, the same Appeals Chamber recognised the connection between the right to adequate notice and the right to prepare a defence.[95]

85. More recently, in the *Bemba* case, where the Defence for Mr Bemba averred that Mr Bemba did not have sufficient notice regarding specific criminal acts,[96] the Appeals Chamber unequivocally found that: "…[i]t considers axiomatic that an accused person be informed promptly and in detail of the nature, cause and content of a charge."[97]

86. Notably, the requisite level of detail of the charges – which is lacking in the *Ongwen* CoC Decision – has been addressed by the Grand Chamber in the *Pélissier and Sassi v. France* case at the ECHR.[98]

d) The Article 56 proceedings violated the Appellant's right to notice

87. The Appellant's right to notice was violated from the inception of the Article 56 hearings on 15 September 2015.[99] When the hearings began, the Appellant had not been charged with any crimes related to the women who were about to testify.

88. As a former member of the Prosecution team in this case noted:

> What was unusual about these [Article 56] proceedings was that at the time the Article 56 testimony began, Dominic Ongwen had not even been charged with any crimes relating to these women. His trial was not to start for over a year. Yet when the Article 56 testimony concluded, a significant part of the trial was over before it had even begun.[100]

89. As a result, Mr Ongwen was not informed of the charge(s) for which the evidence was taken, and in addition, the scope of the evidence elicited exceeded the counts of the SGBC which were

[93] Lubanga Appeals Judgment, paras 118-130.
[94] Lubanga Appeals Judgment, para. 120.
[95] Lubanga Appeals Judgment, para. 121.
[96] Bemba Appeals Judgment, paras 184-186.
[97] Bemba Appeals Judgment, para. 186, and footnote 368.
[98] European Court of Human Rights,Grand Chamber, *Pélissier and Sassi v. France*, *Judgment*, para. 51.
[99] *See*, Trial Chamber IX, *Public Annex B*, ICC-02/04-01/15-1722-AnxB, ('Defence Closing Brief Annex B').
[100] Paul Bradfield, Preserving Vulnerable Evidence at the International Criminal Court – The Article 56 Milestone in Ongwen (2019), p. 374; *See also*, Defence Closing Brief Annex B.

eventually confirmed. The Single Judge erroneously found that the summaries of witnesses were sufficient to constitute notice in lieu of formal charges.

90. The fair trial violation was compounded by the fact that evidence from the Article 56 hearings was used in the CoC Decision in relation to SGBC, confirmed by the same Pre-Trial Chamber judge who had presided over the Article 56 hearings.

91. At paragraph 64, the Judgment's conclusion that the Defence objection on lack of notice had no merit cites Rule 121(3) in support. This rule sets the deadline for the Prosecution to present charges and evidence is in relation to the Confirmation hearing and the rule does not include application to other hearings such as the Article 56 proceedings.

92. It can be concluded that the Chamber takes the position that the right to notice is not applicable to Article 56 proceedings because their purpose is preservation of evidence. It is not logical that the Rome Statute, which enshrines the rights of an Accused during the investigation stage, trial stage and post-trial proceedings would carve out an exception to notice: i.e., that notice did not apply to Article 56 hearings, whose evidence is used at trial, and considered and relied upon by the Chamber in its Judgment. Therefore, the Judgment's conclusion is not based on a consistent application of fair trial principles, as articulated in the Statute.

e) The Appellant's fair trial right was violated by a defective CoC Decision

93. In paragraph 84 of the Judgment, the Chamber concludes that its prior decisions[101] did not violate the Appellant's right to notice and right to prepare a defence. The Defence submits that the Chamber's conclusion is legally incorrect.

94. The issue is: does the CoC Decision articulate or 'make out' the elements of the crimes and modes of liability charged against Mr Ongwen and support each element with factual allegations?

95. The Defence's answer is "no." The *Ongwen* CoC Decision falls far short of this. The 61 convictions for crimes and for two modes of liability should be reversed because they are based on an egregiously defective CoC Decision issued by the Pre-Trial Chamber. Then, the Chamber proceeded in the prosecution of the Appellant, which culminated in his convictions in the Judgment.

[101] *See*, Judgment, fn 162, for a listing of the prior decision to which the Chamber refers this includes decisions on the Defects Series, no case to answer and the appeals judgment on the Appellant's appeal against the Chamber's decision on defects.

96. There are numerous defects in the CoC Decision, and the Defence does not have the space to address all of them. But the main ones based on the convictions are briefly discussed below, with reference to other pleadings.

The CoC Decision was defective because it did not articulate the contextual elements of war crimes or crimes against humanity

97. The Appellant was convicted of 61 crimes, all of which were either war crimes or crimes against humanity. But the CoC Decision, as Judge Perrin de Brichambaut pointed out, failed to articulate the elements of war crimes or crimes against humanity.[102] It is these contextual elements of war crimes and crimes against humanity which transform "ordinary" crimes into "international" crimes.

98. The CoC Decision makes only "vague references to 'evidence' or notorious facts mentioned" in four paragraphs found in the reasoning section of the CoC Decision, at paragraphs 60-64.[103] For example, in the CoC Decision, refers to evidence "provided by insider witnesses, the statements of civilians… of persons associated with the Uganda government, as well as the records of intercepted LRA communications… all relevant to establish the contextual elements of the war crimes and crimes against humanity charged."[104] No factual details, are provided in the CoC Decision. As to "notorious facts mentioned," the CoC Decision states: "[i]n particular, it is a notorious fact, referred to abundantly in the evidence, that in the time period relevant to the to the charges… there was protracted armed violence between the LRA… and the Ugandan government…"[105] Again, there is no factual support.

99. In the section of the CoC Decision, the Statement of Facts regarding the Contextual Elements of Article 7 and Article 8 includes eight paragraphs which allege facts, but fail to link these facts to the elements articulated in Article 7(1) and Article 8(1) of the Statute.[106]

100. As a result, the CoC Decision did not provide notice of the contextual elements for crimes against humanity or war crimes.

f) The pleading of the modes of liability for which the Appellant was convicted was defective

[102] Pre-Trial Chamber II, *Separate Opinion of Judge Marc Perrin de Brichambaut*, ICC-02/04-01/15-422-Anx-tENG, ('Separate Opinion of Judge de Brichambaut').
[103] Separate Opinion of Judge de Brichambaut, paras 20-21.
[104] CoC Decision, para. 60.
[105] CoC Decision, para. 61.
[106] CoC Decision, pp. 71-72, paras 1-8.

101. At the time the Defects Series was filed, the Defence identified errors of pleadings in multiple forms of liability charged in Parts II and III of the "Defects Series." For purposes of this brief, the Defence will focus on the modes of liability for which the Appellant was convicted: Article 25(3)(a) and Article 25(3)(f) of the Statute.

i. Attempt (Article 25(3)(f))

102. The Appellant was convicted of attempted murder in counts 14, 15, 27, 28, 40 and 41.

103. First, a review of the CoC Decision indicates that the legal requirements of Article 25(3)(f) are not even discussed in the Decision. The element, for example, of "substantial step" is addressed in respect to Article 25(3)(b), but the CoC Decision is silent as to what definition is applicable for the element of substantial step in respect to Article 25(3)(f).

104. In the reasoning section, references are made to charges of attempted murder in respect to Odek;[107] to Lukodi;[108] and to Abok.[109] In all of these sections, the charge of attempted murder appears in a list of charges for which the Pre-Trial Chamber considers that the evidence has established the objective elements. Even, arguendo, this were true, the Defence submits that the CoC Decision does not link any evidence to any element which it is supposed to support.

105. Hence, the convictions for attempted murder in counts 14, 15, 27, 28, 40 and 41 should be reversed as a matter of law because the legal elements of attempted murder were not pleaded and not supported by factual allegations in the CoC Decision.

ii. Article 25(3)(a)

106. For the remainder of the convictions (counts 1-13, 16-17, 20-26, 29-30, 33-39, 42-43, 46-70), the Appellant was convicted under Article 25(3)(a). The Statute identifies three different modes of participation: individual, individual jointly with another or through another person.

107. The Judgment, at paragraphs 2780-2788 and 2791 explains the following: commission as an individual is equivalent to direct perpetration; commission through another person is equivalent to indirect perpetration; and commission jointly with another and through another person in

[107] CoC Decision, para. 74 (Charges 14 and 15).
[108] CoC Decision, para. 70 (Charges 27 and 18).
[109] CoC Decision, para. 84 (Charges 40 and 41).

equivalent to indirect co-perpetration. These categories are important when assessing if the legal elements of each form of liability alleged have been pleaded in the CoC Decision.

108. In addition, for all categories, the *mens rea* and *actus reus* of the mode of liability must be pleaded. However, the CoC Decision, at paragraphs 38-41, fails to identify any *mens rea* for the modes of liability of indirect co-perpetration or indirect perpetration. Co-perpetration, for example, requires several *mens rea* elements, including that the defendant either *meant the crime or is aware that the crime will occur in the ordinary course of events*. The defendant also must *be aware* that he/she is making an essential contribution to the crime.[110]

109. The Judgment's findings in respect to modes of liability are as follows: in paragraph 2874, the Judgment finds that the Appellant committed counts 1-10 (Pajule) jointly and through another person(s) [LRA soldiers]; This is indirect co-perpetration. In paragraph 2927, for counts 11-23 (Odek), the Appellant committed jointly and through another person(s) [LRA soldiers]; this is indirect co-perpetration. In paragraph 2973, for counts 24-36 (Lukodi), the Appellant committed through another person (s) [LRA soldiers]; this is indirect perpetration. In paragraph 3020, for counts 37-49 (Abok), the Appellant committed through another person [LRA soldiers]; this is indirect perpetration. In paragraphs 3021-3068, for counts 50-60 (SGBC), the Appellant committed as an individual; this is direct perpetration. In paragraph 3100, for counts 61-68 (SGBC), the Appellant committed jointly with [Joseph Kony and Sinia brigade leadership] and through others [LRA soldiers]; this is indirect co-perpetration. Finally, in paragraph 3115, for counts 69-70, the Appellant committed jointly with [Joseph Kony and Sinia brigade leadership] and through others [LRA soldiers]; this is indirect co-perpetration.

110. For the modes of liability for which the Appellant was convicted in relation to the counts for the IDP camps, there are two: indirect perpetration and indirect co-perpetration. For SGBC crimes, there are also two: direct perpetrator and indirect co-perpetration.

111. Errors in defective pleading have been previously addressed in the Defects Series, and preserved, as well as referred to in the Defence Closing Brief.

g) Errors related to defective pleadings of element of *mens rea* under Article 25(3)(a)

[110] *Lubanga* case, Trial Chamber I, *Judgment pursuant to Article 74 of the Statute*, ICC-01/04-01/06-2842, para. 1013. As the Prosecution notes in their Pre-Trial Brief, the AC in *Lubanga* seemed to adopt or approve of these elements, although they do not state so directly.

112. The Appellant's right to notice was violated because in respect to the forms of liability confirmed, the elements under Article 25(3)(a) of the Statute were incomplete, and unsubstantiated in respect to *mens rea*.

113. The general defect in notice is that the CoC Decision confirmed *only part* of the legal elements of *mens rea* for most of the modes of liability under Article 25(3)(a) of the Statute, and then failed to connect factual support to these elements.

114. Hence, the full or complete *mens rea* element for liability under Article 25(3)(a) of the Statute was not identified or supported by factual allegations in the CoC Decision. Nor was it alleged and supported in either the Prosecution's pre-confirmation brief ("PPCB")[111] or Prosecution's pre-trial brief ("PPTB").[112]

115. For example, there is standard language, in the Charges Section, for a mental state in the conclusory statement of "meant to engage in their conduct and intended to bring about the objective elements of the crimes of…"[113] There are also stock paragraphs in the Charges section that refer to "the requisite intent and knowledge under articles 25, 28 and 30, and under the elements of the respective crimes listed below."[114] But these conclusory statements are not factually supported in the CoC Decision.

116. In respect to the allegations for Pajule,[115] and other camps, the CoC Decision lists conduct alleged to be Mr Ongwen's contribution to a common plan. But there are, however, no elements listed for the *mens rea* for Article 25(3)(a).

117. For the Lukodi allegations, the *mens rea* is conclusory, stating that "Dominic Ongwen was aware of the fundamental features of the LRA and the factual circumstances which allowed him to exert control over the charged crimes,"[116] with a narrative factual statement of his role in the specific attack. This same approach is repeated in paragraphs 55, 119, and 126. There is no evidentiary support for each of the elements of *mens rea.*

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[111] Trial Chamber IX, *Public redacted version of "Pre-confirmation brief", 21 December 2015*, ICC-02/04-01/15-375-Conf-AnxC, ICC-02/04-01/15-375-AnxC-Red2, ('PPCB').
[112] Trial Chamber IX, *Prosecution's Pre-Trial Brief*, ICC-02/04-01/15-533, ('PPTB'). The references herein to the PPTB do not waive arguments made in Part One that the PPTB cannot provide notice in this case.
[113] CoC Decision, pp 37-102, paras 15, 27, 41, 119, 126.
[114] CoC Decision, pp 74-103, paras 19, 31, 44, 57, 131.
[115] CoC Decision, p. 74, para. 17.
[116] CoC Decision, para. 42.

118. Thus, the Appellant's right to be informed in detail of the charges under Article 67 of the Statute, which includes the modes of liability was violated, as well as his right to present a defence.

h) The Chamber erred by convicting the Appellant for indirect co-perpetration for the counts related to Pajule (counts 1-9), Odek (counts 11-23), SGBC (counts 61-68) and conscription of child soldiers (counts 69-70)

119. The Defence incorporates its arguments on indirect co-perpetration from its Closing Brief, paragraphs 180-198, and in its Defects Series, Part II, paragraphs 23-78. The Defence would like to add arguments in the Separate Opinion of Judge Morrison on Mr Ntaganda's appeal, dated 30 March 2021 (after the Defence Closing Brief was filed in 2020). In his Opinion, Judge Morrison concludes that the theory of indirect co-perpetration "contributes more to mislabelling facts and circumstances than it does to fail labelling of an individual's criminal responsibility."[117] He also held that the "well documented criticisms of the application of joint criminal enterprise [JCE] as it was developed at the *ad hoc* tribunals are equally applicable to the manner in which Indirect Co-perpetration is applied at the Court."[118]

120. In this legal context, the prejudice of the defective pleading of legal elements within the requirements of indirect co-perpetration – control of the crime, essential contribution, common plan and ability to frustrate the crime – in the *Ongwen* case is even more egregious.

121. First, as briefed in the Defects Series, the confirmation of indirect co-perpetration is *ultra vires* because it is not found within the statutory language of Article 25(3)(a) and the Chamber does not have the inherent power to add it to the Statute. The Rome Statute was the product of negotiations among State Parties and entered into force in July 2002. Any changes to the content of the Rome Statute must be discussed and approved by the Assembly of States Parties.

122. Second, the Chamber erroneously found that indirect co-perpetration was not a standalone mode of liability but a form of co-perpetration.[119] This finding underscored the need for specificity in the pleadings on modes of liability, which were not provided to the Appellant. The prejudice and fair trial violations regarding defects in the pleading of modes of liability under Article 25(3)(a) were compounded by the Trial Chamber's failure to provide a full and reasoned statement

[117] *Ntaganda* case, Appeals Chamber, *Annex 2: Separate opinion of Judge Howard Morrison on Mr Ntaganda's appeal*, ICC-01/04-02/06-2666-Anx2, ('Separate opinion of J. Morrison of Mr Ntaganda's appeal') para. 41.
[118] Separate opinion of J. Morrison of Mr Ntaganda's appeal, para. 31.
[119] Judgment, para. 2788, fn. 7272. *See also*, CoC Decision, paras 38-39; *Ntaganda* Case, Trial Chamber VI, *Judgment*, ICC-01/04-02/06-2359, para. 772; *Al Hassan* case, Pre-Trial Chamber I, *Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18-461-Corr-Red, para. 809.

individualising the commission or participation of the Appellant in each of the crimes for which he was charged and convicted.[120]

123. Third, there are no allegations of the *mens rea* required for indirect co-perpetration within the criminal charges in the CoC Decision on which the Appellant was convicted. Specifically, the *mens rea* for indirect co-perpetration requires an awareness that if the person's essential task is not undertaken, it will frustrate the implementation of the common plan [to commit the crime].[121]

124. In the CoC Decision, there are no factual allegations to support the element "to frustrate the implementation of the common plan." Citing the *Lubanga* case, the CoC Decision holds that this "requires an evaluation of whether the person had control over the crime by virtue of his or his essential contribution within the framework of the agreement with the co-perpetrators and the resulting power to frustrate the commission of the crime."[122] Thus, the "frustration of the crime" is an overlapping requirement for evaluating the mode of liability: it is required for *mens rea*, but also for the *actus reus*, and connected to the notions of control over the crime as well as essential contribution.

125. In the case of Pajule, the CoC Decision, at paragraph 17, lists alleged conduct of the Appellant, but fails to allege that any of the conduct was essential, or, conversely, that failure to carry out the conduct would frustrate the commission of the crimes alleged. Similarly, the CoC Decision, at paragraph 15, lists co-perpetrators, but fails to identify each one's alleged role in the crime. The language that the Appellant and others "meant to engage in conduct…" in the CoC Decision, at paragraph 15, is conclusory and does not satisfy the legal requirement for *mens rea*.

126. In the case of Odek, the Appellant's contributions are listed in the CoC Decision, at paragraph 29, but – as in the Pajule allegations – there are no allegations as to "essential tasks." Here, at CoC Decision, some of the alleged participants in the common plan are not identified ("Odek co-perpetrators"), nor are the contributions of any other members of the common plan alleged. In a conclusory fashion, the CoC Decision, alleges the Appellant's awareness, with no factual support.[123]

[120] Judgment, paras 2780-2788.
[121] *See*, Defence Closing Brief, paras 38-39; Lubanga Appeals Judgment, fns. 28-29.
[122] Lubanga Appeals Judgment, para. 473; *See also*, *Blé Goudé* case, Pre-Trial Chamber I, *Decision on the confirmation of charges against Charles Ble Goude*, ICC-02/11-02/11-186, para. 141.
[123] CoC Decision, para. 27.

127. At paragraph 24 in his Separate Opinion, Judge Perrin de Brichambaut points out, that there are no factual allegations in support of how the Appellant contributed, as an indirect co-perpetrator, to the common plan in respect to the attacks on Pajule.[124]

128. For allegations of SGBC (counts 61-68), the CoC Decision, at paragraph 32, alleges a common plan, but fails to name the alleged participants (with the exception of the Appellant and Kony). There is no identification of Sinia bridgade leadership, or other LRA leaders ("co-perpetrators") and no factual allegations as to the Appellant (or anyone else's) alleged role in the common plan, and whether it was essential to commission of the crime.[125] Thus, the pleading of indirect co-perpetration in respect to the SGBC crimes was defective.

129. For allegations of conscripting child soldiers (counts 69 and 70), the defects are similar to those above: no identification of the Sinia brigade leadership and other senior LRA leaders or the role of each in the common plan; no allegations as to the Appellant's tasks in the common plan, and whether they were essential to the commission of the crime. The allegations in the CoC Decision, at paragraph 50, regarding the Appellant's contribution to the conscription and use of child soldiers are unsupported by any footnotes detailing the specific evidence. For this reason, the Appellant's right to present a defence was violated because he could not defend against specific factual allegations for which he was not given any notice.

i) The concept of control over the crime was not pleaded, although the Appellant was convicted based on this finding[126]

130. The Judgment concludes that the Appellant had control over the crime at Pajule,[127] Odek,[128] SGBC,[129] and conscription of child soldiers.[130]

131. The Chamber's conclusions are based on defective pleading of legal elements of essential contribution, common plan and power to frustrate the commission of the crime, as discussed *herein*.[131]

[124] Separate opinion of J. Morrison of Mr Ntaganda's appeal, para. 24.
[125] CoC Decision, para. 35 alleges that the Appellant ordered abductions at specified locations and dates, but this in support of the ordering under a theory of command responsibility. The Appellant was not convicted for command responsibility.
[126] The CoC Decision explains indirect co-perpetration at paras 38-39.
[127] Judgment, para. 2864.
[128] Judgment, para. 2918.
[129] Judgment, para. 3095.
[130] Judgment, para. 3111.
[131] *Supra*, paras 77-130.

132. For this reason, the convictions based on the Appellant's individual criminal responsibility – indirect co-perpetration – should be reversed. This is based on the violation of the Appellant's fair trial right to notice: he was not provided with notice of the specific legal elements and factual allegations in support of same for the crimes and modes of liability for which he was charged.

j) The Chamber erred in convicting the Appellant in respect to indirect perpetration because it was defectively pleaded

133. The CoC Decision explains indirect perpetration at paragraph 40. It is when the perpetrator has the "sole control over the crime and commits it by making use of another person who physically carries out the incriminated conduct, rather than by directly executing the material elements of the crime."[132] Thus, while the commission of the crime is carried out by others, the perpetrator has sole control of the crime: the others carrying out the crime have no control.

134. As discussed in the Defence Closing Brief, indirect perpetration is distinguished from indirect co-perpetration in that the objective and subjective elements focus on one perpetrator (as opposed to co-perpetrators). This one perpetrator either exerts control over the will of physical perpetrators, or – within an organisational context – controls the organisation and is the highest authority, who decides whether and how the crime would be committed.[133]

135. The issue in terms of the CoC Decision is: did the CoC Decision provide the Appellant with detailed notice in respect to his alleged direct perpetration for Lukodi and Abok?

136. In the CoC Decision,[134] only the Appellant is named in the "Material facts" section. Paragraph 42 is conclusory: the Appellant "exerted control over the crimes," "committed the crimes through the hierarchical apparatus of the LRA by planning the attack… deploying troops." There are no factual allegations in support of the alleged planning of the attack, selecting and appointing leaders for the attack, instructing the troops prior and ordering and deploying troops to commit crimes. Thus, notice of the mode of liability of indirect perpetration for Lukodi is defective.The Defence requests that the convictions in respect to the crimes at Lukodi be reversed, based on facial deficiency of the CoC Decision.

137. In the CoC Decision,[135] the language regarding allegations of the Appellant's control of the crime and other conduct is identical to the Lukodi language in paragraph 42. Paragraph 55 suffers from

[132] CoC Decision, para. 40.
[133] *See*, Defence Closing Brief, paras 199-202.
[134] CoC Decision, para. 42 (for Lukodi, counts 24-36).
[135] CoC Decision, para. 55 (for Abok, counts 37-49).

the same deficiencies in respect to notice.The Defence requests that the convictions in respect to the crimes at Abok be reversed, based on the facial deficiency of the Confirmation of Charges Decision.

k) The pleading of the crimes of persecution and forced marriage was defective[136]

138. In counts 10, 23, 36 and 49, the Appellant was convicted of persecution; in counts 50 and 61, the Appellant was convicted of forced marriage as other inhumane acts in Article 7(1)(k).

i. Persecution

139. The defects in the pleading of persecution are detailed in the Defects Series, Part IV, at paragraphs 7-23 and are incorporated into this appellate brief.

140. In addition, the Defence argued, based on appellate jurisprudence in *Kupreskic*, that persecution cannot be used as a "catch all" criminal allegation. In fact, the elements of the crimes alleged to be under persecution must be pleaded, so that notice is provided to the defendant.

141. In the *Ongwen* case, persecution is used as a "catch-all." In the PPCB, at paragraph 183, the Prosecution states the underlying crimes of persecution.[137] But, there is no pleading of the elements of the underlying crimes in the CoC Decision, nor can these elements be connected to the evidence alleged.

142. Similarly, the same error is repeated in the PPTB.[138] Here, the counts are footnoted in the PPTB – but again – no underlying elements of crimes are identified, nor is there any evidence connected any legal element to provide notice.

143. For both pleadings, there are no references to, or allegations to the contextual elements for crimes against humanity – widespread or systematic attack directed against any civilian population, with knowledge of the attack.

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[136] Defects Series Part IV identified defects in the pleading of some of the charged crimes. The Defence does not waive any pleading objections to charged crimes not discussed in Part IV.
[137] PPCB, para. 183. The Prosecution submits that the facts described above under counts 1 (attack on civilians), counts 2-3 (murder), counts 4-5 (torture), count 6 (cruel treatment), and count 7 (other inhuman acts), count 8 (enslavement), and count 9 (pillaging) form the underlying conduct of the crime of persecution. *See also*, the submissions in the section on persecution, paras 111 to 147, which are incorporated here be reference.
[138] PPTB, para. 182. The charged crimes of attacking civilians, murder, attempted murder, torture/other inhumane acts/cruel treatment, enslavement, pillaging, destruction of property and outrages on personal dignity form the underlying conduct of the persecution of the civilian population on political grounds at Pajule, Odek, Lukodi and Abok IDP camps. (Footnotes omitted)

144. Thus, there is no notice of underlying crimes allegedly supporting a "catch-all" crime. In other words, if this were a trapeze act – and persecution was on the top rung, and the other crimes were each on the bottom, the trapeze would collapse, and the artist would plunge to her/his death.

145. This defect in pleading the elements of the crime is not cured by the PPTB. In a section on Persecution, in paragraphs 156-203, there are evidentiary allegations. However, these are not linked to the elements of persecution, as enumerated in the Elements of Crimes (the "EoC"), nor are they linked to underlying crimes under the 'umbrella' of persecution.

146. For the reasons stated above, the pleading of the crime of persecution is facially deficient and violates Mr Ongwen's right to notice under Article 67 of the Statute, and the convictions for persecution should be reversed and/or dismissed as a matter of law.

ii. Forced Marriage

147. The Defence, from the inception of this case, has argued that forced marriage is jurisdictionally defective, because it is not in the Rome Statute. The CoC Decision confirmed forced marriage under Article 7(1)(k).

148. As discussed in the Defects Series IV, the CoC Decision fails to identify the elements of the *mens rea* of the crime. In addition, the Defence argues that it is *ultra vires* to confirm a charge of forced marriage because it violates Article 119 and 121 of the Rome Statute. Further, neither the Pre-Trial nor Trial Chamber has inherent jurisdiction to add new crimes, or to interpret the Statute in respect to new crimes, i.e. crimes not identified in the Statute.[139]

149. For these reasons, the Appellant's convictions for forced marriage should be reversed and/or dismissed at a matter of law.

l) The pleading of the crimes of enslavement and use of child soldiers was defective

i. Enslavement[140]

150. The Appellant was convicted of enslavement in counts 8, 20, 33, 46, 57 (in relation to P-099, P-0235 and P-0236) and 68.

[139] Defects Series Part IV, paras 34-53.
[140] The Defence incorporates Defects Series Part IV para 54-60 in this appellate brief.

151. The pleading of enslavement in the CoC Decision was defective. As pointed out by Judge Perrin de Brichambaut, the CoC Decision provides no definition of the elements of the crime of enslavement.[141]

152. At most, the CoC Decision selectively includes only parts of the language from the EoC[142] for enslavement under Article 7(1)(c) of the Statute, and describes facts in a conclusory manner, instead of tying specific witnesses' testimony to each element. Examples of how the elements of enslavement are partially stated in the CoC Decision include paragraphs 23,[143] 36,[144] 48,[145] and 62.[146] These paragraphs are almost identical in wording, but for references or names of IDP camps.

153. The CoC Decision, in the charges section, does not identify the elements of enslavement and it is, therefore, silent on the *mens rea* and contextual elements required for a crime against humanity." None of these legal elements, nor factual support for them is to be found in the CoC Decision.

154. The PPCB does not cure the defects in the CoC Decision. First, there are no allegations of, and factual support for, the required *mens rea* or contextual elements for a crime against humanity. Where there are factual allegations in support of conduct, there are references to the Prosecution's statements, for example at paragraphs 334-336, but the important specifics to support "LRA fighters under Dominic Ongwen's command" in paragraph 334[147] are missing in the PPCB.

155. Thus, the pleading of the crime of enslavement is facially deficient and the Appellant's convictions for enslavement should be reversed.

ii. Conscription of child soldiers[148]

156. The Appellant is convicted in counts 69 and 70 for conscripting and using child soldiers under Article 25(3)(a) for indirect co-perpertation. In the CoC Decision, Pre-Trial Chamber II confirmed these charges under a theory of a systematic practice and policy of the LRA to abduct and conscript

[141] Separate opinion of J. Morrison of Mr Ntaganda's appeal, para. 18.
[142] *See*, Elements of Crimes, p. 5.
[143] CoC Decision, p. 75, para. 23. "LRA fighters deprived civilians of their liberty… reducing them to a servile status."
[144] CoC Decision, p. 79, para. 36: "LRA fighters deprived civilians of their liberty… reducing them to a servile status."
[145] CoC Decision, p. 83, para. 48: "LRA fighters deprived civilians of their liberty… reducing them to a servile status."
[146] CoC Decision, p. 87, para. 62: "LRA fighters deprived civilians of their liberty… reducing them to a servile status."
[147] PPCB, para. 334.
[148] The Defence incorporates its arguments in Defects Series Part IV paras 61-70, on defects in pleading of charges 69-70.

children.[149] The Appellant is alleged to have contributed to the crimes through a common plan, and "also through the LRA fighters under his command."

157. The CoC Decision, however, fails to provide notice on a number of legal elements of the charges and modes of liability.

158. In the CoC Decision,[150] the allegations of "an explicit plan of the LRA leadership, including Joseph Kony and senior commanders, among them Dominic Ongwen" is conclusory and there are no footnotes to indicate on what factual allegations the conclusions rely.[151] Thus, the Appellant was not provided with notice of what his alleged role in the crime was. Similarly, there is no indication as to who the other "senior commanders" are, or what are the alleged roles of these unnamed persons. Paragraph 143 of the CoC Decision concludes that Mr Ongwen ordered abductions of children to be used as child soldiers, but there are no factual allegations to support this.

159. There are also no specific allegations as to the Appellant's *mens rea*: there is a conclusory allegation of "deliberate conduct […] that resulted in the realization of the objective elements of the crime."[152] But the elements of intent and knowledge are not detailed and specified. The specific *mens rea* for conscription and use of child soldiers as war crimes is awareness of the factual circumstances that established the existence of an armed conflict. But there are no allegations, and no factual support, in either portion of the CoC Decision as to this *mens rea*.

160. In the second portion of the CoC Decision, the section on conscription and use of child soldiers (Counts 69 and 70)[153] is replete with generalisations, unsupported factual allegations and simply recites the legal requirements. For example, paragraph 129 alleges the Appellant's contributions to the common plan, but includes no specific factual allegations to support these contributions.[154] In addition, the section in paragraph 129 on command responsibility simply tracks the language of the Statute,[155] with no factual allegations in support. Paragraphs 130 and 131 allege knowledge as to age, and "requisite intent and knowledge" but there is no support for these allegations.[156]

[149] CoC Decision, paras 141-145.
[150] CoC Decision, paras 141-145.
[151] CoC Decision, para. 143.
[152] CoC Decision, para. 147.
[153] CoC Decision, pp. 102-104.
[154] CoC Decision, p. 103, para. 129.
[155] CoC Decision, p. 103, para. 129.
[156] CoC Decision, p. 103, paras 130-131.

161. While more details are provided in the PPCB, these are not even referred to in the CoC Decision, so that it is unclear which factual allegations support which elements of the crimes. But the PPCB provides no notice of the *mens rea* required for conscription and use of child soldiers, and cannot cure this same defect in the CoC Decision.

162. The Defence notes that the PPTB is essentially the same as the PPCB and fails to provide notice.[157]

163. Based on defective pleading, the Appellant's convictions for counts 69 and 70 should be reversed as a matter of law.

m) The Chamber erred by dismissing *in limine* in the Judgment the Defence motions alleging defects in the CoC Decision[158]

164. In the Judgment, paragraphs 37-41, the Chamber re-iterates that its dismissal of the Defects Series was based on Rule 134(2), a timeliness issue and dismissed the Defence arguments in its Closing Brief. The Judgment, at paragraphs 83 and 84, states that there are no new arguments in the Defence Closing Brief and concludes that the Chamber considered all of these allegations and dismissed them.

165. The Chamber again in the Judgment makes no findings on the legal issues of fair trial. Thus, its decision is strictly a procedural one. But, it is impossible to discern from the Decision[159] whether the Chamber considered the content of the Defence's allegations on defective pleadings. Even, *arguendo*, accepting the Chamber's arguments, procedural arguments should not be permitted to trump the "interests of justice," especially in a prosecution of a single defendant for 70 charges and eight modes of liability.[160]

166. In addition, while the Decision summarizes the Defence position in respect to defects,[161] the Chamber made no findings on the content of the alleged violations of notice, or the jurisdictional defect. In respect to the Decision's section on "Jurisdictional challenges"[162] and the charge of forced marriage, the Chamber apparently ignores the record: that the Defence first articulated its

[157] The two changes in the PPTB are for the addition of a few witnesses, and the absence of the evidence of witness P-0198, since the CoC Decision confirms no charges against the Appellant for witness P-0198.
[158] Judgment, paras 37-40; *See also*, *Ongwen* OA4 Judgment, paras 69, 154, 160; Defence Closing Brief, paras 37-40.
[159] Trial Chamber IX, *Decision on Defence Motions Alleging Defects in the Confirmation Decision*, ICC-02/04-01/15-1476, ('Decision on Def. Motion Alleging Defects in the CoC Decision').
[160] The Chamber denied the Defence's No Case to Answer motion, which would have focussed the charging instrument – at least minimally – if its arguments had been granted by the Chamber.
[161] Decision on Def. Motion Alleging Defects in the CoC Decision, para. 11.
[162] Decision on Def. Motion Alleging Defects in the CoC Decision, paras 31-35.

arguments at the Confirmation of Charges hearings in January 2016.[163] This was prior to the commencement of trial.[164] Thus, the defect was litigated and preserved before the Pre-Trial Chamber.

167. In its request for leave to appeal the Chamber's Decision,[165] the Defence presented two issues: (a) whether the Decision, based on procedural grounds under Rules 122(4) and 134(2), implements the Chamber's responsibility under Article 64(2) to "ensure that a trial is fair […] and is conducted with full respect for the rights of the accused, consistent with Article 67(1); and (b) whether the Decision's finding, at paragraph 37, that jurisdictional arguments on forced marriage are untimely, is accurate.

168. The CoC decision is fundamental to fair trial. It "defines the parameters of the charges at trial."[166] It is the starting point for everything that occurs in a criminal proceeding. For this reason, a defective CoC decision which is facially deficient permeates the whole proceeding.

169. The Defence submits that the Chamber committed an error of law by not ruling on the legal issues raised in the Appellant's "Defect Series" and proceeding to trial on a defective confirmation decision. This error materially affected the Judgment, because the Appellant was convicted on charges and modes of liability which were defectively pleaded. The Defence requests the Appeals Chamber to intervene in respect to whether notice, pursuant to Article 67(1)(a), was provided by the CoC Decision.[167]

n) The Chamber erred by not concluding that the CoC Decision failed to provide a reasoned opinion, which prejudiced the Appellant's right to fair trial, including the right to present a defence

170. In the Judgment, at paragraph 84, the Chamber concluded that it had not violated the Appellant's right to notice and to prepare a defence.[168] This conclusion was made in reference to the Defence's allegations of defects in the pleading of the crimes and modes of liability in the CoC Decision.

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[163] Trial Chamber IX, *Defence Request for Leave to Appeal 'Decision on Defence Motions Alleging Defects in the Confirmation Decision (ICC-02/04-01/15-1476), notified 7 March 2019*, ('LTA Decision on Def. Motion Alleging Defects in the CoC Decision'), ICC-02/04-01/15-1480, paras 27-29.
[164] *See*, Article 19(4) of the Statute.
[165] *See*, Decision on Def. Motion Alleging Defects in the CoC Decision; LTA Decision on Def. Motion Alleging Defects in the CoC Decision.
[166] Lubanga Appeals Judgment, para. 124.
[167] A defective charging instrument can be litigated post-judgment, at the appeal stage: *Ongwen* OA4 Judgment, para. 160.
[168] The link between right to notice and to prepare a defence has been recognised in *Ongwen* OA4 Judgment, para. 69.

171. Judge Perrin de Brichambaut has emphasised that a poorly or weakly reasoned CoC Decision, as in the *Ongwen* case, does not provide notice and impacts on the fairness of the trial.[169]

172. At the end of the day, the Appellant was convicted on 61 charges and two modes of liability for which the legal elements were not pleaded at all, or were only partially pleaded; and where the factual allegations in support of the legal elements were not provided either in the CoC Decision or PPCB or PPTB. This prejudiced the Appellant's fair trial rights because he was not given detailed specific notice of the crimes and modes of liability for which he was prosecuted and against which he had to defend, if he so chose; and for which he was eventually convicted.

173. In summary, the Appellant was convicted on a defective CoC Decision, and neither the Pre-Trial Chamber nor the Trial Chamber provided a reasoned opinion.For the reasons above, the Appellant requests the Appeals Chamber to reverse his convictions based on violations of fair trial.

D. Ground 6: The Chamber erred in law and procedure by violating the Appellant's right to notice by a) expanding the material, temporal and geographic scope of the charges beyond the parameters of the charged crimes, and b) relying on evidence of acts not charged, causing prejudice, making the trial unfair, and materially affecting the Article 31(1) defences and Counts 69-70

a) Introduction

174. This ground of appeal raises procedural, legal and evidentiary errors which made the trial and the judgment unfair and the conviction unsafe. The CoC Decision, the decisions made during the trial and the judgment were significantly incoherent, violated the statutory framework of the Court and deprived the Appellant of notice of the charges.

175. The Defence will establish that the CoC Decision was internally inconsistent in its definition of the geographic scope of the case, and deficient in its pleading obligations to provide notice of the contextual elements and elements of the charged crimes.

[169] Pre-Trial Chamber II, *Partially dissenting opinion of Judge Marc Perrin de Brichambaut*, ICC-02/04-01/15-428-Anx-tENG, para. 29. "The fair conduct of the trial is seriously affected in the instant case because the weakness of the reasoning set out in the Bench's own decision restricts the rights of the defence. The way in which the Decision on the confirmation of charges was drafted *does not provide the Defence with details of what evidence was relied on or how the Chamber defined the crimes*. The principle of equality of arms is violated since the Defence is not in a situation to examine the legal and factual bases for the Bench's Decision on the confirmation of charges. The outcome of the trial may well be affected." [emphasis added].

176. The Defence will establish that the Chamber impermissibly expanded the scope of the charges, conflated and relied on different categories of uncharged acts to convict or support the conviction of the Appellant or to reject his affirmative defences.[170]

177. The Appellant incorporates by reference to the objections and submissions in the Defence closing brief which were disregarded.[171]

b) Prejudicial and inconsistent notice of the geographic and temporal scope of the case in the CoC Decision

178. The geographic scope of the case was defined in the pleadings before the Pre-Trial Chamber as the territory of Northern Uganda and the temporal scope as 1 July 2002 and 31 December 2005.[172]

179. The CoC Decision specified that on "16 December 2003, the government of Uganda referred to the Prosecutor of the Court the "situation concerning the Lord's Resistance Army".[173] The Prosecutor proceeded with an investigation, specifying that it would extend to the entire situation in Northern Uganda, regardless of who committed the crimes under investigation (ICC-02/04-1).[174]

180. The CoC Decision also alleged that "unless otherwise indicated, the conduct alleged below took place in northern Uganda and Sudan prior to 1 July 2002 and continued uninterrupted in northern Uganda after 1 July 2002."[175]

181. The CoC Decision also specified that "[i]t should be added that, in line with the charges, the factual analysis of the Chamber is confined to this practice as it occurred within the Sinia brigade between 1 July 2002 and 31 December 2005".[176] By this decision, factual allegations of sex and gender-based crimes which were committed by Kony and the LRA were precluded from imputation by association against the Appellant. Nevertheless, the Trial Chamber made determinations about the acts and conduct of Kony and the entire LRA organisation and relied on the findings to incriminate and convict the Appellant without due regard to procedural bars, relevance, probative value and the prejudice caused against the Appellant.

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[170] Judgment, para. 2586. *See also*, paras 2009, 2096, 2404, 2636, 2640-41.
[171] Defence Closing Brief, paras 84-85, 90, 93, 96, 98, 171, 179, 184, 185, 186, 188, 214, 303, 304, 510.
[172] Prosecutor's Amended Application for Warrants of Arrest Under Article 58, ICC-02/04-01/15-195-ConfAnxA, 18 May 2005 ('Application for Warrant').
[173] CoC Decision, para. 4.
[174] CoC Decision, para. 4.
[175] CoC Decision, p. 90, paras 67, 73; p. 92, para. 82.
[176] CoC Decision, para. 136.

c) The Chamber prejudicially expanded the temporal and geographic scope of the charges and relied on uncharged allegations to convict or support convictions against the Appellant

182. At the start of the trial, the Chamber again emphasised that the case related to events which occurred in Northern Uganda between 1 July 2002 and 31 December 2005.[177] Despite stating that "pursuant to Article 74(2) of the Statute, it has ensured that its findings of fact do not exceed the facts and circumstances described in the charges against Dominic Ongwen as confirmed by the Pre-Trial Chamber",[178] and despite the decision of the Appeals Chamber,[179] the Chamber, without notice, relied on evidence of uncharged acts and evidence outside the temporal and geographic scope of the case to convict or support the conviction of the Appellant in multiple crimes.

183. In the Judgment, the Chamber decided that the conflict in Northern Uganda was an internal armed conflict, but based its evidentiary findings on armed activities which occurred in the territory of Sudan.[180] The Chamber also relied on the evidence of witnesses whose personal experience did not fall within the charges, nevertheless for corroboration to the above testimonies.[181]

184. During the trial, overruling the Defence objections to the admissibility of evidence of crimes not charged or outside the temporal and geographic scope of the case, the Chamber provided an oral decision that it would rely on uncharged evidence for context, circumstances, modes of liability and conscription and use of child soldiers.[182]

185. The decision to use evidence of acts not charged and/or acts out of the temporal and geographic scope of the charges for context, circumstances, modes of liability and use of child soldiers, without notice expanded the charges exponentially with significant prejudice.

186. The Chamber followed through in the Judgment by relying on acts not charged and acts falling out of the temporal and geographic parameters of the charges for conscription and use of child soldiers in hostilities, sex and gender-based crimes, corroboration, modes of liability, inferences, circumstantial evidence, similar evidence and elements of crimes, causing prejudice, making the trial unfair and invalidating the Judgment.[183]

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[177] T-6.
[178] Judgment, para. 122.
[179] *Ongwen* OA4 Judgment, paras 69, 159.
[180] Judgment, paras 1154-1155, fn. 1661.
[181] Judgment, paras 2216-2247.
[182] T-148, p. 5, lns 13-15.
[183] Judgment, paras 122, 228, 2216, 2247, 1177, 1181, 1184, 1187-1188, 1190-1191, 1194-1195, 1200-1123, Fn 2120, 2009, 279, 2308, 2309, 2312-2343, 2365, 2506, 3241-3246, 2329-2337, 3241-2346, 2312-2343, 2365

187. The Chamber further relied on evidence of the persecutory policies of Kony which occurred outside the temporal scope of the charges and were not even tangibly connected to the Appellant to convict or support the conviction of the Appellant by association.[184]

d) The Chamber violated the statutory framework of the court in significant respects

188. The use of the evidence of acts not charged and evidence falling out of the temporal and geographic scope of the case for context, circumstances, impermissible inferences and imputations, modes of liability and conscription and use of child soldiers violated the statutory framework of the Court.[185]

189. The Defence refers to the inconsistent definition of the geographic scope of the case in the CoC Decision.[186] The geographic scope in the CoC Decision was not defined or characterised as evidence of the context of the crimes but as a jurisdictional pleading. During the trial and judgment, the Chamber defined it as a jurisdictional requirement and as a notice issue. The Chamber pledged to confine its judgment to the acts and conduct charged against the Appellant.[187]

190. The Appeals Chamber decided in the *Bemba* appeal judgment that uncharged acts could be used to prove contextual elements of crimes but found that the Trial Chamber in that case, exceeded the scope of charges against Mr Bemba by impermissibly using uncharged acts to convict the Appellant in a number of crimes.[188]

191. The Chamber did not use the evidence for context, and exceeded the scope of the charges by using the evidence to make inculpatory findings, by impermissible inferences, impermissible imputations of guilt by association, common plan, modes of liability, conscription and use of child soldiers and sex and gender-based crimes, attacks on IDP camps and the persecutory policies of Kony.

192. The Chamber did not weigh the prejudice suffered by the Appellant against the probative value of the evidence in the findings or decisions it made relying on evidence of acts not charged and/or evidence out of the temporal and geographic scope of the charges.

[184] Judgment, paras 1108-1145.
[185] Article 74(2) of the Statute.
[186] CoC Decision, paras 2-4, 105; p. 90, paras 68-69; p.91, para. 73; p.92, para. 82.
[187] Judgment, para. 122.
[188] Bemba Appeals Judgment, paras 116-117.

193. The evidence of acts not charged or out of the temporal scope of this case did not meet the jurisprudential threshold of relevancy, credibility and independence in *Gbagbo& Blé Goudé*.[189]

194. In *Ongwen*, the evidence was incapable of establishing the truthfulness of the charged allegations. It was out of the temporal and geographic scope of the charges. The Prosecution pointed to the fact that some of the evidence was out of the timeframe of the charges and requested the Chamber to rely on such evidence for context only. The Chamber disregarded this request, failing to provide a reasoned statement.[190] The Chamber relied on it as corroboration, impermissible inferences, imputation of guilt by association, to convict or support the convictions of the Appellant.

195. The Chamber, without distinguishing, relied on the evidence to support the conviction of the Appellant for direct commission, co-perpetration and indirect co-perpetration in multiple crimes with distinctive elements of crimes and elements of the modes of liability. This deformed the individualisation of the criminal responsibility of the Appellant.[191]

196. It is impermissible to use evidence of acts not charged, which were admitted over Defence objections for lack of notice and other grounds, to convict for sexual and gender-based crimes committed by the Appellant and rely on the same evidence as corroboration for crimes which were not committed by the Appellant directly within a common plan with uncharged persons such as Kony and unidentified "Sinia Leaders". That amounts to a violation of the principles of fundamental fairness in being forced to answer to charges that were not plead in the CoC; adequate notice to the defence of charges; and exclusion of prejudicial evidence.

e) Conclusion

197. On the basis of the foregoing the Defence urges the Appeals Chamber to invalidate the Judgment.

E. Grounds 7, 8, 10 (in part), 25 & 45: The Chamber erred in law in respect to legal standards and burden of proof

a) Introduction

[189] *Gbagbo* case, Trial Chamber I, *Reasons of Judge Geoffrey Henderson*, ('Reasons of Judge Geoffrey Henderson'), ICC-02/11-01/15-1263-AnxB-Red, at para. 46. "…corroboration or corroborative evidence is evidence which tends to confirm the truth or accuracy of certain other evidence by supporting it in some material particular. To fulfil this function, it must itself be relevant and credible, and it must come from a source independent of any evidence which is to be supported by it."
[190] Prosecution Closing Brief, para. 160.
[191] CoC Decision, p. 90, para. 66 – p.99, para. 117; p. 99, para. 118 – p. 102, para. 124; p. 102, para. 125 – p. 104, para. 131.

198. The Defence starts from the premise that legal standards and burden and proof are interrelated in criminal proceedings: legal standards do not exist in isolation from their application to the burden of proof, which is borne solely by the Prosecution.

199. In the case at bar, the Judgment correctly articulates the standard of proof beyond a reasonable doubt (and its mirrored presumption of innocence), referring to Article 66.[192] The Chamber, however, fails to apply and/or misapplies the standard throughout the Judgment. These errors prejudiced the Appellant by materially affecting the Judgment: had the correct legal standard been applied, the Chamber would have reached a different conclusion in respect to its conclusions of guilt.

b) "Ample evidence" is not a legal surrogate for the standard of proof beyond a reasonable doubt

200. Throughout the Judgment, the Chamber refers to the term "reasonable doubt" at paragraphs 229-331, 656, 2455, 2588 and footnote 4253 (quoting its usage in the Defence Closing Brief), but makes only one finding in respect to the evidence and reasonable doubt at paragraph 656.[193]

201. The legal error is that it is impossible to discern whether the Chamber properly applied the reasonable doubt standard to the evidence, since it fails to articulate whether or not an evidentiary finding or a conclusion is reached based on proof beyond a reasonable doubt.[194]

202. Throughout the Judgment, the Chamber applies a different standard of "ample evidence," which generates legal confusion.

203. The Chamber finds D-0133's evidence related to escape "incredible considering the ample evidence received to the contrary."[195] The conclusion is not footnoted, and no definition of "ample" is provided. No reasons are provided to explain why "ample" is used. But, in respect to the standard of proof applied, it is not correct to equate "ample" with proof beyond a reasonable doubt.

204. "Ample evidence" is used by the Chamber to assess the credibility and reliability of witness testimony. The Chamber uses the standard of "ample evidence" to impeach the credibility of P-0250 at paragraph 447; D-0121 at paragraph 542 (on evidence about the abductions from Abok);

[192] Judgment, paras 226-227.
[193] At para. 656: "The Chamber cannot find reasonable doubt that the intercepted audio recordings…are altered…"
[194] *See*, Bemba Appeals Judgment, para. 66.
[195] Judgment, para. 612. The Judgment's misrepresentations of D-133's evidence are addressed elsewhere in this brief.

P-0314 at paragraph 1464 (on looting of food from Odek); P-0085[196] at paragraphs 1484 and 1491 (concerning civilians being killed in the crossfire at Odek); and P-0142 at paragraph 1845.

205. At footnote 4970, the importance of P-0085's testimony to the Judgment's refutation of the Defence argument is demonstrated.[197]

206. "Ample evidence" is used in corroborating evidence that inculpates the LRA, which is interpreted by the Chamber as inculpating the Appellant: P-0264 at paragraph 1497 (shooting of civilians); paragraph 1746 (ample evidence that LRA committed acts at Lukodi).

207. In sum, a correct application of proof beyond a reasonable doubt standard would have explicitly indicated to the Parties when and how the standard was used in the Judgment, instead of keeping the Parties "in the dark."[198] The Judgment's failure to do this prejudices the Appellant, resulting in legal confusion and uncertainty – making the legal error unreviewable because it cannot be discerned.

c) Failure to apply Article 66(2) and (3) of the Statute to the affirmative defences prejudiced the Appellant and materially affected the Judgment

208. The failure to apply the reasonable doubt standard to the Appellant's affirmative defences is prejudicial and is a neon light example of its significance and material effect on the Judgment. The Defence incorporates previous litigation on this issue.[199]

209. Both the Chamber and Defence agree on two important points: a) that the Rome Statute is silent on what standard to apply to affirmative defences; and b) the principles of Article 66(2) and (3) of the Statute should be applied.[200]

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[196] At **fn 4970**, the Judgment states: "…as discussed above, in particular, the credible, consistent and *ample evidence* that a multitude of LRA forces convened for that attack, as well as the testimony of the LRA fighters who actually fought within the Abok IDP camp and testified to the presence of less LRA fighters, the Chamber is unconvinced **by D-0085**'s evidence in this aspect. (italics added)

[197] The incredibility of the evidence of P-0085 in respect to the number of attackers at Abok is referred to in fn 4970, to refute the Defence contention that the Appellant's alleged contribution to Abok attack could not have legally satisfied the legal criterion of "essential contribution" based on the evidence of the large numbers of attackers (in the hundreds, not between 20 and 30, composite numbers stated by P-330 and P-406 (Defence Closing Brief, para. 463) at Abok, from different divisions under separate leadership at Abok (Defence Closing Brief, paras 461-463).

[198] The Defence notes the similarity of this argument to the opaqueness of the evidentiary regime, leaving Parties "in the dark." Defence Closing Brief, para. 101, quoting dissenting opinion of J. Henderson at fn. 98.

[199] *See*, Defence Closing Brief, paras 91-96, 529-534 for arguments and pleadings. *Also see*, Judgment, paras 89-93, 2455, 2588.

[200] Judgment, para. 231; s*ee*, Trial Chamber IX, *Defence Request for the Chamber to Issue an Immediate Ruling Confirming the Burden and Standard of Proof Applicable to Articles 31(1)(a) and (d) of the Rome Statute*, ICC-02/04-01/15-1423.

210. To remedy this legal gap, the Defence suggested a formulation to the Chamber: the Prosecution must disprove each element of the affirmative defence beyond a reasonable doubt.[201] The Chamber did not make a ruling and deferred this to the Judgment.

211. In paragraphs 231,[202] 2455 and 2588, the Chamber states correctly that the general provisions of Article 66(2) and (3) apply, which means the Prosecution bears the burden to disprove grounds excluding criminal responsibility beyond reasonable doubt.

212. The legal error is that the Judgment does not indicate whether or not the Prosecution met its burden in respect to the elements of the mental health and duress defences in Articles 31(1)(a) and (d) of the Statute.

213. The material effect of this on the Judgment cannot be over-emphasised:

- in respect to Article 31(1)(a) of the Statute, the erroneous rejection of the evidence of the Defence experts, as well as the evidence of Professor de Jong and Professor Musisi, indicates that had the reasonable doubt standard been applied, it could not have reached such a conclusion;

- a key element in the Trial Chamber's rejection of the duress defence was its conclusion that the Appellant chose not to escape. This is refuted in this appeal.[203]

214. In sum, all of the Appellant's convictions emanated from the Chamber's rejection of the affirmative defences, since both Article 31 defences were presented as complete defences against all confirmed charges.

215. Based on this, the legal error of not applying the beyond a reasonable doubt standard, resulting in total rejection of the affirmative defences. This error permeated the entire Judgment, resulting in the Appellant's convictions for 61 crimes and two modes of liability.

Burden shifting – in violation of Article 67(1)(i) and 66(2) of the Statute

[201] Trial Chamber IX, *Defence Request for the Chamber to Issue an Immediate Ruling Confirming the Burden and Standard of Proof Applicable to Articles 31(1)(a) and (d) of the Rome Statute*, ICC-02/04-01/15-1423, para. 4.
[202] Judgment, para. 231: "…[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, the general provisions of Article 66(2) and (3) on the burden and standard of proof equally apply, operating (as is always the case for the determination on the guilt or innocence of the accused) solely with respect to the facts 'indispensable for entering a conviction', namely, in this case, the absence of any ground excluding criminal responsibility and, thus, the guilt of the accused."
[203] *See* paras 559-562 below.

216. The reasonable doubt legal error implicitly led to the impermissible shifting of the onus onto the Defence, in violation of Article 67(1)(i) as well as Article 66(2) of the Statute.

217. This is most clearly illustrated by the Judgment's arguments at paragraphs 89-92. Underlying the Chamber's rejection of the Defence burden of proof arguments is a fundamental error in respect to the Defence's legal obligations vis-à-vis an affirmative defence.

218. The Defence must place the issue of an affirmative defence on the legal table (as it did in its initial notice in 2016).[204] This, however, does not change the Prosecution's burden. The burden never shifts away from the Prosecution, even if the Defence chooses to remain totally silent during three or more years of trial. With an affirmative defence, the Defence has no evidentiary burden. This process is further in the Defence's pleadings on the burden and standard of proof applicable to Articles 31(1)(a) and (d) of the Statute.[205]

219. It appears that the Chamber has a different understanding: at paragraph 90 it states: "[i]t further needs to be noted that the Defence had every opportunity to present its evidence or legal submissions on any point of law." The opportunity to present a defence, through witnesses and evidence, including in a rejoinder case is irrelevant to the Prosecution's evidentiary burden. The Chamber's formulation, however, shifts this evidentiary burden by arguing that the Defence had opportunities to call witnesses, etc.

d) The Chamber erred by granting the Prosecution's request for rebuttal evidence from P-0447, which did not satisfy the legal requirements for rebuttal[206]

220. In addition to the legal errors discussed above about the application of the reasonable doubt standard, the Chamber also erred by not requiring any standard to be articulated or applied in respect to the rebuttal evidence of P-0447, including his rebuttal report.

221. The Defence objections to the rebuttal case, and to the admissibility of the report of P-0447 are preserved. Indeed, prior to the rebuttal testimony of P-0447, the Defence placed its objections to the admissibility of the rebuttal report into evidence on the record.[207] The Defence argued that the report, in its present form, without a limited scope on alleged new diagnoses and on material which

[204] *See*, Affirmative Defense | Wex | US Law | LII / Legal Information Institute (cornell.edu). Two notices filed for Article 31 on 9 August 2016.
[205] *See*, Trial Chamber IX, *Defence Request for the Chamber to Issue an Immediate Ruling Confirming the Burden and Standard of Proof Applicable to Articles 31(1)(a) and (d) of the Rome Statute*, ICC-02/04-01/15-1423, paras 2,14; *See also*, Trial Chamber IX, *Defence Reply to Prosecution and CLRV Responses on the Burden and Standard of Proof Applicable to Article 31(1)(a) and (d) of the Rome Statute*, ICC-02/04-01/15-1466, paras 2-4.
[206] Judgment, paras 91, 99.
[207] T-252, p. 3, ln. 21 – p. 8, ln. 10.

was non-repetitive of prior Prosecution expert witnesses P-0446 and P-0447, failed to meet the three standards for rebuttal evidence.[208] Moreover, admission of the rebuttal form was inconsistent with the Chamber's previous holding that scope of rebuttal evidence can only concern points and facts not previously addressed by Prosecution witnesses.[209] The rebuttal report was repetitive, for example, of prior testimony of P-0447 on dissociative disorders and major depressive disorders[210] and P-0446 on malingering and "faking it."[211]

222. In sum, the Defence argued that that admissibility of the rebuttal report impermissibly gave the Prosecution "two bites of the apple" where it provided repetitive testimony.

223. The error was that the Chamber permitted a Prosecution rebuttal case and admitted the expert report without any showing that the legal standards for a rebuttal case were met. The Chamber concurred with the Defence that Prosecution never filed a formal request.[212] Nevertheless, the Chamber, using its discretionary power to limit or preclude rebuttal evidence, permitted the rebuttal case based on the high importance of the subject matter; the fact that the Prosecution did not exhibit negligence; and that new diagnoses were not foreseeable.[213] In its decision, the Chamber anticipated that rebuttal evidence "will concern any points and facts previously not addressed by the Prosecution Expert Witness… will not allow any repetition of evidence."[214]

224. As evidenced in the Report, the Chamber's anticipations did not materialise: in the Rebuttal Report, for example, there are extensive references of PTSD, which is repetitive of evidence provided in the Prosecution case.[215]

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[208] *See*, Trial Chamber IX, *Prosecution request to present evidence in rebuttal*, ICC-02/04-01/15-1569, para. 4.
[209] Trial Chamber IX, *Decision on Requests related to the Testimony of Defence Expert Witnesses D-0041 and D-0042*, ICC-02/04-01/15-1623, ('Decisionon Request related to D-41 and D-42'), para. 16.
[210] T-169, p. 21, ln. 8 – p. 22, ln. 8; p. 54, lns 6-22.
[211] T-162, p. 18, lns 2-16; p. 38, ln. 22 – p. 39, ln. 25 (malingering); T-163, p. 53, lns 5-17; p. 60, lns 1-24 (malingering); T-162, p. 18, ln. 2 – p. 24, ln. 5; p. 38, lns 7 – 21 (faking); T-163, p. 45, ln. 7 – p. 47, ln. 2; p. 60, ln. 25 – p.61, ln. 14 (faking).
[212] Decisionon Request related to D-41 and D-42, para. 13. Note, this in contrast to the situation with the request for rebuttal evidence from Prof Blattman, which was denied by the Chamber. *See*, Trial Chamber IX, *Prosecution request to present evidence in rebuttal*, ICC-02/04-01/15-1569; Trial Chamber IX, *Public Redacted Version of "Defence Response to the Prosecution's 'request to present evidence in rebuttal'" filed on 30 August 2019*, ICC-02/04-01/15-1579-Red, and Trial Chamber IX, *Decision on Prosecution request to present evidence in rebuttal*, ICC-02/04-01/15-1600.
[213] Decisionon Request related to D-41 and D-42, para. 16.
[214] Decisionon Request related to D-41 and D-42, para. 16. The Defence filed a Leave to Appeal, ICC-02/04-01/15-1627, which the Chamber rejected, ICC-02/04-01/15-1644.
[215] There are 52 references to PTSD in T-0447's testimony in T-169; in his Rebuttal Report, there are 48 references to PTSD. Even excluding those references which are bibliographical, one can conclude that the re PTSD does not fulfill the criterion on non-repetitive.

225. The importance of the Rebuttal Report and P-0447's rebuttal testimony in the Chamber's conclusions rejecting the affirmative defence of Article 31(1)(a) is key. There are 36 references to "rebuttal report" in the Judgment, but it is clear that the Chamber relied on P-0477's rebuttal report to support its findings that the Chamber could not rely on the Defence Experts' evidence, particularly on their diagnoses of mental disorders in the Appellant.[216] In particular, the rebuttal report is heavily cited in support of the factors the Chamber identifies, at paragraphs 2528-2568 of the Judgment as indicators of unreliability.

226. If the rebuttal evidence were not before the Chamber, it is less likely that it would have rejected the Article 31(1)(a), and more likely that it would have properly applied the law to the Article 31(1)(a) defence. Thus, the error of admissibility of the rebuttal report materially affected the Judgment.

F. Grounds 9 & 10: The Chamber erred in law in rejecting the Defence submissions on the prejudicial evidentiary regime[217]

227. In the Judgment, the Chamber rejects the Defence's claim that the Appellant was prejudiced by the evidentiary regime or admissibility of evidence regarding PCV-1, P-0447 or P-78.[218] The Defence incorporates the arguments[219] in its pleadings.[220] The issues related to P-0447's Rebuttal Report are addressed separately in this Brief. The issues related to P-78 are addressed in the Defence Closing Brief, at paragraph 101(iii).[221]

228. In respect to PCV-1, the Defence objected to the admission of pages 38 to 42 of his report, which addressed witness testimony.[222] The Defence's objections were based on the fact that the expert gave an opinion on acts and conduct charged to the Appellant,[223] included numerous references to anonymous witnesses and there were translation issues. The Chamber denied the Defence motion

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[216] Judgment, para. 2574.
[217] Judgment, paras 94-102, 237-240; Defence Closing Brief, paras 97-106.
[218] Judgment, paras 97, 102.
[219] *See*, T-175, p. 2, ln 17 – p. 8, ln. 16.
[220] *See*, Trial Chamber IX, *Public Redacted Version of 'Defence Request and Observations on Trial Chamber IX's Evidentiary Regime'*, ICC-02/04-01/15-1519-Red; Trial Chamber IX, *Defence Request for Leave to Appeal the 'Decision on Defence Request regarding the Evidentiary Regime'*, ICC-02/04-01/15-1550; Ongwen Further Submissions, para. 25.
[221] *See also*, Trial Chamber IX, *Public Redacted Version of 'Defence Request and Observations on Trial Chamber IX's Evidentiary Regime'*, ICC-02/04-01/15-1519-Red, paras 27-38.
[222] *See*, Defence Closing Brief, para. 101 (ii); PCV-1's Expert Report is UGA-PCV-0001-0020 at 0058-0062.
[223] In addition to the Chamber's prior decisions referred to in T-175, p. 3, lns 13-15, the Defence notes the holding in *Al Hassan* case, Trial Chamber X, *Decision on Prosecution's Proposed Expert Witnesses*, ICC-01/12-01/18-989-Red, at para. 17, stating, "opinion evidence proved by experts cannot go to into issues such as the guilt or innocence of the accused or whether contextual, material or mental elements of the crimes charged are satisfied."

to exclude portions of the report in an oral decision.[224] The Defence filed a Request for Leave to Appeal, which was denied by the Chamber.[225]

229. Here, the Appellant highlights one of the fair trial violations in the admission of portions of the report as an example: at PCV-1's report at page 41, the last paragraph starts: "Witness UGA-OTP-0227 describes how Ongwen would select a sex slave…"

230. A review of P-0227's testimony at the Article 56 hearings[226] indicates that the witness never used the term "sex slave." This terminology or characterization of the expert is inadmissible because it is a legal conclusion.[227] Legal conclusions are to be made only by the Chamber. In addition, the Appellant was convicted of sexual slavery in counts 55 and 56 (against P-0277 and others).

231. For this reason, the Chamber's decision to deny the Defence motion to exclude portions of PCV-1's expert report prejudiced the Appellant and violated his fair trial rights.

232. The Defence notes that the Chamber's oral decision indicated that it "will take note of the evidence, and of course it will make the ultimate assessment of it."[228]

233. The Defence has no idea what assessment the Chamber ultimately made of this evidence, or of any of the other 5140 items[229] recognised as formally submitted into evidence by the Chamber. There is no indication in the Judgment (for example, in a chart appended in an annex) of the Chamber's rulings on the documentary evidence submitted. The Defence maintains its interpretation of the Appeal Chamber's holding in the *Bemba* case:[230] that it requires the Chamber to consider – for each piece of evidence – its relevance, probative value and the potential prejudice. The Chamber's findings should be made available to the Parties, as part of its obligations under Article 74(5).

G. Ground 11: The Chamber erred in law and procedure by failing to provide translations and interpretation, in violation of the Appellant's fair trial rights under Article 67(1)(f)

[224] T-175, p. 11, ln. 14 – p. 13, ln. 3.
[225] *See*, Trial Chamber IX, *Defence Request for Leave to Appeal the Trial Chamber's Oral Decision on the Exclusion of Certain Parts of the CLRV Expert Report*, ICC-02/04-01/15-1261; Trial Chamber IX, *Decision on Defence Request for Leave to Appeal the Trial Chamber's Oral Decision on the Exclusion of Certain Parts of the CLRV Expert Report*, ICC-02/04-01/15-1268.
[226] T-10 and T-11.
[227] T-175, p. 6, lns 14-19.
[228] T-175, p. 12, lns 13-15.
[229] Judgment, para. 25. References in the Judgment appear in footnotes to some of the items, but not to all of them.
[230] *See*, Defence Closing Brief, fn. 104.

234. The Chamber's fair trial violations in respect to translation and interpretation permeates the entire proceedings, and are intimately tied to the violation of notice. The failure to provide the Appellant with translations started from the inception of this case in 2005. The Appellant never received an Acholi translation of the Prosecution's Article 58 Application for his arrest.[231] There have been at least two dozen objections dealing with the lack of translation or interpretation into Acholi.[232] These Defence requests focused on the Chamber's failure to provide, *inter alia*, a translation of the complete CoC Decision, Article 56 witness statements, and witness statements during trial. Most recently, the Defence has litigated the lack of translation of the 1077-page judgment against the Appellant, which deprives him of his right to meaningfully assist in his defence by instructing his counsel.

235. In the Judgment, at paragraph 81, the Chamber erred in law and in procedure by finding that the lack of a full translation of the CoC Decision in Acholi was immaterial, and did not violate Article 67(1)(a) of the Statute.[233]

236. As illustrated by the chart at paragraph 59 above, at the time of his plea, the Appellant had not received a full translation of CoC decision.[234]

237. The Chamber erroneously claimed that the reading of numbered counts in the CoC Decision, which were interpreted by the Acholi interpreters in the courtroom, was sufficient to provide notice. As discussed elsewhere in this brief, the 'operative part' of the CoC Decision (i.e., recitation of the charges from the DCC) is not identical with the DCC filed by the Prosecution on December 2015.[235] At least one of the modifications in the CoC Decision "operative part" reflects a change in terms of the dates of charged crimes, which is a specific element of the notice requirement.[236]

238. In sum, there was a clear pattern of either no translation into Acholi or significant delays (i.e., more than 1.5 years for Acholi translations of full CoC Decision and Separate Opinion) in translations. These errors amounted to the violation of the Appellant's fair trial rights under Article

[231] ICC-02/04-01/15-3-Conf-Red3 (with annexes).
[232] Trial Chamber IX, *Defence Request to Change the Date of the Closing Statements*, ICC-02/04-01/15-1668, paras 4-32.
[233] Judgment, paras 81-82; Defence Closing Brief, paras 86-90; and Ongwen Further Submissions, paras 16-18.
[234] See chart, *supra*, para. 59.
[235] Pre-Trial Chamber II, *Annex A to the Prosecution's submission of the document containing the charges, the pre-confirmation brief, and the list of evidence*, ICC-02/04-01/15-375-AnxA-Red.
[236] CoC Decision, para. 158; Trial Chamber IX, *Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision*, ICC-02/04-01/15-1147, para. 7.

67(1)(a) and (f). The lack of translation exacerbated the notice violation, and both – individually and together – resulted in a miscarriage of justice which materially affected the decision.[237]

H. Ground 12: The Chamber erred in law by not ruling in the Judgment on the Defence objections to the Prosecution's investigation and disclosure practices, violating the Appellant's right to a fair trial

239. The Defence relies on its arguments in its Closing Brief,[238] and the prior pleadings cited in the footnotes to same. The Chamber's response is found in Judgment, paragraphs 103-105.

240. Disclosure violations impact on fair trial rights in Article 67(b) and (e). In the *Ongwen* case, the Prosecution had at least a ten-year head start on investigation, when compared to the Defence. The arrest warrant for the Appellant was issued in 2005; the Appellant surrendered in 2015, and Defence Counsel was subsequently appointed. The violations of late disclosure or no disclosure discussed in the Defence Closing brief[239] impacted on the Appellant's right to present a defence. Information about the case within the Prosecution's office was unavailable to the Defence, impeding its own investigations and preparation.

I. Ground 13: The Chamber erred in law and procedure regarding the OTP's selection of witnesses and collection of evidence, as illustrated in the role of P-00078[240]

a) Introduction

241. Article 54(1)(a) of the Statute creates a legal obligation to investigate incriminating and exonerating circumstances equally. At the commencement of the present trial, the Presiding Judge stated that the present referral was understood "to extend to the entire situation in Northern Uganda regardless of who committed the offences under this investigation".[241] This was a tacit admission of there being two sides to the conflict in Northern Uganda which required an impartial investigation into the atrocities in order to establish the truth.

b) The Chamber erred in fact and law in finding that the Defence did not raise any particular violation and prejudice caused by the participation of P-0078, an active UPDF soldier who sourced around 40 Prosecution witnesses/interviewees

[237] Defence Closing Brief, para. 88; Trial Chamber IX, *Defence Request to Change the Date of the Closing Statements*, ICC-02/04-01/15-1668, paras 4-32.
[238] Defence Closing Brief, paras 108-117.
[239] Defence Closing Brief, paras 108-117.
[240] Judgment, para. 525; Defence Closing Brief, para. 10 fn. 103; and Trial Chamber IX, *Public Redacted Version of 'Defence Request and Observations on Trial Chamber IX's Evidentiary Regime'*, ICC-02/04-01/15-1519-Red, paras 27-35.
[241] T-26, p. 7, ln. 22 – p. 8, ln. 1.

242. During the trial, it came to the fore that P-0078, an active member of the conflict turned intermediary for the Prosecution, was involved in the collection of several evidentiary items[242] and located over 40 insider witnesses.[243] The Defence raised the matter of P-0078's position as a senior UPDF officer during the trial,[244] but the Chamber failed to rule on the matter until the judgment.

243. The Defence additionally objected to P-0078**'s** methods of procuring evidence and witnesses for the Prosecution.[245] Items disclosed by the Prosecution show that P-0078: a) was directly involved in the conflict between the LRA and the Government of Uganda, and in the killing of Raska Lukwiya during the peace talks;[246] and b) appeared to be acting in conflict with Article 44(2) of the Statute and with the Code of Conduct for the Office of the Prosecutor during the exercise of their role as an intermediary.[247] The Prosecution investigation reports demonstrate that P-0078 breached standards of professional conduct and was requested to provide an explanation for the misuse of a phone and other funds provided by the Office of the Prosecutor.[248] P-0078 was also found to have pressured P-0037 and P-0105 to give evidence to OTP investigators during interviews.[249] Recent LRA returnees were naturally vulnerable to threats or intimidation, especially at a time when their livelihood depended on the UPDF, meaning the sheer presence of a senior officer tasked with sourcing evidence and organising testimony for the Prosecution likely had an effect on the content of any information provided.

244. Further, it should not have been lost on the Chamber that, during their captivity in the LRA, the Article 56 witnesses together with other abductees were constantly fed information to the effect that any attempt at escape resulted in a risk of being killed by the civilian population, in addition

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[242] Based on the information from Defence Ringtail, it appears that P-0078 is linked to at least **271** evidentiary items, either via "Chain of Custody" or "Source Identity" fields.
[243] UGA-OTP-0263-2689-R01, at 2689. *See also* UGA-D26-0017-0139, at 0140: the Prosecution specified that "the list of witnesses on whom the Prosecution rely to prove the case against your client, and whom the Prosecution is aware have had contact with (or at least have been provided with the contact details of) [P-0078] is as follows: [REDACTED].
[244] Trial Chamber IX, *Public Redacted Version of 'Defence Request and Observations on Trial Chamber IX's Evidentiary Regime'*, ICC-02/04-01/15-1519-Red, paras 31-35.
[245] *See* ICC-02/04-01/15-T-116-CONF-ENG, pp 46-47; ICC-02/04-01/15-T-117-Red-ENG, pp 43-45; ICC-02/04-01/15-T-179-Red-ENG, p 63, lines 5-20; ICC-02/04-01/15-T-189-CONF-ENG, p. 52; ICC-02/04-01/15-T-161-CONF-ENG, p. 4; *See also*, Trial Chamber IX, *Public Redacted Version of "Confidential Redacted Version of "Defence Request for a Deadline Extension", filed on 18 April 2018"*, ICC-02/04-01/15-1232-Red2, para. 39.
[246] UGA-OTP-0196-0028-R01, at 0031.
[247] Article 44(2) of the Statute; *See also* Code of Conduct for the Office of the Prosecutor, Chapter 2, Sections 1, 3 and 4; and Chapter 3, Sections 1-2.
[248] UGA-OTP-0263-2681-R01, at 2681; see also UGA-OTP-0263-2689-R01, at 2691: After P-0078's failure to provide any explanation as to her/his alleged misuse of public funds the Prosecution concluded that "[t]he issue of the phone misuse was discussed within the OTP Integrated Team on 15 April 2015 with the conclusion that the office would continue working with [P-0078], as [P-0078] was officially appointed [her/his] superiors and because [she/he] had proved efficient in [her/his] role".
[249] UGA-OTP-0263-2688; UGA-OTP-0263-2685-R01, at 2686: Another investigation report corroborates that the same Prosecution witnesses "had alleged they had been pressured by P-0078 to speak to the ICC".

to the general possibility of being killed by the UPDF – whether under their supervision or not. Hence, the Chamber should have exercised caution when determining the admissibility of evidence provided by Article 56 witnesses sourced by P-0078.

245. The Defence propounds that the Chamber ought to have properly assessed the Defence objections to P-0078's impartial selection of a substantial body of Prosecution witnesses and collection of evidence relied upon to secure numerous convictions against the Appellant.[250] This, combined with the Chamber's deferral of the ruling and subsequent finding that the objections were "unsubstantiated and irrelevant",[251] amount to a flagrant breach of Mr Ongwen's fair trial rights and a gross miscarriage of justice.

246. Consequently, the Defence invites the Appeals Chamber to find that the proceedings were fundamentally unfair to the extent that the reliability of the judgment was materially affected, thus warranting a reversal of the convictions.

J. Grounds 14 & 15: The Chamber erred in law and in fact in its conclusion that it did not discriminate against the Appellant based on mental disability

247. The Defence has extensively litigated and preserved the issue of the Appellant's mental disability and its impact on his fair trial rights.[252] The Defence incorporates the arguments in its Closing Brief, at paragraphs 120-146 in this section.

248. The Chamber discriminated against the Appellant as a mentally disabled person. Article 2 of the Convention on the Rights of Persons with Disabilities ("CRPD") defines discrimination on the basis of disability as:

> [A]ny distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

249. In the Judgment, at paragraph 115, the Chamber finds that the Defence submissions [in its Closing Brief] that the Chamber discriminated against the Appellant are baseless, and that the Defence did not show any impact on his fair trial rights.

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[250] These included key witnesses relied upon throughout the judgment, such as [REDACTED].
[251] Judgment, para. 525.
[252] *See*, Defence Closing Brief, fns 143 and 144, (pleadings re Rule 135 and scheduling to accommodate mental disability).

250. First, the Chamber's conclusion, at paragraphs 113-114, that the Defence misrepresents the facts as to its failure to implement a sitting schedule to accommodate the Appellant for eight months, is erroneous. As Confidential Annex E, filed with the Closing Brief, illustrates, the initial recommendations from the ICC-DC Medical Officer for a "time out" from court on Wednesdays was made four times – in February and March 2018 and twice in July 2018.[253] However, it was not until October 2018[254] – eight months from the first request in February – that the Chamber implemented the "Wednesdays off" sitting schedule. Thus, the Chamber's accommodation of the Appellant as a mentally disabled person, was eight months late and discriminated against him, in violation of Article 2 of the CRPD.

The Chamber denied the Appellant his right to decide whether or not to testify

251. Second, the Chamber violated the Appellant's fair trial right to make a decision whether or not to testify in his case.[255] The right to testify is reflected in the Rome Statute, Article 67(1)(e) and is fundamental to a fair trial.[256]

252. On 16 September 2019, as the Defence was moving toward completion of its presentation of its case, it requested a psychiatric examination of the Appellant, pursuant to Rule 135. The purpose was to determine if he was suffering from any mental condition or disorder which made him unable to make an informed decision whether or not to testify in his defence; the Defence requested that the Chamber appoint an impartial expert to conduct the examination.[257]

253. The Chamber denied the Defence motion, finding "no indications which give rise to an order for a medical examination pursuant to Rule 135…"[258] The Defence filed a Request for Leave to Appeal, which was denied. In its Decision, the Chamber stated that "…the question of whether the

[253] These recommendations are confidential, *ex parte* filings, and are identified on the confidential Annex E (Trial Chamber IX, *Confidential Annex E*, ICC-02/04-01/15-1722-Conf-AnxE, ('Defence Closing Brief Annex E').
[254] Defence Closing Brief Annex E: There is an error in the last box on right: it should read "In October 2018…".
[255] *See*, Trial Chamber IX, *Public Redacted Version of "Defence Urgent Request to Order a Medical Examinaiton of Mr Ongwen" filed 16 September 2019*, ICC-02/04-01/15-1595-Red; Defence Closing Brief, paras 125-135. This issue was not addressed in the Judgment, although the Chamber addressed all the other issues in the Fair Trial section in its Closing brief. Therefore, there is no Judgment paragraph reference to this point. The Defence is amending its Notice of Appeal to include this fair trial violation.
[256] *See*, Defence Closing Brief, paras 125-135. The Defence notes also that the right of a criminal defendant to testify is derived from the U.S. Constitution, 6th Amendment: Marjorie L. Rifkin, The Criminal Defendant's Right to Testify: The Right to Be Seen but not Heard, 21 *Columbia Human Rights Law Review* 253 (1989).
[257] Trial Chamber IX, *Public Redacted Version of "Defence Urgent Request to Order a Medical Examinaiton of Mr Ongwen" filed 16 September 2019*, ICC-02/04-01/15-1595-Red.
[258] Trial Chamber IX, *Decision on Further Defence Request for a Medical Examination*, ICC-02/04-01/15-1622, para 29.

accused may be mentally disabled was never considered in the Impugned Decision…" [259] (underlining added)

254. The Chamber's use of "may be mentally disabled" could have expressed some possible recognition that the Appellant was mentally disabled, but the admission that this was not considered by the Chamber mooted this possibility. The Chamber's admission makes disingenuous its claim at Judgment, paragraph 112, that "the fact the Chamber has not ruled in favour of the Defence does not mean that it has not fully considered the situation of the accused when ruling on the Defence's request".

255. In sum, the Chamber has a "disability blind-spot." It essentially made decisions, contrary to information available from four experts on the Appellant's mental status,[260] about the conduct of the proceedings and fair trial rights of the Appellant as if he were not a mentally disabled defendant. This resulted in a severe impact on the exercise of Mr Ongwen's fair trial rights, and was a miscarriage of justice. As a matter of law, the Appeals Chamber should intervene on the Chamber's fair trial violations and ultimately, in the Defence's view, reverse the Appellant's convictions.

K. Ground 16: The Chamber erred by denying all but one of the Appellant's requests for leave to appeal, resulting in the violation of his fair trial right to appellate review of legal issues which were relevant to, and/or affected the fairness or reliability of the proceedings

256. The Appellant filed forty-three requests for leave to appeal the Pre-Trial and Trial Chambers' decisions during the course of his case. Only one of these requests for leave to appeal was granted by the Chamber.

257. These requests for leave to appeal involved legal issues which were significant to the fair conduct of the proceedings, and which are critical issues in this appeal. These issues include, but are not limited to, evidentiary standards, evidentiary regime, expert witnesses, right to testify, discrimination based on mental disability, disclosure, standard of proof, and other fair trial rights under Article 67 of the Statute. A detailed list, identifying the legal issues, applicable statutory provisions or rules and regulations, and appealable issues is attached in Annex B to this Brief.

[259] Trial Chamber IX, *Decision on Defence Request for Leave to Appeal the Decision on the Defence Request for Medical Examination of Mr. Ongwen*, ICC-02/04-01/15-1640, para. 11.
[260] Prof de Jong (appointed by the Trial Chamber), ICC-DC Medical Officer (appointed by the ICC Registry) and the Defence Mental Health Experts (D-41 and D-42).

These legal issues impact on the Judgment, which has addressed many of them (as indicated in Judgment references to the Requests for Leave to Appeal Chart in Annex B).[261]

258. The Appeals Chamber is the "final arbiter of the law" and may hear arguments which are significant to the Court's jurisprudence, and has *proprio motu* powers to rule on legal issues.[262]

259. The Defence requests that the Appeals Chamber review the Trial Chamber's decisions on the Defence Requests for Leave to Appeal, listed in Annex B, and rule on the legal issues presented. They impact directly on the Appellant and whether his convictions are maintained. One example is the Defence Request for Leave to Appeal Trial Chamber IX's Oral Decision on the Objections of the Defence to the report presented by the rebuttal expert, P-0447.[263] In its Request, the Defence argues that portions of P-0447's Rebuttal Report repeat evidence already presented by the Prosecution in its case-in-chief. Given the reliance of the Chamber on P-0447's rebuttal evidence as a basis to reject the affirmative defence under Article 31(1)(a), a resolution of this issue would materially affect the Appellant's judgment, if there were a ruling inapposite to the Chamber's decision.

L. Ground 17: The Chamber erred in finding that the Appellant's allegations of fair trial violations were unfounded and did not warrant the exceptional remedy of a permanent stay[264]

260. Throughout the proceedings, the Defence has litigated and preserved the numerous fair trial violations. These pleadings are cited and summarised in the Defence Closing Brief, Section II. Fair Trial and other Human Rights Violation, at paragraphs 31-158. In this Appellate Brief, the Defence will highlight a few examples of fair trial violations which prejudiced the Appellant and materially affected the Judgment. The Defence incorporates all the fair trial violations argued in its Closing Brief. The Judgment responds to the Defence Closing Brief in the Judgment.[265]

[261] See Annex B, Chart of Requests for Leave to Appeal.
[262] See, Appeals Chamber, *Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision ofTrial Chamber VI of 8 July 2019 entitled 'Judgment'*, ICC-01/04-02/06-2666-Red, ('Ntaganda Appeals Judgment'), para. 36; Bemba Appeals Judgment, para. 36. *See also*, *Nahimana* Appeal Judgment, para. 12; *Ndindabahizi* Appeal Judgment, para. 13; *Kajelijeli* Appeal Judgment, para. 297.
[263] Trial Chamber IX, *Defence Request for Leave to Appeal Trial Chamber IX's Oral Decision on the Objections of the Defence to the report presented by the rebuttal expert, P-0447,* ICC-02/04-01/15-1682.
[264] Judgment, paras 45, 71-72, 82, 84, 93, 105, 120.
[265] *See*, Judgment, para 42-120.

261. The Defence, at this appeal stage, is no longer requesting the remedy of a permanent stay. Instead, the Defence is requesting that the Appeals Chamber reverse the Appellant's convictions based on fair trial violations. The underlying fair trial violations involved remain the same.

The Trial Chamber erred in rejecting the Defence claim that it violated the Appellant's right to family life[266]

262. Communications restrictions placed upon the Appellant in respect to his children, parents of his children and family members have overshadowed much of this trial, from its inception in the pre-trial and through trial phases. These restrictions violate fair trial rights under Articles 67(1)(b) and 67(1)(e) as well as international instruments guaranteeing the human right to family and private life.[267] The Defence incorporates its Closing Brief,[268] which outlines the legal arguments and authorities. In the Judgment,[269] the Chamber responds to the Defence allegations.

263. These issues are key on appeal for two reasons: (a) the Appellant is likely not the only Accused at the ICC-DC who is or will encounter communications restrictions. Therefore, a review of the litigation by the Appeals Chamber can impact on policies and procedures governing the rights of accused persons in ICC custody; (b) the right to family and private life under international instruments prominently raises the legal question of the interpretation of the Statute, Article 21(3). For these reasons, the Appeals Chamber should intervene on this issue, as a matter of law.

M. Ground 18: The Chamber erred in finding that its denial of a SGBC expert to the Appellant did not violate his fair trial rights[270]

264. Although about one-quarter of the confirmed charges against the Appellant were SGBC, the Chamber denied its request to add a SGBC expert, D-158, to its witness list.[271]

265. At paragraph 72, the Judgment cites the Chamber's reasoning: that "the proposed witness's evidence 'would merely be additional evidence for topics for which direct evidence has already been elicited by the Defence'" and finds no violation of the Appellant's rights.

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[266] The Defence amends its Notice of Appeal to include this ground. The Judgment, paras 116-120, addresses issued raised by the Defence in its Defence Closing Brief, paras 147-155. For this reason, it should be included as a ground of appeal.
[267] *See*, Defence Closing Brief, fn. 204 to full citations to ICCPR, African Charter on Human and Peoples' Rights, American Convention on Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14.
[268] Defence Closing Brief, paras 147-155.
[269] Judgment, paras 116-120.
[270] Judgment, para. 72; Defence Closing Brief, para. 72.
[271] Trial Chamber IX, *Decision on Defence Request to Add Two Witnesses to its List of Witnesses and Accompanying Documents to its List of Evidence*, ICC-02/04-01/15-1565.

266. The Chamber's Decision was unfair to the Appellant and reflected a double-standard: it granted the Legal Representative of the Victims' ('LRV') request for an expert witness related to rape and SGBC. In its Decision on the LRV expert, the Chamber held that the proposed testimony was not repetitive [of the already existing evidence on rape and SGBC] because "expert evidence differs from a first-hand account by a direct victim."[272]

267. Yet, when the Defence proposed that its SGBC expert would testify about the impact of SGBC within the LRA on both women and men,[273] including on the topic of wife distribution, about which fact witnesses had testified,[274] the Chamber applied a different standard. The Chamber no longer distinguished between expert testimony and first-hand accounts, but based its rejection of the Defence expert's evidence as "merely be[ing] additional evidence for topics for which direct evidence has already been elicited by the Defence."[275]

268. Thus, the Chamber erred in law by not applying the same legal standard for experts for the LRV and the Defence, resulting in violation of the Appellant's fair trial rights under Article 67(1)(e).

Conclusion to Fair Trial Section

269. A fair trial is the only means to do justice. But justice was not served in the Appellant's case. Here, the cumulative effect of irreparable fair trial violations starting with the right to counsel and to remain silent at UPDF Operational HQ in January 2015, through the pre-trial and trial proceedings' violations, including the Chamber's discrimination of the Appellant as a mentally disabled defendant, made a fair trial impossible. The Chamber, with the power and responsibility for ensuring fairness of the proceedings, failed. As a result, the legitimacy of the judgment in this case is compromised. For these reasons, the Defence requests that the Appeals Chamber reverse all of the Appellant's convictions.

N. Grounds 19 & 42: The Chamber erred by not relying on the content of Professor de Jong's report, and totally disregarding his report in the Judgment, but for its assessment of the Appellant at the time of the de Jong interviews[276]

[272] Decision of LRV's Request, para. 35.
[273] Trial Chamber IX, *Public Redacted Version of "Defence's request to add Expert Witness UGA-D26-P-0158 and Fact Witness UGA-D26-P-0013 to its List of Witnesses and Accompanying Documents to its List of Evidence", ICC-02/04-01/15-1559-CONF, filed on 10 July 2019*, ICC-02/04-01/15-1559-Red, para. 18.
[274] Trial Chamber IX, *Public Redacted Version of "Defence's request to add Expert Witness UGA-D26-P-0158 and Fact Witness UGA-D26-P-0013 to its List of Witnesses and Accompanying Documents to its List of Evidence", ICC-02/04-01/15-1559-CONF, filed on 10 July 2019*, ICC-02/04-01/15-1559-Red, para. 20.
[275] Trial Chamber IX, *Decision on Defence Request to Add Two Witnesses to its List of Witnesses and Accompanying Documents to its List of Evidence*, ICC-02/04-01/15-1565, para. 21.
[276] Judgment, paras 110, 2576-2578.

270. Professor de Jong was the court-appointed expert, who was requested by the Chamber to examine the Appellant in late December 2016 to early January 2017 and to submit a report. The Defence incorporates references in its Closing Brief, detailing the procedural history and findings and conclusions of his expert report.[277]

271. Professor de Jong concurred with the three fundamental diagnoses of the Defence Experts: he concluded that the Appellant suffered from [REDACTED]; PTSD and [REDACTED]. He labelled [REDACTED] and PTSD as severe, and suggested that complex PTSD may best describe the PTSD. He also agreed with the Defence experts that the Appellant suffers simultaneously from multiple mental illnesses.[278] His report was criticised by the Prosecution experts, P-0446 and P-0447, for its methodology and conclusions.[279]

272. The Judgment does not refer, in its findings or conclusions regarding Article 31(1)(a), to the evidence of Professor de Jong's almost 29-page, singe-spaced report.. The Chamber states that it "does not consider that it can rely on that report directly for its conclusions with respect to the issue at hand" because the report was prepared for a "different purpose" which did not include the Appellant's mental health at the time of his conduct relevant under the charges.[280]

273. The Chamber, setting the parameters of the charged period as the criterion of relevance, disregarded or overlooked relevant evidence in Professor de Jong's report, which it had requested.

274. This included, but is not limited to, for example, Professor de Jong's:

a. Use of a clinical history, dating back to the Appellant's childhood, as a basis to make his findings and conclusions;[281]

b. Recognition of the Appellant's cultural context in respect to the role and importance of the spiritual world.[282]

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[277] *See* references in Defence Closing brief for history and findings of Prof de Jong at paras 80, 123 (iii), 535, 540-41, 547, 562, 587, 590, 598, 609, 590, 598, 609, 627, 657-59, 661.
[278] Defence Closing Brief, para. 540.
[279] T-162, p. 27, ln. 8 – p.28, ln. 10; p. 38, ln. 3 – p.39, ln. 25; p. 44, ln. 1 – p. 45, ln. 10 and T-163, p. 19, lns 5-13; p. 29, ln. 14 – p.30, ln. 18; p. 33, ln. 11 – p. 35, ln. 25; p. 44, ln. 8 – p. 45, ln. 6; p. 47, ln. 14 – p. 48, ln. 9; p. 53, ln. 5 – p. 55, ln. 12; 82, ln. 8 – p. 83, ln. 19; *See also*, UGA-OTP-280-0674 at 0687-0690.
[280] *See*, Judgment, para. 2578; *see also*, paras 109-110.
[281] *See*, Professor de Jong's report, UGA-D26-0015-0046-R01 at 0068-R01 ('Professor de Jong Report'). The Appellant's complaints started in 1998 after he was abducted. It comes when he feels scared, it all started in the bush back then…..[during dissociative episodes] "I don't feel I have control at that time, and especially when I am sad."
[282] Professor de Jong Report, UGA-D26-0015-0046-R01 at 0063-R01 – 0065-R01 (Example of female telling the Appellant: "I want you to listen me and to do what pa dano tells you to do (pa nao means 'son of a man,' in this context referring to Joseph Kony); UGA-D26-0015-0046-R01 at 0072-R01 – 0074-R01 (five ontological dimensions found in many non-western cultures).

c. Acknowledgment of the difficulties of westerners in understanding concepts in non-western cultures,[283] echoing the point of PCV-2.[284]

275. Thus, the Chamber's "reasoning" is not based on the relevant evidence in the record, because it is selective and constitutes an error of law.[285] A reasonable trier of fact reviewing the complete (non-selective evidence) of Professor de Jong would have reached a different conclusion concerning the report's relevance to the issue presented: whether the Prosecution has disproved each and every element of the affirmative defence under Article 31(1)(a) beyond a reasonable doubt.

276. In sum, if the Chamber had considered the complete report of its Court-appointed expert, it would have materially affected the Judgment, by leading to a finding that the Prosecution did not disprove each and every element of the affirmative defences under Article 31(a) and (d) beyond a reasonable doubt.

O. Ground 20: The Chamber erred in law in the test for impermissible concurrence of crimes, *inter alia* by: 1) rejecting the principle of *ne bis in idem* as a basis to guide its assessment of concurrences and 2) in the full formation of a test for permissible concurrence of crimes, leading to prejudice and injustice to the Appellant[286]

a) Article 20 regarding the principle of *ne bis in idem* provides statutory guidance on the appropriate test for concurrence issues

277. Neither the Statute nor the RPE directly addresses how to assess the concurrence of charges or convictions within one trial. The Statute does, however, provide guidance on the appropriate test in Article 20 on *ne bis in idem*. The Chamber erred in rejecting the relevance of Article 20's provisions.

278. The Chamber found that the situation envisaged by Article 20 is 'entirely different' from one involving the concurrence of crimes in a single criminal proceeding before the the Court and concluded that Article 20 is not even guiding law for determining multiple convictions within one

[283] Professor de Jong Report, UGA-D26-0015-0046-R01 at 0070-R01, ("In other words, westerners tend to apply theories and interventions based on western concepts of autonomy and individualization. This may be out of place among individuals or patients with other views of the ego and the self, living in collective, sociocentric societies that promote interdependency.").
[284] T-176, p. 9, ln. 22 – p. 10, ln. 4.
[285] *See*, Judgment, Appeals Chamber, *Prosecutor v. Perisic*, 28 February 2013, para. 95 ("The Appeals Chamber considers that the analysis undertaken by the Trial Chamber with respect to Perisic's effective effective control might be regarded as 'reasoned' in itself. *However, in the Appeals Chamber's view, an analysis limited to a select segment of the relevant evidentiary record is not necessarily sufficient to constitute a reasoned opinion*." (italics added). In para. 96, the Appeals Chamber held that the failure to address relevant portions of testimony… constituted a constituted a failure to provide a reasoned opinion, an error of law.
[286] There was an error in the Defence Notice of Intent to Appeal. It stated that the prejudice was "in Counts 50-68." This ground pertains to all relevant counts and is corrected here in the brief.

case.[287] While Article 20 does not literally apply to cumulative convictions,[288] the Defence avers that the principle of *ne bis in idem* is the foundation for assessing concurrence issues arising within a single trial. Cases found in national law support this position. *Ne bis in idem* is commonly viewed as the basis for concurrence issues in various common law countries, such as the United States,[289] and civil law countries, such as France and Spain.[290]

279. For example, in a decision of 26 October 2016, the French Cour de cassation held, based on the principle of *ne bis in idem*, that facts which proceed inseparably from a single action with a single culpable intention cannot give rise to two criminal convictions against the same accused if they are concomitant.[291] In particular, the Cour de cassation found that, based on *ne bis in idem*, the offences of sexual harassment and sexual aggression are permissible concurrences because the same facts, conversations and acts proceeded from a single culpable intention.[292]

280. Similarly, the Spanish Tribunal Supremo held that impermissible concurrences contravene the principle of "*non bis in idem*".[293] On the basis of the principle of *ne bis in idem*, the crimes of laundering and trafficking of narcotics were an impermissible concurrence as it would lead to the punishment of the same act of enrichment twice.[294]

281. If *ne bis in idem* is the proper construct, then Article 20 provides guidance for concurrence issues and the key concept is the underlying *conduct* rather than the legal definition of the offences. The language of Article 20(1) provides that "…no person shall be tried before the Court with respect to *conduct* which formed the basis of crimes for which the person has been convicted or acquitted

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[287] Judgment, para. 2794.
[288] Article 20 of the Statute refers to subsequent prosecutions. The Appeals Chamber noted that "arguments relating to article 20 (1) of the Statute [are] misplaced" for multiple convictions within a trial. (Appeals Chamber, *Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute*, ICC-01/05-01/13-2275-Red, ('Bemba et al Appeals Judgment') at para. 748.) It did not address whether Article 20's language is a foundation for, or a guide to, an appropriate test for assessing cumulative convictions.
[289] Stuckenberg, Carl-Friedrich, 'Cumulative Charges and Cumulative Convictions' in *The Law and Practice of the International Criminal Court*, ICC-02/04-01/15-1697-AnxA, p. 841.
[290] *Infra* footnotes 291-294. *See also* María Magdalena Ossandón Widow, *El legislador y el principio ne bis in idem,* Polít. crim. vol.13 no.26 Santiago Dec. 2018 (discussing *ne bis in idem* basis for concurrence issues in Chilean law).
[291] Cour de cassation, Chambre criminelle, 26 octobre. 2016, n. 15-84.552. *« Vu le principe Ne bis in idem ; Attendu que des faits qui procèdent de manière indissociable d'une action unique caractérisée par une seule intention coupable ne peuvent donner lieu, contre le même prévenu, à deux déclarations de culpabilité de nature pénale, fussent-elle[s] concomitantes »*. (unofficially translated in text above).
[292] Cass. crim. 18 sept. 2019, n. 18-86.291.
[293] Decision of 19 November 2013, the Tribunal Supremo, Sala segunda de lo penal, segunda sentencia, n° 858/2013, *see also* Gogorza, Amane and Lacaze, Marion, *Chronique de droit espagnol,* Revue Internationale de Droit Pénal 2013/3-4, Vol. 84, pp 515 to 553.
[294] Decision of 19 November 2013, the Tribunal Supremo, Sala segunda de lo penal, segunda sentencia, n° 858/2013, *see also* Gogorza, Amane and Lacaze, Marion, *Chronique de droit espagnol,* Revue Internationale de Droit Pénal 2013/3-4, Vol. 84, pp 515 to 553.

by the Court." [emphasis added] As discussed more fully in the Defence Motion for Immediate Ruling on Standard to Assess Multiple Charging and Convictions,[295] and incorporated here by reference, the drafters of the Statute intended a conduct-based test for *ne bis in idem*. As a corollary, the assessment of impermissible concurrences should also be a conduct-based test.

282. In addition to the *ne bis in idem* support for a conduct-based approach, a conduct-based analysis is also supported by language in the Appeal Chamber's *Bemba et al.* decision,[296] as discussed below. Relying on that decision, the Chamber appropriately used a conduct-based approach, but only in a partial manner.

b) A correct application of a conduct-based test for concurrences would have resulted in fewer convictions

283. Even though rejecting a direct role for Article 20[297] in *Bemba et al.*, the Appeals Chamber recognised the potential relevance of a conduct-based approach to concurrences, in addition to an analysis of overlapping legal elements: "…it is arguable that a bar to multiple convictions could also arise in situations where the same conduct fulfils the elements of two offences even if these offences have different legal elements, for instance if one offence is fully consumed by the other offence or is viewed as subsidiary to it."[298] The language in *Bemba et al.*, is identifying the principles of specialty, consumption and subsidiarity,[299] which form the core analysis of concurrences, or *concursus delictorum*, in civil law systems.[300] While there are variations in the analysis of these principles in national systems, the basic approach of analysing the underlying conduct or facts remains the same.

284. In contrast to the limited approach of the *ad hoc* tribunals and several trial chambers of this Court,[301] the Chamber followed the language of the Appeals Chamber in *Bemba et al.*,[302] and used this broader approach in its Judgment in this case. The Defence does not raise any error with this

[295] Trial Chamber IX, *Motion for Immediate Ruling on Standard to Assess Multiple Charging and Convictions*, ICC-02/04-01/15-1697, Annex A, and Annex B.
[296] Bemba et al Appeals Judgment.
[297] Bemba et al Appeals Judgment, para. 748.
[298] Bemba et al Appeals Judgment, para. 751.
[299] Bemba et al Appeals Judgment, paras 750-751.
[300] *See*, for example, Article 8 of the Spanish Penal Code (listing specialty, absorption and subsidiarity). *See also* Gogorza, Amane and Lacaze, Marion, *Chronique de droit espagnol*, Revue Internationale de Droit Pénal 2013/3-4, Vol. 84; Stuckenberg Carl-Friedrich, 'Cumulative Charges and Cumulative Convictions' in *The Law and Practice of the International Criminal Court*, p. 843-844, ICC-02/04-01/15-1697-AnxA.
[301] *See* Trial Chamber IX, *Motion for Immediate Ruling on Standard to Assess Multiple Charging and Convictions*, ICC-02/04-01/15-1697, Annex A, and Annex B, paras 24-33. The Motion is incorporated by reference here.
[302] Judgment, para. 2795.

basic conduct-based approach in the abstract. The Defence does, however, raise errors in some of the applications of the approach, as indicated in the following paragraphs.

285. The principle of specialty or reciprocal speciality arises when an offence "falls entirely within the ambit of another."[303] This principle is essentially the same as the legal element comparison approach of the *ad hoc* tribunals,[304] but forms only the first step in a *concursus delictorum* analysis of concurrences. Using a specialty analysis, the Chamber correctly found that the war crimes of torture and cruel treatment[305] are an impermissible concurrence as well as the offences of sexual slavery and enslavement,[306] since all the elements of the second crimes are included in the elements of the first crimes.

286. The principle of subsidiarity arises when a single act appears to violate two offences, yet one of the offences "describes a less intensive form […] of the same type of criminal conduct".[307] While the Chamber correctly found that the crime against humanity of other inhumane acts is subsidiary to the crime against humanity of torture, it failed to analyse whether the crime against humanity of forced marriage as an 'other inhumane act' is subsidiary to the crime against humanity of sexual slavery.[308]

287. The principle of consumption arises where two offences protect the same interests.[309] In that situation, there is an impermissible concurrence and the result is a conviction of a single offence.[310] In current French jurisprudence, the emphasis is on whether there is a single culpable intention; nonetheless, the protection of the same social interests also remains relevant.[311]

[303] Bemba et al Appeals Judgment, para. 750.
[304] Bemba et al Appeals Judgment, para. 750. (The Appeals Chamber in *Bemba et al*. noted that the test formulated in *Delalić et al*. ('*Čelebići* case') is only applicable to situations that fall under the principle of speciality).
[305] Judgment, paras 2835, 2893.
[306] Judgment, para. 3051.
[307] Stuckenberg, Carl-Friedrich, 'Cumulative Charges and Cumulative Convictions' in *The Law and Practice of the International Criminal Court*, ICC-02/04-01/15-1697-AnxA, p. 844 *and see* 843.
[308] This error is further elaborated in Ground 22.
[309] Stuckenberg, Carl-Friedrich, 'Cumulative Charges and Cumulative Convictions' in *The Law and Practice of the International Criminal Court*, ICC-02/04-01/15-1697-AnxA, p. 843-844.
[310] Stuckenberg, Carl-Friedrich, 'Cumulative Charges and Cumulative Convictions' in *The Law and Practice of the International Criminal Court*, ICC-02/04-01/15-1697-AnxA, p. 843-844.
[311] *See* Goudjil, Sofian, *Principe* ne bis in idem: *rejet du cumul des délits de détention de dépôt d'armes et d'association de malfaiteurs*, Dalloz Actualité, 30 avril 2020.

288. The Defence contends that the Chamber erroneously found that war crimes and crimes against humanity based on the same underlying conduct are permissible concurrences.[312] The Chamber also erred in finding that sexual slavery did not consume rape.[313]

P. Ground 21: The Chamber erred in law and in fact in finding that war crimes and crimes against humanity based on the same underlying conduct are permissible concurrences

289. War crimes and crimes against humanity based on the same underlying conduct are impermissible concurrences because there is a complete overlap based on the facts in the present case. As articulated by ICTR Judge Dolenc, in a situation where the same underlying facts existed for multiple crimes, "virtually every criminal act could be classified as a violation of […] different contextual provisions"[314] and "such results are not consistent with basic principles of law."[315] It is fundamentally unfair to impose multiple convictions for the identical conduct and harm.

290. Although the Chamber analysed the protected interests at stake, which is a consumption analysis, it erred in finding that the contextual elements of war crimes and crimes against humanity protect significant different interests when occurring in a single factual situation.[316] The Chamber held that war crimes give protection to individuals in situations of armed conflict whereas crimes against humanity protect civilians from a widespread and systematic attack on a civilian population.[317] The Defence notes that each overlapping crime occurred simultaneously within a context of both an armed conflict and a widespread or systematic attack. The crucial protected interests in the single context were harms that occurred, such as the loss of life through murder,[318] the attempted loss of life through attempted murder,[319] the protection of severe physical or mental pain or suffering on persons through the crime of torture,[320] violence against physical integrity through the crime of rape,[321] deprivation of liberty and violence against physical integrity through the crime of sexual slavery,[322] and violence against physical integrity through the crime of forced pregnancy. [323] The Defence maintains that the protected interests were identical in each

[312] This error is addressed in Ground 21.
[313] This will be further elaborated in Ground 22.
[314] *The Prosecutor v. Semanza*, Separate and Dissenting Opinion of Judge Pavel Dolenc, ICTR-97-20-T, para. 16. This same position was also articulated by Judges Hunt and Bennouna in *Čelebići,* Judgement, Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, AC, IT-96-21-A, paras 22-27.
[315] *The Prosecutor v. Semanza*, Separate and Dissenting Opinion of Judge Pavel Dolenc, ICTR-97-20-T, para. 17.
[316] Judgment, paras 2820-2821.
[317] Judgment, paras 2820-2821.
[318] Counts 2-3, 12-13, 25-26, 38-39.
[319] Counts 14-15, 27-28, 40-41, 51-52, 62-63.
[320] Counts 4-5, 16-17, 29-30, 42-43.
[321] Counts 53-54, 64-65.
[322] Counts 55-56, 66-67.
[323] Counts 58-59.

overlapping pair of convictions. Moreover, if focusing on intention, in each case there is only one culpable intention for the indivisible acts that occurred, such as murder.

291. For example, the Chamber found that the elements for count 2 (murder as a crime against humanity pursuant to Article 7(1)(a) of the Statute) and count 3 (murder as a war crime under Article 8(2)(c)(i) of the Statute) were satisfied by the same underlying acts which were committed on or about 10 October 2003.[324] The underlying conduct for both counts was the killing of at least four civilians by LRA fighters during the Pajule IDP attacks[325] The acts of murder occurred simultaneously during an armed attack and a widespread or systematic attack. There is an indivisible action with one culpable intention and the same protected interest of protection of life. The same analysis pertains to each of the pairs of counts; the identical underlying conduct occurred during both an armed attack and a widespread or systematic attack. The significant protected interests is the same harm for each pair of counts.

292. The Appeals Chamber of the Special Court for Sierra Leone ('SCSL') recognised the same protection of interests in overlapping war crimes and crimes against humanity in the *AFRC* case.[326] The Appeals Chamber did not allow a conviction for forced marriage as a war crime of outrages upon personal dignity, finding that a conviction for a crime against humanity of other inhumane acts on the basis of the same facts sufficed to express "society's disapproval of the forceful abduction and use of women and girls as forced conjugal partners…"[327] In this case, too, the social interests and the condemnation of the acts should be satisfied by one conviction of an atrocity crime for the same conduct.

293. As a consequence of the error in allowing a concurrence for war crimes and crimes against humanity based on the same underlying conduct, one of the two convictions should be reversed

[324] Judgment, para. 2826.
[325] Judgment, para. 2826, referring to para. 152 of the Judgment.
[326] SCSL, Prosecutor v. Brima et al., AFRC case, SCSL-2004- I 6-A, 3 March 2008, para. 202.
[327] In making this finding, the SCSL Appeals Chamber recognised that, if based only on the legal elements, multiple convictions would be permitted because of the different contextual elements for war crimes and crimes against humanity *see* para. 202. For other factual examples of consumption, s*ee* Cass. Crim. 11 mars 2020, FS-P+B+I, n. 19-84.887 , paras 19-24 (the offence of possession and detention of arms and the offence of belonging to a criminal association is an impermissible concurrence since the possession and detention of arms is included in the offence of belonging to a criminal association and proceeds from the same culpable intention); *see also* Goudjil, Sofian, *Principe* ne bis in idem: *rejet du cumul des délits de détention de dépôt d'armes et d'association de malfaiteurs*, Dalloz Actualité, 30 avril 2020 (discussing arms case). *See also* Cass. crim. 14 nov. 2019, F-P+B+I, n. 18-83.122 particularly paras 45-51 (impermissible concurrence of attempted assassinations and assassinations, destruction and degradation committed with an explosive substance and the transport of an explosive weapon being a grenade; the transport of the grenade was a necessary predicate operation to commit the other offence committed on the same day with a single guilty intention). *See also* Crim. 24 janv. 2018, FS-P+B, n. 16-83.045.

for the following pairs of counts: Counts 2-3; 4-5; 12-13; 14-15; 16-17; 25-26; 27-28; 29-30; 38-39; 40-41; 42-43; 51-52; 53-54; 55-56; 58-59; 62-63; 64-65; and 66-67.

Q. Ground 22: The Chamber erred in law and in fact in finding that rape and sexual slavery are a permissible concurrence, and in failing to find other impermissible concurrences, including but not limited to, forced marriage and sexual slavery. This caused impermissible prejudice to the Appellant and materially affected Counts 50-68

294. The Chamber erroneously found that sexual slavery did not consume rape as the Chamber did not analyse whether there were different protected interests at stake or an identical intention for both crimes.[328] The Chamber used the same underlying acts for rape (counts 53, 54, 64 and 65) and for sexual slavery in order to conclude that it was of sexual nature (counts 55 and 56, 66 and 67).[329] The protected interest of rape is the violence against physical integrity whereas for sexual slavery it is the violence against physical integrity and the deprivation of liberty. The crime of rape is consumed by the crime of sexual slavery since both crimes overlap in terms of the protected interest. Moreover, there is a single culpable intention. In this case, rape is a necessary predicate offence for the commission of the crime of sexual slavery, particularly since the Chamber found that the acts of sexual nature for the crime of sexual slavery were the acts of rape.[330] Based on both the protected interests and the single culpable intention, the crimes of rape and sexual slavery are an impermissible concurrence and convictions for Counts 53, 54, 64 and 65 should be reversed.

295. Alternatively, in the event that the Appeals Chamber finds that rape and sexual slavery protect different interests, the Defence contends that in the present case, the crime of rape is subsidiary to the crime of sexual slavery. More specifically, since the acts of a sexual nature for the crime of sexual slavery are solely based on the acts of rape, the Defence avers that sexual slavery in this case is a more intensive form of rape.

296. The Chamber correctly found that the crime against humanity of other inhumane acts pursuant to Article 7(1)(k) of the Statute is subsidiary to the crime against humanity of torture.[331] However, the Chamber failed to analyse whether forced marriage as an "other inhumane act" is subsidiary to the crime against humanity of sexual slavery. The Defence agrees with the Chamber that Article

[328] Judgment, paras 3037-3039.
[329] For counts 53-54 (rape) see Judgment paras 3039-3040; for counts 55-56 (sexual slavery) *see* Judgment, para. 3047 in which the Chamber considers the same underlying facts being that Dominic Ongwen had sex by force as in Judgment, para. 3040; for counts 53-54 (rape) *see further* Judgment, para. 3039. *See also* Judgment, para. 3079 for counts 64-65 (rape) and counts 66-67 (for sexual slavery).
[330] *See* analogous case on an impermissible concurrence where there is a necessary predicate offence in Cass. crim. 14 nov. 2019, F-P+B+I, n. 18-83.122 particularly paras 45-51, *supra* fn. 327.
[331] Judgment, paras 2837 and 2944.

7(1)(k) of the Statute is residual in nature,[332] and further contends that forced marriage and sexual slavery share the same protected interest of violence against physical integrity and the deprivation of liberty. Therefore, concurrence between these crimes is impermissible and convictions on Counts 50 and 61 should be reversed.

297. In conclusion, the Chamber's errors of law materially affected the impugned decision since without them, it would have rendered a substantially different Judgment.[333] Moreover, the errors of fact by the Chamber were to such an extent that an objective and reasonable person would find serious doubts regarding the findings.[334] Had the Chamber properly applied the law, there would have been significantly fewer convictions. As a matter of fairness, an accused should not have to answer to crimes for the same conduct more than once. The number of convictions further affects the stigma of a criminal judgment and potentially the sentence, early release and other future consequences.

R. Ground 23: The Chamber erred in law and procedure in finding that it does not have an obligation to state the outcome of its evidentiary rulings, including probative value and relevance, for every item of evidence in its judgment (or annex to it) and that it only needs to refer to the assessment of evidence as appropriate

298. The approach of the Chamber can be summed up as the following: it adopted a submission approach which entailed a holistic assessment during the deliberations phase of every item of evidence submitted rather than excluding evidence based on their relevance and probative value during the trial.[335] Following this assessment, the Chamber did not explicitly address the outcome of such evidentiary rulings in its judgment,[336] nor in an Annex to it.[337] The combination of not making evidentiary rulings during trial and failing to specify evidentiary rulings in the Judgment violates the rights of the Appellant to defend the case against him and to appeal erroneous evidentiary decisions.

299. The Appeals Chamber in the *Bemba* Interlocutory Decision stated that "irrespective of the approach the Trial Chamber chooses, it will have to consider the relevance, probative value and the potential prejudice of each item of evidence at some point at the proceedings – when evidence

[332] Judgment, paras 2837 and 2944.
[333] Bemba Appeals Judgment, paras 36-37.
[334] Bemba Appeals Judgment, paras 38-46.
[335] Judgment, paras 234, 237, 239-240.
[336] Judgment, para. 247.
[337] Judgment, fn. 266.

is submitted, during or at the end of the trial."[338] The Appeals Chamber in *Bemba et al.* held that trial chambers "may" but are not obligated to rule on the relevance, the probative value and the prejudice of every item of evidence submitted during its assessment of the guilt of innocence of the accused.[339] The holding of *Bemba et al.* conflicts with the holding of the *Bemba*, to the extent that Judge Eboe-Osuji referred to the decision as an attempted reversal of the in the *Bemba* by a differently constituted Appeals Chamber.[340]

300. These two holdings lead to an impasse. The Defence has differentiated the two holdings, arguing that the findings in *Bemba et al.* apply only to Article 70 proceedings. This distinction was rejected by the Chamber on the basis that the argument was exclusively based "on a remark expressed in a minority opinion" and that "all references to the legal framework of the Court, the intentions of their drafters [...] are relevant to any type of criminal proceedings conducted at the Court."[341]

301. The Defence maintains that there is a distinction between Article 70 and Article 5 proceedings.[342] Aside from the difference in gravity of Article 5 and 70 crimes, which the Statute clearly differentiates, the RPE dedicate an entire separate Chapter (Chapter 9) for Article 70 offences.

302. The Chamber's interpretation of the submission approach and its obligations with regards to evidentiary rulings would create a two-tier system. If parties are assigned a trial chamber that adopts an admission approach, those parties will know with certainty the outcome of the evidentiary rulings for every item of evidence, as the chamber will exclude evidence based on their relevance and probative value during the trial.[343] Under the Chamber's interpretation of its obligations under a submission approach, parties assigned to such a trial chamber will never know the full outcome of the Chamber's holistic assessment for every item of evidence submitted.[344] This creates a disequilibrium between the two approaches, which is inconsistent with *Bemba*'s position that the end result remains the same since every Trial Chamber will have to rule on the

[338] *Bemba* case, Appeals Chamber, *Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence"*, ICC-01/05-01/08-1386, ('Bemba Interlocutory Decision'), para. 37.
[339] Bemba et al Appeals Judgment, para. 597.
[340] *Bemba* case, Appeals Chamber, *Concurring Separate Opinion of Judge Eboe-Osuji*, ICC-01/05-01/08-3636-Anx3, ('Judge Osuji Concurring Separate Opinion'), para. 297.
[341] Judgment, fn. 252.
[342] Judgment, fn. 252. *See Bemba* Appeals Chamber, *Separate Opinion of Judge Van den Wyngaert and Judge Morrison*, ICC-01/05-01/08-3636-Anx2, ('Separate Opinion of Judge Van den Wyngaert and Judge Morrison'), paras 17-18.
[343] Judgment, para. 239.
[344] Judgment, para. 247. *See also*, para. 239.

relevance, probative value and the potential prejudice of every item of evidence "at some point in the proceedings".[345]

303. The Chamber maintains that its submission approach is consistent with, *inter alia*, Rule 64 RPE.[346] In making this conclusion, the Chamber misinterpreted the law. Rule 64(2) requires reasons for ruling on evidentiary matters and that the reasons are placed in the record. As expressed by Judge Eboe-Osuji, it is contradictory to suggest that a "Trial Chamber is entirely absolved from making evidential rulings".[347]

304. Moreover, even if rulings on specific items of evidence are discretionary as a general matter, *Bemba et al.* made clear that, under the circumstances of an individual case, a trial chamber is obligated to rule on individual items of evidence if it is necessary to ensure the rights of the accused.[348] In this case, with over 4200 items of evidence submitted,[349] the rights of Mr Ongwen to defend himself against the evidence and now to determine on what grounds to appeal were violated.

305. Even within the framework laid out in the *Bemba et al.* decision, the Chamber erred in failing to specify how it assessed the evidence in this case. The Appeals Chamber emphasised that a trial chamber fails in fulfilling its mandate under Article 74(5) if it "fails to explain sufficiently why it considers an item of evidence—whether documentary or testimonial—to be relevant and with sufficient probative value to be relied upon for its factual analysis (or *vice versa*) despite issues raised at trial in that regard…"[350] Without greater detail in the judgment, the Defence was unable fully to identify errors in the Chamber's determinations of relevance, probative value and potential prejudice of items of evidence.

306. In summary, had the Chamber either made rulings during trial or provided the annex that the Defence requested, detailing the outcome of its evidentiary rulings for every item of evidence submitted, the rights of the Appellant would have been substantially protected. The lack of this

[345] Bemba Interlocutory Decision, para. 37. *See also* Judge Osuji Concurring Separate Opinion, para. 296.
[346] Judgment, para. 241.
[347] Judge Osuji Concurring Separate Opinion, para. 303; Judges Morrison and Van den Wyngaert are in agreement, *see* Separate Opinion of Judge Van den Wyngaert and Judge Morrison, para. 18.
[348] Bemba et al Appeals Judgment, para. 603
[349] For example, of 2507 (*see* ICC-02/04-01/15-580) and 1006 (*see* ICC-02/04-01/15-654) items requested to be submitted into evidence by the Prosecution via 'bar table motions' only 47 were rejected by the Chamber; *See also* Ongwen Further Submissions, paras 24-25.
[350] Bemba et al Appeals Judgment, para. 597.

annex has a ripple effect as it now places the Defence in a precarious position during the appeals process as it does not know with certainty which items were found to be inadmissible.

S. Grounds 26 & 47: Errors in respect to the Appellant's childhood, abudction and life in the LRA

a) Introduction

307. The two Grounds deal with the manner in which the Chamber assessed and evaluated, or the fact that it failed or disregarded to assess and evaluate the evidence of the impact of the age, abduction, and indoctrination of the Appellant and his childhood development within the LRA; together with the enduring effects of the same, on the Appellant; when making an evaluation of his affirmative defences; especially in regard duress.

308. The errors of the Chamber materially and fundamentally affected its final finding and conclusion and decision, thereby leading it the wrong decision that the defence of duress is not available to the Appellant.

309. The Defence recalls that the court record shows that the Appellant spent the first nine of his 27 years in the LRA as a child soldier. These were the childhood development and formative years of his life. From evidence on record these were some of the years when LRA war machinery, steeped in spiritualism and application of the LRA brutal disciplinary regime.

310. A human being cannot be detached from his past. It was therefore pathetic, insensitive and factually and legally erroneous for the Chamber to, at paragraph 2592 of the Judgment, to focus its assessment of the affirmative defence of duress only on the Appellant's situation as Battalion and Brigade Commander during the charged period, saying that his "childhood experience in the LRA is not central to the issue". Just like the aggregate past experiences of members of different communities in the world form the differences in their customs and cultures, the conduct of a person at every period in his life is, to a considerable extent, informed by his past experiences.

311. It is therefore further submitted that, to properly assess the conduct of the Appellant during the charged period, the Chamber ought to have considered the background experiences of the Appellant from his childhood immediately before and after his abduction, the vicissitudes and vacillations of his life under the coercive environment in the bush, his traumatic multiple injuries, the consequences of his contact with Gen. Salim Saleh, including his detention, his peculiar cum special attributes and the attention he was given, leading to his spectacular rise in rank, individually analysed as follows:

b) Immediately before and after abduction

312. The Chamber found an "abundance of evidence" that the phenomenon of indoctrination was the greatest tool used by the LRA to prevent escape and to enforce other disciplinary measures in the LRA. However when it came to application of this to the Appellant, the Chamber, at paragraph 2592 of its Judgment misconstrued the Defence reliance on evidence in respect to the age, abduction, and indoctrination of the Appellant and his childhood development within the LRA, and arrived at the wrong conclusion that the Defence was asking to find that the threat to him started from the time of his abduction. What the Defence was asking the Court to consider, was not the threat to the Appellant during those early stages, but the enduring impact on him up to and including the period of his charged conduct, including the impact of the age, abduction, and indoctrination of the Appellant and his childhood development within the LRA. Had the Chamber correctly considered the impact of the relevant factors above, it would have arrived at a different conclusion supporting the defence of the Appellant in respect to affirmative defences.

313. The Chamber erred in law and in fact when it chose to ignore the early childhood background of the Appellant given by Johnson Odong (D-0008), uncle of the Appellant, P' Atwonga Okello (D-0012), teacher and uncle of the Appellant, Joe Kakanyero (D-0007), relative of the Appellant, all of which it accepted as credible. Had the Chamber considered this background evidence, together with that of D-0006, the Appellant's cousin who was later abducted and informed the Appellant about the brutal killing of both his parents, it would have found that this impacted on his mind not to take the risky path of escape since he had no home to go back to.

314. The Chamber erred in law and in fact when it chose to ignore the early life experiences of the Appellant as an abducted child soldier who it found underwent the process of indoctrination that started with the so-called 'taking out the civilian mentality' from the abductee by brutal caning and later being forced to kill peers who attempted to escape. From the beginning he was told who his enemies were – UPDF and all civilian collaborators who he must kill on encounter. It is submitted that, had the Chamber considered this background evidence, it would have found that this impacted on the Appellant and left an indelible mark and; at least, informed part of the Appellant's conduct during the charged period.

315. In the same breath, the Chamber, at paragraph 2582, quoted and misapplied the principle enunciated in the *Commentary of the International Criminal Court: Observer's Notes, Article by Article, and* arrived at the wrong conclusion that the Appellant was "'only' coercively enrolled generally but not forced to commit the charged crimes" by the LRA. In the instant case, the

Appellant's abduction was specific; and by the time he was abducted the LRA had a standing order to abduct, have matrimonial union with the opposite sex, loot food and other items; and to kill those identified to him as enemies. The crimes the Appellant was charged with were those covered under the LRA standing orders, which were clear and unequivocal. It is submitted that, had the Chamber considered the influence of the instructions given to the Appellant at the time of his abduction, including the standing orders, it would have found that they impacted on the Appellant and left an indelible mark him and; at least, informed part of the Appellant's conduct during the charged period.

c) The vicissitudes and vacillations of his life under the coercive environment

316. The Chamber erred in law and in fact when it chose to ignore its own findings[351] about the consistent evidence of disciplinary measures being applied in the LRA "in an immediate, crude and brutal manner. It was not based on clear rules and procedures but on arbitrariness and fear."

317. The Appellant lived in a coercive environment where he crossed big rivers, climbed mountains, walked hundreds of miles across the boarders of Uganda and Sudan, experienced brutal executions of commanders such as Otii Lagony and Odonga Canogura. He above all, lost hope of ever regaining his lost life opportunities.[352] The Appellant fought many battles that exposed him to death on multiple occasions. Had the Chamber considered this background evidence, it would have found that it impacted on the Appellant and at least informed part of his conduct during the charged period.

d) The peculiar cum special attributes and the attention he was given, leading to his spectacular rise in rank

318. The Chamber ignored testimonial evidence of the special attributes of the Appellant pointing to his leadership ability that put him apart from the rest of the other child soldiers from his early age. The Chamber erroneously ignored/avoided/failed to take into account evidence of important milestones in the childhood development of the Appellant and instead incorrectly concluded that the Appellant's rapid promotions were due to his loyalty to Kony and being a willing participant in the LRA.

319. Had the Chamber considered this background evidence, it would have found that they impacted on the Appellant and; at least, informed part of the Appellant's conduct during the charged period.

[351] Judgment, paras 957, 2587.
[352] T-83, p. 15, ln. 23 – p.17, ln. 15. Rwot Oywak at one of the meetings at Palabek testified about the devastating effect on the mental and physical wellbeing of children abducted and Ongwen in particular.

SECTION: THE CHAMBER ERRED BY REJECTING THE APPELLANT'S ARTICLE 31(1)(A) AFFIRMATIVE DEFENCE[353]

T. Grounds 27, 29, 31, 32, 35-41

a) Introduction

320. An affirmative defence is a "defense in which the defendant introduces evidence which, if found to be credible, will negate criminal liability or civil liability, even if it is proven that the defendant committed the alleged acts."[354] A defendant must only introduce the evidence, or raise the issue and has no other burden. Then, the onus is on the Prosecution to refute each element of the defence beyond a reasonable doubt.[355]

321. In the *Ongwen* case, the Defence gave notice of its intent to raise the affirmative defences of Article 31(1)(a) and (d) on 9 August 2016.[356] Subsequently, on 5 December 2016, the Defence filed the Defence Experts' First Report.[357] At this point, the burden or onus to disprove each and every element of the affirmative defences rested with the Prosecution, and never shifted back to the Defence. As the Defence argued in its Closing Brief, the Prosecution failed to disprove the elements of Article 31(1)(a) beyond a reasonable doubt.[358] The Defence incorporates these arguments by reference in this Appellate Brief.

322. Recognising that the Judgment responds to the Defence arguments in its Closing Brief, the Defence will endeavour to focus on the Judgment's conclusions which involved errors of law, fact

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[353] This Section covers errors in the Judgment, paras 2450-2580, reflected in Defence Grounds of Appeal 27, 29, 31-32 and 35-41. In respect to Ground 35 (Judgment, paras 2464-2469), the Defence notes that the Chamber is correct that P-0445 acknowledged the limitations of not having a clinical interview with the client. The Defence amends para. 657 in the Defence Closing Brief to state that two of the Prosecution Experts, P-0446 and P-0447, failed to acknowledge the absence of a clinical interview as a shortcoming. A third Expert, P-0445 acknowledged the limitations of not conducting a clinical interview. In respect to Grounds 31 and 32, arguments refuting the Chamber's conclusions on the evidence of P-0446 and P-0447 are found in the Defence Closing Brief, including at paras 541, 590, 609-615, 623, 638, 644, 656, 670. We also refer the Appeals Chamber to the cross-examination of P-0477 during the rebuttal case.

[354] Affirmative Defense | Wex | US Law | LII / Legal Information Institute (cornell.edu)

[355] *See*, Grounds 7 and 8 above.

[356] Trial Chamber IX, *Defence Notification Pursuant to Rule 79(2) of the Rules of Procedure and Evidence*, ICC-02/04-01/15-518, para. 2; Trial Chamber IX, *Defence Notification Pursuant to Rules 79(2)and 80(1)of the Rules of Procedure and Evidence*, ICC-02/04-01/15-517, para. 1.

[357] Trial Chamber IX, *Public Redacted Version of 'Defence Request for a Stay of the Proceedings and Examinations Pursuant to Rule 135 of the Rules of Procedure and Evidence' filed on 5 December 2016*, ICC-02/04-01/15-620-Red; *See also*, Defence Experts' reports submitted into evidence by the Defence, including Brief Medical Report for Dominic Ongwen (9 February 2016) UGA-D26-0015-0154; First Psychiatric Report (6 December 2016) UGA-D26-0015-0004; Second Psychiatric Report (28 June 2018) UGA-D26-0015-0948; and Supplemental Report (25 January 2019) UGA-D26-0015-1219; Rejoinder Rebuttal (UGA-D26-0015-1574). All of these reports are confidential.
The Defence Experts' C.V.s submitted into evidence are: CV of D-41 (UGA-D26-0015-0849) and Bio Sketch of D-41 (UGA-D26-0015-1470); CV of D-42 (UGA-D26-0015-0856) and Bio Sketch of D-42 (UGA-D26-0015-1472).

[358] Defence Closing Brief, paras 535-603.

and procedure, using the Judgment's framework of the factors for the unreliability of the Defence Experts' evidence.

b) The Chamber erred in law and fact in its unequivocal rejection of the Defence Experts' evidence

323. The Chamber rejected all of the Defence Experts' evidence (as well as that of Professor de Jong), concluding that it could not rely on any evidence from D-41 or D-42, the Defence Experts.[359]

324. As was the case with D-0133, the Defence's child soldier expert, there were no challenges to the expert qualifications of D-41 and D-42 ('Defence Experts'), nor were there objections from the Prosecution or Victims' representatives as to the admissibility of their expert reports.[360] The Prosecution accepted the qualifications of the Defence Experts. Both of the Defence Experts are Ugandan psychiatrists, with over 50 years collectively of experience in psychiatry, including in clinical and academic settings and decades of work in forensic psychiatry.[361]

325. Instead, the Prosecution adopted the strategy of attacking D-41's and D-42's expert status through the critiques of their methodology, notably in the reports of P-0446 and P-0447.[362] But the third Prosecution Expert, P-0445, did not criticise D-41's and D-42's methodology; in fact, she relied on their clinical interviews with the Appellant, as well as those of Professor de Jong, as a basis for making her own findings and conclusions.[363]

326. The Judgment, adopting the Prosecution arguments and P-446's and P-447's expert reports, disregards the content of the Defence Experts' findings and conclusions solely on the basis of their methodology.[364] There are factual errors in respect to the evidence of methodology which invalidate the Judgment's conclusions, and resulted in the rejection of the Article 31(1)(a) defence.

327. Moreover, the Judgment fails to provide a reasoned opinion as to its conclusions on methodology. As a result, the Judgment simply chooses the Prosecution expert evidence over the Defence expert evidence, without explaining how the alleged methodological errors contributed to the Defence Experts' findings and conclusions. This is tantamount to the error cited by the ICTY Appeals

[359] Judgment, para. 2574.
[360] Brief Report, UGA-D26-0015-0154; First Report, UGA-D26-0015-0004, Second Report, UGA-D26-0015-0948; Supplemental Report, UGA-D26-0015-1219; Rejoinder Report, UGA-D26-0015-1574.
[361] Defence Closing Brief, para. 604.
[362] The Defence incorporates herein its critique of the findings and conclusions of P-0446 and P-0447 in its Closing Brief.
[363] *See* P-0445's Forensic Psychiatric Report for Dominic Ongwen, UGA-OTP-0280-0732 at 0732-0733.
[364] *See* Defence Closing Brief, paras 651-653 which argues, based on the transcripts, that the Prosecution did not disprove beyond a reasonable doubt that the Defence Experts' methodology was faulty so as to invalidate their conclusions.

Chamber in *Perisic*, where it held that an analysis limited to a select segment of the relevant evidentiary record is not necessarily sufficient to constitute a reasoned opinion.[365]

328. The Defence incorporates its arguments and references in its Closing Brief.[366] In this Appeal Brief, the Defence addresses the six factors in the Judgment as to why it found the Defence Experts' evidence to be unreliable.[367]

c) The Chamber erred in concluding that the Defence Experts blurred the line between treating and forensic experts (Factor #1)[368]

i. There is no evidence that D-41 and D-42 were treating physicians

329. The Judgment concludes it cannot rely on the evidence of D-41 and D-42.[369] Its first argument is that the Defence experts blurred the line between treating physicians and forensic experts, which led to a loss of their objectivity. The Chamber relies on the Prosecution's Closing Brief, which make the same assertion.[370]

330. The Prosecution's conclusion, which is not footnoted, cites no authority for its premise that the alleged blurring of the line leads to loss of objectivity. Moreover, the Chamber points to no evidence to support this conclusion.

331. To the contrary, D-41 makes it very clear that the Defence Experts were not treating physicians. A treating physician provides treatments and medications to a client which means actually being involved in the treatment. The providing of recommendations for treatments and medications is something very different.[371] As D-41 explained, "…when we see patients across the world we make recommendations for them to get treatment."[372] This indicates that part of the responsibility of the psychiatrist who evaluates a patient, is to also recommend treatment based on the professional evaluation.

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[365] *Prosecutor v. Perisic*, IT-04-91-A, Appeals Judgment, 28 February 2013, para. 95.
[366] *See* Defence Closing Brief, paras 529-674, Grounds for Excluding Criminal Responsibility.
[367] Judgment, paras 2528-2573.
[368] Judgment, paras 2528-2531.
[369] Judgment, paras 2527, 2531.
[370] Prosecution Closing Brief, para. 374.
[371] Prof de Jong, the Court appointed Expert, includes in his Report a section on Advice on Intervention at UGA-D26-0015-0046-R01 at 0053-R01 in which he assesses the current Detention Centre strategy and suggested other therapies which may be considered for 2017/2018 – based on his assessments of Appellant. Similarly, D-41 and D-42 suggest recommendations based on their examination of Appellant at the end of their first (UGA-D26-0015-0004 at 0017-0018) and second reports (UGA-D26-0015-0948 at 0980).
[372] T-249, p. 31, lns 6-7.

332. But D-41 gave evidence that he was not the provider of any suggested or recommended treatment for Appellant. Where and how a patient received treatment depended on the circumstances, and – in this case – treatment for the Appellant was up to the Court:

> …Sometimes they get the treatment under our watch. Sometimes they get the treatment from home. Sometimes they get it from a hospital; sometimes they get if from a prison... that is decided by a number of factors. *And again, I think the Court would decide where – where the client gets treat from.*[373] [emphasis added]

333. Thus, D-41 drew a distinction between his role in assessing the Appellant and the Court which decides how treatment is provided.

334. Similarly, it was part of the psychiatrist's responsibility to communicate with the persons providing treatment for the Appellant and share any professional insights and observations.[374] As indicated in the Detention Reports in evidence, all treatments and medications have been decided by the medical officer and administered by ICC-DC health personnel.

335. In sum, the Defence submits that there was no "blurring" and that the Chamber's conclusion is not based on the evidence. The Chamber, moreover, fails to provide a reasoned statement on the "blurring" point, making it impossible for a reasonable trier of fact to discern how it reached this conclusion. The conclusion was a key factor in the Chamber's rejection of the Article 31(1)(a) defence, and, hence, materially affected the Judgment.

ii. The Chamber's factual misrepresentations

a. The usage of the term "therapeutic alliance" does not make D-41 or D-42 treating physicians

336. The Judgment's argument, at paragraph 2529, that the Defence Experts were in a therapeutic alliance with the client, and that D-41 accepted the Prosecution's suggestion that he was a treating physician misrepresents the record.[375]

337. Looking at the referenced sections cited by the Chamber, D-41 testified that the report of their first interaction with the client, dated 9 February 2016, was used to establish a therapeutic alliance so that they would be able to gather more information at other times from the Appellant.[376] It cannot

[373] T-249, p. 31, lns 6-12.
[374] *See*, paras 403-404.
[375] Judgment, para. 2529.
[376] T-248, p. 87, lns 17-25; p. 88, lns. 6-9.

be inferred, from the use of the term "therapeutic alliance" and D-41's evidence, that this meant that D-41 was a treating physician.

338. Similarly, an accurate reading of D-41's testimony at paragraph 2529, footnote 6822, reveals that it is the OTP who describes him as a "treating physician" in the formulations of its cross-examination question.[377] Contrary to the Judgment's conclusion, there is no evidence that D-41 is in agreement with this suggestion. In fact, when asked by the OTP about treatment and rehabilitation for Appellant in Uganda, D-41 responds:

> A: I think he can still get some treatment in his current state in this place… And then whatever the Court decided, then we'll see whether he continues to get the treatment from home or where it is…[378]

339. In sum, the evidence does not support either the blurring of the distinction between a treating and forensic physician, or D-41's acceptance of the OTP suggestion that the Defence Experts were treating physicians.

b. The Judgment points to no evidence to support its conclusion that D-41 and D-42 were not objective, or that their objectivity was compromised

340. The Defence Experts were transparent to the Court in respect to how they got involved in the *Ongwen* case, and frankly disclosed their personal circumstances during the conflict which they had to overcome to carry out their professional tasks. D-42, for example, explained how his family in the village was affected by the crimes of the LRA. Yet, D-42 affirmed his oath as a medical practitioner and psychiatrist "to help even my enemies when I can."[379] D-41 acknowledged that he looked at the client and the area and time period, and thought "this could have actually been me."[380]

341. As the Defence previously explained, the Defence Experts' professional credibility and integrity were magnified by their frank discussion about their individual circumstances.[381] Thus, the Chamber's conclusion is not supported by the evidence.

[377] T-249, p. 29, ln. 24 – p. 30, ln. 2.
[378] T-249, p. 30, lns 7-11.
[379] T-250, p. 16, ln 16 – p. 18, ln 1.
[380] T-248, p. 42, ln. 8 – p.43 ln. 2.
[381] *See*, Defence Closing Brief, paras 604-608.

d) The Chamber erred in concluding that the Defence Experts did not apply scientifically validated methods and tools in reaching their conclusions (Factor #2)[382]

342. The Judgment concludes, based on the critique in P-0447's report of the methodology of the Defence Experts, that there are "major doubts" as to the validity of their methods.[383]

343. First, the Judgment repeats P-0447's criticism that the Defence experts failed to use scientifically validated methods. This is simply not based on the evidence, as cited in the Defence Closing Brief and footnoted below:

> The Defence Experts, both of whose expertise included decades of teaching and mentoring medical students – in Uganda and throughout the world – described their methodological approach in great detail. They presented cogent evidence on the issues of corroboration, various diagnostic scales, psychometric testing and the DSM and the multi-axial diagnostic approach. The Defence experts used the DSM as a living manual and described their approach to psychometric tests. And, while each is the author of a diagnostic scale related to two of the diagnoses they identified in the client – suicide ideation (the intention to kill oneself) and depression – they chose not to use their own scales because it was a waste of time and unnecessary to take the client through a 35 item screening tool when he was, in fact, providing information that he was obviously suicidal. In respect to eliminating alternatives, Dr Akena addressed that it was not a limitless exercise with the example of depression and the Second Report specifically discusses elimination of alternatives presented in this case.[384] (footnotes omitted)

344. The evidence shows that there are differences in the approach of the P-0447 and the Defence Experts on the value of the clinical interview, and the use of psychometric testing. But these are differences among experts, not grounds to invalidate methodology.[385]

345. Second, P-0447's criticism, relied on by the Judgment at paragraph 2533, that the Defence Experts used outdated classifications, i.e. the Diagnostic and Statistical Manual of Mental Disorders-IV

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[382] Judgment, paras 2532-2535.
[383] Judgment, para. 2535.
[384] Defence Closing Brief, para. 651; *See also*, D-42's evidence at T-254, p. 12, ln. 24 – p.14 ln. 8 explaining methodology and the role of psychometric tests within that methodology; Second Report, UGA-D26-0015-0948 at 0970-0973; Dr Akena: T-248, pp 31-40(generally), pp 60-63 (on DSM), pp 82-85 and pp 116-120 (on psychometric testing and use re diagnosing malingering); Prof Ovuga on psychometric tests T-254, pp 12-13, Prof Ovuga: T-250, pp 34-35 (multi-axial diagnoses); T-249, pp 82-85; T-249, pp 116-120;T-249, pp. 82-85, 116-120; T-250, pp 11-12. Prof Ovuga authored 3 tests, including one to detect suicidal individuals, an instrument to describe the impact of trauma on former child soldiers or abducted children in a government rehabilitation school outside Gulu town, and one to measure the severity of PTSD as related to trauma over specific periods in their lifetime; Dr Akena developed a test for depression for illiterate population, see UGA-D26-0015-0849, at 0851; T-250, p. 12; T-248, pp 63-64; Second Report, UGA-D26-0015-0948, at 0969 (regarding malingering); at 0975 (regarding epilepsy).
[385] The Defence incorporates arguments in its Defence Closing Brief at paras 651-660.

(DSM-IV) rather than the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* ("DSM-5"), is based on a misrepresentation of the Defence Experts' evidence as well as the DSM-IV and DSM-5.[386]

346. The Defence Experts state that "we report our findings according to DSM-5 (American Psychiatric Association, 2013)."[387] Thus, this is contrary to the erroneous assertion by the Judgment and P-0477 that their findings are based on dated or outmoded classifications.[388] The Defence Experts also state they "present the summary of diagnoses using the DSM-IV-TR to ease understanding of the psychiatric problems we identified."[389]

347. The Defence Experts used the concept of multi-axial diagnoses from the DSM-IV-TR. As the DSM-IV explains, a multiaxial system provides "a convenient format for organizing and communication clinical information…" [390] It is a method to present information, including diagnostic criteria. But the diagnostic criteria are still defined by the DSM-5.

348. The Defence Experts chose this multi-axial approach because it examined mental disorders in a "holistic and comprehensive way." [391] This enabled them to present the Appellant's mental disorders in a "biological, psychological and social-economic-cultural perspective."[392]

349. For example, the fundamental diagnostic criteria for 300.14 for Dissociative Identity Disorder are included in both the DSM-IV and DSM-5.[393] But the DSM-5, building on its predecessor volume, has added additional points, including, for example, the role of cultural and religious practice.[394]

350. It is erroneous to conclude, as both P-0447 and the Judgment do, that a format for organising and communicating information is the same as diagnostic criteria for a disorder. This is not based on the evidence, and not consistent with the DSM's explanation.

Is there a test for malingering?

[386] Judgment, para. 2533.
[387] Second Psychiatric Report, UGA-D26-0015-0948 at 0971.
[388] *See* reference to DSM-5 criteria for depressive disorder in Second Psychiatric Report, UGA-D26-0015-0948 at 0952.
[389] Second Psychiatric Report, UGA-D26-0015-0948 at 0971.
[390] DSM-IV-TR, American Psychiatric Association, 2000, p. 27.
[391] Second Psychiatric Report, UGA-D26-0015-0948 at 0970.
[392] Second Psychiatric Report, UGA-D26-0015-0948 at 0970.
[393] *See*, DSM-IV-TR, p. 529 and DSM-V, p. 292.
[394] In fact, the DSM-5 includes Culture-related Diagnostic Issues as a standard section for all diagnoses. Although similar cultural considerations also found in DSM-IV-TR, the DSM-5 includes an extensive section on Cultural Formulation, including cultural concepts of distress and a Cultural Formulation Interview, pp. 749-759.

351. In their Rejoinder Rebuttal,[395] the Defence Experts explained there was no test for malingering, contrary to P-0447's claims.[396] They discussed three types of tests that they use as psychiatrists: screening, diagnostic and rating tests. The Defence Experts assessed no clinical features and indications for malingering, and questioned P-0447 as to which of the three types of test he would have applied.[397]

352. The Chamber relied on P-0447's position on psychometric tests as a factor in finding the Defence Experts evidence unreliable and completely rejecting all of their findings and conclusions.

353. However, the Chamber erred in failing to indicate how it reached its preference of P-0447's position versus the Defence Experts' positions, and why it made no finding of reasonable doubt, based on the latter's credible evidence.

e) The Chamber erred in law in fact by accepting the Prosecution's submission and P-0447's evidence that the "symptoms recorded in the reports of Professor Ovuga and Dr Akena are 'sometimes incoherent' and the diagnoses 'inconsistent'" (Factor #3)[398]

354. The Chamber latched onto P-0447 critique of "incoherence" and "inconsistency" to buttress its finding of unreliability. P-0447 concluded that the Defence Experts' report was "insufficient or inconsistent or unfounded or sloppy in almost every aspect" and "does not fulfil the minimal quality criteria of a professional forensic report according to the current state of the art."[399]

i. The Chamber erred in its representation of the evidence on record

355. The "inconsistency" referred to in the Judgment, paragraph 2537, is about assessing and interpreting the evidence presented by the Appellant as to his mood or feeling at a particular time.[400]

356. First, it is not accurate for the Chamber to state that the Defence Experts' explanation that the Appellant was masking symptoms "is not specifically explained in the original report, [and] the ex-post explanation is unconvincing."[401] In the First Report, the Defence Experts concluded that the Appellant's outward presentation [cheerful and humorous] "is deceptive and cover ups the intense emotional turmoil he experiences almost every day."[402] Masking is a form of covering

[395] Rejoinder Rebuttal, UGA-D26-0015-1574 at 1580.
[396] Report on Second Psychiatric Report, UGA-OTP-0287-0072 at 0087.
[397] *See*, Rejoinder Rebuttal UGA-D26-0015-1574 at 1579 – 1580; *See also*, Defence Closing Brief, paras 651-653.
[398] Judgment, paras 2536-2544.
[399] Report on Second Psychiatric Report, UGA-OTP-0287-0072 at 0098.
[400] Judgment, para. 2537.
[401] Judgment, para. 2537.
[402] UGA-D26-0015-0004 at 0013; *See also*, Defence Closing Brief, para. 554.

something up, and deceives the observer. Hence, what s/he observes does not represent the reality experienced by the person being observed.The Chamber erred, then, in basing its assessment on a factual misstatement of the evidence.

357. Secondly, D-42 gave evidence, which was not challenged, that what appeared as inconsistencies in mood (for example, appearing happy but in actuality, claiming to be sad) were not inconsistencies but an example of reaction formation.[403] This occurs when a person visibly shows the opposite emotion that s/he may be feeling inside. This concept was endorsed, as well by Professor de Jong.[404]

ii. The Chamber erred in concluding that the Appellant did not have suicidal tendencies

358. At paragraph 2538 of the Judgment, the Chamber poses a contradiction between having suicidal tendencies and also being motivated by a survival instinct.[405]

359. The evidence from the Defence Experts demonstrates that there is no contradiction between suicidal tendencies or ideation and the urge, motivated by obsessive compulsive disorder, to go into battle. As Professor de Jong pointed out, the Appellant went into battle to escape his life, hoping to be killed.[406]

360. A reasonable trier of fact would raise questions about P-0447's analysis. P-0447 asks: if the Appellant had such an acute risk of suicide, how did he manage to survive?[407] Essentially, P-0447 is negating the suicide ideation diagnosis based on the fact that the Appellant made eight attempts and survived? P-0447 write in his First Report:

> [REDACTED].[408]

361. In other words, according to P-0447, if the Appellant had succeeded, his suicide success would have made the diagnosis credible.

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[403] T-254, p. 12, ln. 24 – p. 14, ln. 8.
[404] *See* Defence Closing Brief, para. 627, fn. 1022 and 1023 - transcript references for D-41 (T-255, pp 3-6; *see also* Rejoinder Report, UGA-D26-0015-1574 at 1578; and T-254, pp 13-14) and Prof de Jong (Dr de Jong Expert Report, UGA-D26-0015-0046, at 0049-R01, p. 5). *See also*, Defence Closing Brief, para. 628 which provides evidence that LRA abductees were punished for showing their feelings, a factor which is important in determining the accuracy of one's observations.
[405] Judgment, para. 2538.
[406] *See* Defence Closing Brief, para. 649; *See also*, references on suicide attempts in First Report, UGA-D26-0015-0004 and Second Report, UGA-D26-0015-0948; Prof de Jong's Expert Report, UGA-D26-0015-0046-R01 at 0059-R01; First Report, UGA-D26-0015-0004 at 0009; Second Report, UGA-D26-0015-0948, at 0967-00968.
[407] UGA-OTP-0280-0674 at 0688-0689.
[408] UGA-OTP-0280-0674 at 0691.

362. At paragraph 2539, the Chamber rejects the Defence Experts' evidence that mental illnesses are not incompatible with functionality. The Chamber's argument is based on the positions of P-0446 and P-0447. Their positions are addressed extensively in the Defence Closing Brief section entitled: "Prosecution Myth #2: Those who suffer from mental illness are dysfunctional."[409] The Defence concluded that the Prosecution did not disprove beyond a reasonable doubt that mental illness and functionality can co-exist.[410]

363. The Defence Experts were not alone in their assessments about mental illness and functionality. Professor Wessels, the Victims' expert, also contradicted the Prosecution's position; he explained that even if someone shows resiliency, resiliency is not a permanent state and dysfunction can occur if risk factors increase.[411] This presents evidence that even if the Appellant appeared at a particular time to be resilient and functional, the adverse environment of the LRA meant that – at any time – he could be overwhelmed by risk factors and become dysfunctional.

364. At paragraph 2540, the Chamber notes there is a contradiction between the Defence Experts' diagnosis of dissociative amnesia in its Second Psychiatric Report, and what is written in its Brief Report in 2016 that the Appellant had no amnesia about events in the LRA.[412]

365. The Chamber's conclusion is not accurate because it does not refer to the complete evidence on the issue of amnesia. In the Second Psychiatric Report, at page 24, there are a number of examples of memory loss under dissociative amnesia.[413] These include memory loss for events associated with a period of loss of consciousness in 1996, 1997, 1999, 2022, 2005, and 2009 following battles.[414] Hence, the Chamber's contradiction is not based on the evidence.

366. In paragraph 2541, the Chamber highlights P-0447's point that the Appellant, "smartly dressed" and "in a happy mood" could follow an interview for three hours contradicts the clinical picture of a person who is suffering from a severe mental disorder.[415]

367. Given the evidence from the Defence Experts,[416] it is incomprehensible to the Defence that the Judgment would give credibility to an observation based on a) outward appearances; and b) the

[409] Defence Closing Brief, paras 637-644.
[410] Defence Closing Brief, paras 637-644.
[411] Defence Closing Brief, para. 644.
[412] Judgment, para. 2540.
[413] UGA-D26-0015-0948 at 0971.
[414] UGA-D26-0015-0948 at 0971.
[415] Judgment, para. 2541.
[416] T-249 p. 89 ln. 21 – p. 91 ln 6. Here, D-41 testified, for example that medical students are shocked when they first walk into a psychiatric ward: all "appears" normal on the surface.

notion that one who is severely mentally ill "looks" a certain way. Empirically, there are countless examples of well-known people who commit suicide; the newspapers and tabloids are full of headlines that so-and-so appeared normal, went to work every day, dealt with the press, etc. Thus, this level of analysis is not within, in the Defence's view, the parameters of evidentiary value, and it was an error for the Judgment to rely on it.

368. At paragraph 2542, the Chamber erroneously concludes that there is "no indicia for… discontinuity" to support that the Appellant suffers from dissociative identity disorder.[417] Although the Defence Experts present significant evidence of two Dominics – A and B,[418] the Judgment relies on its section on corroborative evidence, at footnote 6853. These are the positions of P-0446 and P-0447 – that if the Appellant were mentally ill, someone around him would have observed and identified symptoms. This is discussed below under Factor #4.

369. In evidentiary terms, the Chamber relies on circumstantial evidence. However, as shown by the Defence Experts' evidence, especially in respect to masking and reaction formation, the Chamber's inculpatory inference (rejecting the affirmative defence) is not the only reasonable inference available to be drawn from the evidence.[419] Therefore, as a matter of law, it cannot be concluded that the Prosecution disproved the affirmative defence beyond a reasonable doubt.

370. It is not, as the Chamber concludes at paragraph 2544, that the Defence Experts failed to take account of contradictions or explain them.[420] It is more accurate to say that the Defence Experts' explanations were totally rejected by the Chamber. The Chamber, moreover, never explains, pursuant to Article 74(5) of the Statute, why it rejected, for example, masking and reaction formation.

371. Similarly, although relying on P-0447's remarks on "incoherency" and "insufficiency" and "sloppy" as an assessment of the Defence Experts' evidence, the Chamber never points out what is sloppy or insufficient.

372. P-0447's choice of the term "sloppy" to describe the Defence Experts' report was unfortunately used by him more than once in his evidence. At the end of his Rebuttal Report, he characterised their report as "insufficient, or unfounded, or inconsistent, or contradictory or sloppy in every aspect and does not fulfil the minimal criteria of a professional forensic report according to current

[417] Judgment, para. 2542.
[418] *See* Second Psychiatric Report, UGA-D26-0015-0948 at 0952 to 0957 on the two Dominics.
[419] Bemba et al Appeals Judgment, para. 868.
[420] Judgment, para. 2544.

state-of-the art."[421] He misrepresented testimony of the Defence Experts about the ICC-DC reports in his Rebuttal Report, accusing the Experts of "degrading their [the ICC-DC] clinical ratings as sloppy clinical notes."[422] No such evidence was presented by the Defence Experts. On cross-examination, P-0447 conceded that D-41 did not criticise the ICC-DC notes as sloppy.[423] Finally, he admitted that although the Defence Experts and Professor de Jong reached the same conclusions in respect to the mental illnesses the Appellant suffered from, that "sloppy" only applies to the Defence Experts and not to Professor de Jong.[424] P-0447 does not explain the disparate descriptions. D-42, in his rejoinder testimony, criticised P-0447's characterisations of "deviant" and "sloppy" as applied to the Defence Experts' work, noting that these descriptions did not reflect the standard of criticism within an academic, professional environment.[425]

f) The Chamber erred in law and fact by finding that the conclusions of the Defence experts are invalidated by their failure to take into account other sources about the Appellant which were available to them (Factor #4)[426]

373. The criticism of failure to corroborate is built on factual misrepresentation that the Defence Experts: a) interviewed collateral sources; and b) met with professionals treating the Appellant, and reviewed their notes from the ICC-DC.

i. The Defence Experts interacted with the experts at the ICC-DC in the very beginning of their mandate and attempting to continue these interactions

374. In the First Report, at page 2, under Methods of Work, the Defence Experts describe their meeting in November 2016 with the Appellant's Clinical Psychologist and indicate that there was "broad agreement between us and the Clinical Psychologist on the nature of [the Appellant's] mental health problems" and they discussed medication options on the local market, which appear in the recommendations section of the First Report.[427] In the next days, they reviewed the translated Clinical Psychologist's notes and found the information was "to a large extent similar to ours."[428]

375. D-42 testified that later, both he and D-41 tried several times in early 2019 when they were in The Hague to contact the Appellant's treating physicians at the ICC-DC. D-42 testified, when

[421] Report on Second Psychiatric Report, UGA-OTP-0287-0072 at 0098.
[422] Report on Second Psychiatric Report, UGA-OTP-0287-0072 at 0081.
[423] *See* Defence Closing Brief, paras 611-612 for argument and transcript references; *See also* T-253, p. 81 ln. 6 – p. 86 ln. 16. The Defence notes that the disrespect communicated by using the term "sloppy," was unfortunately repeated by the Prosecution's characterisation of D-42's testimony as "nonsense." The Prosecutor apologised, claiming that he was suffering from hypoglycemia as the reason he made the remark. *See* T-251, p. 31 ln 23 – p. 34. ln. 20.
[424] T-253, p. 31, ln 9 – p.32, ln. 21
[425] T-254, p. 8, lns 5-25.
[426] Judgment, paras 2545-2557.
[427] UGA-D26-0015-0004 at 0005.
[428] UGA-D26-0015-0004 at 0005.

questioned on cross-examination whether he requested any recordings or any video clips of the UPDF compound showing the Appellant when he surrendered, that "he was told in no uncertain terms on one occasion that 'you are a Defence witness. I am not going to give you material that belongs to the Prosecution.'"[429] He asked that Prosecutor what else would he have done, if he received this same message.[430] D-42 continued that despite this response from the treating physician, he and D-41 continued to ask for material.[431] During their second visit, they were given clinical notes in Dutch and the Defence Experts sat with an interpreter so they could understand the material.[432]

376. In sum, the Chamber's conclusion that the Defence Experts did not "engage seriously with the clinical notes of the Detention Centre psychiatrist" at paragraph 2550 factually misrepresents the record.[433] The Defence Experts reviewed the clinical notes which were given to them, and continued to try to obtain materials, but to no avail. The Chamber (erroneously) faulted the Defence Experts for their lack of "detailed discussion" on the content of the clinical notes, when it was evident that access to the notes was not within their control.[434]

ii. The Defence Experts sought collateral sources

377. At paragraph 2553, the Judgment recognises that the Defence Experts interviewed collateral sources in their First Report.[435] In fact, they conducted interviews with one of the Appellant's wives, one of Kony's wives, who was a relative of the Appellant, a senior LRA commander and a subordinate of the Appellant.[436] The Defence Experts noted that two of these people suffered from severe mental illness: one had severe PTSD and the other was depressed and suicidal. Both had not been assessed for mental illness and were not being treated.[437]

378. What was corroborated by these sources about the Appellant is significant: the rituals and indoctrination and brainwashing of new abductees; the gruesome punishments that abductees were forced to mete out to those who tried to escape but were caught; the use of torture within the LRA; the supernatural powers and brutality of Kony; the Appellant's personality as someone who liked to help his colleagues; observations of the Appellant's suicidal behaviour and dissociative

[429] T-251, p. 17, lns 1-7.
[430] T-251, p. 17, lns 1-7; T-254, p. 36, ln. 6 – p.37 ln. 6.
[431] T-251, p. 17, lns 16-22.
[432] T-251, p. 17, lns. 16-22; *See also* T-254, p. 36, ln. 6 – p.37 ln. 6.
[433] Judgment, para. 2550.
[434] Judgment, para. 2550.
[435] Judgment, para. 2553; First Report, UGA-D26-0015-0004 at 0020-0023.
[436] *See*, Defence Closing Brief, paras 616-617.
[437] *See*, UGA-D26-0015-0081 at 0084.

episodes; the Appellant's attempts to escape the LRA and the intense scrutiny from Kony's intelligence network; and their perceptions of what this case against the Appellant was about.[438]

379. In addition, during its case, the Defence presented the evidence of Mr Joe Kakanyero, who was abducted by the LRA at the same time as the Appellant, on his way to school and spent the first few months with the Appellant; then they were split up.[439] He described being forced to watch, with the Appellant, the LRA soldiers beheading and hacking of the body of one of the commanders, Omony from Patiko, who had tried to escape.[440] Mr. Kakanyero's evidence was corroborative evidence of the crimes of the LRA, and the traumatic events experienced by the Appellant when he was abducted.

380. In sum, the issue was not about the quantity of clinical notes reviewed, or the number of persons interviewed by the Defence Experts – it was about the findings and conclusions of the corroborative evidence. The record supports that corroborative evidence was presented by the Defence, but the conclusions contradicted the Judgment's fundamental conclusions: (a) that the Appellant's abduction was not relevant to the charged period,[441] and that what every abductee experienced – the indoctrination, horrors, punishments and brainwashing – did not apply to the Appellant.[442] The Chamber carves out an "Ongwen Exception" to rationalize its failure to base its conclusions on the evidence.

iii. The Chamber erred in its reliance on evidence from lay witnesses that Appellant exhibited no symptoms of mental illness[443]

381. The Chamber erred in recounting the testimony of D-41 and D-42 as "indicat[ing] that they agreed that albeit lay persons could not make a diagnosis, they would have noted at least some symptoms of the mental disorders in question.[444] If one reads the testimony cited in full, and in its context, a different picture is presented.

382. At paragraph 2500, footnote 6769, the Chamber cites P-42's testimony. The Expert is responding to a Prosecution questions on DSM-5 Criterion B for PTSD. He testified:

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[438] *See*, UGA-D26-0015-0081
[439] Defence Closing Brief, paras 618-621.
[440] Defence Closing Brief, paras 618-621.
[441] Judgment, paras 27, 2592.
[442] Judgment, para. 2658 ("There is also no evidence indicating that the belief in Joseph Kony's spiritual powers played a role for Dominic Ongwen…").
[443] Judgment, paras 2497-2521.
[444] Judgment, para. 2500, fn. 6769.

> I would expect they would notice… they would regard what they notice as the consequences of his involvement in… bush or bush activities. They would interpret this as spirit possession, signs of spirit possession and they would expect that if only rituals could be conducted, Mr Ongwen would be normal. But otherwise, I cannot say that they did not notice.[445]

383. D-42 agrees that someone living in a person's household would notice if the person was going through some kind of a traumatic event.[446] But what D-42 explains is that the person would perceive what s/he is noticing is a consequence of the Appellant's life in the bush. In fact, the person would interpret this as spirit possession and consider the Appellant to be acting normally. Hence, the observer would not conceptualize or perceive what s/he sees as a symptom of mental illness.[447]

384. The Chamber, however, either could not or did not consider the cultural aspect of a person's observations, since it supported the Prosecution's view that "the possibility that witnesses may regard symptoms of mental disorders as spirit possession is immaterial."[448]

385. The DSM-5 does not appear to agree with the Chamber as to the "immateriality" of spirit possession. It recognises that symptoms which appear as possession need to be carefully scrutinised and categorised. In its section on Dissociative Identity Disorder, the DSM-5 notes that "…the majority of possession states around the world are normal, usually part of spiritual practice, and do not meet the criteria for dissociative identity disorder".[449] This assessment is consistent with P-42's evidence that a person would view symptoms as spirit possession and consider the Appellant to be normal.

386. The Judgment's inference, based on circumstantial evidence, that a person would see symptoms and think "mental disorder" is clearly not the only reasonable inference from the evidence.[450] Thus, a reasonable trier of fact, reviewing the same evidence, would reach a different conclusion

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[445] T-251, p. 52, lns 12-16.
[446] T-251, p. 52, lns 9-16.
[447] *See*, T-254, p. 26, ln. 20 - p. 27, ln. 8. In addition, D-42 was asked by Defence counsel whether a person seeing Appellant acting violently one day, and then playing with children in a non-violent manner the next day would view these different behaviours as a sign of mental illness. He replied that it was tough to respond, because of the level of mental health literacy and person may not have been able to tell. But the angry, violent Dominic B always appeared on the battlefield, and violence in that situation was not viewed as abnormal. *See also*, T-251, p. 35, lns 2-8.
[448] Judgment, para. 2501.
[449] DSM-5, 5th Edition, 2013, pp 293-294.
[450] Bemba et al Appeals Judgment, para. 868.

which is not consistent with the Judgment's conclusion that lay persons would be able to see symptoms of mental disorders.[451]

387. At paragraph 2500, footnote 6769, the Judgment's reference to D-41's testimony addresses the issue of whether a mentally diseased person can be functional. The Defence incorporates its extensive arguments in its Closing Brief on this issue.[452]

388. Although D-41 admits that friends or lovers or others around a person will notice if someone is not sleeping, or not doing his or her job, it cannot be concluded from his testimony that this means that these phenomena are symptoms of mental illness or that they are perceived as such by observers.

389. First, it is the Prosecution, not the witness, who tries to link symptoms and mental illness in the question's formulation:

> Q. I'm not suggesting that the people around Mr Ongwen would have diagnosed the nature of this illness, but these building blocks, these criteria, they are everyday things aren't they? If you get angry, if you can't sleep, if you can't do your job, that's the way mental illness affects you in ways that ordinary people, your colleagues, your friends, your lovers, they notice?
>
> A: That's true.[453]

390. Secondly, the beginning of D-41's testimony emphasises the need to have someone who is competent to make a clinical judgment. He affirms this by saying:

> …We have situations where loved ones bring patients to us, they have lived with this patient for 10, 15 years. You go back, you find the patient has been depressed for six years nonstop. They didn't even know that. But then we tell them and they are shocked.[454]

391. In sum, the conclusion that this evidence is a basis from which to conclude that lay persons can observe symptoms of mental illness as symptoms of mental illness, even though they cannot make a diagnosis, is not the only conclusion from the evidence. In fact, an accurate reading of the

[451] Judgment, para. 2500.
[452] Defence Closing Brief, paras 637-650 in the section entitled, The Prosecution did not disprove beyond a reasonable doubt that mental illness and functionality can co-exist.
[453] T-249, p. 92, lns 17-21.
[454] T-249, p. 92, lns 8-11.

evidence cited indicates that there is reasonable doubt that lay people can observe symptoms of mental illness.

392. Thus, the Chamber's factual errors in representing the evidence led it to an erroneous conclusion, especially at paragraphs 2500 and 2501, which resulted in rejecting the affirmative defence of Article 31(1)(a) and selectively making inculpatory conclusions on which the Judgment is based.

g) The Chamber erred in concluding that D-41's and D-42's "dismissal" of Appellant's malingering was a "major factor militating against reliance on their reports"[455]

i. Introduction

393. The arguments addressed herein cover the Judgment, paragraphs 2558-2668. These arguments were previously raised by the Prosecution at trial, and the Appellant, for the purposes of refuting them, incorporates its analysis and arguments from its Closing Brief.[456]

ii. The Chamber failed to accurately represent the Prosecution and other evidence adduced at trial

394. At paragraph 2559, the Chamber states that "the experts who gave evidence… generally agreed that malingering… is a known risk in mental health assessments."[457] First, the evidence (testimony and report) of P-0445 does not include any comments on the issues of malingering or self-reporting. Professor de Jong, the Court-appointed Expert, whose report was received into evidence, also did not discuss the issue.

395. Malingering, however, was a central issue for two of the Prosecution experts: P-0446 and P-0447.[458] As the Defence has previously stated, P-0446 led the charge of malingering, although she acceded that it was not easy to maintain, "…You can occasionally produce symptoms that look like mental illness, but to maintain that is impossible."[459]

396. Let's assume, *arguendo*, that the Appellant was malingering: by the Prosecution's own methodology, he would have had to maintain alleged symptoms throughout more than two decades in the LRA, plus for the last six years since his surrender. A quarter of a century is a long time to

[455] Judgment, para. 2568.
[456] Defence Closing Brief, paras 667-673, section entitled "the Prosecution failed to disprove beyond a reasonable doubt that Mr Ongwen was not malingering and that his self-reporting could not be relied upon as a factor in diagnosing his mental illness."
[457] Judgment, para. 2559.
[458] *See*, T-162, p. 18, lns 2 – 16; p. 38, ln. 11 – p. 39, ln. 25; T-163, p. 53, lns 5 - 12 and p.60 lns 1 - 24; UGA-OTP-0287-0080 at Section 2.10, -0081 to -0082 (WP Report on 2nd Psychiatric Report); T-252, p. 10, ln. 3 – p. 11, ln. 15. T-253, p. 55, ln. 6 – p.56, ln. 13.
[459] T-163, p. 45, lns 16-20.

maintain what the Prosecution deems as "feigned" or "faked" symptoms. This is an unlikely feat, especially considering that the conditions of life for the Appellant during that period were fraught with a myriad of adversities. Therefore, the Prosecution's and Judgment's thesis that the Appellant faked his illnesses for almost 26 years is not believable.

397. There is the obvious question as to how and where – in the bush – the Appellant, whose education was disrupted when he was abducted in 1987, would have learned about mental illness symptoms. But, *arguendo*, let's assume that somehow the Appellant acquired this information. According to the theory of "faking it," one would have expected the Prosecution to elicit evidence that those persons close to the Appellant noticed some symptoms. But, the Prosecution did not pursue this route: instead, it confronted, for example, D-42 on cross-examination with witness extracts that the Appellant liked to joke around and play – conduct on its face does not appear to signal mental distress.[460] One would expect at least some Prosecution adduced evidence that the Appellant was exhibiting signs of mental distress or illness.

398. The Prosecution cannot have it both ways: it alleges malingering to discredit any finding of mental illness, yet claims that the Appellant's faked symptoms were apparently, invisible to those around him. Its own Prosecution experts P-446 and P-447 staunchly supported the view that lay people could identify visible symptoms of mental illness. In conclusion, the Appellant is alleged to have faked his symptoms, but also to have made them invisible.

iii. The assessment of malingering and possible motivation

399. The Defence Experts repeated their methodology for assessing malingering many times during their extensive testimony.[461] As pointed out in the Judgment, at paragraph 2563, they considered the diagnosis and excluded it.[462] D-42 expounded on the Defence Experts' perspectives on malingering, and their relation to the Appellant's diagnosed dissociative disorder.[463] The Defence Experts were convinced that the Appellant was not malingering because his first dissociative episode, followed by amnesia, occurred "during instruction to him and his team to go and carry out an assignment [in the LRA]."[464] There were other episodes during the charged period where

[460] T-251, p. 39, ln. 19 – p. 41, ln. 17.
[461] *See*, Defence Closing Brief, paras 668-669, 672 and their respective footnotes.
[462] Judgment, para. 2563.
[463] T-254, p. 15, ln. 13 – p. 20, ln. 1.
[464] T-254, p. 19, lns 8-11.

the Appellant would ask his friends after a battle – what happened? The Appellant was "asking other people to confirm that during that period is what made us accept his descriptions."[465]

400. But, the Chamber was not satisfied with their expert opinion and made a finding which rejected their conclusion and questioned their choices about standardised methods.[466]

401. The Defence Experts opinion were given no weight, which seems imprudent at the very least: D-41 and D-42 were the only two experts who spent many hours, on different occasions, throughout a three year period, interviewing the Appellant.[467]

402. Moreover, there was no unanimity among Prosecution experts.[468] Looking at the grouping of experts as a whole: two (P-446; P-447) said "yes" to malingering; two (D-41; D-42) said "no"; and two took no position (P-445; Professor de Jong).This "line-up" of expert opinion would suggest two things: that there was reasonable doubt that the Appellant was malingering and that the Prosecution had not disproved the affirmative defence beyond a reasonable doubt.

403. As to possible motivation to malinger, the Judgment clearly took a different position than the Defence Experts: at paragraph 2562, footnote 6895, the Judgment quotes D-41's evidence that the Appellant had nothing to gain from malingering, based on their assessment.[469] The Chamber contends that the potential gain was exclusion of criminal responsibility.[470]

404. First, the Chamber's view is not supported by the record: the "gain" perceived by the Judgment must be assessed in terms of evidence on record that is totally disregarded. This includes, for example, statements from the Appellant that he wanted to be normal and understand what he was going through, and why he was ill;[471] repeated attempts to take his own life[472] and diagnoses of suicide ideation[473] that would not indicate he was content with his life, as well as indications that the Appellant expressed the desire to get better, noting that malingers were not looking for help.[474]

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[465] T-254, p. 19, ln. 25 – p. 20, ln. 1.
[466] Judgment, para. 2566.
[467] Judgment, para. 2563; *See also*, T-251, p. 14, ln. 7 – p. 23, ln. 8.
[468] Two expert witnesses (P-446 and P-447) said "yes" to malingering and one expert witness (P-445) was silent on the issue, and in fact, had used clinical interviews from the Defence Experts and Professor de Jong to formulate her own conclusions.
[469] Judgment, para. 2562.
[470] Judgment, para. 2562.
[471] T-248, p. 55, lns. 12-15.
[472] First Report, UGA-D26-0015-0004, 0009. Supplemental Report, UGA-D26-0015-1219; UGA-D26-0015-0948, 0987 .
[473] UGA-D26-0015-0046-R01 at 0058-R01; UGA-D26-0015-0004 at 0017 – 0018.
[474] T-248, p. 56, lns 11-13.

405. Yet, the Chamber rejected the Defence Experts' evidence, and made no finding of reasonable doubt. Such a finding would have been a correct application of the standard of proof beyond a reasonable doubt, espoused in theory in the Judgment.

406. Second, the risk of a misdiagnosis in respect to malingering was well-known to the Defence Experts, and a safeguard to ensuring that they took the appropriate professional measures in making their assessment.

407. D-41 was quite aware of the dangers of misdiagnosing malingering, not only to the patient but also the physician. He testified:

> …malingering is dangerous. It's extremely dangerous to malinger both for you as the professional, who is looking for this information, because should somebody find out that the client has been malingering, then your credibility really goes down the drain. And we were not willing to – to go through that.[475]

408. Two Prosecution experts disagreed with the Defence experts. The Chamber chose the viewpoint of the Prosecution experts to find the evidence of the Defence experts unreliable, rather than acknowledge that it was based on credible evidence and presented reasonable doubt as to the Prosecution's on malingering.

409. The Chamber, then, erroneously adopted the malingering diagnosis as a factor in rejecting the affirmative defence. The Chamber failed to apply the legal standard of beyond a reasonable doubt correctly to the evidence, and erred as a matter of law. The Chamber, moreover, did not explain why it chose the Prosecution evidence over the Defence Experts' evidence and did not present a full and reasoned statement, as per Article 74(5) of the Statute.

h) The Chamber erred in law and fact by not relying on the Defence Experts' report because its findings were not anchored on the relevant period and the more specific factual contexts in which Dominic Ongwen acted"[476]

410. First, it is factually inaccurate for the Chamber to conclude that the Defence Experts' findings were not "anchored on the relevant period" and in the Appellant's "specific factual contexts."[477] The evidence is that the Defence Experts' were well aware of the charged period,[478] and in fact, information in their reports from the Appellant includes dates within this period. For example, sections on Dissociation and Dissociative Identify Disorder chronicle specific experiences dating

[475] T-248, p. 56, lns 15-19.
[476] Judgment, paras 2569-2573.
[477] Judgment, para. 2569.
[478] T-254, p. 19, lns 8-11.

as far back as 1996 and through 2005.[479] Thus, the Chamber's conclusion, at paragraph 2570, that the Defence Experts failed to acknowledge the challenge of the charged period, and this significantly impaired the reports' value, is unfounded based on the evidence.[480]

411. The specific information in their reports indicates that the Defence Experts assessed the Appellant as a whole person to make their findings and conclusions. To paraphrase P-0445, the Appellant did not drop from the sky as an adult (referring to his chronological age above 18).[481] His personhood was formed by all the prior experiences in his life.

412. But the Chamber took a different approach: repeatedly it concluded, for example, that the Appellant's abduction was not relevant to its determinations.[482] We note, however, that the Defence Experts stressed that his mental illnesses occurred after his abduction; therefore, the reference point of the abduction was relevant to his development at all levels.[483]

413. As the Judgment points out, Article 31(1) of the Statute states "at the time of the person's conduct." But it cannot be assumed that the most narrow, circumscribed definition of time period was envisioned by the drafters of the Statute. It is only logical that what a person is at a given point in time, is based on a sum of her or his previous history.

414. Second, at paragraph 2569, the Chamber erroneously concluded that the Defence Experts' reports included very general analyses and findings.[484] If one looks at the sections of the reports, it is evident that findings and conclusions are based on specific detailed information. Thus, the Chamber's conclusion is unfounded.

415. Third, the Chamber's criticism that the Defence Experts did not address the "more specific factual contexts in which Dominic Ongwen acted"[485] comes impermissibly close to criticising the Defence Experts for not questioning the Appellant on his criminal responsibility and presenting his answers, as admissions related to his conduct.

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[479] Second Psychiatric Report, UGA-D26-0015-0948 at 0966.
[480] Judgment, para. 2570.
[481] T-166, p. 55, ln. 106 - p. 56, ln. 2.
[482] Judgment, paras 27, 2592.
[483] This is further explained by D-42 at T-254, p. 31, ln. 4 – p. 33, ln. 21, who clarified that Appellant's conditions arose after, not from his abduction, indicating that other factors after the abduction influenced the development of mental disorders.
[484] Judgment, para. 2569.
[485] Judgment, para. 2569.

416. In addition to the fact that the Appellant's charged crimes were not within their terms of reference, it is disingenuous for the Chamber to reject an expert report because it failed to provide information to the Court about the client's views on conduct and his mental state in relation to the charged crimes. The Defence has no obligation to do this. It is up to the Prosecution to prove the elements of *mens re*a and *actus reus* of a charged crime beyond a reasonable doubt. Thus, the Chamber's view impermissibly shifts the burden of proof beyond a reasonable doubt from the Prosecution to the Defence.

i) Conclusion

417. The Judgment's conclusions on the affirmative defence of Article 31(1)(a) of the Statute were based on a total acceptance of the Prosecution Experts' evidence, and especially on the rebuttal evidence of P-447[486] and an unequivocal rejection of the Defence Experts based on methodology.

418. The Chamber's conclusions were marked by legal, factual and procedural errors as discussed in this Brief.

419. But the predicate error was that the Judgment's analyses and conclusions did not correctly apply the standard of proof beyond a reasonable doubt as solely the burden of the Prosecution. There are no findings that the Prosecution disproved the elements of the Article 31(1)(a) affirmative defence beyond a reasonable doubt. In addition, there are no findings that Defence Experts' evidence provided any reasonable doubt *vis-à-vis* the Prosecution Experts' conclusions that the Appellant did not suffer – at any time in his life – from mental illness. In this light, the Chamber's assessment and reliance on the evidence of P-0446[487] and P-0447[488] is unfounded and resulted in errors that materially affected the outcome of the Judgment, i.e. the rejection of the Appellant's affirmative defence under Article 31(1)(a) and conviction for 61 crimes and multiple modes of liability under Article 25.

U. Ground 28: The Chamber disregarded evidence of the abduction of the Appellant, relied on the same evidence to convict and failed to issue a reasoned statement

420. The decision of the Chamber that the evidence of the abduction, indoctrination and childhood experience of the Appellant is not central to the issues[489] was not reasonable and unwarranted. No reasonable trier of fact would have come to this conclusion on the basis of the evidence on the trial

[486] *See*, Grounds 7, 8, 10 (in part), 25 & 45 regarding the legal errors of the Chamber in accepting the Rebuttal Evidence without requiring that the Prosecution meet the legal criteria for rebuttal and permitting the Defence to respond.
[487] Judgment, paras 2470-2478.
[488] Judgment, paras 2486-2496.
[489] Judgment, paras 27, 2592.

record. Upon disregarding this central evidence, the Chamber used evidence of uncharged crimes and acts outside the temporal and geographic scope of the case, which were committed by Kony and the LRA, to convict or support the conviction of the Appellant.[490] This caused prejudice which rendered the entire trial unfair and the convictions unsafe.

421. Additionally, the Chamber provided no reasoned statement substantiating its decision which profoundly impacted the judgment, warranting an appellate review.[491] The evidence of the abduction, indoctrination and childhood experience in the LRA was central to the Appellant's defences and material to the affirmative defences under Article 31(1)(a). The Defence also submits that the decision by the Chamber to reject the entire Article 31(1)(a) defence without a reasoned statement was a miscarriage of justice, violated Article 74(2)(5) of the Statute and the Appellant's fair trial rights guaranteed by Article 62(2), Article 67(1) and internationally recognised human rights under Article 21(3).

422. A central piece of the Appellant's Article 31(1)(a) defence was presented by witnesses and Defence experts. The central piece was that the Appellant's mental illness stemmed from his abduction by the LRA around 1987, continued through his years in the LRA and still plagues him today. Mental disease destroyed the Appellant's capacity to appreciate the unlawfulness or nature of his conduct and capacity to control his conduct to conform to the requirements of law.

423. The Defence also explained the effect of the command, control and spiritual powers of Kony on the Appellant as a centre of this Defence.[492] The evidence established that Kony used these powers to force the Appellant to function as his command and control tool. The Appellant functioned as Kony's command and control tool to the extent that, based on the evidence, a reasonable trier of fact would have concluded that the Appellant's will was irrelevant when he executed the orders of Kony and standing rules of the LRA, which Kony relied on to indoctrinate him and other abductees, subjecting him to duress.[493] The Chamber misdirected itself by disregarding this evidence which, if assessed by a reasonable trier of fact, would have significantly affected the outcome of the trial in favour of the Appellant.

424. The injustice and prejudice suffered by the Appellant was accentuated by the finding that the conditions of recruitment, initiation and service in the LRA could be relied on for obedience in the

[490] Judgment, paras 2957, 2914, 2964, 3011.
[491] Bemba Appeals Judgment, para. 66.
[492] Judgment, paras 2643 and 2644.
[493] Defence Closing Brief, paras 484-485, 487-489, 496, 501, 537, 547, 568-569, 572-574, 586, 671, 713 and 715.

execution of orders to the extent that LRA fighters functioned as a tool of the Appellant, making their will irrelevant.[494]

425. Although Kony was solely responsible for this policy, which predates the abduction of the Appellant and of which he was a victim, the Chamber relied on it to convict or support the conviction of the Appellant. The Chamber relied on incriminating evidence of uncharged crimes, abductions, indoctrination and other crimes committed by the LRA and Kony to convict or support the conviction of the Appellant by association.

426. The centrality of the evidence of abductions, initiation and indoctrination, condition of service in the LRA and other violations with enduring effects on victims, including the Appellant, was disregarded. This evidence was disregarded when it favoured the Appellant and unjustifiably asserted and relied on by impermissible inferences or imputations to incriminate, convict or support conviction for all charges under Article 25(3)(a) of the Statute. The Chamber provided no reasoned statement for the adverse imputation or impermissible inferences it made from the finding to arrive at wide ranging convictions in the attacks in the IDP camps of Pajule, Odek, Lukodi and Abok, SGBC, and the conscription and use of child soldiers in hostilities in Northern Uganda from 2 July 2002 to 31 December 2005.[495]

427. The Chamber provided no reasoned statement on this inconsistent and prejudicial assessment of evidence. By failing to provide a reasoned statement, the Chamber violated its statutory obligation to guarantee the fairness of the trial (Article 67(1)), to provide an assessment of the totality of the evidence in the case, to provide to a reasoned statement (Article 74(2)(5)) and to guarantee the fair trial rights of the Appellant (Article 62 (2)).

428. The Appeals Chamber held that if the Chamber fails to accompany its finding with reasoning of sufficient clarity, which unambiguously demonstrates both the evidentiary basis upon which the finding is based as well as the Chamber's analysis of it, then "the Appeals Chamber has no choice but to set aside the affected finding, since the lack of adequate reasoning renders the finding unreviewable, thereby constituting a serious procedural error."[496]

429. The Defence submits that the Chamber committed multiple evidentiary, fair trial and procedural violations by disregarding the evidence of the abduction, initiation and indoctrination of the

[494] Judgment, paras 2856, 2858, 2914, 2964, 3011, 3091 and 3108.
[495] Judgment, paras 2856, 2858, 2914, 2964, 3011, 3091, 3108.
[496] Bemba Appeals Judgment, para. 66.

Appellant, which was a central issue in this case, warranting an immediate appellate intervention, review and a reversal of convictions and setting aside of the judgment.

V. Grounds 30, 34, 36 & 43: The Chamber erred in respect to its conclusions related to culture and mental health issues, and its assessment of the Prosecution's Experts on culture[497]

a) Introduction

430. Culture matters in international criminal courts and tribunals. It permeates everything – from the judicial assessment of witness demeanour to the judicial understanding and interpretation of the content of the testimony.[498] In 2021, the issue is no longer should international criminal justice address cultural issues but, how will judges manage the intersection of cultural and legal issues.[499] For justice to be seen to be done, especially by communities whose cultural background may differ from the dominant cultures at the seat of the ICC, judicial judgments are a key marker.

431. The *Ongwen* case places the role and impact of Acholi culture upfront and in the centre of the Defence's affirmative defences and sentencing arguments. It is the Defence's view that the errors in the Trial Judgment in respect to cultural issues, individually and in the aggregate, will contribute to the shattering of the delicate mosaic described in the Rome Statute's Preamble.[500]

432. The Defence incorporates by reference its arguments in the Defence Closing Brief,[501] which are addressed in the Judgment at paragraphs 2458 – 2463.

b) The Chamber erred by disregarding cultural factors when assessing the Appellant's Article 31(1)(a) defence

433. The importance of the cultural context when assessing and evaluating a person's mental health status is undisputedly recognised and codified in the DSM-5.[502] The DSM-5, produced by the

[497] In this brief, the Judgment's errors in respect to culture related to the Article 31(1)(d) defence include Grounds 55 and 62 (ground 62 is addressed in section of on expert evidence of D-0133).
[498] *See*, for example, Kelsall, Tim, Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone, Cambridge Studies in Law and Society, CUP 2009; Combs, Nancy Amoury, Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions, CUP 2010, pp. 79-105.
[499] *See*, Nistor, Merrylees and Hola, *Spellbound at the International Criminal Court: The Intersection of Spirituality & International Criminal Law*. Using the *Ongwen* case as an example, this article concludes (at p 15) that in the relation between culture and law, "the hybrid created, instead of reflecting a mosaic of diversity as recalled in the Rome Statute's preamble, may just become a creature that no longer resembles either of the worlds that were mutilated into fitting each other, but a cultural Frankenstein left to understand its own purpose."
[500] The Preamble to the Rome Statute reads: "The States Parties to this Statute, Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate moasaic may be shattered at any time…"
[501] Defence Closing Brief, paras 661-666.
[502] DSM V, Introduction, "Cultural issues" at pp. 14-15 and Section III on "Cultural Formulation," pp. 749-759.

American Psychiatric Association, has been regarded by professionals in the field as a key volume which sets the standards and criteria for practitioners.

434. The Defence Experts unequivocally placed the mental illnesses of the Appellant the context of the mass trauma experienced in Acholiland in the period 2002-2005. The trauma had two sources: initially from the enemy [Ugandan government] and then the mass trauma of the LRA insurgency.[503]

435. The notion of mass trauma was first introduced in the *Ongwen* trial by the evidence of Dr Seggane Musisi (PCV-0003), an expert psychiatrist for the CLRV, as well as others who described the effects of the at least twenty-year and counting UPDF war against the LRA.[504]

436. Hence, the Judgment's holding, disregarding the evidence of Professor Musisi, objectively runs counter to a recognised authority in the mental health field as well as other evidence on record.

437. Professor Musisi's report, which analysed the LRA and its leader, Kony, as a cult, provided documentation to demonstrate that during the twenty year plus insurgency in Northern Uganda – which included the 2002-2005 years of the charged period – people living in the North suffered trauma at the hands of both the LRA and the UPDF. The scale and severity of this trauma resulted in mass trauma of the population.[505]

438. Yet, the Chamber provided no reasoned statement to explain why it concluded that the psychological context presented by Professor Musisi (which was not contested by any party) did not provide "specific information in relation to the question whether Dominic Ongwen suffered from a mental disease or defect during the period of the charges."[506]

439. It is impossible to discern how the Chamber reached the conclusion that the Appellant, who lived within this context of mass trauma as an abductee of the LRA, was not affected by, or was immune from, this mass trauma.

440. Similar to other conclusions in the Judgment,[507] the Appellant is treated as an "exception" to the rule: according to the Judgment, he did not experience what other abductees experienced, he did not have any fears about Kony, he was not subject to the same rules and threats as others in the

[503] T-250, p. 81, ln.2 – p. 38, ln. 21.
[504] Dr Otunnu report: UGA-D26-0018-2779, Adam Branch Expert Report, UGA-D26-0015-1172; *See also*, T-218.
[505] Dr Musisi's Expert Report, UGA-PCV-0003-0046.
[506] Judgment, para. 2579.
[507] Judgment, para. 2658.

LRA, and so on. There is no proof beyond a reasonable doubt that these assertions and inferences were true. In fact, the opposite exists: there was evidence of the Appellant's failed escape attempts over the years, and his punishments, including imprisonment in the LRA.[508]

441. In general, the Judgment considers context for everyone else, but not for the Appellant – creating an "Ongwen exception." Essentially the Chamber is saying: context, and in this case, cultural context, does not matter. Hand in hand with this cultural, contextual "blind spot" is a myopic and inconsistent focus on the "charged period" or whether the evidence "directly underlie[s]… whether the facts alleged in the charges are established."[509] According to the Judgment, Professor Musisi's evidence is not related to the charges.

442. All of these constructs, on their face, appear narrow and undialectical. While it is understandable that the focus of this Judgment is on a charged period, the years 2002-2005 are ensconced by impenetrable bookends, but only when it suits the Chamber. These instances include, for example, refusing to factor in the impact of the Appellant's abduction as central to the charges,[510] and concluding it could not rely on Prof. de Jong's evidence for the conduct "relevant to the charges."[511]

443. The misrepresentation by the Chamber of the evidence Professor de Jong, a court-appointed expert, is particularly troubling. It concludes, for example that he "did not attempt to make a historical diagnosis."[512] A close reading of Professor de Jong's Report at Section 7, Differential Diagnoses[513] suggests otherwise: Professor de Jong states that the Appellant suffers from severe depression, severe PTSD and a dissociative disorder. He continues:

> As happens often, the depression and PTSD co-occur. In addition to severe PTSD, the concept of complex trauma may best capture DO's prolonged trauma experiences… The dissociative symptoms that developed after the abduction in his youth are a defense mechanism…[514]

[508] Professor de Jong Report, UGA-D26-0015-0046-R01 at 0056-R01 to 0058-R01. The Appellant tried to escape four times when he was very young and a fifth time when he was an officer and older. The Appellant, when asked by Professor de Jong who assumed that "a career in the LRA would be incompatible with trying to get out," tells the following: "I did not give up on escaping, I still wanted, but instead of escaping I went to the the battle front to be killed. But I never got killed, only injured. I just wanted to die because my parents were killed, two uncles and two other family members. And my best friends dies, I never understand why I did not get killed." *See also*, references to the Appellant and escape and punishments in the Defence Experts' First Report, UGA-D26-0015-0004, at 0011, 0023.
[509] Judgment, para. 602.
[510] Judgment, para. 27.
[511] Judgment, paras 2576-2578.
[512] Judgment, para. 2576.
[513] Professor de Jong Report, UGA-D26-0015-0046-R01, at -0051-R01 to 0052-R01.
[514] Professor de Jong Report, UGA-D26-0015-0046-R01, at -0051-R01 to 0052-R01.

444. Professor de Jong's reference points are historic – and indicate time of abduction as a starting point in the diagnosis. At the same time, however, the Judgment is inconsistent about the "charged period" focus. It argues acts not charged which are outside the temporal jurisdiction – 2006 and peace talks, to refute the duress argument – that the Appellant did not escape.[515]

445. But when it comes to looking backward as to the roots of the mental health, the Chamber's position is inconsistent with that articulated by Presiding Judge Schmitt:

> In a forensic setting, "you always have to go back in time and try to figure out how the state of the client… was at that time. I think that is inherent in forensic psychiatry".[516]

446. The importance of context is particularly important to the evidence in *Ongwen*, precisely because of its cultural contours. As PCV-0002, an expert witness for the CLRV, explained that there is a sense of collectivity and community which is imbed in individual persons in Acholiland.

> In Acholi society, people understand themselves as part of a communal system, is a collectivist society wherein they do not define themselves as isolated individuals, but they see their individual well-being as inextricably interconnected with that of other people, so they look at their relations. So taking a relational approach I think is very important….[517]

447. PCV-0002 emphasised that this sense of community also included one's ancestors:

> In Acholiland it is very – it has a very spiritualistic cosmology. People believe that well-being in the visible world is based on harmony with the ancestors and good relations with the spirit world. And so to have this breach going on with the ancestors is very upsetting.[518]

448. Although PCV-0002 spent years working in Northern Uganda, he was cognizant that those – like himself – from different backgrounds, have difficulties understanding what is happening and what they are being told:

> It is difficult for westerners to understand [breach with the ancestors] because it just doesn't fit with our belief system, but it is a form on non-well-being. It is a form of pain and agony that is really very deep… And again, I think it's hard for wester psychologists like me, it's hard for us to get our head around this because our cultural beliefs and identity are different.[519]

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[515] *Supra*, section on temporal jurisdiction.
[516] T-248-Conf., p. 67, ll. 16-21. *See*, Defence Closing Brief, para. 549.
[517] T-176, p. 9, ln. 25 – p. 10, ln. 4.
[518] T-176, p. 25, ln. 24 – p. 26, ln. 2.
[519] T-176, p. 26, lns 1-17.

449. PCV-0002 advocated the necessity to work with traditional healers to address mental disorders. He explained that he had not seen any standard trauma or depression treatments which rid a child of *cen*.[520] He recounted, during the war in Angola, how he and a co-worker responded to a 14-year old's complaint that he could not sleep with a possible PTSD diagnosis. But, the psychologists realised they were wrong, once the boy explained he could not sleep because the spirit of the man who he had killed comes to him at night, asking: why did you do this to me?[521] He testified that *cen* and PTSD are not the same thing, and that a person suffering from both could need different treatments, including traditional treatments, for each.[522]

450. PCV-0002's evidence supports the important role of cultural context in mental health, and underscores that analysing mental health status absent this context will lead to treatment and diagnoses that are a) not accurate; and b) not effective.

c) The Chamber's conclusions that the Prosecution experts, P-0446 and P-0447, did not ignore or dismiss cultural factors were erroneous, and not based on the evidence

451. At paragraphs 2461-2462, the Chamber states that the Defence misrepresented the evidence of the Prosecution experts in respect to cultural factors.

452. First, Dr Mezey dismissed the role of cultural factors in any mental health assessment of the Appellant:

> …I do not consider that I needed to be aware of every single belief system and ritual that was performed within the LRA in order to understand that there was a spiritual -- a strong spiritual and cultural element affecting the LRA at the time, and needing to factor this in when considering both the question of whether a mental disorder was present, but also how that mental disorder may have expressed itself, given that cultural context.[523]

453. This statement needs to be assessed in the context of P-0446, who has not worked with child soldiers or in conflict zones in Africa, based on her c.v. and testimony.

454. Nor is there evidence that P-0446 attempted to fill this cultural gap in order to carry out her tasks: for example, she testified as to her lack of knowledge about the article authored by Professor

[520] T-176, p. 31, ln. 23 – p. 32, ln. 1.
[521] T-176, p. 33, lns 17-24.
[522] T-176, p. 49, lns 22-25.
[523] T-163, p. 18, ln. 24 – p. 19, ln. 4.

Ovuga and Dr Abbo on *orongo* and *cen*[524] which addressed, *inter alia*, *cen* and PTSD. While she is, of course, not expected to read everything, the relevance of these concepts to the *Ongwen* case is central to the issues concerning mental health and culture.[525] And, especially given the fact that Dr Mezey did not claim any experience with ex-LRA child soldiers, its importance cannot be dismissed.

455. The mischaracterisation of P-0447 in his rebuttal report[526] of the Defence experts' views on culture illustrate that he simply did not understand and/or apply any knowledge or respect for cultural factors in his evidence.

456. On page 8 of his Rebuttal Report,[527] P-0447 describes the Defence experts' position as "non-African mental health professional could not be capable of diagnosing individuals from an African country." There is absolutely no basis the evidence of this statement, nor evidence from which to make an inference.

457. P-0447 concedes it is his "impression during the court hearing …that contradictions were blamed to a misunderstanding western psychiatrists have, who do not 'sense' the special conditions in the 'African context.'"[528] But his impression is wrong; D-0041 testified about the differences in respect to mental health in African and in Western societies. For example, D-0041 described the lack of mental health literacy in African populations, which meant that "most people in Africa cannot describe the signs and symptoms of depression by themselves."[529] This testimony is consistent with D-0042's evidence about the somatisation of mental health problems in Africa. He explained that "[i]n our part of the world, we somatise. What that means is we convert psychological distress into physical symptoms. And we also spiritualise… we explain our psychological distress in the terms of the effects of the spirits, ancestral sprits, the wrong we have done […]".[530]

[524] Ovuga and Abbo, *"'Orongo' and 'Cen' Spirit Possessions – Post-Traumatic Stress Disorder in a Cultural Context: Local Problem, Universal Disorder with Local Solutions in Northern Uganda," Comprehensive Guide to Post-Traumatic Stress Disorder*, Springer International Publishing Switzerland 2015; UGA-D26-0015-0197.
[525] Both Defence and Victims' Experts addressed these concepts.
[526] Report on Second Psychiatric Report, UGA-OTP-0287-0072.
[527] Report on Second Psychiatric Report, UGA-OTP-0287-0072, at 0079.
[528] Report on Second Psychiatric Report, UGA-OTP-0287-0072, at 0079.
[529] T-248, p. 49, lns 7-17.
[530] T-254, p. 14, lns. 16-24; *See also*, T-248, p. 46, ln.9 – p.49, ln. 21.

458. In their Rejoinder Rebuttal,[531] the Defence experts indicate that the work of Elialilia Okello and Oye Gureje are "examples of individuals who have described explanatory models of mental illnesses in African populations."

d) The Chamber erred in concluding that examples of Appellant's food request for termites and the absence of the word "blues" in many African languages are "trivial" and "without any serious link to the issue […] under consideration"[532]

459. In its cross-examination of D-0041, the Prosecution asked whether making jokes and being in a good mood were "typical symptoms of a man suffering from major depressive disorder?"[533] The Prosecution used ICC-DC reports from its psychiatrist, who had reported that the Appellant had "jokingly" asked him if the prison psychiatrist could get termites on the prison shopping list, because the Appellant was having problems with Dutch food.[534]

460. D-0041 explained that "termites" was the term for white ants, *ngwen* in Acholi, which people added to their food.[535] He also stated that he did not think the Appellant was joking: he wanted something different than Dutch food.[536] When P-0447 was cross-examined by the Defence, he was asked whether he agreed with D-0041's analysis. At first, he did not understand the point of the question and had no idea how the word "termites" is interpreted in Acholi culture.[537] Finally, he interpreted the Appellant's request a joke (as the prison psychiatrist had done).[538]

461. This example is not trivial: it illustrates the importance of the cultural context in every day affairs, such as what food one eats. As this relates to the Appellant, it demonstrates the importance of cultural context in the interpretation of observations of the Appellant which others make.

462. Moreover, its impact was not trivial: at the heart of the Prosecution case was the theory that the Appellant appeared happy and joking, and displayed no symptoms of mental illness to anyone around him. This was a theory adopted by the Chamber in its findings and conclusions that the

[531] Rejoinder Rebuttal UGA-D26-0015-1574 at 1577.
[532] Judgment, para. 2463.
[533] T-249, p. 51, lns 12-17. *See*, Defence Closing Brief, paras 627, 647 on reaction formation, which indicates that the visible emotion may be "covering up" its opposite, true emotion; *See also*, T-255, p. 3, ln. 20 – p. 6, ln. 2; Rejoinder Report, UGA-D26-0015-1574 at 1578; T-254, p. 12, ln. 24 – p.14, ln. 8; Professor de Jong Report, UGA-D26-0015-0046-R01 at 0049-R01.
[534] T-249, p. 51, lns 12-19.
[535] T-249, p. 51, lns 12-19.
[536] T-249, p. 51, ln. 18 – p. 52, ln. 7.
[537] T-253, p. 42, lns 9 – 25.
[538] T-253, p. 42, ln. 25.

Appellant suffered from no mental diseases and therefore, the affirmative defence of Article 31(1)(a) was rejected.

463. Thus, the interpretation of these symptoms was a central issue of the affirmative defence. Whether or not the Appellant was "joking around" was a key factual issue on which the Chamber's conclusion, rejecting the affirmative defences, hinged.

464. D-0041 offered, based on the evidence, another plausible factual explanation than the one implied by the Prosecution: that Mr Ongwen had a serious food complaint regarding termites,[539] and that it could be inferred that he was serious, and not joking around.

465. A reasonable trier of fact, understanding the significance of this evidence, based on a cultural interpretation of the food request, could have reached a different conclusion – that the Appellant was not joking around. Thus, D-0041's evidence was reasonable doubt as to the conclusion that the Appellant, was, in fact, happy and in a good mood.

466. In sum, the food request was not a "trivial" matter because it could have materially affected a key conclusion that was used to undermine the mental health experts' analysis and to reject the affirmative defence of Article 31(1) of the Statute. The fact that the Chamber characterised this example as "trivial" indicates that it either: a) did not pay attention to the cultural context; or b) consciously rejected its implications. Either way, the result was the same: a lack of understanding about the cultural context of the termite request resulted in a factor which the Chamber used to reject the affirmative defence.

467. The second example referred to as "trivial" by the Chamber is that there was no translation for "blues" in many African languages.[540] As stated in the Defence Closing Brief, Professor Ovuga added that symptoms of mental illness are somatised.[541] Somatisation means that psychological distress experienced by a person is expressed as a physical symptom.[542]

468. The significance of Professor Ovuga's testimony is that since a patient would not say, "I am feeling blue…" s/he may complain of not being able to sleep. Not being able to sleep, without further probing, can be a symptom of many things. In the context of this case, Professor Wessels noted

[539] "Termites" is the English translation for the Acholi work, *ngwen*, which means "white ants" – a delicacy in Acholi.
[540] Judgment, para. 2463.
[541] T-254, p. 15, lns 13-24.
[542] According to Definitions from Oxford Languages, in psychiatry, the verb "somatise" is defined as "manifest (psychological distress) though physical symptoms." For example, "depressed patients may often somatize their distress."

that, upon further probing, it was a symptom of a young 14-year-old child soldier experiencing *cen*.[543]

469. Where a concept or a feeling cannot be expressed in a particular language, it is logical that the person will find other ways to express the feeling. A Chamber is not expected to be, nor is it assumed to be, knowledgeable about every culture in the world, or how every language is constructed or operates.

470. But, a Chamber needs to recognise and acknowledge where there are alternative explanations, including those based in traditional cultural practices, they raise reasonable doubt within the legal context in which it operates. This was not done in the *Ongwen* Judgment, where the Chamber, based on its own cultural constructs, dismissed the evidence of language and somatization as "trivial."

W. Ground 33: The Chamber erred in its selective use of P-0445's testimony and its total disregard for evidence which was potentially exculpatory[544]

a) Introduction

471. The *Bemba* Appeals Chamber has held that it is an error for a Trial Chamber to disregard relevant and potentially exculpatory evidence from a witness upon whom it has relied for inculpatory evidence.[545]

472. In *Bemba*, the Defence alleged that evidence of D-0048 was selectively used by the Chamber: it was relied upon to inculpate Mr Bemba, but exculpatory evidence that refuted the finding that he made no effort to refer alleged MLC crimes to CAR authorities was disregarded.[546] The Appeals Chamber noted that the Chamber did not address Mr Bemba's statement that he wrote a letter to CAR authorities requesting that an international commission of inquiry be set up, and did not address the testimony of D-0048, which attested to the existence and content of Mr Bemba's letter.[547]

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[543] T-176, p. 33, ln. 17 – p. 34, ln. 25.
[544] The Defence incorporates its analysis and references to P-0445's evidence in Defence Closing Brief at paras 571, 578, 590, 659.
[545] *See*, Bemba Appeals Judgment, paras 189, 194; One of serious errors in Chamber's assessment of whether Mr Bemba took all necessary and reasonable measures to prevent or repress the commission of crimes by his subordinates or to submit the matter to the competent authorities for investigation and prosecution is a ground for majority finding that one of the grounds of command responsibility was not properly established and Mr Bemba cannot be held liable under Article 28(a).
[546] Bemba Appeals Judgment, para. 148.
[547] Bemba Appeals Judgment, paras 174-175.

473. In the case at bar, the evidence of P-0445 is selectively used by the Chamber in the Judgment to reject the Appellant's affirmative defence under Article 31(1)(a), but P-0445's potentially exculpatory evidence is also disregarded, particularly in respect to the effects of the adverse and toxic LRA environment on the Appellant's development, including his moral development and "child-like" personality/development when he was above the age of majority.

474. The selective use of P-0445's evidence by the Chamber prejudiced the Appellant. Especially because P-0445's approach and methodological processes are clearly distinguishable from the two other Prosecution experts, P-0446 and P-0447, a reasonable trier of fact reviewing her evidence would reach a different conclusion than the Judgment: that P-0445's evidence provided reasonable doubt on a number of issues. A finding of reasonable doubt would have materially changed the outcome of the Judgment.

b) The Judgment's endorsement of P-0445's conclusions on the Appellant's moral development are not based on proof beyond a reasonable doubt

475. At paragraph 2485, the Chamber holds that P-0445's expert testimony is pertinent and valuable in its findings, in particular her assessment of the Appellant's moral development.

476. While the Chamber cites P-0445's conclusion that the Appellant "attained the highest level of moral development, the post conventional level,"[548] a closer examination of her conclusion indicates that a reasonable trier of fact would reach a different conclusion based on the evidence on which she relies.

477. P-0445 relies on quotations from the Defence Experts in Section 5.1.2 of her report (starting at -740) as expressions of remorse from the Appellant, which she treats as a significant criterion of moral development. P-0445, in analysing the evidence, however is not unequivocal. She writes that: "The quotations below demonstrate that DO [Dominic Ongwen] may have reached the post conventional level of moral development…"[549] (underlining added)

478. One quotation used is from the Defence Experts' First Report (2016). It states that "…[the Appellant] feels deeply remorseful and he regrets his participation in the activities of the LRA…"[550] If one refers to the report, this quote is preceded by important information which is not included in P-0445's report:

[548] UGA-OTP-0280-0732, at 0741.
[549] UGA-OTP-0280-0732, at 0740.
[550] UGA-OTP-0280-0732, at 0740.

> When asked directly whether he knew that the various acts he saw, participated in or carried out in the bush were 'wrong,' Mr Dominic Ongwen said that when he was in the bush, he did not appreciate the wrongfulness of his acts. However, after coming out of the bush, he realized that what he saw and did were wrong…[551]

479. What is clear from the Defence Experts' Report is that the Appellant articulated an awareness of right and wrong after he successfully escaped from the LRA, and was interviewed in the ICC-DC in The Hague in 2016. At that time, he explicitly said he did not realise what was right and wrong while he was in the bush, which includes the period of the charged acts.[552]

480. P-0445's report refers to evidence from Professor de Jong's report,[553] which is similar: P-0445 quotes the following (in italics), but the Defence has included the preceding sentence expressing regret:

> …he acknowledges he abducted people, but regrets he did so, and mentions that the LRA forced them to do so. *He tells he was mean to his soldiers and gave them 30 strokes, but only when they tortured civilians. He wonders why one would enjoy doing people harm if they were not your enemy…*"[554] (italics indicates what is quoted by P-0445 in her report)

481. Throughout the Judgment, the Chamber emphasises the period of the charged acts, and explicitly rejects evidence which does not address this period.

482. Applying this same temporal standard to the evidence on which the conclusion of moral development was based, the Judgment erred by not taking cognizance of the timing of the Appellant's remorse years after the charged period, and retroactively applying his verbalised awareness to the period of 2002-2005.

483. Expressions of remorse in 2016 or 2017 about events in an earlier period, particularly 2002-2005 – at least more than a decade earlier – are not proof beyond a reasonable doubt that the Appellant had the same understanding or self-awareness of his conduct at the time of the crimes for which he was convicted. Therefore, the Judgment's conclusions about the level of the Appellant's moral development[555] are factual errors. Relying on these errors, the Chamber reached the conclusion

[551] UGA-D26-0015-0004, at 0014.
[552] UGA-D26-0015-0004, at 0014. *Also note* P-0445, in her report, UGA-OTP-0280-0732 at 0741, in section 5.1.2 refers to quotes Defence Experts report at p. 4 ("Mr DO is angry at himself because of the terrible things he did in the bushes on the orders of his bosses") and p. 7 ("…he didn't like the hardships and atrocities they committed in the bush").
[553] Professor de Jong's interview with the Appellant took place between 22 December 2016 and 4 January 2017.
[554] Profesor de Jong Report, UGA-D26-0015-0046-R01, at 0051.
[555] Judgment, para. 2481, 2485.

that the Appellant was responsible for his conduct, and rejected the affirmative defence under Article 31(1)(a) of the Statute.

c) The Chamber erred by disregarding the approach of P-0445 in formulating conclusions about the Appellant[556]

484. Unlike the other two Prosecution experts, P-0445, recognised the limitations of not being able to interview the Appellant, and instead, relied upon the findings of the Defence Experts and Professor de Jong, all of whom interviewed the Appellant on multiple occasions.[557]

485. For P-0445, the line between Mr Ongwen the child, and Mr Ongwen the adult, was not well-defined:

> Mr Ongwen as a child was forced to do certain things and then as an adult, but again he was able to, to have some control. But again, I wouldn't categorise in that way. *I would like to look at it on a timeline and not divorce Mr Ongwen from his childhood because Mr Ongwen did not fall from space as an adult.* He – he grew up to adulthood from his childhood, so it becomes a little bit more difficult for me to just say, Mr Ongwen as an adult and Mr Ongwen as a child because it's a continuous thing.[558] (italics added)

This was also the position of Professor de Jong, who referred to the blurring of the boundary of child soldiers in the LRA.[559]

486. For P-0445, this timeline or continuum started with the Appellant's abduction. For the Judgment, this timeline explicitly excluded the Appellant's abduction.[560] Hence, it is difficult to discern how the Chamber could claim to use P-0445's evidence in support of its conclusions to inculpate the Appellant, by rejecting the affirmative defence.

d) The Chamber erred in disregarding the potentially exculpatory evidence of P-0445

487. Not only did P-0445 start from the LRA's abduction of the Appellant, but she provided evidence of the adverse and unfavourable environment of the LRA and its effects on his development.

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[556] Judgment, paras 2479-2485.
[557] UGA-OTP-0280-0732, at 0075. *See*, Section 9.1. "One major limitation of this report is the fact that CA did not clinically interview DO [Dominic Ongwen]…"
[558] T-166, p. 55, ln. 10 – p. 56, ln. 2. (P-0445 is responding to question of P-0447's critique of Prof de Jong)
[559] Profesor de Jong Report, UGA-D26-0015-0046-R01, at 0071-R01. "…In the case of child soldiers in the LRA, the boundary between victim and perpetrator gets blurred, a problem that has also been described in other conflict affected areas in the world… "
[560] Judgment, paras 27, 2592.

488. By adverse, P-0445 explained that the environment offered no alternatives to abductees.[561] She pointed out that an unfavourable environment would mean one which was not supportive to [a child's] development. She described a child as needing an environment that meets the child's basic needs and is not toxic, and which does not impact negatively on the development of the child.[562] P-0445 emphasised the impact of adverse or toxic environments on a child's brain.

489. P-0445 discussed the Appellant's lack of control over his environment in the LRA,[563] particularly in her Conclusion in 8.4:

> However, important mitigating factors include being abducted during a developmental age, continuing to develop in a bush, unfavourable environment and being under control of JK [Joseph Kony]. Like other children, DO [Dominic Ongwen] as a child and an adolescent had no choice over the environment he lived in when he committed the alleged crimes against humanity. As an adolescent, he was vulnerable and lacked control over his immediate environment. This means, he can't be blamed for failing to escape negative influences in his whole environment.[564]

490. P-0445 testified that the Appellant was removed from his normal environment and put in an unfavorable environment, which is considered toxic for development, over which he had no control. "Like any other child developing, they have no control of where they develop from."[565]

491. One of the results of the toxic environment was the Appellant's arrested development. In her report, P-0445 concludes that based on his abduction and her assessment at an adolescent level, evidence of his [Appellant's] child-like behaviour and perceptions in the Defence Experts' report "may be an indication that his psychosocial development was arrested at the time of abduction."[566]

492. The most significant evidence from P-0445 of the Appellant's arrested "child-like state" (even when chronologically of majority age) was her analysis that the Appellant referred to children who were with him as soldiers, reflecting his own experiences. She testified,

> …Mr Ongwen's concept of a child which could have been carried on from--from his own experience of having been abducted as a child and he became a soldier then and

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[561] T-166, p. 61, lns 18-25.
[562] *See*, T-167, p.7, ln. 20 – p. 8, ln. 4.
[563] T-166, p. 61, lns 18-25. *See also*, Defence Closing Brief, fn. 957.
[564] UGA-OTP-0280-0732, at 0755.
[565] T-166, p. 58, lns 22-23.
[566] UGA-OTP-0280-0732 at 0734, section 3.4. *See* Defence Closing Brief, paras 565-571 for arguments that the Appellant's moral development was frozen when he was abducted by the LRA, and that the LRA recruited children because of their "moral malleability". *See also*, D-0042's evidence on moral development in response to P-0447's assertion that "the discussion of moral development within the Acholi culture is 'unfounded" at T-254, p. 32, l. 10 to p. 33, l. 22.

> so his [concept] of a child is a soldier and not a child because that is what he experienced as himself.[567]

e) Conclusion

493. P-0445 ultimately reached similar conclusions[568] in respect to whether the Appellant suffered from a mental disease or defect during the charged period as the other two Prosecution experts. However, a careful review of her expert evidence reveals that her conclusions were not as unequivocal as presented by the Judgment.

494. Nor were P-0445's conclusions "cookie cutter" replicas of the other two Prosecution experts, P-0446 and P-0447. P-0445's methodological approach reliance on the clinical findings of other experts, and her interweaving of the cultural context into her conclusions stand out in contrast to the other Prosecution experts.[569]

495. Most importantly, P-0445 submitted expert evidence on the adverse and toxic effects of the Appellant's life in the LRA, starting from the point of his abduction.

496. If a reasonable trier of fact reviewed P-0445's evidence, including the factors she identified which mitigated against the Appellant's responsibility for his actions, this would have materially affected the Judgment by presenting reasonable doubt.

497. The Chamber took the most restrictive and illogical approach to its task: defining the "charged period" as if it was suspended in air, with no prior history. The result was that it disregarded, or overlooked the factors that negatively affected the Appellant's development, starting with his abduction and, as if he fell from space as an adult, ascribed to him criminal responsibility once he turned into an adult at the chronological age of 18.

498. The Chamber's approach made it impossible for it to properly assess the affirmative defence under Article 31(1)(a), resulting in the convictions of the Appellant.

X. Ground 44: The Chamber erred in fact and in law in its statutory interpretation of Article 31(1)(d)[570] and its findings that Article 31(1)(d) was not applicable[571]

[567] Defence Closing Brief, para. 571, quoting T-166, p. 47, lns 7-9.
[568] With the exception of PTSD. *See* Defence Closing Brief, para. 659, fn. 957 (P-0445 appears to accept the PTSD diagnoses in Defence Experts' and Professor de Jong's Reports.
[569] *See*, Grounds 34, 36 and 43.
[570] Judgment, paras 2581-2585.
[571] Judgment, paras 2668-2671.

499. Many errors naturally flowed from the above error of law and fact. As discussed below, these errors materially affected the decision of the Chamber on the issue of duress to the great prejudice of the Appellant.

500. The Chamber summarily ruled that the defence of duress under Article 31(1)(d) was not met. The Chamber arrived at this conclusion because it failed to properly interpret Article 31(1)(d) after adopting a wrong analytical approach. Instead of dealing with the definition of the clear wordings and totality of the Article, it wrongly went on a frolic to split hairs and defined **'imminent'** and **'continuing'** in isolation from **'threat'**, saying that the two words **'refer to the nature of the threatened harm, and not the threat itself'**.

501. The provisions of Article 31(1)(d) must be read as a whole, and put into proper context. According to the wording of Article 31(1)(d), duress must be resulting from apprehension of **i) a threat of imminent death,** or **ii) a threat of continuing imminent serious bodily harm**.

502. The Chamber erroneously made a big and convoluted issue of the interpretation and application of the terms **'imminent'** and **'continuing'** in Article 31 of the Statute as referring to "**the nature of the threatened harm and not the threat itself. It is not an 'imminent threat' of death or a 'continuing or imminent threat' of bodily harm'**". The Chamber stated that "the threatened *harm* in question must be either to be killed immediately ('immediate death'), or to suffer serious bodily harm immediately or in an ongoing manner ('continuing or imminent serious bodily harm')" [572], without providing a reasoned explanation for its conclusion.

503. The Chamber failed to explain why it did not believe that, in the circumstances of the Appellant, the latter could not have genuinely feared that he would be killed or seriously harmed if he defied the orders of Kony. In addition, it did not explained what it considered as 'in an ongoing manner'. For example, the Chamber did not consider the possiblility that duress emanated from the perpetual hostile and violent environment which ruled the life of the Appellant at the time of the charges.

504. The Chamber further failed to reason out what would happen to the Appellant if Kony or any delegated authority acted in the manner described at paragraphs 957 and 2587 of the Judgment and treated him under such "**crude and brutal manner…not based on clear rules and procedures, but on arbitrariness and fear**", and gave him upwards of 500 lashes that would

[572] Judgment, para. 2582.

certainly end up maiming him. It erroneously did not assess and evaluate whether that would in fact amount to 'imminent continuous bodily harm'/'in an ongoing manner'.

505. Any trier of facts properly assessing and evaluating the evidence on record should have come to the conclusion that Article 31(1)(d) was applicable because the Appellant was subjected to a threat of imminent death or imminent or continuing serious bodily harm.

506. In the instant case, any trier of facts properly addressing its mind to the evidence on record would have come to the conclusion that the fear of the spiritual world, ingrained by indoctrination and by the coercive environment in the LRA, in addition to the knowledge that human intelligence was always hovering around him, subjected the Appellant to a threat of imminent death or imminent continuing serious bodily harm. It would have further found that these were circumstances not within the control of the Appellant. The coercive environment within the LRA did not afford any luxury of trial and error. The lingering threat posed by the fear of Kony's omnipresent spirit and the spy network directly accountable to Kony, made it impossible for the Appellant to think like a rational person. Because of the reasons given above, the Chamber committed an error of fact when it failed to come to the conclusion that the Appellant was not a rational man and was therefore susceptible to threat under Article 31(1)(d) of the Statute during the charged period.

507. Even if the Appellant did not fear being immediately killed by the lower ranks under him for defying Kony's order during the charged conduct, he might still be killed later on the instruction of Kony. This was based on his belief in the spiritual attributes of Kony, ingrained by indoctrination that, apart from Kony's human intelligence, the Appellant was always aware that every step of his was being watched by the spirits that reported back to Kony. Under such circumstances he was always under apprehension of continuing imminent serious bodily harm.

508. Under Article 31(d)(i) and (ii) of the Statute, the threat may either be "made by other persons or constituted by circumstances beyond that person's control". Whichever way one looks at it, the operative word in the provision is "**threat**". By its ordinary meaning "threat" means a statement by which one tells another that they will punish or harm them.[573] Therefore, the threat must be understood from the perspective of the person receiving it, regardless of whether death or bodily harm was indeed going to materialise. If the recipient of the threat genuinely fears these consequences, then there is a situation of duress.

[573] Oxford English Dictionnary.

509. The Chamber ultimately came to the erroneous conclusion that "**duress is not available if the accused is threatened with serious bodily harm that is not going to materialise sufficiently soon**", without defining what is "**sufficiently soon**". In doing so, the Chamber erroneously imposed a criterion not foereseen under Article 31(1)(d), which makes no mention of timing in relation to the marterialisation of the threat. The Chamber further erroneously continued that "**[a] merely abstract danger or simply an elevated probability that a dangerous situation might occur – even if continuously present – does not suffice**".[574]

510. As already established in the findings about the disciplinary regime in the LRA,[575] and from a multitude of witness evidence on record on the issue, the consequences of defiance of orders in the LRA was not "**an abstract danger or probability that a dangerous situation might arise**", as concluded by the Chamber. Therefore from the evidence on record and from the Chamber's findings and observations, the "**probability that a dangerous situation might occur**"[576] was real. The LRA had a disciplinary regime that decisively dealt with defiance of orders; particularly those from Kony.

511. The Appellant, like all other child soldiers, was not **'only' coercively enrolled generally, but also forced to commit the charged crimes** by the LRA. The crimes the Appellant was charged with were those covered under the LRA standing orders, which ruled the conduct of all LRA members, and which were clear and unequivocal.

512. The Chamber failed to appreciate evidence on record, such as witness evidence of the LRA coercive environment, evidence of Acholi traditional practitioners on the effect of spiritualism on a victim, the enduring effect of indoctrination on a child soldier, such as the Appellant, the consequences of the Appellant being discovered fraternising with 'an enemy' General and the resultant imprisonment and surveillance on him (apparently with a suspended death sentence on him), Kony's spirit intelligence backed by human intelligence, and the mental trauma caused by multiple injuries on the Appellant around the charged period. In sum, the Chamber failed to properly assess and evaluate evidence on the Article 31 affirmative defences, based on the peculiar individual circumstances of the Appellant immediately before, during and after the charged period.

513. The attitude adopted by the Chamber about the situation in the LRA as pertained to brutal disciplinary regime was, to say the least, causal and lackadaisical. It did not properly address its

[574] Judgment, para. 2582.
[575] Judgment, paras 957 and 2587.
[576] Judgment, para. 2582.

mind to the evidence on record which pointed to the fact that in the LRA it was a matter of life and death[577] and one had to get only a clear unique opportunity to escape before taking a leap into it.

Y. Ground 46: Kony's control over the Appellant

a) Introduction

514. This ground of appeal relates to the command and control of Kony over the Appellant. There is a critical insufficiency and deficiency in the reasoning of the Chamber, which disregards and is totally detached from the personal circumstances of the Appellant.

515. The Chamber identified the LRA disciplinary regime as an established tool to ensure obedience in its ranks.[578] The Chamber established the differences of impact on high ranking and low ranking LRA members.[579] The Chamber found that although the LRA was an effective hierarchical structured organisation, it was not under the absolute control of Kony and he relied on the co-operation of various commanders to execute LRA policies.[580] The Chamber also found that the LRA was a collective project in which battalion and brigade commanders exercised free will and could disobey the orders of Kony without dire consequences.[581] From these findings, the Chamber impermissibly inferred that the Appellant exercised free will and was not subjected to duress in the execution of the orders of Kony. This finding contains unsubstantiated and inaccurate assessments.

b) The finding contradicts the context and substance of the confirmed charges

516. The Chamber's findings on the hierarchical nature of the LRA structure under an effective command and the role of the Appellant within the LRA are inconsistent[582] and contradict the confirmed charges.[583]

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[577] Application for Warrants, paras 68-77. The Prosecution from inception of this case, identified threats against those who were abducted by the LRA. The Prosecution noted that new abductees were promptly warned that any "attempt at escape would be punished by death" and in the event of successful escape, Kony ordered that "the LRA would kill the abductee's whole family". Kony also "disseminated the message that even a successful escapee could never survive, because the Ugandan government would poison him or her".
[578] Judgment, paras 873, 950-970.
[579] Judgment, paras 951, 970.
[580] Judgment, para. 2590.
[581] Judgment, para. 873.
[582] Judgment, paras 123-124, 873.
[583] CoC Decision, para. 56.

517. The DCC alleged that in the late 1980s the LRA began an insurgency against the Government of Uganda.[584] The pleading materially defined the armed conflict, its nature and parties to the conflict. It significantly provided context to the charges which were confirmed.

518. The CoC Decision laid out the structure and status of the LRA and the status of the Appellant within the structure from 1 July 2000 to 31 December 2005 for contextual elements and for the individual criminal responsibility of the Appellant.[585]

519. Rejecting the Defence's objections about the alleged hierarchical structure of the LRA, the Pre-Trial Chamber found that the hierarchical structure "was effective notwithstanding the possibility of deviations."[586] The Pre-Trial Chamber further cited the invocation of mystical powers by Kony to maintain his "tight grip" on the organisation.[587] The confirmed charges alleged the creation of four brigades and battalions over which Kony appointed individuals at his pleasure to serve as commanders to ensure the execution of his orders.[588]

c) The Chamber did not provide a reasoned statement on the central issues on the command-and-control authority of Kony

520. The Chamber did not provide reasoned statements about the command-and-control authority of Kony. A discussion about the powers, command and control authority of Kony was essential to the reliability of the conclusions which the Chamber reached. It was essential to determining the degree of subordination of the Appellant to Kony within the LRA coercive environment into which he was abducted, initiated, indoctrinated and raised.

521. The Chamber did not discuss the abduction, initiation and indoctrination of the Appellant under the command and control of Kony from his childhood formative years to adolescence, which fell on the charged period. The Chamber alleged but did not discuss or provide a reasoned statement on the rules which were imposed by Kony and the disciplinary regime which he established to ensure compliance with his orders. In the absence of credible evidentiary analysis, the Chamber relied on impermissible inferences made from cherry-picked, untested and unauthenticated

[584] At the time of the confirmation of charges, "an armed fighting at varying levels of intensity, mostly in northern Uganda, but also in the neighbouring areas of Uganda, Sudan/South Sudan, the Democratic Republic of Congo and the Central African Republic, between the LRA fighters under the command of Joseph Kony, on the one hand, and the Ugandan government, on the other hand, which in the course of the years launched different military offensives against the LRA." *See*, CoC Decision, para. 3.
[585] CoC Decision, para. 54.
[586] CoC Decision, para. 56.
[587] CoC Decision, para. 56.
[588] CoC Decision, para. 56.

logbooks summaries of alleged LRA communications, acts not charged and acts out of the temporal and geographic scope of the case to incriminate the Appellant.

522. The Chamber ignored the Defence submissions on spiritualism, the disciplinary regime of the LRA, LRA coercive environment and the abduction, initiation, indoctrination and forceful subordination of the Appellant by Kony. Spiritualism, orders and rules imposed and enforced by Kony, were the bedrock of the Appellant's defence. The failure to provide a reasoned statement, rendered the trial and judgment unfair and unsafe.[589] The Chamber provided no reasoned opinion to justify its decision which amounted to a miscarriage of justice. The Defence incorporates the Defence submissions in the Defence Closing Brief by reference in this Brief.[590]

523. The Chamber found that while Kony was far removed in Sudan, brigade commanders took their own initiatives and inferred from this finding that the Appellant took his own initiatives in the commission of the charged crimes,[591] a majority of which were alleged to have been committed in a common plan with Kony. Other pleadings in the case painted a different forensic picture which showed Kony fully in control of the crimes which were committed during the charged period and the Appellant fully subordinated and functioned as a victim, not a perpetrator.[592]

524. The evidence establishes that LRA disciplinary regime was applied by Kony to the Appellant, the same was as it was on everyone in the LRA. Kony did not make a distinction based on status on the application of the LRA disciplinary regime when there was a violation of his orders or standing rules. The power of life and death was with him, and he exercised the authority indistinctively no matter the rank or position the violator held.[593]

525. The decision of the Chamber to the contrary, relating to the applicability of the disciplinary regime to the Appellant, was not consistent with the evidence.[594] The reasons for the execution of LRA superior commanders found by the Chamber[595] are irrelevant to the fact that they were executed irrespective of their rank, pursuant to the disciplinary regime which was put in place and enforced by Kony. The Chamber failed to provide a reasoned statement to explain or justify the rank or

[589] Judgment, paras 27, 2592.
[590] Defence Closing Brief, paras 692-713.
[591] Judgment, para. 2665.
[592] Application for Warrants, paras 30-33, 68, 72, 76-80, 82-83, 8-87, 92-95, 97, 101-102, 104-109, 111.
[593] Judgment, paras 2609, 2611, 2613.
[594] Judgment, paras 2590-2591.
[595] Judgment, paras 2614-2615.

status exception it established to incriminate the Appellant. The execution of these commanders by Kony significantly contradicts the fact that such a role existed in the LRA.

526. The Chamber found that "as a matter of fact, high-ranking commanders of the LRA, including the Appellant, did not always execute Joseph Kony's orders"[596] and misrepresented or equated this with disobedience of Kony's orders or the LRA standing rules. The misrepresentation is discernible from the examples the Chamber cherry-picked to support its finding or to make impermissible inferences against the Appellant. None of them can be interpreted or construed as disobedience to the orders of Kony.[597] Contrary to the findings by the Chamber that the Appellant did not always obey the orders of Kony, P-0040 testified that Kony and Vincent Otti often "were happy because [the Appellant] would have gone and implemented an order that they have issued".[598]

527. Witness P-0440 was asked to listen and interpret an enhanced audio intercept of the communication between Kony and Vincent Otti in which they talked about the lazy performance of Odongo and Onen. P-0440 testified that:

> [t]hey were talking about Odongo and Onen in regard to a mission that they went for and they did not perform well. They were complaining about the performance of those people and Otti should arrest or apprehend those people because they are lazy and that their future missions should---those people should not be assigned soldiers because they will not perform. Kony gave an example of how Dominic works, he plans well and the result is always positive.[599]

When the asked what happened to Odongo and Onen by the time he left the LRA in August 2004, the witness answered: "When I returned home in 2000--in August 2004 they remained there, so it was not easy for me to know that they were still commanders or they were no longer commanders".[600]

528. The testimony of P-0440 was mischaracterised to support a conclusion that LRA commanders, including the Appellant, disobeyed Kony's orders without consequences. This conclusion was not supported by the evidence on the record.

[596] Judgment, para. 2593.
[597] Judgment, paras 2594-2597.
[598] T-40, p 20, lns 4-8.
[599] T-40, p.40, lns 9-15.
[600] T-40, p.41, lns 16-18.

529. The measures taken by the Appellant to seek clarification of the orders from Kony or special measures taken to ensure that the orders are carried out correctly[601] were not acts of disobedience. These actions show a determination to comply with Kony's orders to avoid dire consequences, not disobedience. The inference made that his interaction with Kony was incompatible with a situation of threat of imminent death or serious bodily harm is, therefore, impermissible.

530. The actions by the Appellant to approach Kony to seek guidance and explain the difficulties in carrying out the missions were not acts of disobedience. They were reasonable cautionary steps aimed at preventing at protecting the fighters under him from avoidable risks and not disobedience. The conclusion that the relationship between Kony and the Appellant was not characterised by the complete dominance of the former and subjection of the latter but that of a self-confident commander who took his own decisions on the basis of what he thought right or wrong,[602] is inconsistent with the evidence and the pleadings in this case.[603]

531. Being a confident commander in operations is not an attribute of insubordination to Kony. Being praised by Kony as one commander who worked well and urging other commanders to emulate his example[604] was an attribute of subordination of the Appellant to Kony. Vincent Otti and Otti Lagony, who were superior commanders, were executed by Kony despite the fact that they wielded considerable authority over LRA commanders and fighters, including the Appellant. Their authority included enforcing the orders of Kony and deploying fighters for operations. In this context, Vincent Otti arrested the Appellant from the sickbay and took him to Control Altar on the orders of Kony.[605] As the second in command to Kony, Vincent Otti exercised considerable authority over the Appellant and other commanders in the LRA. A reasonable inference to make from his execution was that every commander and fighter in the LRA, including Dominic Ongwen survived in the LRA by obeying the orders of Kony and the standing rules. The Chamber provided no reasoned statement for its conclusions; as a result, its findings were not proved beyond a reasonable doubt. Significantly, they contradicted the pleadings, making the charged allegations not proved beyond a reasonable doubt.

532. The Chamber failed to apply the standard of reasonable doubt to favourable Prosecution and Defence evidence and relied on internally inconsistent findings to incriminate and convict the

[601] Judgment, paras 2597-2599.
[602] Judgment para. 2602.
[603] CoC Decision, para. 56.
[604] Judgment, para. 2604.
[605] Judgment, paras 1019, 1050, 1061, 1063.

Appellant. In respect of the distribution of women, the Chamber disregarded the evidence that the orders came from Kony and incriminated the Appellant by association for the distribution of women without specifying the circumstances.[606] The Chamber found that the Appellant was appointed brigade commander of Sinia brigade on 4 March 2004. Prior to this, he was brigade commander of Oka battalion.[607]

Z. Ground 48: The Chamber erred in respect to the existence of a spy/informant newtwork in the LRA

533. The LRA maintained a network of spies/informants with the objective of reporting on the actions of the those within the LRA to Kony and his intelligence officers. This network of spies/informants created an atmosphere of danger and duress within the ranks of the LRA, including those labeled as senior commanders. The Chamber overlooked or completely dismissed key evidence of such a network in the Judgment.

534. The LRA, through Kony, maintained a spy network of informants with the purpose of reporting actions which Kony deemed undesirable.[608] The principal reason for the spy network was to report on persons who were contemplating escape,[609] the result of which usually meant death. The network was real, known and reported to the Chamber on many occasions by many witnesses.

535. This network of spies/informants, while not highly developed, played a significant role in the duress exuded by Kony in the LRA. While not independently sufficient to meet the criteria of Article 31(1)(d) of the Statute, this role compounded the hardships which everyone, from newly abducted to senior commander, had in order to escape from the LRA. The Chamber made a serious error of fact when it concluded that no such network or system existed,[610] and it negatively impacted on the Appellant's affirmative defence of duress. As such, the Defence requests the Appeals Chamber to overturn this finding of fact and apply it to the duress defence argument contained herein.

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[606] Judgment, paras 2167-2170, 2177, 2182, 2220, 2279, 2285, 2308.
[607] Judgment, paras 132, 134-138, 223.
[608] T-114, p. 11, ln. 16 to p. 12 ln. 1; *see generally* T-92, p. 26, lns 6-15 and T-121, p. 32, ln. 19 to p. 33, ln. 3.
[609] T-64, p. 26, lns 18-24; T-66, p. 50, ln. 23 to p. 51, ln. 2, p. 52, lns 9-19; T-104, p. 61, ln. 24 to p. 62, ln. 6; T-107, p. 13, lns 5-20 (*noting* that [REDACTED]); T-112, p. 30, ln. 14 to p. 31, ln. 15; T-114, p. 11, ln. 16 to p. 12, ln. 1; T-182, p. 26, ln. 1 to p. 27, ln. 5; T-187, p. 45, ln. 17 to p. 46, ln. 10; T-192, p. 45, lns 15-23 and p. 54, lns 3-23; T-197, p. 53, ln. 2 to p. 54, ln. 6; T-201, p. 11, lns 6-9; T-202, p. 28, ln. 19 to p. 30, ln. 7; T-203, p. 53, l. 19 to p. 55, ln. 13; T-208, p. 53, ln. 20 to p. 55, ln. 8; T-224, p. 69, ln. 14 to p. 70, ln. 4; T-241, p. 20, ln. 20 to p. 21, ln. 9; and T-247, p. 46, lns 11-23; and UGA-D26-0015-1022, at 1026; *Also see generally* T-222, p. 46, lns 3-8 and T-228, p. 33, lns 3-16 and p. 37, lns 6-16.
[610] Judgment, para. 2607.

AA. Ground 49: The Chamber erred in law and in fact by disregarding and misrepresenting evidence that neither men nor women had choice when partners were distributed,[611] and by accepting the Prosecution argument that evidence on SGBC had "persuasive force" for the Chamber's conclusion that duress does not apply[612]

a) Introduction

536. The Chamber erred when it misrepresented the evidence on record by imputing that because some of the alleged SGBC were committed in private, it was further indicative that the Appellant had not been subjected to a threat so as to successfully plead the defence of duress.[613]

537. There were strict orders to obey orders regarding women possession, arising from the LRA policy on the man-woman relationship in the LRA. This assertion was clearly bone out by the Prosecutor's own admissions.[614]

538. Among the statements relied on by the Prosecutor during its application for an arrest warrant, made by former LRA commanders, they corroborated the fact that the policy was longstanding, and predated the Appellant's adulthood or any policy decision making in the LRA. They identified Kony as the source of the policy.[615]

b) Disregarding evidence on wife distribution

539. The Chamber erred when it disregarded the evidence of P-0028 on wife distribution and yet it found other pieces of his evidence reliable.[616] P-0028 testified about how neither man nor woman had a choice in case they were given a partner. Refusal to accept the partner would be interpreted otherwise as a move of wanting to escape, which would call for execution. He stated that he was forced to take a girl, after he had initially refused when Kony called for a public meeting and out of fear of being killed.[617] The Chamber further ignored and disregarded consistent credible witness testimony that neither men nor women had a choice when partners were distributed to them by Kony, thereby occasioning a miscarriage of Justice.[618]

c) "Wives" were not exclusive to the person to whom they were assigned

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[611] For examples of evidence disregarded, see Defence Closing Brief, para. 683 at fn. 1105.
[612] Judgment, para. 2667.
[613] Judgment, para. 2667.
[614] Application for Warrants, para. 87.
[615] UGA-OTP-P-0085; UGA-OTP-P-0083; Charles Abola; UGA-OTP-P-0070.
[616] Judgment, para. 263.
[617] UGA-OTP-0217-0218, pp 0224-27.
[618] T-48, p. 20 ln. 25 to p. 21 ln. 2 (P-205); T-71, p.27 lns 18-21 (P-142); T-98, p.54 lns 13-16 (P-245); T-91, p.66 ln. 21 to p.67 ln. 3 and p.68 lns 1- 3 (P-114); T-208, p. 37 lns 6-12, p.58 lns 24- 25, p. 60 ln. 22 to p. 61 ln. 8 (D-92); T-226, p.39 ln. 14 to p. 41 ln. 1 (D-25); T-240, p.27. ln. 3 (D134); T-216, p. 20 ln. 25 to p.21 ln. 2 and p.23 ln. 5 (D-118); T-194, p. 26 lns 1-5 (D-6); T-202, p. 39 ln. 15 to p. 40 ln. 25 (D-27).

540. The Defence submits that the so-called "wives" were not exclusive to the person to whom they were assigned. As a matter of fact, they were held at the pleasure and behest of the LRA high command. There is overwhelming evidence on record that, for example, once it was discovered that the man was not treating the woman well, the woman was taken away from him and distributed to another man. On the other hand, if Kony coveted a woman under the charge of another man, he would take her at will as demonstrated below:

a) In the Report by Ray Apire, Acama Jackson and Muzee Kenneth Banya, these senior commanders stated thus; "In 2001, when Joseph Kony ordered for the arrest of a total of 29 officers namely Jackson, Ray, Hillary Lagen, Livingstone Nyeko Lubul, etc. for trying to cause a mass defection, their wives were taken away".[619]
b) [REDACTED].[620]
c) P-0172, testified how, notwithstanding pleas from various women including one of Kony's wives, to have the life of Ocan Bunia's wife a senior commander at the time who had attempted to escape spared, Kony still proceeded to execute her, meaning every woman in the LRA was the property of LRA, and not the man in her charge.[621]

541. From the foregoing therefore, any trier of fact having evidence clearly delineated above would have reached the conclusion that the Appellant under duress as he was subjected to threat of imminent death or of continuing or imminent serious bodily harm against his person or another person

BB. Ground 50 & 56: The Chamber erred in law and in fact by disregarding and misrepresenting threats of Kony and his killing senior commanders.

542. A central piece of the Defence argument on duress was that the threats by Kony were imminent. Kony repeatedly demonstrated swift and severe consequences to those who broke his rules. Senior Commanders like Otti Lagony and Okello Can Odonga,[622] Vincent Otti,[623] and James Opoka[624] were all arrested and executed for breaking rules and not towing Kony's strict edicts. The Chamber, however, mischaracterised the evidence on record by finding that such senior commanders killed on Kony's orders were killed because of political power, thereby occasioning a miscarriage of justice.

[619] UGA-D26-0022-0001, at 0008.
[620] T-202, p. 57, lns 21-24.
[621] T-113 p. 38 lns 12-25 (P-172)
[622] T-123, p. 43 lns 4-16 (P-231); T-49, p. 29 lns 3-7 (P-205); T-199, p. 41, ln. 8 and p. 31 lns 5-12 (D-32); T-202, p. 24 lns 8-12 and p. 27, lns 23-25 (D-27); T-208, pp 29- 31 (D-92).
[623] T-49, p. 29 lns 5-9 (P-205); T-100, p. 24 ln. 18 to p.25, ln. 1 (P-245); T-112, p.13 lns 17-23 (P233); T-191, p.36, ln. 24 to p.37, ln. 5 (D-26).
[624] T-199, p. 35 ln. 15 to p. 36 ln. 2 (D-32); T-202, p. 24 ln. 21 to p.25, ln. 1 (D-27); T-208, p.34 lns 12-14 (D-92).

543. Contrary to the Chamber's finding, credible evidence on record showed that there was an unquestionable obligation to follow Kony's orders, failure of which would result death or serious consequences.[625] The Chamber further erred when they asserted that the Appellant was not under any threat during the relevant period ignoring credible evidence that showed that he himself came close to execution for getting in touch with and receiving money from Lt General Salim Saleh.[626]

544. From the foregoing, a trier of fact having duly considered testimonial evidence on record regarding the killing of Senior LRA commanders would have reached a different decision and ultimately confirmed that the Appellant was truly under an imminent threat from Kony during the relevant period. As such the Defence requests the Appeals Chamber to invalidate the conviction.

CC. Ground 51: The Chamber erred in law and in fact regarding the Appellant and Salim Saleh

a) Introduction

545. This ground of appeal deals with the decision of the Chamber in which it mischaracterised, misrepresented and disregarded favourable evidence on the threats faced by the Appellant for his contacts with Lt General Salim Saleh of the UPDF in attempts to escape from the LRA while in the sickbay recovering from an injury.

b) The decision is inconsistent with the evidence on the record

546. The Chamber rejected the UPDF intelligence report dated August 2003 which stated that the Appellant narrowly escaped firing squad for receiving bags of money from UPDF Lt General Salim Saleh which the evidence established, was intended to facilitate his escape while in the sickbay.[627] The Chamber provided no credible reason for the rejection of the evidence, but only stated that it was not possible to ascertain the source from which the UPDF got the information.

547. The Chamber rejected the evidence because there is no other evidence to the same effect that the Appellant came close to execution because of his contact with LT General Salim Saleh.[628] This reasoning is inconsistent with the evidence on the record which the Chamber disregarded.

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[625] T-17, p. 65 lns 6-15 (P-235); T-113, p. 44 ln. 6 (P-172); T-121, p. 36 lns 12-18 (P-138); T-34, p. 78 lns 22-25 and p 80 lns 1-6 (P-16); T-194, p. 24 lns 14-24 (D-6); T-202, p. 23 ln. 18, p. 61 lns 15-18, p. 19 lns 1-19 (D-27); T-199, p. 41 ln. 8 (D-32); T-224; p. 44 ln. 22 to p. 45 ln. 2 (D-75); T-236, p. 16 lns 10-14 (D-19); T-226, p. 27 lns 18-24 (D-25); T-197, p. 41 ln. 25 to p. 42 ln. 4 (D-60).

[626] UGA-D26-0015-0948, at 0950 (stating that Dominic contacted Salim Saleh in a bid to escape but instead he was arrested and put in jail); T-122, p. 61 ln. 14 to p. 62 ln. 18, p. 64 lns 10-14; T-123, p. 56, lns 9-25; T-59, p. 68 lns 10-15; *See also*, UGA-OTP-0255-0943, at 0945.

[627] Judgment, para. 1054.

[628] Judgment, para. 2618.

c) The decision of the Chamber is inaccurate and prejudicial

548. The evidence about the contact between the Appellant and Lt General Salim Saleh was presented to the Chamber by P-0205 whom the Chamber found credible and reliable in several charges for incriminating evidence against the Appellant. Witness P-0205 testified that "at that time an order was issued that Dominic should be attacked. Okwonga Alero should have gone to shoot Dominic. But what happened that stopped that from being done I cannot tell, because at that time, I was just at the bay near Dominic".[629]

549. The sources of intelligence reports in this case were disclosed by a witness whom the Chamber credited and characterised as a core witness.[630] It was also provided by a key Prosecution witness who analysed and presented a report of the Prosecution evidence in the case.[631] It was therefore not accurate for the Chamber to reject the report on the ground that the UPDF did not disclose the source from which it got the report. By so deciding the Chamber came to a conclusion which no reasonable trier of fact would have arrived at based on the evidence on the trial record.

d) The UPDF intelligence report was corroborated by first-hand accounts and other evidence before the chamber which was ignored or disregarded

550. The UPDF intelligence report which was corroborated by Prosecution and Defence evidence was a reliable account of the arrest and grave threat to the life of the Appellant. The Defence urges the Appeals Chamber to reverse the rejection of the intelligence report accord the appropriate weight on it in making a threat assessment in the defence duress defence.

551. The rejected UPDF intelligence report described the gravity of the threat on the life of Dominic Ongwen due to his contacts with Lt General Salim Saleh. This account is corroborated by Florence Ayot who was an eyewitness when the plan to escape by the Appellant was hatched, found out and he was arrested.[632] The Chamber did not provide a reasoned statement on the plan by Dominic Ongwen to escape which was narrated by Florence Ayot and the gravity of the threat to his life. Rather, the Chamber sidestepped the issue.

552. The Chamber instead determined the relevance and probative value of the matter on the unrelated issue of the Appellant exercising his authority as an LRA commander, disregarding the relevance of the matter to the Appellant's duress defence. The Chamber accorded insufficient or no weight to the matter warranting an appellate intervention. The Defence respectfully refers the Chamber to

[629] T-49, p.42, lns 16-21.
[630] T-44, p. 94, l. 17 to p. 95, l. 1.
[631] P-0403 Report, UGA-OTP-0272-0446, at 0473, para. 89.
[632] Judgment, para. 1057.

the punishment for escape or attempted escape in LRA in its assessment of the gravity of the threat to the Appellant.[633]

e) The Chamber misinterpreted, mischaracterised and minimised favourable evidence

553. The Chamber misinterpreted the fact that the Appellant was not executed and was subsequently promoted at some point in time to find that the consequence of being on the wrong side of Kony was not necessarily grave.[634] This finding undermined the execution of several LRA commanders for being on his wrong side. Kony being a capricious leader and commander did whatever he wanted at his own time and on his own terms.

554. The finding about Kony promoting the Appellant is inconsistent with the evidence in the case. Prosecution evidence provided by P-0440, a core witness, made a clear distinction between appointments to command positions which Kony made, and promotions which Kony said were made by the spirits and he was just a spirit medium to communicate the information to the LRA.

555. P-0440, who was among the persons promoted, testified that Kony, Vincent Otti, Ocan Labongo, the Appellant and several other commanders were promoted by the spirits. Witness P-0440 listened to the audio of the intercepted promotion by the spirit and interpreted to the Court.[635] It was again inaccurate for the Chamber to mischaracterise the evidence by finding that Kony promoted the Appellant when the evidence before it stated clearly that it was the spirits who made the promotion.

f) The Chamber wrongly assessed and evaluated the gravity of the threats against the Appellant

556. As submitted in the Defence Closing Brief, hereby incorporated by reference,[636] the Appellant was placed in constant surveillance, and he was aware that he was closely monitored. This awareness increased his threat level making it hard for him to attempt to escape. The discussion by the Chamber of the meaning of arrest and detention in the LRA is irrelevant to the question of the threat which the Appellant faced after his arrest.[637]

[633] *See* Ground 48, paras 533-535 above.
[634] Judgment, para. 2620.
[635] T-40, p.42, lns 17-24; p.43, lns 2-10.
[636] Defence Closing Brief, paras 717-718.
[637] Judgment, para. 1057.

557. The Defence urges the Appeals Chamber to assess the gravity of the threats within the context in which it was executed and the coercive environment. P-0205 described the severity of the injury which the Appellant suffered and his precarious condition in the sickbay at the time of his arrest.[638]

DD. Ground 52: The Chamber erred in law and in fact by not applying the standard of proof beyond a reasonable doubt to its conclusions about the possibility of escape in the LRA and rejecting credible evidence that escape occurred because of opportunity

a) Introduction

558. In discounting the Appellant's defence of duress, the Chamber erred in law and fact when they concluded that escaping or leaving the LRA by the appellant was a realistic option to him as it was for many others of relatively high rank and position in the LRA who successfully escaped including some proximate to Dominic Ongwen.[639]

b) The Chamber erred by disregarding exculpatory evidence

559. The Defence, in making a case for the duress defence, argued that it was nearly impossible to escape from the LRA.[640] Indeed, the Chamber found rightly that Sinia members, and LRA members generally, were threatened with death if they attempted escape. On certain occasions, execution of re-captured escapees in fact took place.[641] The Chamber, however, erred when it rejected credible evidence that escape in most cases occurred because of opportunity, for example when there was cross fire between the UPDF and the LRA.[642] The Chamber also erred when it relied on inculpatory evidence of some witnesses and disregarded their exculpatory evidence when they testified that they escaped from the LRA through opportunity when they were attacked by the UPDF as detailed below:

a) P-0209 [REDACTED] his escape in 2009. [REDACTED][643]
b) P-0138: [REDACTED].[644] He testified that at the time of escape they were constantly being pursued by UPDF gunships.[645] And on that day, there was a gunship that came and UPDF soldiers also came and attacked them.[646]
c) P-0018. This witness escaped in May 2004 after the Lukodi attack. She testified that during the attack on Lukodi camp, the helicopter gunship arrived and instructions

[638] T-50, p. 11, ln. 15 – p. 14, ln. 13.
[639] Judgment, paras 2621, 2634 and 2635.
[640] Defence Closing Brief, para. 686.
[641] *As examples see* T-49, p. 7, lns 1-11; T-65, p. 23, lns 13-24; and T-94, p. 45, l. 21 to p. 46, l. 14.
[642] D-133'expert evidence at T-203, p. 81, lns 4-15 and T-204 p. 35, lns 9-18.
[643] T-160, p. 39, lns 7-19 and p. 35, lns 19-23.
[644] T-120, p. 17, lns 5-8.
[645] T-120, p. 68, lns 20-25.
[646] T-120, p. 69, lns 4-14.

were given to squat down and hide the luggage. She squat down until the next morning when the rebels had left.[647]

d) D-0118 [REDACTED].[648] [REDACTED].[649]

e) D-0119 escaped in 2004[650] after her group was attacked [REDACTED].[651]

560. Besides the witnesses referred to in the immediate preceding paragraph, there were other credible witnesses who testified how they got the opportunity to escape when the LRA was attacked by the UPDF. These were ignored by the Chamber in the resolution of possibility of escaping from the LRA. These included P-0340;[652] P-0352;[653] P-0101;[654] and D-0032,[655] among others.

561. Some of the witnesses relied on by the Chamber seized the opportunity of escaping while in the sickbay. Indeed evidence during trial revealed that even the Appellant attempted to escape while in sickbay in vain.[656] Some of these witnesses who escaped from sickbay and of relatively of high rank included [REDACTED],[657] D-0134,[658] and P-0045.[659]

562. The Appeals Chamber has previously stated that it is an error for a chamber to disregard potentially exculpatory evidence from a witness upon whom it has relied regarding inculpatory evidence.[660] The Chamber erred in law and in fact by not applying the standard of proof beyond a reasonable doubt to its conclusions about the possibility of escape in the LRA contrary to Articles 66, 67(1)(i), and 22(2) of the Statute.

EE. Ground 53: The Chamber erred in law and in fact by concluding that escaping from or otherwise leaving the LRA was a realistic option available to the Appellant

a) Introduction

563. This ground of appeal challenges the procedural, legal and evidentiary errors made by the Chamber in arriving at the findings by which it rejected the defence of duress raised by the Appellant.[661]

[647] T-69, p. 17, l. 23 to p. 19, l. 2.
[648] T-216, p. 37, lns 20-22.
[649] T-216, p. 41, lns 4-16.
[650] T-196, p. 44, lns 6-7.
[651] T-196, p. 39, l. 10 to p. 43, l. 11.
[652] T-102, p. 46, l. 19 to p. 47, l. 7.
[653] T-68, p. 22, lns 12-14.
[654] T-13, p. 26, lns 20-21 (*testifying* that after the Pajule attack, the plane came and shot at people. Some civilians managed to escape while others did not).
[655] T-200, p. 35, lns 6-13.
[656] *For example see* T-122 and T-123 (*noting* that P-231 was arrested with the Appellant for attempting to escape in April 2003).
[657] T-106, p. 47, l. 4 to p. 49, l. 5.
[658] T-240, p. 70, l. 1 to p. 71, l. 23.
[659] T-105, p. 19, l. 16 to p. 20, l. 17.
[660] Bemba Appeals Judgment, paras 189 and 194.
[661] The impugned findings are found at paragraphs 2581-2672 of the Judgment.

The decision of the Chamber was premised on a wrong legal and evidentiary standard, impermissible inferences, incomparable patterns and circumstances, and evidence out of the timeframe of the charges. The Chamber also relied on unreliable logbook summaries of LRA intercepted radio communications, which it mischaracterised as contemporaneous notes, to arrive at the prejudicial decision that escape at the time of the conduct relevant to the charges was a realistic option.[662]

b) Relying on evidence out of the temporal scope of the case to reject the duress defence was prejudicial and violated the statutory framework of the Court

564. The Chamber decided that during the time of the Appellant's conduct relevant for the charges, the Appellant was "not under threat of death or physical harm".[663] In arriving at this finding, the Chamber relied on evidence of events which occurred out of the temporal scope and circumstances of the case. These included the refusal of the Appellant to surrender to the UPDF in September 2006. This decision violated the Chamber's statutory mandate to guarantee fundamental fairness of the proceedings, the right of the Appellant to a fair trial and the commitment by the Chamber to confine itself to the facts and circumstances of the charges.[664]

c) The Chamber relied on incorrect standards of overwhelming evidence and comparable circumstances

565. The Chamber lowered the evidentiary threshold and burden of proof beyond a reasonable doubt by finding that the Appellant had a realistic option available at the time of the charged crimes to escape without providing a reasoned statement. The Chamber failed to contextualise its finding to the special circumstances of the Appellant.[665]

566. The Chamber did not provide a reasoned statement explaining the nexus between the request by senior UPDF officers for the Appellant to surrender in September 2006, and the charged crimes which occurred from 1 July 2002 to 31 December 2005. The Chamber did not explain how the surrender of Mr Ongwen in that occasion would have impacted on the commission of the charged crimes. By relying on this act not charged, and out of the temporal scope of the charges, to reject the Appellant's duress defence, the Chamber punished the Appellant for refusing to surrender under circumstances which were not linked to the charged crimes. The Chamber provided no

[662] Judgment, para. 2635.
[663] Judgment, para. 2640.
[664] Articles 66(2), 64(2) and 74(2) of the Statute.
[665] Judgment, para. 2635.

reasoned statement to establish that the request and refusal to surrender were linked to the charged crimes or the ICC warrant against the Appellant.

i. Impermissible inferences

567. The Chamber rejected the duress defence based on impermissible inferences made from circumstantial evidence which was far removed from the charged crimes. The Appeals Chamber in the *Bemba et al.* case decided that "where a factual finding is based on an inference drawn from circumstantial evidence, the finding is only established beyond reasonable doubt if it was the only reasonable conclusion that could be drawn from the evidence."[666]

568. Several alternative inferences were discernible from the evidence. It was a reasonable inference that the Appellant, who was not anticipating such a request, did not trust the UPDF soldiers against whom he had been fighting. He might have reasonably thought they were entrapping to capture and kill him.[667] It was a reasonable inference that he believed that his action would advance the peace efforts which Kony and President Museveni had worked out. He reasonably believed that his actions were part of the peace effort which his defection would have compromised and possibly prolong the war. This is informed by the fact that despite the military campaign and the crimes committed in Northern Uganda, efforts to resolve the conflict through peaceful means, including peace talks were always the focus of the international community and the parties to the conflict. The Chamber referred to the evidence on this in the Judgment.[668]

569. The logbook summaries of intercepted LRA radio communications from which impermissible inferences drawn in the Judgment,[669] were mischaracterised: i) the Chamber disregarded the intercept evidence which raised reasonable doubt and mischaracterised the impugned logbook summaries as contemporaneous records which they were not.[670] No reasonable trier of fact would have disregarded and substituted contemporaneous notes of the intercepted communications with logbook summary records of interceptors' the recollections; ii) the evidence was unauthenticated and untested; iii) although the Appellant's name was mentioned in some of the conversations, the evidence was wrongly credited for the truthfulness of its content and relied on to make adverse findings against the Appellant, and his defences; iv) the evidence did not relate to the charged crimes against the Appellant and was irrelevant to any of the issues in the case; v) the evidence

[666] Bemba et al Appeals Judgment, para. 868. *See also*, Reasons of Judge Geoffrey Henderson, at para. 5.
[667] T-110, p. 66, lns 6-11, p. 54, lns 10-15, p. 58, lns 11, 17-19.
[668] Judgment, paras 9, 278, 433, 447, 448, 515, 522 and 2638; fns 345, 770 and 772.
[669] Judgment, paras 2660, 2661 and 2663.
[670] Judgment, paras 667-669.

was not a comprehensive complete forensic record of the communications; vi) the interest of justice warranted that Chamber order a translation and interpretation of the contemporaneous record. The difficulties identified by the Chamber were not of a nature that would have rendered the contemporaneous record of no probative value; and vii) the inferences and conclusions made by the Chamber from the logbook summaries were impermissible, unreasonable, and unwarranted.

ii. Wrong evidentiary standards

570. The Chamber violated the fair trial rights of the Appellant by applying the wrong evidentiary standard of "overwhelming evidence", "totality of circumstances" and "whether others in comparable circumstances were able to necessarily and reasonably avoid the same threats."[671] The Chamber did not provide a reasoned statement on these standards.

571. The alleged "other comparable circumstances" which the Chamber relied on in this case, were not a complete evidential record of the escape of the LRA commanders and fighters. The Chamber cherry-picked a few cases of escape without a showing that the escapees found themselves in the same circumstances as the Appellant. The Chamber did not provide a reasoned opinion explaining the comparable circumstances. The inferences made from unmotivated comparable circumstances were impermissible due to the fact that many of the commanders who escaped due to opportunities, were captured in combat, or wounded in combat. The Chamber came to the conclusion that the Appellant's position and rank placed him in a relatively better position to escape compared to lower members.[672] There was no reasoned statement substantiating this finding, nor detailing and explaining the circumstances of the escape of the selected LRA fighters and commanders who the Chamber relied on to make its prejudicial finding.

572. The Defence subscribes to the reasoning of Judge Geoffrey Henderson in his Separate Opinion in the *Gbagbo & Blé Goudé* no case to answer decision, that "anyone can claim the existence of a pattern by cherry-picking examples that fit preconceived characteristics and ignoring all other information that does not conform. The burden is upon the Prosecutor to show how and why she selected the incidents relied upon".[673] According to the Judge Henderson, "in order to establish the true nature and extent of a pattern, it is indispensable for the party alleging it to demonstrate that the examples provided as proof of the pattern are representative samples of the totality of

[671] Judgment, paras 231, 2583, 2588 and 2621. *See also*, Articles 64(2), 66(2) and 74(2)(5) of the Statute.
[672] Judgment, para. 2634.
[673] Reasons of Judge Geoffrey Henderson, para. 1888.

relevant events and not simply chosen because they fit a preconceived conception."[674] In the case at bar, no such demonstration was made.

573. The Defence respectfully urges the Appeals Chamber to find that the alleged comparable circumstances could not corroborate each other. It could not be relied on for a pattern of escapes by commanders in the LRA, because the patterns were not proved to exist independently from the individual instances that constituted them.[675] There was absolutely no discussion of the circumstances of the escapes by each escapee.

d) Impermissible reversal of the burden of proof by the Chamber

574. The Chamber rejected the Appellant's explanations for not surrendering to the UPDF, or escaping. The Chamber endorsed the speculative theory of the Prosecution that because some LRA commanders escaped, the Appellant also had a reasonable prospect of escaping. The Chamber misrepresented and rejected the Defence evidence without weighing the evidence in the context of the personal circumstances of the Appellant.[676] Particularly, the Chamber misrepresented the evidence of Defence witnesses D-0013, D-0008 and failed to individualise the circumstances applicable to the Appellant.[677] The Chamber ignored the fact that all the Appellant had to do was to raise reasonable doubt, which he did in the context of the wrongly rejected evidence.[678]

575. The reversal of the burden of proof and the procedural, legal and evidentiary errors made by the Chamber led to the unjustifiable rejection of the duress affirmative defence raised by the Appellant. These violations are inconsistent with the Appeals Chamber decision in the case of *Kilolo et al.* where it was decided that "it is not sufficient that a conclusion reached by a trial chamber is merely a reasonable conclusion available from that evidence; the conclusion pointing to the guilt of the accused must be the *only* reasonable conclusion available."[679] By reversing the burden of proof and applying the standards of "totality of evidence",[680] comparable circumstances, and the standard of "the only reasonable conclusion" instead of the statutory burden of proof ordained by Article 66(1), (2) and (3), the Chamber rejected the Defence affirmative defence of

[674] Reasons of Judge Geoffrey Henderson, para. 80.
[675] Reasons of Judge Geoffrey Henderson, para. 47.
[676] Judgment, paras 2592-2599, 2602, 2615, 2618, 2620, 2621-2627, 2635, 2639, 2642, 2645, 2658 and 2668.
[677] Judgment, para. 2630.
[678] Judgment, paras 2638, 2639, 2640 and 2641.
[679] Bemba et al Appeals Judgment, para. 868. *See also*, Judgment, paras 2873, 2926, 2972 and 3019.
[680] Judgment, paras 1476, 1506-1520, 1523, 1525, 1528, 1531-1534, 1538, 1542, 1545, 1746, 1760-1754, 1756, 1769, 1670-1675 and 1775-1776.

duress and entered multiple convictions against the Appellant causing significant prejudice. This made the trial unfair and the judgment unsafe, warranting a reversal and an acquittal.

FF. Ground 54: The Chamber erred in law and fact by failing to give a reasoned statement as to why the possibility of collective punishment for escape did not apply to the Appellant, especially in light of the Chamber's contradictory holding on this evidence

576. The Chamber explicitly acknowledged that members of the LRA were threatened that their home areas would be attacked by the LRA if they escaped. However, it erred in fact and law by concluding that the possibility of collective punishment was not a factor contributing to a threat under Article 31(1)(d) of the Statute.[681]

577. As noted by the Chamber and confirmed by several witnesses, collective punishment imposed by the LRA against villages for escapees was widely known.[682] There was no evidence provided to the effect that the threat of collective punishment would only be applied in instances where the escapees had escaped with guns and or caused havoc prior to their escape or were affiliated with the UPDF, as the Chamber tried to assert by distinguishing the facts of the Mucwini case.[683]

578. Article 74 of the Statute sets the requirements for the judgment that decides either on the acquittal or the conviction of the accused. Paragraph 5 of said article has been understood by the Appeals Chamber as requiring the Trial Chamber to provide "a full and reasoned statement of [its] findings on the evidence and conclusions",[684] which also determined that if "a decision under article 74 of the Statute does not completely comply with this requirement, this amounts to a procedural error".[685] It concluded that decisions on the guilt or innocence of the accused must clearly state the factual findings and the assessment of evidence.[686]

579. In the present case, the Chamber merely outlined the facts of the incident at Mucwini as a basis for distinguishing it from other instances of escape, but failed to provide a reasoned statement as to why the possibility of collective punishment did not apply to the Appellant. This amounts to a procedural error which materially affects the judgment.

GG. Ground 55: The Chamber erred in fact when, while considering the evidence pointing to Commanders who successfully defied Kony without serious consequences, it

[681] Judgment, paras. 2587 and 2642.
[682] Judgment, paras. 991-998.
[683] Judgment, para. 998.
[684] Paragraph 5 states: The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Chamber shall issue one decision. [emphasis added]
[685] Bemba Appeals Judgment, para. 49.
[686] Bemba Appeals Judgment, para. 52.

failed to consider the evidence on record of Kony's unpredictability and his claims spirits could order that there should be no killing, or abduction[687]

a) Introduction

580. The Defence notified the Chamber in accordance with the RPE that it would be raising the affirmative defence of duress,[688] and maintains the position that the Prosecution has failed to adduce cogent evidence that the Appellant is culpable for all the charged crimes.

581. The present case features unprecedented complexity, with traditional cultural beliefs playing a central role. This is due to the fact that spiritualism was used as a means of indoctrinating LRA members, in particular child soldiers. Because of this, the Defence noted the need to avoid adopting a simplistic view on spiritualism which would result in an assessment of evidence which reflects one's own personal beliefs rather than the subjective beliefs of the Appellant at the time of the charged conduct.

582. The Chamber did not pay due consideration to the substantial body of evidence detailing how Kony portrayed himself as a medium and the rules that flowed from his alleged spiritual power.[689] Furthermore, the Chamber failed to consider cultural factors, the effects of spirits specifically on abducted children, including the Appellant,[690] and how this impacted their view towards escape.[691]

b) The Chamber erred by disregarding cultural factors

583. There is a plethora of evidence on the record detailing how spiritual beliefs within Acholi culture helped to bolster Kony's claim of being a medium which he used the same to control the LRA.[692] The Chamber has rightfully acknowledged "[t]he fact that Joseph Kony acted also as a spiritual leader, building on Acholi traditions, is uncontroversial and well-attested in the evidence."[693]

584. Many people in Northern Uganda, although they might not agree with Kony and his violence, believe that he possessed some spiritual powers. Witnesses P-0205,[694] P-0070,[695] and D-0032[696] all testified to the fact that the LRA was using witchcraft which had to be countered by Kony's

[687] Judgment, paras 2593-2606.
[688] Trial Chamber IX, *Defence Notification Pursuant to Rules 79(2)and 80(1)of the Rules of Procedure and Evidence*, ICC-02/04-01/15-517.
[689] *See* Defence Closing Brief, paras 702-711.
[690] *See* Defence Closing Brief, paras 712-713.
[691] *See* Defence Closing Brief, paras 714-715.
[692] *See* Defence Closing Brief, paras 24-29.
[693] Judgment, para. 2643.
[694] T-49, p. 26, ln. 19 - p. 27, ln. 8.
[695] T-107, p. 28, lns 24-25.
[696] T-199, p. 61, ln. 18 - p. 63, ln. 1.

spirits, while P-0172 testified emphatically that in Acholi and Lango, people grew up knowing about the spirits.[697]

585. The insurgency in Northern Uganda points to the fact that it was this single factor of belief in Kony's spiritualism, not military might, that sustained the LRA resistance war for so long. However, the Chamber failed to properly assess evidence on the record regarding Acholi society, especially concerning spiritual beliefs and thier impact on the everyday interactions of people.

586. The Chamber first views the testimony of D-0150, a spiritual healer who gave evidence regarding Acholi spiritual traditions, as irrelevant becasue the witness had no knowledge of Kony's alleged possession or of the Appellant.[698] Not only does this show a disregard for the fundamental role of Acholi culture, it also ignores the probative value of this exonerating circumstantial evidence.

587. D-0111, a spiritual healer (*ajwaka*), was considered to "not be of direct relevance to the charges".[699] This is despite the witness having explained how children learned of spiritualism from elders early in life,[700] and provided important details on how spiritual traditions determined treatments for different ailments.[701] D-0111 stated her experience of providing exorcisms on former LRA members who felt they hosted bad spirits resulting from their time in the LRA,[702] and the ceremony performed.[703] The witness went on to explain that many of the people she has helped were abducted at early ages, like at 10, and grew up in captivity and continued to suffer from the long-term effects of their experience.[704]

588. The evidence of D-0060 is also viewed as being "of limited value" on the basis that he did not "question the statements made to him about the spiritual influence on LRA fighters and did not consider it to be his role to make a judgment about the truthfulness or falsity of the statements".[705] However, considering that spiritual beliefs are subjective, this response is entirely appropriate and recognises how the faith of all LRA members cannot be categorically determined.[706]

[697] T-114, p. 16, ln. 24 – p. 17, ln. 3.
[698] Judgment, para. 608.
[699] Judgment, para. 518.
[700] T-183, p. 19, ln. 5 – 16.
[701] T-183, p. 7, lns 1-4.
[702] T-183, p. 12 ln. 22 - p. 13, ln. 5.
[703] T-183, p. 14, lns 7-10.
[704] T-183, p. 15, ln. 12 – p.16, ln. 17.
[705] Judgment, para. 597.
[706] For another example of evidence concerning Acholi cultural norms being disregarded, *see* Judgment, para. 517.

589. In light of the above paragraphs, any reasonable trier of fact should have come to the conclusion that according to Acholi culture there is a likelihood that children, like the Appellant, may believe that they remain under the spirit's spell as the effects of indoctrination endure into adulthood and the charged period. Moreover, the circumstantial evidence of local and cultural practices demonstrates the spiritual ideology of Acholi society and how these permeated into the LRA environment to increase the believability of Kony's claims to be a medium and Acholi nationalist sent by God, as according to *ajwaka* witnesses, his spiritualism was no different from any other experienced under the traditional Acholi cultural beliefs.[707]

c) The Chamber erred by disregarding exculpatory evidence and failing to provide a reasoned opinion as to why the spiritual influence did not apply to Appellant, despite accepting the credibility of other witness testimony on spirituality in the LRA

590. The Chamber failed to consider the key role that spirituality played in the LRA when assessing the relevant evidence, despite this being acknowledged in the CoC Decision,[708] and thereby erred in both law and fact.

591. Rituals "were a stable feature of the LRA" used to instil obedience and prevent escape,[709] and there is consistent evidence that soon after abduction new recruits underwent an initiation ceremony which used symbolic elements of Acholi culture, namely being anointed with shea butter and warned against escape or disobeying the rules.[710] D-0074 testified that the most important set of rules in the LRA were the 10 Commandments which were established by the Holy Spirit, with Kony acting as the medium.[711] However, despite being deemed a credible witness who "provided details in keeping with what could be expected of a witness who spent a significant amount of time in the LRA",[712] D-0074's evidence regarding spiritualism fails to be mentioned by the Chamber – aside from merely noting at the end of footnote 7047 that D-0074 testified that he believed in Kony's spirits and that "everybody [within the LRA] believed".[713]

592. According to D-0060, there was a widespread and firm belief that following the rules of the spirits would ensure survival on the battlefield,[714] while the shea butter (*moo ya*) allowed the spirits to find

[707] *See* Defence Closing Brief, para. 703. *See also*, T-183, p. 20, ln. 1 – p.22, ln. 16; T-184, p. 23, ln. 22 – p. 26, ln. 22.
[708] *See* CoC Decision, para. 56.
[709] *See* Judgment, paras 129 and 906.
[710] Judgment, paras 906-912.
[711] T-187, p. 38, lns 11-20 and p. 39, l. 18.
[712] Judgment, para. 286.
[713] T-187, pp 15-16 and T-188, p. 19, lns 9-15.
[714] D-0060: UGA-D26-0018-3904.

them should they ever attempt escape. D-0060 also testified that combatants feared to escape because it was believed that Kony had the power to read their minds.[715]

593. The allegation that Kony possessed spiritual powers was detailed by former members of the LRA. These are outlined in the Defence's Closing Brief and warranted proper consideration by the Chamber when assessing the potential threat experienced by the Appellant.[716] The Judgment, however, shows these aspects were unduly ignored by in the final evidentiary assessment.

594. Aside from the ample evidence outlining the spiritual aspects of the LRA, witnesses also discussed the effect of these claims on their own belief system and mind-set. Further evidence raising reasonable doubt is noted by the Chamber in its judgment,[717] yet the significance and exculpatory value of this testimony is completely overlooked by the Chamber, which goes on to state:

> All of this evidence leads the Chamber to the conclusion that LRA members with some experience in the organisation did not generally believe that Joseph Kony possessed spiritual powers. There is also no evidence indicating that the belief in Joseph Kony's spiritual powers played a role for Dominic Ongwen.[718]

595. Not only is this conclusion detached from the evidence, but it also evinces a complete disregard for the evidence of spiritual indoctrination and psychological manipulation used by Kony to create a coercive environment in which people were forced to obey the rules.[719] This greatly influenced the Appellant who, like others,[720] felt he was constantly being watched.[721]

596. Unlike many other witnesses, however, the Appellant spent a lifetime in the LRA due to the early age at which he was abducted. While this is discussed further in Ground 68 of the Appeal Brief,[722] suffice to say that spirituality was much more prominent within the LRA between 1986 and during Operation Iron fist,[723] the period within which the Appellant was forcefully recruited and initiated into the LRA. A reasonable inference from this evidence is that the Appellant was even more impacted by Kony's alleged spiritual powers and the threat they created then others who were abducted later and spent less time in such a coercive and violent environment.

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[715] D-0060: UGA-D26-0018-3904. *See also* D-0074: T-188, p. 19, lns 9-15.
[716] Defence Closing Brief, paras 709-711.
[717] Judgment, paras 2650, 2651, 2652, 2655, 2656 and 2657; fn. 7047.
[718] Judgment, para. 2658.
[719] Defence Closing Brief, para. 476.
[720] *See* Judgment, para. 984: P-0406, a credible witness, stated that Kony's warning not to escape had a strong impression on him as "at that time I believed it because he warned us that if you don't believe, he would know".
[721] Defence Closing Brief, paras 476-477.
[722] *See* Ground 68, sections b and c. *See also* Defence Closing Brief, paras 712-713.
[723] T-197, p. 34, lns 1-2.

597. The Appellant's strong spiritual beliefs during the charged period is supported by evidence which not only mentions the Appellant's presence at initiation rituals,[724] but even details a prayer personally led by the Appellant to bless the fighters prior to the attack on Odek.[725] The Defence recalls how being anointed with shea butter was believed to offer protection on the battlefield,[726] and considers this evidence indicative of a genuine spiritual belief which created an imminent and continuing threat of serious bodily harm to in the mind of the Appellant.

598. The Chamber violated Article 74(5) of the Statute by failing to provide a reasoned statement as to why it disregarded the evidence which raised substantial reasonable doubt in the conclusion that there was "no evidence indicating that the belief in Joseph Kony's spiritual powers played a role for Dominic Ongwen".[727] Rather than use this exculpatory evidence to support a conviction against the Appellant,[728] a reasonable trier of fact would have considered the testimony in an unbiased manner and found that his obvious spiritual beliefs and indoctrination supported his Article 31 defences.

d) The Chamber erred by concluding that LRA spirituality is not a factor contributing to a threat pursuant to Article 31(1)(d)

599. Despite spiritualism being key to Kony's control over the LRA, the Chamber failed to properly assess all available evidence. Instead, it committed an error of law and fact by assessing the evidence in a biased, selective, and discriminatory manner. It focussed solely on incriminatory evidence when assessing whether Kony's alleged spiritual powers were sufficient to create or sustain a threat relevant under Article 31(1)(d) of the Statute.[729]

600. Upon hearing the personal accounts of LRA members detailing the effect and role of spiritualism in the military organisation, it concluded that it does not "discern in the issue of LRA spirituality a factor contributing to a threat relevant under Article 31(1)(d)".[730] Instead, it found:

> [c]onsistent evidence that for many persons who stayed in the LRA longer their belief followed a pattern: it was stronger in the young, new and impressionable abductees and then subsided and disappeared in those who stayed in the LRA longer.[731]

[724] *See* Judgment, para. 907.
[725] Judgment, para. 1404.
[726] *See* paras 596-597 above.
[727] Judgment, para. 2658.
[728] *See* Judgment, paras 2913, 2916 and 2920.
[729] Judgment, paras 2643-2658.
[730] Judgment, para. 2658.
[731] Judgment, para. 2645.

601. This is an impermissible inference detached from the evidence on the trial record. This is not the only reasonable conclusion that may be drawn from the evidence, which contradicts this finding on a number of occasions and raises substantial reasonable doubt.

602. To substantiate this claim, the Defence draws attention to the evidence of P-0209 discussed in paragraph 2651. Here, the witness admits "it's possible there were spirits" as although he didn't believe in Kony's spirits personally he did accept that based on Acholi traditional culture he could have been a chief and possessed some spiritual capacity. At paragraph 2655, Charles Lokwiya stated that the gatherings about spirituality did not have an effect on him, but that there were, still at the time of his testimony, people in the bush who did believe that "Kony has a spirit". The Chamber subsequently notes the evidence of Joseph Okilan, who stated that "sometimes, as a human being, you can actually believe that probably this man's spirits worked".[732]

603. The Chamber's conclusion, which is based on an impermissible inference drawn from solely relying on incriminatory testimony, fails to consider the reasonable doubt raised by the evidence outlined above. The finding represents a manifest error in both law and fact on an issue that is central to the individual criminal responsibility of the Appellant which affects the Judgment as a whole.

HH. Ground 58 (in part): The Chamber erred by failing to respond to Defence arguments that Uganda had a legal duty to protect the Appellant as a child[733]

a) Uganda is legally bound by its obligations under International Humanitarian Law to have protected the Appellant as a child

604. While general human rights and humanitarian law instruments are applicable to the protection to children,[734] the 1989 Convention on the Rights of the Child ('CRC') and the 2000 Optional Protocol on the involvement of children in armed conflict ('Optional Protocol') address the rights and protections of Children. Uganda ratified the CRC on 17 August 1990 and acceded to the Optional Protocol on 6 May 2002. This conduct made both instruments legally binding on Uganda.

[732] Judgment, para. 2656.
[733] Defence Closing Brief, paras 494-496. There is no Judgment reference because the Chamber made no finding on this issue, raised in the evidence of D-0133 at T-204, pp. 7-13.
[734] *See*, Article 77 of the Additional Protocol to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. *See also*, Article 4(3)(c)&(d) of the Additional Protocol to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

605. Thus, Uganda is bound by Article 38(2) of the CRC and Article 4 of the Optional Protocol to ensure that children under the age of fifteen "do not take a direct part in hostilities"[735] and "[a]rmed groups, distinct from the armed forces of a State, should not under any circumstances, recruit or use in hostilities persons under the age of 18 years".[736]

b) Uganda's legal responsibilities should be defined consistent with the Vienna Convention on the Law of Treaties (VCLT)

606. Although Uganda has not signed the VCLT, its legal responsibilities should be interpreted in light of the VCLT's principles, which have been endorsed by 161 countries.[737] According to Article 26 of the VCLT, States Parties must perform the legally binding provisions in good faith.[738] Article 31 extends the application of good faith to the interpretation of the treaty itself, which is to be done in light of its object and purpose.[739]

c) Uganda failed to uphold the Appellant's rights under the CRC and Optional Protocol

607. The Government of Uganda failed to fulfil its obligation to ensure fundamental rights in respect to the Appellant, who was abducted in 1987. While the principle of non-retroactivity of treaties prevents any State Party from being legally bound by its provisions in relation to any act or acts which took place before the entry into force of the treaty for that particular signatory,[740] the ongoing nature of the Appellant's abduction brings the conduct of Uganda within the scope of the CRC, its Optional Protocol, and the Additional Protocols I and II to the Geneva Conventions.

608. Abduction, like enforced disappearance under Article 7(1)(i) of the Statute,[741] continues as long as the victim remains held against his or her will. Therefore, Uganda's obligation to protect the Appellant began the day he was abducted and continued throughout his captivity until he escaped captivity in 2015. This interpretation of abduction as a continuous crime[742] is consistent with the

[735] Article 38(2) of the Convention on the Rights of the Child ('CRC'), 20 November 1989.
[736] Article 4(1) of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000.
[737] *See* UNTC for list of State Parties' signatures, accessions, successions and ratifications to the VCLT.
[738] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 26 March 1986, Article 26.
[739] VCLT, Article 31(1).
[740] VCLT, Article 28.
[741] Articles 7(1)(i) and 7(2)(i) of the Statute.
[742] This analysis of abduction as a continuous crime does not waive Defence objections in SGBC Defects to defective pleading in the CoC Decision of "continued, uninterrupted" in respect to SGBC.

object and purpose of the CRC and the Additional Protocols, which is to protect the rights of children in armed conflict.[743]

609. Even if Uganda's obligation to protect the Appellant ended when he turned 18, there are 9-10 years during which Uganda, through acts of omission, violated its obligations under the CRC and the Optional Protocol. Uganda's failure to protect its children was recognised by the Committee on the Rights of the Child, through the reporting mechanism in the CRC, at Articles 43-44.[744] In its initial report in 1997, the Committee recommended that Uganda "take measures to stop the killing and abduction of children and the use of children as child soldiers in the area of the armed conflict"[745] after expressing its concern regarding the "abduction, killings and torture of children occurring in this area of armed conflict and the involvement of children as child soldiers".[746] In a subsequent report, the Committee urged Uganda the "take all necessary measures to protect children, to the maximum extent possible, against the risk of abduction by the LRA and other armed forces".[747]

610. Although these reports were drafted after the Appellant's abduction, they reaffirm the need for Uganda to provide greater protection for children. They also demonstrate Uganda's inability to address the crisis and its failure to uphold its duty to safeguard children's fundamental rights. Uganda had a duty to ensure and protect the Appellant's rights, failed to meet this obligation, and violated international the norms with which it purportedly agreed. The Chamber erred by failing to respond to the Defence arguments regarding Uganda's legal duty to protect the Appellant.

II. Grounds 61, 62 & 63: The Chamber erred in law, in fact and in procedure regarding the Expert Evidence of D-0133

a) Introduction[748]

[743] The objective of the CRC and the Optional Protocol to the CRC is to guarantee the comprehensive protection of children's civil, political, economic, social and cultural rights generally and in the context of armed conflicts. The rights enshrined in the Convention are intended to be made available to all children and are considered of equal importance, with the text to be interpreted as a whole.
[744] D-0133 was twice elected, under CRC, Article 43, to the Committee on the Rights of the Child (T-203, pp. 12-13) in 2005 and 2008. *See*, D-0133's UGA-D26-0015-1154 at 1158-1162 on work as a UN Expert, and complete C.V. detailing expertise as a child soldier expert.
[745] 16th Session: Consideration of Reports Submitted by States Parties Under Article 44 of the Convention – Concluding Observations of the Committee on the Rights of the Child: Uganda, 21 October 1997, para. 34.
[746] 16th Session: Consideration of Reports Submitted by States Parties Under Article 44 of the Convention – Concluding Observations of the Committee on the Rights of the Child: Uganda, 21 October 1997, para. 9.
[747] 40th Session: Consideration of Reports Submitted by States Parties Under Article 44 of the Convention – Concluding Observations of the Committee on the Rights of the Child: Uganda, 23 November 2005, para. 70.
[748] The Defence incorporates references to D-0133's evidence in its Defence Closing Brief, at paras 566-567, 572, 577, 621, 663, 693 and 724-25. Please note that the witness is referred to as D-133 in the Defence Closing Brief.

611. Major Pollar Awich (D-0133), a retired military official in the NRA/UPDF and also a lawyer, testified as a Defence expert on child soldiers. His expertise was based: (a) on his personal experiences of having been abducted as a child by the NRA and having worked professionally later with ex-LRA abductees, and (b) on his twice elected membership to the U.N. Committee on the Rights of Children, based in Geneva. The U.N. Committee is mandated with overseeing the compliance of States Parties, under Article 43 with the Convention's provisions.[749]

612. The Chamber found D-0133's testimony regarding his own experiences as an abductee and those of LRA abductees credible. However, the Chamber rejected the witness's general conclusions which he made as an expert. In particular, the Chamber rejected the theme and conclusions in his Report that the experiences of being a child soldier endure and affect a person throughout his or her life. In addition, the Chamber found D-0133's testimony on escape "incredible" and held that the remainder of Major Awich's testimony did not go to the issues relevant to the charged crimes.[750]

613. The Judgment does not refer to D-0133's testimony for any purposes. The Chamber totally ignores D-0133's expert evidence, and apparently did not rely on any evidence from D-0133 – including the evidence it deemed credible – in any of its findings or conclusions in Judgment.

614. Major Awich, in his expert report and testimony, provided relevant and probative evidence, to support the elements of the Defence's affirmative defence of duress, including the lack of free will in child soldiers, and that the effects of child soldiering continued beyond the actual years in an army or militia.[751]

615. In addition, the Chamber's misrepresentation of the evidence from Mr Awich on escape contributed to its legal error in finding that the elements of the affirmative defence of duress were

[749] T-203, pp. 12-13.
[750] Judgment, para. 612.
[751] *See*, T-203, p. 78, l. 2 to p. 79, l. 7 (D-0133 testimony on persistence over time of psychological and physical phenomena in [former] child soldiers, including PTSD). The longevity of the effects of being a child soldier is also a conclusion of other experts. For example, in the *Ongwen* case, Victims's Expert PCV-2 concludes children abducted by the LRA suffered from long-term in many areas, and that the long-term harm was enabled by the intergenerational transmission of trauma. *See*, Executive Summary at UGA-PCV-00020-0081, from "The Consequences of the Abduction of Children Under 15: Implications for Individuals, Families, Communities, and Acholi Society," a detailed Expert Report ((UGA-PCV-0002-0076) by Michael G. Wessells, PhdD. Another example is the Expert Report by Elizabeth Schauer, Ph.D a Prosecution expert in *Lubanga*. Her report, "The Psychological Impact of Child Soldiering," ICC-01/04-01/06-1729-Anx 1. 25-020 2009, which was submitted into evidence by the *Ongwen* defence; it is available at https://www.legal-tools.org/doc/ccb0d2/pdf. Dr. Schauer also details the long-term effects of trauma child soldiers experience, including PTSD, which persists, according to one study, up to 40 years after the trauma (Schauer Report, at p. 15) and describes the effects on individuals, and their families and communities, noting the transgenerational effects.

not satisfied. The Chamber's factual error based on an erroneous cultural understanding led to a miscarriage of justice (the conviction of the Appellant) and morphed into a legal error.

b) Procedural appellate errors

i. Error #1: The Trial Chamber violated its own procedures in respect to expert witnesses

616. Generally, one of the key points of distinction between expert testimony and fact testimony is that experts are permitted to provide opinion evidence. This is based on their recognised knowledge and expertise. Hence, an expert witness is not required to have personally experienced about what s/he may be giving an opinion.[752]

617. With D-0133, the expert provided an advantageous perspective to the Chamber – from both his own personal experience as well as expertise. However, the Chamber chose to disregard any conclusions based on his expert opinion and treated the Defence expert only as a fact witness.

618. In treating the expert witness as a fact witness, the Chamber violated its own procedures for expert witnesses.[753] There are no provisions for the Chamber to decide, *sua sponte*, on expert status, in the absence of challenges from non-calling parties. There is no evidence in the record, nor is any referred to in the Judgment, that the expert status of D-0133 was challenged by any party or participant. No motions were filed challenging the witness's expert qualifications, nor were there any objections to entering his expert report into evidence under Rule 68(3) RPE.[754]

ii. Error #2: The Trial Chamber failed to provide a full and reasoned opinion for its rejection of D-0133's expert evidence, based on the record[755]

619. In respect to Article 74(5), "where a party's submission is decisive for the outcome of the proceedings, it requires a specific and express reply."[756]

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[752] Expert witnesses are ordinarily afforded wide latitude within their expertise and their views need not be based upon first-hand knowledge or experience. *Al Hassan* case, Trial Chamber, Decision on Prosecution's Proposed Expert Witnesses, ICC-01/12-01/18-989-Red, at para. 17.

[753] *See*, Trial Chamber IX, "Initial Directions on the Conduct of Proceedings," ICC-02/04-01/15-497, paras 32-33: "All expert witnesses must be clearly identified on the witness list. As a general rule, challenges to a witness's expertise should be made in writing so that they can be resolved prior to the start of testimony. No later than 30 days before the anticipated testimony of an expert witness, any non-calling participant may file a notice indicating whether it challenges the qualifications of the witness as an expert. Submitted expert reports must satisfy the procedural prerequisites of Rule 68 of the Rules unless no such objections to the submission are raised."

[754] T-203, p. 16, ln. 14 – p. 17, ln. 2.

[755] Bemba Appeals Judgment, para. 49.

[756] Triffterer/ Ambos, *The Rome Statute of the ICC*, 3rd Edition, 2016, p. 1850, section 66: According to international human rights jurisprudence, Courts are required to 'indicate with sufficient clarity the grounds on which they based their

620. The Chamber failed to provide a full and reasoned opinion as to its rejection of D-0133's expert conclusion about the "enduring effect on mental health of having been a child soldier." Clearly, D-0133's conclusion was central to the Defence's affirmative defence of duress. No reasonable trier of fact, assessing D-0133's expert evidence, could have found that the Prosecution disproved the duress defence beyond a reasonable doubt. Thus, the Chamber's rejection of D-0133's expert evidence prejudiced the Appellant and materially affected the decision.

621. Moreover, at a minimum, the expert's conclusions raised reasonable doubt as to the Prosecution's theory that upon reaching the age of 18, the Appellant's victim status was automatically replaced by the status of an adult perpetrator.[757]

a. Rather than examining the content of the Defence argument, the Chamber presented reasons for rejecting the testimony that were not supported by the trial record

622. The Chamber rejected D-0133's conclusion on "enduring effect" because (a) he is not a mental health expert; and (b) only the Chamber can determine whether Article 31(a) or (d) requirements are fulfilled by the evidence.[758] However, the Chamber points to no evidence in the record to support its conclusions. This may be because, in fact, there is none. There are no objections to exclude D-0133's evidence or motions to exclude it. D-0133 did not testify as a mental expert or usurp the Chamber's legal task to make determinations regarding Article 31(a) and (d) of the Statute.

623. D-0133 never claimed to be a mental health expert or legal expert in respect to Article 31. He was consistently identified (by the Defence and self-identified) as a child soldier expert, not a mental health expert or legal expert on Article 31(a) or 31(d). The evidence cited in the Judgment affirms this.

624. In fact, a review of the record indicates that it is the Presiding Judge who raised the issue of prohibited legal conclusions for the expert, before there was any testimony, and he provided

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decision.' Courts are obliged to give reasons for their decisions, but cannot be required a detailed answer to every argument. *However, where a party's submission is decisive for the outcome of the proceedings, it requires a specific and express reply. The courts are therefore required to examine the litigants' main arguments*. (footnotes omitted, italics added)

[757] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of Trial in the case against Dominic Ongwen (icc-cpi.int) ("…One aspect of this case is the fact that not only is Ongwen alleged to be the perpetrator of these crimes, he was also a victim….we are not here to deny that Mr. Ongwen was victim in his youth…This Court…[will decide] whether he is guilty of the serious crimes committed as an adult…").

[758] Judgment, para. 612.

parameters and guidance. The Presiding Judge advised counsel to refrain from asking the witness to interpret the law. Counsel indicated that she would heed the advice.[759]

625. As the examination of D-0133 continued, the Presiding Judge indicates there are no problems with the examination process by counsel.[760] He intervened to facilitate the questioning of the witness, based on his encounters, about his findings on psychological and physical phenomena that persisted over a longer period with former child soldiers.[761]

b. Footnotes 1084, 1085 and 1086 of the Judgment

626. There are three references cited in support of paragraph 612 by the Chamber at footnotes 1084, 1085 and 1086. Footnote 1084[762] is attached to the text in paragraph 612, "enduring effect on mental health of child soldiering." In the cited transcript excerpt, D-0133 explains that an enduring effect of being a child soldier is that it impacts on your mind, "mak[ing] your mind be in a situation of not a normal person, a right-thinking person"[763] and "makes you be in a mental situation that it's difficult for the person to have command over yourself."[764]

627. Here, the Chamber does not include the witness's explanation of what "command over yourself" means, but includes it in footnote 1086.[765] There, D-0133 states that "[s]o you find that a child soldier is actually a moving biological person, but actually not a thinking person…"[766] and agrees that the mind of a child soldier is not one's own.[767]

628. Nothing in the evidence indicates that D-0133 made any conclusion about whether a child soldier suffers a mental disease or defect; no mental condition is named (in contrast to mental health experts who discuss PTSD, DID, etc.).[768]

629. Footnote 1085[769] is attached to the text in paragraph 612 about "conditions within the LRA on abductees and the influence on their free will as a grown up." In the cited trial record, D-0133 gives evidence on the formative minds of children who are abducted, and the impact of having no

[759] T-203, p. 17, lns 6-25.
[760] T-203, p. 74, lns 1-3, p. 77, ln. 14 to p. 78, ln. 18.
[761] T-203, p. 78, ln. 19 – p. 79, ln. 3.
[762] T-203, p. 31, ln. 25 – p. 32, ln. 13.
[763] T-203, p. 32, ln. 7.
[764] T-203, p. 32, lns 12-13.
[765] Footnote 1086 – whether child soldiers are responsible for actions taken as adults, T-203, p, 33, ln. . 203, p. 33, ln. 13 to p. 34, ln. 4.
[766] T-203, p. 33, lns 13-14.
[767] T-203, p. 34, lns 2-4.
[768] T-203, p. 32, -34.
[769] T-203, p. 63, ln. 17 – p. 66, ln. 6.

free will as a child soldier, even when the person reaches the age of majority (18 years). D-0133 provides evidence that the effects of being a child soldier do not automatically end at age 18. He concludes that "…so the child is there, although he has become adult today."[770]

> And yet the effect in the LRA with the spiritual domain was even, the spiritual and violence domain was even more stronger. So it is true it has an effect. . . .I came to believe that it has such a big, a strong negative effect that sometimes you really have to take serious note of this child who was moved from seven years with this kind of mental impact through the childhood stages, the formative stage that I mentioned, going with it through the adulthood, he is still moving in that mind that actually he is not himself…it has a much, much long effect to the extent that even if such a child attains majority, he's attaining a majority with an empty mind or with a mind that actually should benefit from what I think as the exception of the general rules, because the general rule is that me as Awich, I'm presumed to know what is good and right. But how about when I grow up from childhood not told what is good or I was told the opposite of what is good and wrong and the violence and the spirit. So it has that long effect. . . .A. [14:50:37] . . .So the majority age I'm talking about is 18 and above, which the child would have gone with that kind of mental exposure.
>
> Q. [14:52:08] So would it be fair to say, if I may, that the majority age does not end the mental issues, the mind issues you are talking about?
>
> A. [14:52:28] It does not end… remember that even this former child soldier of yesterday who has just passed the age in biological terms is still even under the command. So even if he has passed the majority age, with that mindset, even after passing that, he's still being watched.. . . he moved through to 18, and now 18, all of a sudden, we expect him to understand. And even again he's not even free, he's not himself. Still he's watched, he's ordered, he's captured in the mind and he's captured by intelligence network. *So the child is there, although he has become adult today.*[771] (italics added)

630. In sum, evidence cited by the Chamber at the three footnotes above in paragraph 612 is key to the affirmative defence of duress. But, based on a review of the record, no reasonable trier of fact could reach the conclusion that Mr Awich presented himself as a mental health expert or usurped the Chamber's function to determine whether the elements in respect to Articles 31(a) and (d) are fulfilled by the evidence.

631. The Chamber did not explain why it rejected D-0133's the expert evidence on conclusions about enduring aspects of child soldiering which do not end at age 18, the lack of free will and control

[770] T-203, p. 66, lns 6-7.
[771] T-203, p. 64, l 8 – p. 66, ln 6.

over one's mind of child soldiers and lack of responsibility as an adult of child soldiers. All of these points were central and relevant to the issues in this case, and to the defence of duress.

632. At best, the Chamber misread the record and failed to appreciate it; at worst, it simply disregarded D-0133's evidence on record and misrepresented it. Either way, its reasons in paragraph 612 are not based on the evidence presented, and hence, do not constitute a full and reasoned statement under Article 74(5) of the Statute because they are based on factual misrepresentations.

633. These procedural and factual errors resulted in a miscarriage of justice. This warrants appellate intervention, especially because it cannot be discerned how the Chamber could have reached its conclusions re D-0133's expert evidence based on the evidence at trial.[772]

c) Appellate errors of law and fact

i. Error #3: The Chamber erred in law and in fact by concluding that "the remainder of Pollar Awich's testimony does not go to issues of relevance to the disposal of the charged crimes"

634. The Chamber provides no reasons for this conclusion, so there is no basis on which an appellate review of this assessment can occur. While the Chamber can determine relevance, it is a fundamental premise of criminal law that the issues related to culpability of a defendant are always relevant to the charged crimes.

635. Both the Defence and the Prosecution placed all of Pollar Awich's testimony in a "relevance box." The Defence's affirmative defence of duress, which was noticed and articulated from the beginning of the case, was that the Appellant, an LRA abductee at the age of eight or nine, was always a victim; in the proceedings, the Appellant stated, "I am not the LRA."[773]

636. The Prosecution's theory was based on the construct of Mr Ongwen as a victim-perpetrator, holding dual status: his victimhood ended when he reached the statutory age of culpability of 18.[774] Since the crimes for which he was convicted occurred within a few years of him turning 18, while a young adult, testimony related to whether he suddenly became culpable when he turned 18 is very relevant.

[772] *See*, Bemba Appeals Judgment, para. 40.
[773] T-26, p. 17, lns 5-6.
[774] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of Trial in the case against Dominic Ongwen.

637. As a child soldier expert, the evidence of Mr. Awich was very much on point: all of his evidence was on the topic of child soldiering, and its effects on the child soldier throughout her/his life.

638. In sum, the Chamber effectively rejected all of D-0133's evidence since it is not referred to in any of the 1077 pages of the Judgment. In this context, there is no clarity as to what the Chamber means by its conclusions that the "remainder of the testimony" is not relevant to the "disposal of the charged crimes." Hence, the Chamber provides no reasoned opinion for its assessment of D-0133's evidence.[775]

ii. Error #4: The Chamber's finding that D-0133's evidence about escape was incredible is erroneous, and not based on the evidence; it also disregards the cultural and language issues involved in the concept of escape

639. At paragraph 612, the Chamber found that D-0133's statement that "there are no cases where children escaped […] voluntary" was "incredible considering that ample evidence received to the contrary."

640. First, it is impossible to discern the Chamber's reasoning because it does not explain what is meant by "ample" which is not footnoted.

641. Second, the Chamber's conclusion of incredibility is unfounded in the evidence. The essence of D-0133's evidence was that escape, when it was successful, was the result of opportunity – in a combat situation, for example. D-0041 gave gruesome evidence, recounting what happens when escapees are caught and punished, as the Appellant described it. D-0041 recounted that within a month or so of his abduction, the Appellant, as a new abductee, was forced to skin a captured young escapee alive with a machete heated by fire, as an example of Kony's punishment for unsuccessful escape.[776]

642. Within the text referenced in footnote 1087, the witness explains that, based on his work with children in rehabilitation, the

> known process of them getting out is by a recovery from the military, when the army gets into contact with them, with the LRA. But I just want to clearly differentiate that it is not known that group of children left the LRA on their own and went to report, say, to the government army or to a church leader. That was pretty difficult and nearly

[775] Bemba Appeals Judgment, para. 53 (sufficient clarity must be provided by TC to fulfill obligation of reasoned opinion).
[776] T-248, p. 104, ln. 10 – p. 105, ln. 1.

> impossible. So my emphasis there was how to get in to the hands before rehabilitation.[777]

643. On cross-examination, D-0133 repeated similar evidence:

> As I said, the known cases of recovery of children, children ever getting out of the grip of the LRA is in combat situation where LRA get in touch with the UPDF and, in the process, children are left actually by the LRA. So even the one that is said to have escaped is actually, when conflict has occurred, an LRA has run away. But I'm not aware about a normal bush situation of LRA where children plan when the commanders are sleeping and they escape. No, not to my knowledge".[778]

644. D-0133 clearly concluded that those abductees who escaped did so when opportunity presented itself: for example, in a military battle or while the person was in sickbay. In fact, evidence in the Judgment supports this conclusion, for example, in respect to P-0138 and P-0209, who escaped when there was an opportunity during battle, and also P-0099, while in sickbay.[779] Moreover, the Chamber erred by selectively choosing evidence from these three witnesses to inculpate the Appellant, while disregarding evidence of escape by opportunity that refuted the Chamber's conclusion at paragraph 612 about D-0133's evidence on escape.[780]

645. For P-0340 and P-0352, opportunity was provided in the aftermath of an ambush.[781] For P-0018 and P-0410, the opportunity to escape was provided in incidents with a gunship: P-0018 managed

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[777] T-203, p. 81, lns 10-15.
[778] T-204, p. 35, lns 12-18.
[779] *See for example*, **P-0138** (Judgment, para. 2632; T-120, p. 69, lns 3-14) and the Chamber relied upon for inculpatory evidence which ranged from the planning and subsequent attacks on IDP camps to the LRA's policy regarding the 'distribution' of women and abduction of children, *see* Judgment, paras 564, 566, 616, 698, 708, 1194, 1198, 1199, 1217, 1232, 1331, 1333, 1356, 1369, 1378, 1382, 2180, 2221, 2329 and 2356); *see also* **P-0099** (T-14, p 47, lns 11-25; Judgment, paras 2086-2087) and Chamber used evidence to convict (Judgment, paras 2011-2012, 2029, 2036, 2037, 2042, 2042-2044, 2070, 2072 and 2519); *see also* **P-0209** (Judgment, para. 2628, T-160, p. 39 lns 7-19 ad p. 35, lns 20-21) and Chamber relied on evidence to convict (Judgment, paras 1181-1182, 1191- 1194, 1206 and 2651-52). For other witnesses escaping from sickbay, *see* **P-0045** (Judgment, para. 2623 and T-105, p. 19, l. 16 to p. 20, l. 17) whose testimony regarding the attack on Pajule IDP camp (*See* Judgment, paras 1181, 1182, 1208, 1226, 1232, 1253, 1262, 1269, 1281, 1290, 1342, 2137 and 2217) and sexual and gender-based violence (*See* Judgment, paras 2269 and 2295) is explicitly mentioned by the Chamber; *see also* **P-0070** whose evidence detailing the LRA regime, (*See* Judgment, paras 853, 855, 857, 859, 862, 866, 868, 967, 1059, 1076, 1093, 1106, 1152, 2596, 2648 and 2664) abductions, (*See* Judgment, paras 928-931, 974, 992, 999, 1007, 1009, 1010 and 2317) in addition to 'distribution' and sexual and gender-based violence was also relied upon (*See* Judgment, paras 2136, 2146, 2170, 2232, 2249, 2266, 2280 and 2299; *see further* Judgment, paras 1181, 1185 and 1223 for the Chamber relying on **P-0070**'s evidence as corroborative evidence for the Pajule attack).
[780] The *Bemba* Appeals Chamber has held that it is an error for a Trial Chamber to disregard relevant and potentially exculpatory evidence from a witness upon whom it has relied for inculpatory evidence (Bemba Appeals Judgment, paras 189, 194).
[781] *See*, **P-0340**: T-102, p. 46, l. 19 to p. 47, l. 7 and **P-0352**: T-68, p. 22, lns 12-14.

to hide until the next morning when the LRA had left the camp,[782] while P-0410 was able to take cover in the bushes while the rest after being pursued.[783]

646. But all the witnesses *supra* were selectively relied upon for their inculpatory evidence only.[784] The Chamber disregarded relevant evidence to support the testimony of D-0133 on opportunity and escape.

647. In sum, the Chamber's error is not one of misinterpreting the evidence: it clearly either misread or disregarded the relevant evidence. Either way, the Chamber's representation of the factual evidence was inaccurate, resulting in a miscarriage of justice. A reasonable trier of fact, looking at the same evidence, could have reached a different conclusion which would not have been inculpatory to the Appellant, and used to reject D-0133's expert evidence. Evidence concerning escape and the Chamber's conclusions in respect of the Appellant's ability to escape are a key element in its rejection of the affirmative defence of duress.[785]

648. The Chamber's error was further compounded by its failure to take account of the cultural context associated with the word or notion of escape, and its meaning in Luo, the language understood by the abductees. This is illustrated by the following section, which is omitted from the Judgment: on cross-examination, using a study by Professor Blattman, the OTP tried to challenge the reliability of Mr Awich's conclusion on escape.[786] The OTP focused on a study involving 462 abducted males, then 14-30 years, which indicated that 80% had escaped the LRA, 15% were released and 5% were rescued. The Prosecutor asked D-0133 for a comment on the research. Mr Awich responded that he disagreed with the data, based on the view that escape within the cultural context meant something different than how it was interpreted in the study by the researcher:

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[782] Judgment, para. 2632.
[783] T-151, p. 75, ln. 19 to p. 81, ln. 2.
[784] *See*, **P-0340** Judgment, paras 925, 933, 938, 1006, 1008, 1011, 1402, 1407, 1409, 1417, 1439, 1443, 1452, 1556, 1879, 1887, 1888, 1902, 1903, 1905, 1915, 2173 and 2287; for **P-0406**. *see* Judgment, paras 926, 933, 941, 962, 984, 991, 1003, 1006-1008, 1076, 1080, 1085, 1097, 1162, 1405, 1415, 1424, 1432, 1498, 1500, 1557, 1560, 1599, 1680, 1698, 1700, 1702, 1713, 1723, 1730, 1743, 1788, 1798-1799, 1834, 1864, 1865, 1866, 1881, 1905, 1911, 1927-1929, 2149, 2155, 2226, 2254, 2349, 2359, 2361, 2364, 2380, 2436, 2438 and 2446; for **P-0352**, *see* Judgment, paras 1403, 1410, 1415, 1425, 1446, 1454, 1483, 1497, 1500, 1557, 1614, 2125, 2151-2152, 2184-2186, 2193, 2197, 2205, 2244, 2253, 2258, 2292 and 2401. *See also*, **P-0018** (on Lukodi attack**)**, Judgment, paras 1653, 1654, 1655, 1665, 1676, 1742, 1781, 1801, 1827, 1833, 2440-2442; *See also* **P-410, (**on Lukodi attack**)** Judgment, paras 1666, 1667, 1679, 1689, 1702, 1710, 1713, 1717, 1723-1724, 1731, 1743, 1744, 1782, 1788, 1800, 1803 and 1838); (on Odek), Judgment, paras 1387, 1389, 1394, 1395, 1400, 1404, 1405, 1407, 1409, 1415, 1419, 1433, 1556 and 1559; (conscription and use of child soldiers), Judgment, paras 2385, 2429, 2431, 2436, 2439; ("distribution of women") Judgment, para. 2243.
[785] Judgment, para. 2635.
[786] T-204, pp. 35, ln. 19 – p. 40, ln. 22.

> …question is good. You see, when you're in LRA speak and in the local language in Luo, if you talk to somebody, and with due respect to the professor, to escape in Luo or in Acholi would actually not mean to -- to escape I think in the English context. For example, laor, that is in Luo, but what if you ask this person, this child, "You escaped. How did you escape?" The child will still go back to the story, "You see, when the army ambushed us, we were here. And after the ambush when they shot, we escaped." Now if I was to do a critique of that research after this professor had done it, I would point that out to the professor that, "Actually your term, your concept of escape is inadequate because all this escape they're saying is not an initiated willful move by the children when LRA is sleeping and they escaped." If you go to the root of whatever one clear story of escape, every child has a story of how he escaped and all of them are connected to a conflict, to an attack or they were attacked and that is how they escaped. So I don't agree with this data.[787]

649. The fact that this testimony from D-0133 on the meaning of "escape" in Luo is not included in the Judgment does not mean that the Chamber did not consider it. However, because the evidence of escape is so central to the conviction,[788] it is clearly relevant and was disregarded when it should have been addressed.[789] Based on the evidence that some abductees escaped, the Chamber concluded that child soldiers had a choice about escaping, and this materially affected the Appellant's conviction. Given the plethora of evidence presented by the Defence,[790] a reasonable trier of fact could not have arrived at a conclusion that escape was a viable option for abductees, beyond a reasonable doubt.

650. In sum, the Chamber's factual misrepresentation of the evidence from D-0133 on escape contributed to its legal error in finding that the elements of the affirmative defence of duress were not satisfied. What started out as a factual error based on an erroneous cultural understanding, led to a miscarriage of justice, and morphed into a legal error: the conviction of the Appellant.

JJ. Ground 64 (part): Errors on control over the crimes, (Counts 61-70) essential contribution and resulting power to frustrate commission of the crimes

a) Introduction

[787] T-204, p. 38, ln. 17 – p. 39, ln. 5.
[788] At para. 2535, the Chamber finds that Mr Ongwen had the option to escape and it uses this conclusion to refute the first element of the Defence affirmative defence of escape, a continuing threat of imminent harm or threat of imminent death.
[789] *See*, Ntaganda Appeals Judgment, para. 41 (Appeals Chamber may interfere with Trial Chamber's factual finding if it, *inter alia*, fails to evaluate and properly weigh relevant evidence and facts).
[790] Defence Closing Brief, paras 681-682, particularly fn. 1099 citing the evidence of Prosecution and Defence witnesses on the threats of death in the LRA for breaking the rules or trying to escape.

651. This ground of appeal relates to procedural, legal and evidentiary errors which made the conviction of the Appellant for his control over the crimes, essential contribution and resulting power to frustrate the commission of the crimes unfair. These convictions should be reversed.

b) No reasoned opinion on control over the crimes, essential contribution and resulting power to frustrate the crimes

652. The Chamber mirrored the allegations in the confirmed charges but failed to individualise control over the crimes and made no findings on evidence that raised reasonable doubt. Specifically, the Chamber failed to consider or give sufficient weight to the procedural, legal and evidentiary issues submitted for consideration and determination by the Appellant in his Closing Brief regarding Article 25(3)(a) (ordering, indirect perpetration and indirect co-perpetration), which the Appellant hereby incorporate by reference.[791]

c) Failure to individualise criminal responsibility under the charged forms of committing under Article 25(3)(a)

653. The Chamber made findings on alleged crimes committed by the LRA and Sinia brigade and attributed control over the crimes, essential contribution and resulting ability to frustrate the crimes to the Appellant.[792] The Appellant incorporates by reference his submissions in grounds 66, 83, 84, 85, 86, 87, 88 and 89. The attribution of responsibility of the crimes of Sinia brigade and the LRA in Northern Uganda from 1 July 2002 tod 31 December 2005 on the Appellant is inconsistent with the findings of the Chamber stating that the Appellant was not the commander of Sinia brigade during the entirety of the charged period and the finding of free will and agency by individual battalion and brigade commanders, making the inferring of a common plan impermissible.[793]

654. The Chamber did not establish a nexus between the acts and conduct of the physical perpetrators, individual battalion and brigade commanders in Sinia, the LRA, the so-called Sinia leadership and Kony and the Appellant in specific crimes alleged.[794] Having failed to establish this nexus, the convictions must fail as a matter of law. Furthermore, the Statute does not provide a provision for

[791] Defence Closing Brief, paras 181-208.
[792] Judgment, para. 3092, Trial Chamber IX found: "Following the findings that (i) Dominic Ongwen was a participant to the agreement with Joseph Kony and the Sinia brigade leadership, pursuant to which the crimes charged under Counts 61-68 were committed, and (ii**) the conduct of the Sinia brigade members who executed the material elements of the crimes must be attributed to Dominic Ongwen,** Joseph Kony and the Sinia brigade leadership as their own." [emphasis added].
[793] Judgment, paras 858, 884 and 890.
[794] Trial Chamber II, *Judgment Pursuant to article 74 of the Statute*, ICC-01/04-01/07-3436-tENG, paras 1086-1087, noting that the Trial Chamber was unable to infer a direct nexus to suggest that the Accused used these children to participate in the hostilities.

the transformation of forms of Article 25(3)(a) mode of liability into a conduit for conviction by association or an avenue for the depersonalisation of criminal responsibility.

d) Criminal responsibility for indirect acts and conduct against unidentified victims

655. The Chamber convicted the Appellant for conduct against victims who were not identified beyond a reasonable doubt, did not appear before the Chamber and were described only in categories based on gender (SGBC) and physical features (conscription and use of child soldiers in hostilities).[795] The Chamber made no findings on the *mens rea* of the physical perpetrators to ascertain whether the Appellant shared their *mens rea* for the commission of each of the charged crimes which occurred in his absence or incidentally during the temporal and geographic scope of the case.

656. The Chamber made inconsistent findings about the Appellant exercising command over the Sinia brigade between 1 July 2002 and 31 December 2005. Additionally, the Chamber failed to provide a reasoned statement on the awareness by the Appellant that his role was essential to a common plan and to commit the charged crimes through his essential contribution, his resulting ability to frustrate its crimes and by refusing to perform the essential task assigned to him.

657. The fungible nature of the LRA organisational structure made the possibility of a subordinate commander to Kony frustrating crimes occurred by him or in execution of his standing rules difficult. Pursuant to the CoC Decision and the capricious and unpredictable command and control capabilities of Kony over the LRA, including the Sinia brigade and the Appellant, the ability of the Appellant to frustrate the crimes was not proved beyond a reasonable doubt.[796]

658. The Chamber also did not provide a reasoned statement establishing the evidentiary and legal basis for the conviction of the Appellant for all the crimes committed in Northern Uganda or the charged attacks on IDP camps after finding that he did not personally participate in the charged attacks (apart of Pajule) and made no finding or sufficient findings about his personal participation in the commission of any of the charged conduct in Northern Uganda from 1 July 2002 to 31 December 2005.

e) No evidence of the Appellant defining and sustaining a system of abduction

659. The Chamber determined that "[t]hese facts reveal that Dominic Ongwen was among the persons who helped define and, through their actions over a protracted period, sustained the system of

[795] CoC Decision, paras 61-70.
[796] CoC Decision, p. 72, para. 11: "The LRA, including the Sinia brigade, was composed of a sufficient number of fungible individuals capable of replacement to guarantee that the orders of superiors were carried out, if not by one subordinate, then by another."

abduction and victimisation of civilian women and girls in the LRA. Within Sinia, his role was crucial and indispensable."[797] Based on this determination, the Chamber inferred control of the crimes by the Appellant.[798]

660. The Chamber provided no reasoned opinion or evidentiary and legal basis for this conclusion. The conclusion and the inference are deficient and impermissible. The finding that the Appellant was among persons who helped define and, through his actions over a protracted period, sustained the system of abduction and victimisation of women and girls in the LRA is undermined by findings of the Chamber that Kony alone established the standing rules, made orders for abduction, oversaw enforcement of the rules and a reporting system and the suspension of the execution of the rules and his orders, over which the Appellant, himself a victim of the rules, had no control.[799]

f) No reasoned statement on *mens rea* and no consistent evidentiary basis for the impermissible inferences

661. The *mens rea* element was not pleaded or proved beyond a reasonable doubt. The inference of *mens rea* on inconsistent determinations in the Judgment and evidence raising reasonable doubt and allegations which were not proved beyond a reasonable doubt was impermissible, unwarranted and unfair.[800]

662. The findings and inferences on *mens rea* made by the Chamber[801] are undermined by pleadings in the case and inconsistent evidentiary findings in the Judgment.[802] The Chamber relied on evidence of the SGBC crimes personally committed by the Appellant, which fell out of the temporal and geographic scope of the charges for impermissible inferences and convictions.[803]

[797] Judgment, paras 3094-3095.
[798] Judgment, paras 3094-3095.
[799] Judgment, paras 854, 866 - 868, 873, 970 and 2156-2157.
[800] Judgment, paras 3096-3097.
[801] Judgment, para. 3097.
[802] Application for Warrants, paras 86 and 92; Judgment, paras 182-183, 184, 100, 101 and 104-111.
[803] Judgment, paras 205-206, 3023 and 3025. P-099 for example, P-0099 was abducted in 1998 (T-14), at p. 20, lns 15-25. The witness testified that after the birth of her child until she escaped, she did not sleep with Dominic Ongwen (p. 49 lns 13-16 and p. 57, lns 18-25); P-0099 explained how Kony permitted persons who were interested to woo Minkack, who had lost her husband for marriage. Ongwen successfully wooed and secured her consent for marriage (p. 62 lns 2-11). P-0099 testified that [REDACTED]. When she went to GUSCO to collect her supplies, [REDACTED]. The Defence submits therefore that she was not confined by the Appellant as the Chamber found. P-0214 first testified that she was adbucted in June 2000 (T-15, p. 5, ln. 10) and taken by Kony to Sudan. She then changed the date of arrival in Abatulanga in Sudan to meet Kony to March 2002 (See p. 17, lns 15-18: Q. (Prosecutor) Madame Witness, what year did you arrive Abatulanga?'; A. March 2002. A. Can you tell the court why in your statement it is March 2004. A. It was March 2002.). See also T-15, p. 18 lns 8-10: .Q. Why did you give the date 2004? A. Yes, I was given to Dominic in 2004 while we were in Sudan.

663. The Chamber disregarded evidence provided by the victims of these violations that they were abducted and distributed to the Appellant pursuant to the orders and standing rules established by Kony. They were presented to Kony after their abductions and were with the Appellant at the pleasure, and under the authority, of Kony.[804]

g) Conclusion

664. On the basis of the foregoing evidentiary determinations and the inferences made to convict the Appellant, the convictions were legally and factually deficient, unfair, occasioned an injustice making the judgment unfair and the convictions unsafe and should be reversed.

KK. Ground 65: The Chamber erred in law and in fact regarding the structure of the LRA and the Appellant's role

a) Introduction

665. This ground relates to procedural, legal and evidentiary errors pertaining to the criminal responsibility of the Appellant for the charged crimes. The Chamber convicted the Appellant for crimes which the Chamber found to have been committed by individual Sinia brigade members, and for failing as commander of Sinia brigade to frustrate the crimes. The Chamber also determined that the LRA had a "functioning hierarchy" at all levels but also relied on the independent actions and initiatives of commanders at division, brigades and battalion levels, which made the LRA a collective project. These internally inconsistent findings made the conviction of the Appellant of multiple crimes unreasonable, unwarranted and unfair and should be reversed.

b) Lack of notice of the means by which the Appellant would have frustrated the crimes

666. The Appellant was not provided notice of the means by which he could have frustrated the crimes charged in the CoC Decision.[805] The Pre-Trial Chamber stated that "[i]n circumstances where a plurality of persons was involved in the commission of a crime within the jurisdiction of the Court, the most appropriate criterion to determine whether a person "committed" the crime jointly with others […] is "control over the crime", which requires an evaluation of whether the person had control over the crime by virtue of his or her essential contribution within the framework of the agreement with the co-perpetrators and the resulting power to frustrate the commission of the crime."[806] The CoC Decision emphasised the capacity of each of the co-perpetrators to frustrate the crimes as one of the element of co-perpetration.[807] The charge identified non-performance by

[804] Judgment, paras 2010-2012, 2014, 2019-2020, 2037-2038, 2043 and 2092.
[805] *See*, Appeals Brief, paras 112, 125-127, 133; *See also*, Defect Series, Part II, paras 37-42.
[806] CoC Decision, Section E. Remarks on modes of liability, para. 39.
[807] CoC Decision, para. 40.

co-the perpetrator of the coordinated contributed act within the framework of the agreement as one of the methods of frustrating the crime.[808] No further example was alleged.

667. The Chamber did not carry out an evaluation of the resulting power of the Appellant within the framework of the common plan, the means and his ability to frustrate the crimes within the said framework and did not provide a reasoned statement. Instead, the Chamber relied on a declaratory statement devoid of reasoning and motivation to find that these requirements were fulfilled to convict the Appellant.[809]

668. The inconsistent pleading in the CoC Decision and inconsistent evidentiary findings on the command structure and hierarchy functioning of the LRA should have raised a reasonable doubt about the resulting power of the Appellant within the framework of the common plan to frustrate the crimes, and thus, on the co-perpetration of the crime.

c) Inconsistent evidentiary findings

669. The CoC Decision determined that, at the relevant time, "the LRA was an organised entity disposing of a considerable operational capacity. The undisputed leader of the organisation was Joseph Kony, from whom emanated all important decisions. To maintain his tight grip on the organisation, Joseph Kony also successfully invoked possession of mystical powers." The charge alleged further that Kony had directly under him, a central organ known as Control Altar, which was also an operational unit. Four other operational units were Sinia, Gilva, Trinkle and Stockree. These brigades were composed of a considerable number of individuals under an effective command structure, which ensured that orders were executed. A strict system of discipline was used for this purpose, which included capital punishment and imprisonment as sanctions for disobedience.[810]

670. The unique command and spiritual qualities of Kony, the founder, commander and spirit medium of the LRA, ensured that he effectively used the subordinate structures of the organisation which he created, a strict disciplinary regime which he established and enforced, and sufficient number of fungible individuals who he maintained on standby as replacement to guarantee that his orders were carried out. In this context, it was impossible for Dominic Ongwen to frustrate the crimes,

[808] The confirmed charge alleged that "the LRA, including the Sinia brigade, was composed of a sufficient number of fungible individuals capable of replacement to guarantee that the orders of superiors were carried out, if not by one subordinate, then by another." See CoC Decision, Section 3. Statement of Facts regarding Common Elements of Modes of Liability, para. 11.
[809] Judgment, paras 2787, 2859, 2864, 2915, 2918, 3092 and 3095.
[810] CoC Decision, Section B. The LRA and Dominic Ongwen's status within the organisation, paras 56-57.

because Kony had a sufficient number of fungible individuals in Control Altar, Jogoo division, Trinkle, Gilva, and Stocktree brigades and the battalions in these units to guarantee that the crimes were carried out. He additionally used strict punishment, including the capital punishment to dissuade disobedience of his orders and LRA rules.

671. The Chamber determined that Kony exercised command and control authority over all the units of the LRA. The Chamber determined that Kony's orders were generally carried out. The Chamber found that when he was geographically removed and was in Sudan, subordinate commanders exercised free will and made they own decisions.[811] These finding contradicts finding that the LRA had a functioning hierarchy during the charged period since Kony was most of the time in Sudan.

672. The Chamber further determined that the LRA was a collective project which depended on the independent actions and initiatives of commanders and coordinated action by its leadership to operate and sustain itself. Based on this finding, the chamber determined that all the actions of the LRA should not be attributed to Kony.[812] The Chamber did not provide a reasoned statement explaining when the LRA operated as a functioning hierarchy and when it operated as a collective project or on the free will of subordinate units.

673. The Chamber heard evidence from Prosecution witnesses P-0205 and P-0142. The Chamber found P-0205 reliable for his knowledge of the LRA organisational structure that Kony sometimes bypassed hierarchy and gave orders directly to battalion commanders.[813] The evidence that Kony bypassed the hierarch and gave orders battalion commanders contradicts the imputation that the Appellant was responsible for the acts of battalion commanders and fighters under their command in Sinia brigade. P-0205 was [REDACTED] during the charged period. The Chamber found that he took part in the attack in Odek and Lukodi IDP camps.[814] The Prosecution did not elicit evidence from him about the common plan within which the attack on Odek IDP camp occurred and the resulting power of the Appellant to frustrate the crimes. The witness did not testify about him or fighters in [REDACTED] deployed to Odek and Lukodi functioning as a tool of Dominic Ongwen. The Chamber provided no reasoned statement on the *mens rea* of P-0205 and fighters [REDACTED]. Without a finding on the *mens rea* of the physical perpetrators the crimes committed by them cannot be imputed to the Appellant.

[811] Judgment, paras 123-124.
[812] Judgment, para. 873.
[813] Judgment, paras 868 and 2182.
[814] Judgment, paras 1396, 1648, 1675 and 1688.

674. P-0205 testified that neither he nor the Appellant went Odek.[815] In respect of Lukodi, he was the deputy commander of the operation but testified that he did not see any civilian killed[816] in the attack and that he attacked the military barracks and not the Lukodi centre where civilians were located.[817] The Chamber found that the Appellant did not go to Lukodi.[818] P-0142, [REDACTED],[819] testified that he collected food from the food barns at the outskirt of the town as they were instructed and that the Appellant did not know that civilians were killed in Lukodi. This account, which was corroborated by P-0205[820] and P-0101,[821] was rejected by the Chamber without a reasoned statement.[822] No reasonable trier of fact would have rejected the corroborated accounts of two out three commanders who led the attack on Lukodi IDP camp attack that Dominic Ongwen did not know about civilian attacks and that he was enraged when he heard about civilian deaths from FM radio reports. [REDACTED]."[823]

675. A reasonable trier of fact would, upon finding that the two key witnesses, P-0205 and P-0142, who [REDACTED], find reasonable doubt in favour of the Appellant. The Chamber failed to do so and this occasioned miscarriage of justice.

676. Despite the finding that P-0142 and P-0205 [REDACTED], the Chamber proceeded to find the witnesses reliable. [REDACTED].[824] The decision by the Chamber that Dominic Ongwen possessed a resulting power within the common plan to frustrate the crimes was not proved beyond a reasonable doubt. The Chamber did not provide a reasoned statement on means at the disposal of the Appellant and the resulting power to frustrate the crimes committed during the attack on Lukodi IDP camp.

d) Wrongful attribution to the Appellant of responsibility for the acts of Sinia brigade members

677. The finding that LRA brigades and battalion commanders exercised free will, personal initiatives and was a collective project,[825] contradicts the finding by the Chamber that Dominic Ongwen possessed a resulting power within the common plan to frustrate the charged crimes. Based on the

[815] Judgment, para. 1396.
[816] Judgment, para. 1736.
[817] Judgment, para. 1664.
[818] Judgment, para. 1697.
[819] Judgment, para. 1687.
[820] Judgment, para. 1843
[821] Judgment, para. 1844.
[822] Judgment, para. 1845.
[823] Judgment, para. 1688.
[824] Judgment, paras 868, 873 and 2182.
[825] Judgment, paras 864, 869, 873, 970, 1392, 2665, 2911 and 3010.

finding that "the LRA was a collective project, and that the Chamber does not accept the proposition of the Defence that the LRA should be equated with Joseph Kony alone, and all its actions attributed only to him",[826] and the finding of the free will and personal initiatives, the Defence urges the Appeals Chamber to find that the decision of the Chamber holding the Appellant accountable for the actions and crimes by individual battalion commanders in Sinia was unreasonable, unwarranted and a miscarriage of justice.

678. The Chamber did not provide a reasoned statement establishing that the Appellant had the power or authority to frustrate the crimes which were committed by any or all the battalion commanders in Sinia and the fighters under their command.[827] The Chamber made no finding that the Appellant used threats or other coercive means to force Sinia fighters to commit the charged crimes. LRA commanders who participated in the attacks all testified that the Appellant did not personally participate in the attacks and the Chamber agreed, except in the case of Pajule. The Chamber failed to provide a reasoned statement establishing that the Appellant knew or intended to commit the crimes and did commit them. The Chamber additionally made no finding on the *mens rea* of the physical perpetrators prior to imputing responsibility of their criminal conduct on the Appellant.

679. The Chamber found that the attack on Abok IDP camp was carried out by Okello Kalalang but that the Appellant did not personally participate in the attack.[828] The Chamber found that the Appellant delegated leadership of the physical attack to Okello Kalalang.[829]

680. The Defence notes that the charge of command responsibility was not retained by the Chamber. By the reason of the exercise of free will and personal initiatives by battalion commanders and the fact that the LRA is a collective initiative, the decision of the Chamber finding Dominic Ongwen responsible for the actions Kalalang and fighters under him had no legal and evidentiary basis. On the basis of the foregoing, the Defence urges the Appeals Chamber to reverse the Judgment and enter an acquittal.

LL. Ground 68: The Chamber erred in law and fact by disregarding evidence of the Appellant's "conditions of recruitment, initiation, training, and service in the LRA" which made him function as a tool of Kony, while otherwise finding that he subjected

[826] Judgment, para. 873.
[827] Judgment, para. 890. The Chamber provided the names of battalion commanders in Sinia during the charged period. Buk Abudema was the brigade commander of Sinia from 1 July 2002 to March 2004, when the Appellant took over from him.
[828] Judgment, para. 1873.
[829] Judgment, para. 1874.

LRA fighters to these conditions, resulting in their functioning as tools with their conduct being attributed the Appellant

a) Introduction

681. At the outset of the Judgment, the early age at which Dominic Ongwen was abducted is determined to be nine years old.[830] Although subsequently describing the brutal treatment faced by new recruits and the lasting impact of this coercive environment, the Chamber took the opinion that his exact age at the time and when the abduction took place are "not as such relevant to the charges".[831]

682. The Chamber erred in law and fact by treating the ample evidence of the horrific methods adopted by the LRA to ensure their capacity to undertake military operations in isolation. Failure to apply the same reasoning and consideration to the Appellant materially affected the Judgment and resulted in a miscarriage of justice.

b) The Chamber failed to apply its findings on the "conditions of recruitment, initiation, training, and service in the LRA" to the personal experiences of Dominic Ongwen

683. The conditions of recruitment, initiation, training and service in the LRA were discussed extensively by the Chamber in 'ways to ensure capability to undertake military operations'[832] and the 'conscription and use of childrend in armed hostilities'.[833] At various points throughout these sections of the judgment, the Chamber notes testimony recounting the traumatic personal experiences of witnesses.

684. The fact that no one joined the LRA voluntarily is widely accepted,[834] with recruitment through abduction being a long-standing policy.[835] Yet, much of the policies relating to the recruitment, initiation and training of abductees are equally as long-standing and applied to the Appellant just as much as the witnesses from whom the Chamber received evidence.

685. The means of initiating new abductees represents one of such policies. As noted by the Chamber, initiation rituals were a stable feature of the LRA intended to instil obedience and prevent escape through tactics of terror and brainwashing.[836] Initiations often included new recruits being beaten, whipped canned, or having to kill or witness brutal killings, in an attempt to create fear and ensure the recent abductees' compliance with LRA rules.[837] Such is the trauma of these experiences that

[830] Judgment, paras 29-30.
[831] Judgment, para. 27.
[832] See Judgment, paras 893-1012.
[833] See Judgment, paras 2310-2447.
[834] Judgment, para. 893.
[835] Judgment, para. 895.
[836] Judgment, para. 906
[837] *See* section on 'initiation of new recruits', Judgment, paras 906-930.

the Chamber notes that witnesses recount rituals with "striking detail" as the memory has been ingrained since the event took place.[838]

686. When analysing the evidence regarding the rules of obedience and disciplinary system in the LRA, the Chamber noted that a "considerable number of witnesses, in particular lower ranking insiders, testified categorically that in the LRA, no one could refuse orders, most commonly referring to the risk of being killed".[839] Respect towards superiors and following instructions was instilled in new recruits immediately,[840] and there is consistent evidence of disciplinary measures being applied in "an immediate, crude and brutal manner" should the general rules be violated by anyone.[841]

687. There is extensive witness testimony detailing the means of preventing escape, which included the killing of attempted escapees in front of abductees with warnings that the same would happen to them should they try leave the LRA. There were also threats of attacking the escapee's home town, of them being lost in the bush as a result of their initiation ritual, and being apprehended and killed by government forces.[842] In addition, the evidence on the trial record "indicates convincingly that the LRA sought to manage the information available to its members, in order to prevent them from developing a realistic view on the possibility and consequences of escaping".[843]

688. The Chamber stated that these threats and brutal acts of punishment had the desired effect on LRA members, and noted the testimony of P-0309 and P-0406, who stated that they did not try to escape "because of the things that I witnessed, killing people, the extreme punishment of anybody who tried to escape, and the killing of people who tried to escape"[844] and that Kony would know if they did not heed his warnings that they would be caught and killed if they made any attempt.[845] The Chamber also recalled witnesses that were afraid of "engaging in actions, even if innocuous, which could make it appear that they were thinking of escaping and thus put them at risk of violence".[846]

689. Hence, in the Chamber's view, there is no doubt that the LRA was effective in its use of a disciplinary system to ensure compliance,[847] and it noted that its effect was heightened by the

[838] Judgment, para. 916.
[839] Judgment, para. 951.
[840] Judgment, paras 952-955.
[841] Judgment, paras 956-957.
[842] See section on 'preventing escape', Judgment, paras 971-1004.
[843] Judgment, para. 1004.
[844] Judgment, para. 983.
[845] Judgment, para. 984.
[846] Judgment, para. 985.
[847] Judgment, para. 970.

living conditions to which its members were subjected.[848] This compounded the suffering and emotional strain they were under from living in an environment of constant fear and apprehension,[849] and naturally resulted in them being more susceptible to the authority of Kony's leadership thereby enabling them to function as his "tools".

690. While the impact of the long-standing LRA policies outlined above has been explicitly acknowledged, when considered alongside the testimony concerning the reasoning underpinning the conscription of young children the manifest errors in the Judgment become apparent.

691. At paragraph 2316 of the Judgment, the Chamber recalls the evidence of P-0233 who testified that persons "[f]rom the age 15, 14, even 13 years would be taken", reasoning that this was because such persons could still be "mentored' and "influenced to do what you want the person to do".[850] Other examples listed by the Chamber for the reasoning behind the abduction of young children include P-0070 who explained that "it's easy to indoctrinate them so that they cannot escape" and that "[w]hen they are taken far away from the place where they were abducted from, they can be trained to become very good fighters of the LRA as soldiers"[851] and P-0372 who stated:

> The reason they would keep the younger ones, was because these young ones couldget confused and indoctrinated and would not think about returning home. It was very easy to change their mindsets so that they could be part of the soldiers. Children could also easily forget.[852]

692. ISO logbook entry dated 29 November 2002 provides evidence to the same effect, as Vincent Otti is recorded as telling Kony he had only abducted young children not mature people "who know what the world is".[853] So inherent was the policy to the LRA that the specific term 'kadogo' was used to refer to young soldiers. Again, the Chamber refers to witness testimony to explain its meaning and notes that P-0330 considers 'kadoge' as children between 13 and 15 years old "who were abducted while still very young, but grew up in the bush and they were very dangerous people" adding that "that is why they insisted they should abduct young people".[854]

693. The Chamber relies on this evidence, and proceeds to consider the practice of 'beating out the civilian' which would ensue after their abduction. In addition to regular beatings to ensure

[848] Judgment, para. 1005.
[849] Judgment, paras 1005 and 1012.
[850] T-111, p. 25, lns 9-13.
[851] Judgment, para. 2317. *See* P-0070: T-105, p. 86-87.
[852] Judgment, para. 2369. *See* P-0372: T-148, p. 51, lns 5-8.
[853] Judgment, para. 2326. *See* ISO Logbook (Gulu), UGA-OTP-0065-0002, at 0073.
[854] Judgment, para. 2328.

compliance with orders and initiation rituals in which children were indoctrinated and made to believe in the spiritual powers of Kony, new recruits were also subjected to "an almost initiation-like flogging, caning or hitting" to impress upon them that they were now part of a military organisation.[855] This has been described by witnesses as brainwashing in order to eliminate "that civilian aspect of your life" or force one to leave it behind.[856]

694. The Chamber found that as a result of the aforementioned LRA policies and practices LRA members functioned as tools of the Appellant, as their own free will had been completely quashed. Yet, at the same time, the will of the Appellant is viewed as intact based on the reasoning that commanders had a degree of agency.[857]

695. This reasoning is illogical since it disregards the adjudicated fact that the Appellant experienced the same conditions of recruitment, initiation and training as the other lower-ranking LRA members whom the Chamber has viewed as being devoid of free will.

c) The Chamber wrongfully attributed the conduct of LRA fighters to Dominic Ongwen on the basis of his status, without paying due regard to the long-term effects of his upbringing in the LRA coercive environment

696. In attributing the acts of LRA fighters to the Appellant,[858] the Chamber fails to apply the same reasoning as it did to other victims of the LRA's brutal policies. Rather, it creates a dichotomy between the Appellant as a child with no free will who has suffered since his abduction and the Appellant as an adult who is fully responsible for the crimes he is alleged to have committed, but also for those committed by others.

697. This is apparent in paragraph 2672, in which the Chamber disregards the Defence's argument that it fails to consider the Appellant's abduction and subsequent victimisation and states that he committed the relevant crimes as an adult. Although an adult during the charged period, the Chamber has failed to properly consider the long-term effects of living in a state of constant fear and apprehension, in addition to being subjected to extreme emotional, mental and physical strain throughout his early developmental years.

[855] Judgment, para. 2373.
[856] Judgment, paras 2374 and 2379.
[857] Judgment, paras 871-872, 970.
[858] *See* Judgment, paras 2858, 2914, 2964, 3011, 3091 and 3108.

698. The Appellant had been stripped of his free will as a result of his childhood experiences, just like the many other LRA members who testified, and has since internalised the long-standing rules of respecting one's superiors and obeying orders.

699. The Chamber has focussed on instances in which the Appellant was identified the source of threats due to his position as a commander, and thus attributes to him responsibility for the acts of Sinia fighters.[859] However, the Appellant's growth within the LRA does not equate with a return of agency, as his will remains subjugated by Kony. Moreover, the mere fact that he has reached adulthood does not eliminate the lasting impact of trauma experienced in his earlier years, especially considering he continued to be immersed in the same coercive environment.

d) Conclusion

700. The Defence urges the Court to apply the same finding that the "conditions of recruitment, initiation, training, and service in the LRA" which resulted in Sinia fighters functioning as tools to the personal circumstances of the Appellant. The evidence on the trial record details the long-standing nature of many of these policies, to which the Appellant was as much a victim as the witnesses who gave testimony relied upon by the Chamber in its conviction.

701. One cannot underestimate the lasting impact of having experienced trauma consistently since early-childhood. To find that Sinia fighters functioned as a tool of the Appellant and the LRA hierarchy is to adopt an overly simplified and erroneous view of both criminal responsibility and mental health. In line with this view is the assumption that upon reaching adulthood and a more senior-level in the hierarchy, one simply regains their sense of free will or agency enableing them to disregard the rules that have been internalised during a near lifetime of ill-treatment and fear. This is directly contradictory to the trial record.

702. This oversight and inconsistent application of reasoning on behalf of the Chamber represents an error of both law and fact, and materially affects the judgment as a whole.

MM. Ground 69: The Chamber erred in law and in fact by finding that there was a common plan regarding the conscription of children below the age of 15, as the mode of liability was defectively pleaded and was not proven beyond a reasonable doubt

a) Introduction

[859] Judgment, paras 902, 907, 913, 940, 964-966, 971, 977-979, and 2389.

703. The Chamber erred when it found that the Appellant, Kony and the Sinia brigade leadership engaged in a coordinated effort, relying on the LRA soldiers under their control, to abduct children under 15 years of age in Northern Uganda and force them to serve as Sinia fighters.[860]

704. From the outset, the acts charged and subsequently convicted regarding abduction and conscription of children were acts alleged against Kony, Otti and other LRA commanders as contained in the amended arrest warrant pleadings. These were only confirmed against the Appellant due to the Prosecution's inability to bring Kony to justice. All charges stemming from the abductions in Teso, Lwala School, Pajule, Barlonyo and other locations were against Kony, Otti and other commanders, and not the Appellant.[861]

b) The Chamber erred when it proceeded on defective charges

705. The charges of conscription and use of child soldiers under Counts 69 and 70 were fundamentally defective as they did not provide notice of the elements of the alleged crimes and modes of liability, nor any evidentiary or factual support for the allegations. The Defence hereby incorporates its submissions in the Defect Series.[862]

c) The Chamber erred when it found that there was a common plan regarding conscription of children under 15 years of age

706. Even before the abduction of the Appellant, the LRA policy of abduction and recruitment of children under the age of 15 years had been conceived and vigorously enforced by Kony. Indeed, under the Prosecution's application for an amended arrest warrant, it was unequivocally stated that Kony's LRA rules concerning abduction were strictly implemented. It therefore goes without saying that it was pursuant to this same policy, that the Appellant was abducted and subjugated to Kony's control and command.

707. To support the adverse findings agasint the Appellant, the Chamber disregarded testimonial evidence to the effect that orders for abductions came directly from Kony.[863] This leads to the reasonable conclusion that rather than being a key figure in the creation and subsequent enforcement of a common plan involving "a specific methodically pursued organization-wide policy" regarding the conscription of child soliders,[864] the Appellant was merely another victim of said policy carrying out orders dictated by Kony.

[860] Judgment, paras 222 and 3106.
[861] Application for Warrants, Counts 6-26.
[862] ICC-02/04-01/15-1433, Part IV, paras 62-70.
[863] *See* Judgment, paras 2329-2337.
[864] Judgment, paras. 2312-2313.

708. Evidence on the trial record further demonstrates that whoever dared to disregard Kony's orders would face dire consequences as obedience in the LRA ranks was "characterized by their brutality".[865] Kony's *modus operandi* in issuing his instructions only in consultation with or at the command of the spirits of which he was the medium render the finding of a common planning void. Thus, the Defence submits that the Chamber erred in finding that the Appellant was involved in a common plan with Kony and the Sinia Brigade leadership to conscript children in Norhtern Uganda. This conclusion both fails to reflect the evidence and disregards the personal circumstances of the Appellant, amounting to a miscarriage of justice which renders the convictions unsafe.

NN. Grounds 60 & 70: The Chamber erred in law and fact by disregarding favourable evidence or evidence raising reasonable doubt on corroborative evidence, impermissible inferences, hearsay, evidence of self-incriminated witnesses and witnesses who concealed their criminal involvement in the crimes

a) Introduction

709. Since the beginning of the proceedings, the Defence has objected to the adoption of a prejudicial evidentiary regime. However, the Judgment raises new grounds for concern in light of the manner in which evidence on the trial record has been assessed. As showcased by the chart of witnesses selectively relied upon in Annex C to the present Appeal Brief,[866] the Chamber has consistently disregarded favourable evidence or evidence raising reasonable doubt from witnesses who it otherwise deems credible and reliable.

710. One prominent example may be found in the evidence provided by P-0205, one of the most heavily-relied upon witnesses, who is deemed to have a "detailed and precise" recollection and "comprehensive" and detailed testimony which the "Chamber could expect from a witness with his rank and time spent in the LRA".[867] The Chamber makes this finding despite the many instances in which his testimony is contradicted or inconsistent[868] and that fact that he even gave false testimony to conceal his own involvement in the Odek attack.[869] In its subsequent analysis,

[865] *See* Judgment, paras 2587. *See also*, Judgment, paras. 950-963.
[866] Annex C, Chart of Witnesses Selectively Relied Upon.
[867] Judgment, para. 272.
[868] *See* Judgment, paras 1044, 1396 and 1674-1675; fns 1687, 2043, 5490 and 5806.
[869] *See* Judgment, para. 1396, detailing P-0205's statement that he didn't participate in the attack on Odek, which is directly contradicted by his subordinate, P-0372. Still, the "Chamber does not deem it necessary for the present purposes to resolve this discrepancy in the evidence. Due to P-0205's in Court testimony, the manner of recounting the events, as well as the corroboration by other witnesses, the Chamber finds that it is without bearing on the reliability of P-0205".

the Chamber proceeds to disregard each favourable piece of evidence or evidence raising reasonable doubt adduced by P-0205,[870] and focuses exclusively on incriminatory statements.

711. The same applies to other witnesses such as P-0070, P-0142 and P-0231 who were also consistently referenced in support of convictions against the Appellant but whose exculpatory evidence was overlooked.[871] For example, despite finding that the Appellant's authority was not compromised while in sickbay, P-0231 (a witness deemed credible and relied upon extensively) testified that during the Appellant's time in sickbay, the members of Oka battalion who were with him followed his instructions, but that he otherwise did not issue any orders to other members of the group during that time,[872] nor did he have any radio communication equipment.[873] This was echoed by P-0016,[874] while P-0309 stated he did not see commanders visit[875] with D-0056 explaining that he "did not have any authority" at that time.[876]

712. To further demonstrate the Chamber's error in both law and fact, the Defence outlines below the Chamber's overall assessment of evidence regarding the attacks on IDP camps and the unacceptable inferences made from the evidence of only some witnesses in relation to the agency of commanders and belief in Kony's spiritual powers.

b) The Chamber disregarded evidence in relation to the IDP camps which raised reasonable doubt, and based its findings on hearsay, impermissible inferences and corroboration by partial witnesses

713. The Chamber erred in its decision not to rely on D-0139's expert report on the basis that it was "not directly relevant to the charges".[877] The finding is inconsistent with the Chamber's recognition of the probative value and relevance of circumstantial evidence later in the judgment.[878] Its dismissal contradicts the Chamber's position on testimony usually considered relevant and reliable.[879] Moreover, it reveals the prejudicial manner in which evidence on the trial record has been assessed as the Chamber uses hearsay evidence or inferences as corroboration of the facts in dispute when there existed other direct evidence.[880] Hearsay evidence is permissible

[870] *See* Judgment, paras 1736, 1843, 2154, 2162, 2508 and 2613.
[871] *See* Annex C for the chart of witnesses selectively relied upon, which clearly outlines many instances in which this occurs.
[872] Judgment, para. 1038.
[873] Judgment, para. 1045.
[874] Judgment, para. 1045.
[875] Judgment, para. 1044.
[876] Judgment, para. 1038.
[877] Judgment, para. 598.
[878] Judgment, paras 851 and 2009.
[879] This has included evidence of acts not charged or those falling outside the temporal and geographical scope, *see* Grounds 3, 6, 53, 66, 87 and 89.
[880] *See* Judgment paras 1223, 1274-1276, 1282, 1283, 1338, 1350, 1494, 1825, 1867, 1953 and 1957.

before the Court, but its probative value is lower than testimony of personal experience. In addition, inferences drawn from a body of evidence in which there is multiple causes for reasonable doubt ought not to be relied upon for a conviction by an international criminal court or tribunal.

714. D-0139's expert evidence regarding the political objectives of the Appellant is not only relevant to the charges, but also raises reasonable doubt in the Chamber's findings that the Appellant possessed the persecutory intent for the targeting of civilians at IDP camps. The Chamber's justification that more direct evidence could be relied upon is thus contested by the Defence in light its reliance on inferences rather than testimony or evidence unequivocally proving such intent.

715. Even aside from the reasonable doubt raised by the evidence of D-0139, other evidence on the trial record is sufficient to invalidate the Chamber's findings in relation to Dominic Ongwen's individual criminal responsibility for the attacks on IDP camps. Firstly, the Appellant's alleged responsibility as co-perpetrator of the attack on Pajule is brought into question by an ISO Logbook entry indicating that Kony issued an order for the LRA to move to Teso, with the exception of the groups of Vincent Otti and Opiro Livingstone, and specifically adding that "Dominic should remain behind with Otti… he has good plans which can help…".[881] This recording clearly indicates that like other LRA members, Dominic Ongwen was following instructions rather than planning an attack on Pajule alongside Kony, or even Vincent Otti.

716. In regard to the composition of the attacking forces, the Chamber inferred from P-0379's statement that Okello Tango, a member of Oka battalion, automatically leads to the conclusion that Dominic Ongwen's subordinates were at the attack.[882] This finding is corroborated by hearsay evidence from P-0070 who was told that the attack on Pajule was undertaken by combined forces of the Control Altar and Sinia Brigade.[883] The source of P-0070's information was not indicated in the Judgment. Aside from not being strongly supported by the evidence, this conclusion is not the only reasonable inference since the Chamber notes at paragraph 865 that "movement of people from one unit to another, including between brigades, was a relatively common occurrence in the LRA"

[881] ISO Logbook (Gulu), UGA-OTP-0232-0234, at 0501; see also Judgment, para. 1180.
[882] Judgment, para. 1186.
[883] Judgment, para. 1223.

and it was widely acknowledged that there were a number of commanders participating in the attack.[884]

717. Secondly, there was substantial doubt concerning Dominic Ongwen's awareness of the order issued by Kony to attack Odek IDP camp. The Appellant was not present for the gathering in Sudan, nor does D-0032's testimony provide a basis to conclude that the radio message was received by him at the time.[885] Despite this uncertainty, the Chamber infers from the testimony of P-0142 that Dominic Ongwen knew of the order since Okwer, a commander involved in the planning of the attack, had told him Kony's order had already reached the ground when concrete plans were being made.[886] P-0142's evidence is disregard on the basis of it being inconsistent a number of occasions throughout the judgment,[887] and the Defence struggles to see how this singular piece of hearsay evidence supports the inference and subsequent conclusion that Dominic Ongwen was aware of the order, especially since no timeline is even provided. This is an unsupported speculation on behalf of the Chamber, who has rejected similar speculatory statements in the course of its Judgment.[888] This conclusion is inferred solely from the testimony of P-0205 and P-0410, which the Chamber believes to be corroborated by P-0054 despite only part of the witness' statement mentioning such an instruction.[889] This finding is based on an impermissible inference that fails to reflect the evidence on the trial record, rendering the conviction unsafe.

718. In regards to the order issued by Mr Ongwen, the evidence also raises reasonable doubt as P-0054, P-0264, P-0142, P-0314, P-0340, P-0372 and P-0314 all stated that the instructions primarily

[884] *See* Judgment, paras 1492, 1733, 1739, 1922, 1937 and 1946.
[885] Judgment, paras 1387-1389.
[886] Judgment, para. 1390.
[887] *See* Judgment, para. 1411, in which the Chamber does not rely on his testimony that two fighters from Gilva brigade participated in the attack, as there is no other testimony to the same effect. See also para. 1634, where the Chamber recalls that P-0142 said he was certain that Dominic Ongwen reported the attack, but notes that the witness did not hear what was actually said in the conversation: P-0142: T-70, p. 43, lns 5-7. Further inconsistencies may be found in relation to the attack on Lukodi, at para. 1677, where the Chamber notes that while initially stating that '[t]here was no order about civilians', P-0142 confirmed in court, after having his memory refreshed from his previous written statement, that, in fact, the order was also to kill the civilians they find during the attack & at para. 1829 in which the Chamber accepts P-0142's testimony that there were young boys of approximately 16-18 among the abductees from Lukodi but rejects his testimony that no children under 15 were trained in the LRA and more specifically in the Sinia Brigade, at para. 2382. The Defence wishes to draw attention to this selective reliance on testimony, which clearly seeks to implicate the Appellant to the utmost extent.
[888] *See* Judgment, paras 1492, 1733, 1739, 1922, 1937 and 1946.
[889] *See* Judgment, para. 1397 who stated that "when people were at a place called Orapwoyo, Ongwen instructed people to go and collect food from Odek" and indicated that "[a]t that time there was a big problem of hunger so he invited Kalalang and other commanding officers and instructed them that since we do not have food people
should go to Odek" – P-0054 merely confirmed aw truthful his prior testimony that the order also included an attack on civilians, which was not mentioned by other witnesses mentioned above.

related to collecting food as there was a genuine hunger problem at the time.[890] Thus, a literal interpretation of the phrase is permissible in the circumstances and refutes the Chamber's conclusion that "the evidence before it justifies and necessitates the finding that Dominic Ongwen, as well as other commanders, ordered LRA fighters to target everyone they find at Odek, including civilians".[891]

719. This conclusion is inferred solely from the testimony of P-0205 and P-0410, which the Chamber believes to be corroborated by P-0054 despite only part of the witness' statement mentioning such an instruction.[892] This finding is based on an impermissible inference that fails to reflect the evidence on the trial record, rendering the conviction unsafe.

720. Thirdly, the likelihood of civilian deaths by crossfire has been raised by the Defence in relation to both the attack on Odek and Lukodi, as multiple witnesses have indicated this possibility. P-0372 stated that civilians were "shot by accident" and were not targeted but rather the victims of a stray bullet.[893] Similarly, P-0309 testified that he did not see anyone shooting directly at civilians, rather the LRA fighters were "aiming at soldiers who were mixed up civilians".[894] P-0085 also testified that he was told by Dominic Ongwen that civilians had been killed in the crossfire,[895] while P-0233 speculated that this would likely occur as bullets cannot bypass civilians when fighting.[896] Despite these various pieces of testimony, the Chamber finds that since "not one witness testified of a specific incident where a civilian was shot by government soldiers or of a civilian actually killed in alleged crossfire" and there is "ample evidence" that LRA fighters shot and killed civilians, the necessary inference is that LRA forces were the ones that killed the civilians in Odek.[897] This is factually incorrect as P-0309 stated that he saw five civilians shot in the crossfire as they were present among government soldiers,[898] yet this is overlooked by the Chamber.

[890] Judgment, paras 1397-1399, 1401-1402 and 1405.
[891] Judgment, para. 1407.
[892] *See* Judgment, para. 1397 who stated that "when people were at a place called Orapwoyo, Ongwen instructed people to go and collect food from Odek" and indicated that "[a]t that time there was a big problem of hunger so he invited Kalalang and other commanding officers and instructed them that since we do not have food people should go to Odek" – P-0054 merely confirmed aw truthful his prior testimony that the order also included an attack on civilians, which was not mentioned by other witnesses mentioned above.
[893] Judgment, para. 1478.
[894] Judgment, para. 1482.
[895] Judgment, para. 1484.
[896] Judgment, para. 1485.
[897] Judgment, para. 1492.
[898] Judgment, para. 1482.

721. Turning to Lukodi, key witnesses P-0142 and P-0205 both raised the possibility of civilian deaths by crossfire in addition to P-0172 and D-0072.[899] Furthermore, P-0205 subsequently indicated that when he raised the radio broadcast which reported the events at Lukodi with Dominic Ongwen, he answered that "what he knows is that he did not kill them".[900] P-0101, a witness deemed credible by the Chamber, also testified that she overheard the Appellant reproaching Ocaka for "spoiling his name on the radio" as he had asked him not to kill children or civilians and now "they would say he is the one who did it".[901] Once again, the Chamber fails to acknowledge the reasonable doubt raised by this evidence and rejects the possibility of civilian deaths by crossfire and finds Dominic Ongwen criminally responsible for the targeting of civilians at Lukodi.

722. The Chamber reaches the same conclusion for Abok, inferring that Dominic Ongwen's order "logically included targeting civilians" despite no testimony detailing this specific instruction.[902]

c) The Chamber reached adverse conclusions on the Appellant's spiritual beliefs and degree of agency derived from erroneous inferences of specially selected evidence

723. While the Chamber states, at paragraph 121, that "when setting out the material facts and circumstances which form the basis of the Chamber's decision… discusses the evidence which 'directly or by way of inference (thus, through additional facts of a subsidiary nature) supports each of these findings'", the inferences made misinterpret the evidence and should not form the basis of the Chamber's conclusion for two of the fundamental issues relating to the affirmative defence of duress in the present case.

724. The first concerns the degree of agency allegedly enjoyed by commanders. The Chamber misinterpreted the evidence regarding commanders such as Unita and Odongo, which explained how they would sometimes delegate tasks or pretend to be ill, as an indication that they had a "considerable degree of choice" or independence.[903] Additionally, testimony stating that Kony's orders were general in nature led the Chamber to disregard the evidence of Simon Tabo explaining that Kony would execute those who acted without authorisation.[904]

725. The Chamber erred in making an impermissible inference from the aforementioned evidence which supported its conclusion that brigade and battalion commanders had the ability exercise

[899] *See* Judgment, paras 1734-1736.
[900] Judgment, para. 1843. *See also* P-0205: T-51, p. 16, lns 7-9.
[901] Judgment, para. 1844. *See also* P-0101: T-13, p. 32, l. 5 to p. 33, l. 13.
[902] Judgment, para. 1870.
[903] Judgment, para. 871.
[904] Judgment, para. 872.

their own free will, meaning not all acts could be solely attributed to Kony.[905] This fundamental misunderstanding of the evidence by the Chamber renders the subsequent convictions unsafe as delegating duties or making excuses so as to not participate in certain activities does not equate with the ability to directly disobey orders – with multiple witnesses testifying "categorically" that no one could refuse orders in the LRA.[906]

726. Later in the Judgment, the issue is reconsidered specifically in the context of the personal circumstances of the Appellant. The Chamber recalls P-0231's testimony in which he described Dominic Ongwen as the type of commander who would not automatically execute orders but "intervened if he deemed it necessary, including going back to Joseph Kony for more information,"[907] leading the Chamber to conclude that Dominic Ongwen was a self-confident commander who took his own decisions. Again, this inference misinterprets the evidence as discussing an order or seeking further information does not amount to an outright refusal to obey.

727. The second issue concerns the manifest error committed by the Chamber in its disregard for favourable and exculpatory evidence concerning spiritual beliefs and Kony's alleged powers. As discussed under Ground 55, the Chamber made an impermissible inference which established a belief pattern that led it to conclude that spiritualism had no effect on the Appellant nor on any potential threat amounting to duress.[908] This is inference is wholly unacceptable in light of the body of evidence on the trial record which directly contradicts such a finding, and proves that it is not the only reasonable conclusion – as required by the jurisprudence of the Court.

d) Conclusion

728. The antecedent analysis has endeavoured to demonstrate the lack of evidentiary support for many of the Chamber's inferences and subsequent convictions. These include the alleged persecutory intent inferred from incriminatory circumstantial evidence, as well as the misinterpretation of direct evidence selectively relied upon which is used to support the charges against the Appellant in regard to the attacks on IDP camps.[909]

[905] Judgment, paras 873 and 970.
[906] Judgment, para. 951. *See also* P-0067: T-126, p. 37, lns 14-18; P-0142: T-72, p. 62, lns 7-14; P-0226: T-9, p. 36, lns 5-8; P-0252: T-87, p. 61, lns 4-5; P-0264: T-65, p. 15, lns 9-21, p. 16, lns 4-11; P-0379: T-57, p. 67, lns 10-18.
[907] Judgment, para. 2597.
[908] Judgment, paras 2645 and 2658. *See further* Ground 55 above, sections b-d.
[909] *See* Judgment paras 2867, 2868, 2921, 2922, 2967, 2968, 3014 and 3015.

729. The same applies to the Chamber's prejudicial assessment of evidence concerning the spiritual beliefs of Dominic Ongwen and his alleged agency within the LRA, both of which play a fundamental role in the determination of the Appellant's individual criminal responsibility.

730. Therefore, the Defence respectfully requests the Appeals Chamber to recognise the reasonable doubts raised by the evidence on the trial record and remedy the mixed errors of law and fact committed by the Chamber, which renders the convictions unsafe and the trial unfair,

OO. Grounds 71 and 24: The Chamber erred in law by making credibility and reliability assessments and predeterminations detached from the facts of the trial record without a discernible criterion or statutory evidentiary standard

731. Before detailing its assessment of the evidence on the trial record, the Chamber correctly noted that in accordance with Article 66(3) of the Statute they must be convinced of the guilt of the accused beyond reasonable doubt. This standard is to be applied to "any facts indispensable for entering a conviction, namely those constituting the elements of the crimes or modes of liability charged".[910] Furthermore, the Chamber explicitly acknowledged that such a standard requires a "holistic evaluation and weighing of all the evidence taken together in relation to the facts at issue".[911] The holistic evaluation and weighing of all evidence taken together in relation to the facts in issue, while mandated by Article 74(2) of the Statute, it is not a substitute for the legal and evidentiary standard and burden of proof mandated by Article 66(3) of the Statute which the Chamber articulated but failed to apply in this case.

732. Throughout the course of the trial, a total of 130 witnesses testified live before the Chamber, in addition to the evidence of seven witnesses which had been preserved under Article 56 and the prior recorded testimony of a further 49 witnesses submitted pursuant to Rule 68(2)(b) or (c). Despite the number of witnesses, however, the Chamber failed to consistently apply any discernible criteria, nor did it uphold the statutory evidentiary standard of proof beyond reasonable doubt in its findings.

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[910] Judgment, para. 227; See also Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Public Redacted Version of Judgment on the appeal of Mr Thomas *Lubanga* Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red (hereinafter: '*Lubanga* Appeals Judgment'), para. 22; Bemba et al Appeals Judgment, paras 96, 868; Appeals Chamber, *The Prosecutor v. Mathieu Ngudjolo Chui*, Public Version of Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute", 7 April 2015, ICC-01/04-02/12-271-Corr, paras 123-25.
[911] Judgment, para. 227.

733. Prior to determining the reliability of witness testimony, the Chamber listed certain factors which it considered indicative of the truthfulness of the content therein.[912] These factors included: the "richness of details and coherence of the narrative provided by the witness, as well as the coherence of the testimony with other evidence before the Chamber", the coherence between the testimony given at trial and their prior accounts, whether the witness was in a position to provide certain information, and the basis of knowledge from which a statement is made.[913]

734. The Chamber also took into account more technical considerations relating to the individual circumstances of the witness, such as their "relationship to the accused, age, the provision of assurances against self-incrimination, indication of bias against the accused – or a lack thereof – and/or motives for telling the truth".[914] Prior to setting forth its general considerations with respect to each of the witnesses, the Chamber stated that the factors listed "can by no means be considered an exhaustive list of factors, or a 'check-list' of requirements for a witness to be relied upon" and that "the same witness may be reliable in one part of their testimony, but not in another".[915]

735. The Defence wholly agrees with the above statement and does not expect an entirely accurate recollection of events in order to establish the witness's reliability and proof beyond reasonable doubt, especially considering the time that has elapsed since the events in question. However, the extent of inconsistencies and contradictions present in the evidence submitted by witnesses otherwise deemed credible and reliable by the Chamber cannot be overlooked.

736. Despite listing factors relevant to an assessment of reliability, the Chamber subsequently disregarded the said criteria without any consideration of the effect this had on the witness' general credibility. Rather, it proceeded to identify self-incrimination or positive feelings towards the Appellant as factors which supported the credibility and reliability of witness statements.[916] Considering the number of witnesses that testified with assurances, revealing self-incriminating information ought not to be viewed as a sign of reliability. Moreover, whether witnesses provided complementary or favourable statements regarding the Appellant is wholly irrelevant to any assessment of the truthfulness of their testimony.

[912] Judgment, paras 255-260.
[913] The Chamber noted that this is particularly relevant where there is a competing version of events, resulting in the Chamber having to determined which evidence it considers more probative, *see* Judgment, para. 257.
[914] Judgment, para. 258.
[915] Judgment, para. 260.
[916] *For example see* Judgment, paras 319 and 361 (assessment of witnesses) and [REDACTED], 1330, [REDACTED], 1675, [REDACTED] and [REDACTED] (discussion of evidence heard during trial).

737. A clear example of the Chamber making credibility and reliability assessments detached from the evidence may be found in the testimony of P-0205, which is replete with inconsistencies. In spite of this, however, the Chamber determined the former LRA battalion commander to be a forthcoming witness with a "detailed and precise" recollection and "comprehensive" testimony which the Chamber could expect "from a witness with his rank and time spent in the LRA".[917]

738. To showcase the extent of these inconsistencies the Defence will discuss just a few instances which warrant the conclusion that the witness, who is relied upon throughout the Judgment for numerous convictions, should not be deemed credible. Firstly, in footnote 1687 of the Judgment, the Chamber noted that P-0205 stated that Buk Abudema replaced Tabuley as brigade commander in 2003, but rejected this information "in light of all the other evidence" to the contrary. The Chamber considered this false testimony to simply be an inaccurate recollection of the year – despite P-0205 being described as a witness well-placed to comment on the internal structure of the Sinia Brigade almost immediately after this finding.[918] Secondly, when evaluating the evidence concerning the order to attack Odek the Chamber recalled P-0205's statement that the Appellant ordered LRA fighters to "abduct good boys and girls" while those who were not fit to be in the army should be killed instead.[919] However, this detail was absent from a prior statement to the Prosecution, with the witness stating was simply because "he had forgotten at the time".[920] In relation to the attack on Odek itself, P-0205 explicitly said that he remained behind and did not go to the camp, which is directly contradicted by P-0372, his subordinate at the time, who placed P-0205 on the ground during the attack.[921] Despite this major discrepancy, the Chamber found that it was "without bearing on the reliability of P-0205's evidence as to the preparations for the attack".[922] Considering that the standard of proof beyond reasonable doubt is to be applied to any facts that are indispensable for entering a conviction, it is important to note at this point that the Chamber based its conclusion regarding the order for Odek on the evidence of P-0205 and P-0410.[923] It is also important to note that the evidence of P-0410 was also found to be unreliable on occasion, as the Chamber refused to uphold the witness's testimony that Buk Abudema and Vincent Otti participated in the planning of the Odek attack and were present at the gathering where orders were

[917] Judgment, paras 272 and 853.
[918] Judgment, para. 886.
[919] Judgment, para. 1396
[920] Judgment, fn. 3213.
[921] Judgment, para. 1396.
[922] Judgment, para. 1396.
[923] Judgment, para. 1407.

issued.[924] In addition, this evidence was corroborated by the testimony of P-0054 – a witness whose reliability is also called into question below.

739. Turning back to the testimony of P-0205, when describing the instructions given by the Appellant in relation to Lukodi, the witness recounted the order that "everyone should be killed."[925] Yet, in his interview with the Prosecution in 2015, he stated that the order was to only attack the military and that "the mission was not to kill civilians".[926] Upon being questioned, P-0205 replied that he had not remembered the information during the interview in 2015. Once again, the Chamber accepted his testimony as truthful without any further consideration of the obvious impact that such incoherence has on one's reliability.[927] Lastly, the Chamber was forced to disregard P-0205's testimony on two additional occasions in which he incorrectly confirmed the presence of P-0226 and P-0227 at Lukodi.[928] Notwithstanding the many discrepancies and contradictions in the witness's testimony, the Chamber still considered him to be a well-informed witness with detailed and reliable testimony – a finding clearly detached from the evidence on the trial record.

740. Similarly, P-0054 was also deemed a reliable witness "whose testimony was filled with the type of detail that showed they spent many years in the LRA".[929] Notwithstanding this assessment, the Chamber rejected his statement, which asserted that the LRA paid attention to the principles of International Humanitarian Law on the basis that no other witness provided testimony to the same effect.[930] It later noted P-0054's inconsistent testimony concerning the Appellant's order to attack Odek, but provided no reasoning as to how this discrepancy in the witness' memory affected the value of his evidence, nor on how it affected the overall credibility of his prior testimony.[931] Further inconsistencies may be found in P-0054's testimony regarding the order to attack Lukodi, as he testified firmly that Gilva brigade was not involved, which was rejected in light of the specific evidence to the contrary.[932] When discussing the acts of LRA fighters at Abok, the witness's statement that nobody looted food due to the surrounding chaos was also found to be unreliable considering that he stayed outside the camp during the attack,[933] despite the Chamber previously

[924] Judgment, para. 1394. For further examples of P-0410's testimony being deemed unreliable, *see* paras 1419 and 2175.
[925] T-47, p. 54, lns 10-16.
[926] T-51, p. 7, l. 1 to p. 10, l. 24.
[927] Judgment, para. 1675.
[928] See Judgment, fns 5490 and 5806.
[929] Judgment, para. 295.
[930] Judgment, para. 947.
[931] P-0054 stated that Dominic Ongwen instructed people to go collect food from Odek before upholding his prior testimony to the effect that Dominic Ongwen also ordered fighters to "attack the civilians", *see* Judgment, para. 1397.
[932] Judgment, para. 1691.
[933] Judgment, para. 1908.

accepting his testimony in relation to Odek (where he also remained beyond the parameters of the camp).[934] Like P-0205 and P-0410, the witness was relied upon at various points throughout the Judgment for a number of convictions without meeting the required standard of proof beyond reasonable doubt.

741. For a final example of a witness regularly relied upon, and whose assessment of reliability and credibility is detached from the evidence on the trial record,[935] the Defence recalls the testimony of P-0309. The first instance of his evidence being disregarded by the Chamber is found at paragraph 1044, wherein the Chamber noted that P-0309 stated that he did not see Vincent Otti, Raska Lukwiya, Charles Tabuley or Tolbert Yadin come visit the Appellant at the sickbay, and that he did not know whether Buk Abudema, David Oyenga or Cesar Acellam visited either. However, the Chamber considered that this evidence did not bring into question the reliability of the testimonies of P-0379 and P-0205, which detailed the many visits allegedly received by the Appellant while injured. Just shortly after, the Chamber again found P-0309's estimation that the Appellant spent between five and six months in sickbay as unreliable on the basis that P-0205 and P-0231 provided context and were not considered to be brought into question by the divergent testimony.[936]

742. In light of all the above, the Defence reiterates its submission that the Chamber erred in law by making numerous assessments of reliability and credibility that were not supported by the evidence on the trial record. The witnesses discussed above are just a few examples of the many instances in which inconsistencies and contradictions in Prosecution witness testimony are disregarded, oft without a reasoned statement. When these instances are considered cumulatively, it is clear that the factors outlined by the Chamber which were thought to indicate reliability – aside from some being irrelevant to such a determination – fail to be applied consistently throughout the judgment or when determining the probative value of the evidence. This raises substantial doubts in relation to the truthfulness of the information therein, making the judgment and convictions unsafe.

PP. Ground 72: The Chamber erred in law and in fact related to the intercepts, logbook entries and shorthand notes

a) Introduction

[934] Judgment, para. 1416.
[935] Judgment, paras 341-346.
[936] Judgment, para. 1068.

743. This ground of appeal relates to the legal, procedural and evidentiary violations and prejudicial reliance on unauthenticated and untested inculpatory logbook summaries of interceptors' notes for direct evidence, corroboration and inferences, to convict or support the conviction of the Appellant. The logbook summaries of intercepted LRA communications were not a complete forensic record of the communication of the Appellant or even of LRA commanders, and were assessed without the corresponding audios of the intercepted communications in their original form.

744. The plethora of violations recorded in the selective use of incriminatory logbook summaries assembled by the Chamber to the exclusion of favourable evidence or evidence raising reasonable doubts, made the trial, Judgment and conviction fundamentally unfair.

b) The Chamber failed to review the complete evidentiary record of intercept evidence and abused its discretion by relying on a "general discussion of the reliability of intercept evidence" to make incriminate the Appellant

745. The intercepts of LRA radio communications were tendered through a bar table motion and recognised as formally submitted by the Chamber despite objections by the Defence.[937] After reviewing the Defence's objections,[938] the Chamber decided that it "recognises the submission, not 'admission', of all items identified by the Prosecution" and deferred its consideration of the objections raised by the Defence "until the judgment and in the light of the entirety of the evidence brought before it."[939] The request for leave to appeal sought by the Defence was denied.[940]

746. The Chamber pointed to its discretionary powers in assessing the relevance, reliability and probative value of evidence that was formally submitted into evidence. The Chamber abused its discretion by failing to follow the statutory parameters, guidance and safeguards in its exercise of these discretionary powers.[941] Rather, the Chamber explained that it was deferential regarding the "submission of the different batches of documentary evidence by the Prosecution and by the

[937] Trial Chamber IX, *Decision on Prosecution Request to Submit Interception Related Evidence*, ICC-02/04-01/15-615, para. 26.
[938] The Chamber summarised these at paras 14-21 of the *Decision on Prosecution Request to Submit Interception Related Evidence*.
[939] Trial Chamber IX, *Decision on Prosecution Request to Submit Interception Related Evidence*, ICC-02/04-01/15-615 paras 14-21, 26.
[940] Trial Chamber IX, *Decision on Prosecution Request to Submit Interception Related Evidence*, ICC-02/04-01/15-615 paras 14-21, 26.
[941] Articles 64(9)(a), 69(4), 69(7) and 74(5) of the Statute.

Defence" and "generally considered that an intervention on its part in terms of exclusion of material from the evidentiary record of the case in the course of the trial was unwarranted."[942]

747. The Chamber declined to rule on the totality and substance of Defence objections because of anticipated concerns of "an inherent risk, which may be in tension with the ultimate purpose of a trial to establish the truth."[943] For that reason, it excluded "items of evidence on the basis of a determination of their relevance or probative value when considered individually" [944] and considered evidence objected to "as part of the system of evidence as a whole – and on the basis of a knowledge on the part of the Chamber which, until the end of the trial and prior to the rest of the evidence being available to it, is by definition partial."[945]

748. The Chamber consequently engaged in a "general discussion of the reliability of intercept evidence"[946] without explaining the criteria or standard it relied on in proclaiming the evidence reliable. The decision by the Chamber not to provide a reasoned statement on the criteria and statutory and legal evidentiary standards it relied on in making a determination of general and holistic reliability of the Prosecution intercept evidence compromised the fairness of the proceedings and amounted to an abuse of discretion and a violation of Article 74(5) of the Statute.[947]

749. Pursuant to the jurisprudence of the Court, when considering the admissibility of evidence, the factors to be considered are: (1) relevance; (2) probative value; and (3) prejudicial effect, when weighed against probative value.[948] Probative value includes the reliability of the evidence, while reliability requires that the document be authenticated. Documents that are not authenticated have no probative value and, although a document may be authentic, it may still be deemed unreliable.

750. More specifically, when assessing incriminatory recordings, the Appeals Chamber in *Bemba et al* has warned against relying upon evidence where there are discrepancies unless the material was "corroborated by other evidence".[949] Further, the "reliability of the recording depends on the type of information on which the Chamber seeks to rely. As a result, *the Chamber must review each*

[942] Judgment, para. 240.
[943] Judgment, para. 239.
[944] Judgment, para. 239..
[945] Judgment, para. 239..
[946] Judgment, fns 2082-2084.
[947] Judgment, paras 637-638.
[948] Trial Chamber I, *Decision on the Admissibility of Four Documents*, ICC-01/04-01/06-1399, paras 27-32; Trial Chamber II, *Decision on the Prosecutor's Bar Table Motions*, ICC-01/04-01/07-2635, para. 14; Katanga case, Trial Chamber II, *Decision on the Bar Table Motion of the Defence of Germain Katanga*, ICC-01/04-01/07-3184, para. 15.
[949] Bemba et al Appeals Judgment, para. 1003.

and every excerpt within a telephone conversation to be relied upon" and where difficulties are identified the Chamber must "*treat with circumspection* any probative value to be attributed to the information emanating from the evidence concerned. Hence, *where discrepancies appear plausible,* the *Chamber refrained from relying on the recordings*.[950]

751. Therefore, the Chamber had an obligation to establish discernible criteria and standards for the evaluation of evidence which was formally submitted, and to make separate and discrete assessments and determinations of the unauthenticity, relevance, probative value and reliability of the evidence. It also had the obligation to make assessments and determinations on the objections raised in the Defence Closing Brief and during trial, which the Chamber consistently deferred to Judgment.[951]

752. These assessments were not made, particularly in relation to crimes which were not directly committed by the Appellant such as evidence against former ICC indictees such as Vincent Otti, Rask Lukwiya, Joseph Otti and other LRA commanders, as there was no determination on whether the prejudicial effect of the intercept evidence outweighed its probative value.

c) The Chamber relied on untested and unauthenticated logbook evidence to make prejudicial and inconsistent reliability assessments, which disregarded evidence raising reasonable doubt

753. The Chamber in the *Ntaganda* case held that it would only admit into evidence "those entries that have been covered by *viva voce* testimony of the witness."[952] In the present case, the Chamber compared 17 audio excerpts against logbook entries.[953] In contrast, the Judgment referred to 50

[950] Bemba et al Appeals Judgment, para. 227.
[951] Judgment, paras 637-640.
[952] Trial Chamber VI, Decision on Admission of Certain Documents used during the Testimony of Witness P-0005, ICC-01/04-02/06-1796-Red at para. 3.
[953] Tape 638 (UGA-OTP-0241-0303), logbook discussed at Judgment, para. 692; Tape 646 (UGA-OTP-0241-0313), logbook discussed at Judgment, para. 697; Tape 693 (UGA-OTP-0247-1102), logbook discussed at Judgment, para. 703; Tape 695 (UGA-OTP-0247-1110), logbook discussed at Judgment, para. 712; Tape UGA-OTP-0037-0314; (enhanced: UGA-OTP-0239-0062), logbook discussed at Judgment, para. 719; Tape 721 (UGA-OTP-0239-0101), logbook discussed at Judgment, para. 725; Tape 757 (UGA-OTP-0141-0005) and Tape UGA-OTP-0025-0625, logbook discussed at Judgment, para. 734; Tape 760 (UGA-OTP-0239-0079), logbook discussed at Judgment, para. 742; Tape 771 (UGA-OTP-0239-0085), logbook discussed at Judgment, para. 748; Tape 781 (UGA-OTP-0239-0106), logbook discussed at Judgment, para. 755; Tape 808 (UGA-OTP-0235-0038), logbook discussed at Judgment, para. 762; Tape UGA-OTP-0039-0006 (enhanced: UGA-OTP-0235-0015), logbook discussed at Judgment, para. 769; Tape 822 (UGA-OTP-0235-0043), logbook discussed at Judgment, para. 782; Tape 824 (UGA-OTP-0239-0123), logbook discussed at Judgment, para. 788; Tape 830 (UGA-OTP-0239-0112), logbook discussed at Judgment, para. 794; Tape 837 (UGA-OTP-0235-0049), logbook discussed at Judgment, para. 800; and Tape 876 (UGA-OTP-0258-0143), logbook discussed at Judgment, para. 806.

events where only logbook entries were cited and discussed.[954] The Chamber does not explain why the 17 examples are sufficiently representative of all logbook entries.[955]

754. The Chamber's general assessment of the reliability and admissibility of logbook summaries significantly compromised the fairness and integrity of the trial. By allowing a holistic admission of the bulk of intercept evidence and disregarding exculpatory evidence and Defence objections, thereby constructing a patchwork of incriminatory summaries of radio intercepts, the Chamber violated Article 67(1)(e) of the Statute. The prejudice caused outweighs their probative value and rendered the trial unfair and the convictions unsafe.[956]

755. In its decision on logbook records, the Chamber listed witnesses P-0003, P-0016, P-0059, P-0440 as core intercept witnesses. Witnesses P-0016 and P-0440 were LRA signallers, while P-0003[957] and P-0059 were ISO interceptors in Gulu.[958] No interceptor, whose unauthenticated reports were submitted into the trial records, testified at trial.[959] Furthermore, the Chamber found that none of the witnesses gave indisputable evidence on all points relevant to the case and noted the difficulty in voice attribution after several years.[960]

756. The alleged prejudice is showcased in the Chamber's rejection of the testimony of senior intercept officials which raised reasonable doubt.[961] A prime example is found in its assessment of the evidence of P-0440, the LRA signals commander who developed the TONFAS. P-0440 testified that "if Joseph Kony wanted to give directives to a commander, he would use the TONFAS… He doesn't send a message plainly."[962] The TONFAS were a central communication tool for the

[954] Discussing persecution: Judgment, paras 1108-1117, 1119-1127, 1129-1130, 1132-1140, 1142-1143, and 1145; discussing sexual and gender based violence not committed by Mr Ongwen: Judgment, paras 2102-2107, 2112, 2279 and 2308; and discussing conscription and use of children: Judgment, paras 2323-2327, 2332, 2333 and 2337.
[955] Although occurring in the course of a different factual and legal determination, Judge Geoffrey Henderson, in Reasons of Judge Geoffrey Henderson paras 80-81, cautioned that "to establish the true nature and extent of a pattern, it is indispensable for the party alleging it to demonstrate that the examples provided as proof of the pattern are representative samples of the totality of relevant events and not simply chosen because they fit a preconceived conception" and "it is important to stress that the Prosecutor should not cherry-pick those (parts of) exhibits that support her narrative and ignore the rest"
[956] Judgment, para. 1070, fn. 2440, where the Chamber recalls its "discussion on the general reliability of logbooks". The Defence has argued in ground 73 of this Brief that the general reliability standard which the Chamber applied to the logbooks in this case violates the statutory framework of the Court which mandates clear criteria and standards of proof in the admissibility, credibility, reliability, relevance and probative assessments. The general reliability standard is arbitrary and unsafe.
[957] UGA-OTP-0272-0446 at 0460.
[958] UGA-OTP-0272-0446 at 0466.
[959] UGA-OTP-0272-0446 at 0459-0478.
[960] Judgment, para. 559.
[961] Judgment, paras 574, 576 and 578.
[962] T-40, p. 13 lns 8-12; p. 67 lns 1-14; p. 68 lns 3-6.

exercise of Joseph Kony's command and control authority over the LRA and the execution of his operations.

757. In the present case, the criminal responsibility of the Appellant under Article 25(3)(a) hinged on a common plan or agreement with Kony meaning the orders regarding the charged crimes are central to a manifestation of justice. However, a complete forensic picture was not presented by the Prosecution as P-0440 left the LRA and was conscripted into the UPDF, yet was never asked by the UPDF or the Prosecution to break the TONFAS codes and explain the relevant operational orders.[963]

758. This is particularly noteworthy considering P-0003 explained that whenever LRA TONFAS was captured, the LRA took measures to change the call signs and issue a new one or would sometimes even stop using call signs.[964] Furthermore, P-0003 testified that the interceptors relied on the call sign of LRA commanders to attempt to connect them to a particular communication and that the Appellant was "a commander who was quiet. He didn't like talking so much."[965] This statement is similar to the conclusions made by almost all Prosecution intercept witnesses.[966] This is in addition to the already acknowledged difficulties in identifying voices of LRA commanders in the enhanced audios which were played to him in Court and the prejudicial selection of excerpts which featured the Appellant.[967] This caused an intrinsic bias in what was selected and preserved – notably exculpatory radio exchanges such as threats being made against the Appellant or his family were unlikely to be recorded.[968] The Chamber responded to this argument by noting that "*[i]t cannot speculate* as to what further evidence there could have been."[969]

759. Another example can be found in the Chamber's conclusion that intelligence reports prepared by P-0403 were of limited value even though it contained a comprehensive record of the Prosecution intercept evidence.[970] The Chamber provided no reasoned statement, despite the reports having been analysed with the directional findings before passing the threshold required by his superiors

[963] T-41, p. 33, l. 24 to p.34, l. 19.
[964] T-42, p. 57, lns 1-18.
[965] T-42, p. 72, lns 22-25.
[966] *See*, UGA-OTP-0262-0446, at 0451, para. 18.
[967] Witness P-0003 provided information about the prejudicial focus of the selection of intercepts of LRA communications when he was asked why he failed to intercept LRA communications in order to foil attacks on Pajule, Odek, Abok and Lukodi, stating, "[t]hey picked only those tapes that they were interested in, and that is what I gave them." *See also* T-45, p. 46, lns 14-19; p. 47, lns 4-7; p. 49, lns 2-15; p. 51, lns 9-11; T-46, p. 19, lns 6-22. *See also* T-45, p. 25 lns 13-18.
[968] Trial Chamber IX, *Defence Response to "Prosecution's formal submission of intercept evidence via the 'bar table'" (ICC-02/04-01/15-580)*, ICC-02/04-01/15-599, para. 22.
[969] Judgment, para. 644 (italic added).
[970] Judgment, para. 589.

to be forwarded to the Chieftaincy of Military Intelligence in Kampala for further operation analysis with other reports from other intelligence sources spread across the country.[971]

760. A reasonable conclusion is that the report and the evidence contained exculpating evidence and evidence that raised reasonable doubt. It contained strong reservations on the limitations of the technical intelligence evidence which the core witnesses, including P-0003, P-0016, P-0440 and P-0059, expressed in their testimony. Likely due to the difficulties mentioned by P-0003 the Presiding Judge inquired to the witness whether "the higher up in the hierarchy of intelligence you go and look at the reports that are made there, the more different sources are combined in those reports." And he answered, "Yes your honour, that is exactly how it is done".[972] This response evinces the probative value of the report, which had the ability to raise reasonable doubt and prove the innocence of the Appellant.

761. This sheds light on the Prosecutor's failure to compile a complete forensic record and present both incriminating and exonerating evidence equally, as mandated by Article 74(2) and (5) of the Statute.[973]

762. Turning to the reliability of the intercept evidence, the Chamber found that logbook evidence was mutually corroborated yet failed to substantiate this claim. Failure to provide evidentiary support to this finding and relying on an uncorroborated single source logbook report to incriminate and support the conviction of the Appellant amounts to a violation of the fundamental tenets of fair trials which traversed the fairness of the judgment, warranting a reversal.

763. From the body of untested evidence, the Chamber made a number of findings used to convict the Appellant. For example, an individual report from the UPDF Logbook (Gulu) is used to make a number of adverse conclusions.[974] Firstly, the report notes the Appellant informing Raska Lukwiya that Pokot[975] was with him and that he and Ojok had gone for another mission, which is said to be corroborated by witnesses who stated generally that even when in sickbay the Appellant exercised his role as commander by sending subordinates on missions.[976] Secondly, the Chamber relied on the logbook list of co-signs transmitted by Kony's signaller on 2 December 2002 to

[971] T-42, p. 21 lns 8-13.
[972] T-44, p. 88 lns 19-21.
[973] Judgment, paras 642, 644; fns 1317, 1342, 1352, 1363, 1378, 1407, 1430. Defence Closing Brief, paras 225(a) and 233.
[974] UGA-OTP-0254-3399, at 3459.
[975] The Chamber found that Pokot was a battalion commander, meaning he was not a subordinate fighter under the command of the Appellant, *see* Judgment, para. 890, fn. 1709.
[976] This finding was made despite there being no corresponding logbook entries for this specific date.

conclude that the Appellant was active on the radio after that date.[977] Thirdly, the Chamber disregarded evidence which strongly suggests that the communications may have been carried out by a signaller who was assigned to the Appellant and using the same co-signs while deployed to a different commander because of the Appellant's disability – a consistent practice in the LRA.[978]

764. This singular piece of evidence is used to undermine the evidence the Appellant's injury, the relief of his command over Oka battalion, his arrest by Vincent Otti and his alibi for the attack on Pajule. However, P-0403's report also contradicted a logbook record which alleged that the Appellant "rushed to the radio to announce what he had achieved to all units."[979] The report by further established that Ugandan Government personnel intercepting LRA radio communications normally attributed communications to a particular commander rather than to a signaller who might have been speaking on the commander's behalf.[980]

765. Although the Defence promptly requested the audio recordings of the intercepted radio communications, which these logbook summaries purported to record, the Prosecution stated that they were not subject to disclosure.[981] This deprived the Defence of an opportunity to verify the authenticity and reliability of the logbook summaries and caused significant prejudice which rendered the trial and subsequent convictions unsafe.

766. Lastly, by disregarding favourable evidence provided by witnesses who were present and had first-hand accounts of the arrest of the Appellant and Kidega to instead rely on logbook evidence mischaracterised as "radio intercept evidence" to reject the alibi of the Appellant, the Chamber caused prejudice which occasioned a miscarriage of justice and rendered the trial unfair.[982]

d) The Chamber impermissibly substituted shorthand notes of intercepted LRA radio communications with logbook summaries of interceptors recollections, which it mischaracterised as contemporaneous written records

767. Upon discounting evidence which raised reasonable doubt, the Chamber impermissibly mischaracterised and substituted contemporaneous shorthand notes of intercepted LRA radio

[977] Judgment, paras 1046-1049, 1056.
[978] Report of P-0403 UGA-OTP-0272-0446, at 0449 - 0450, paras 9-12.
[979] The report identified LRA signaller P-0016 as one of the core intercept witnesses who contradicted the statement, as he accompanied the Appellant as his signaller even though he was not personally assigned to him. P-0016 noted that the Appellant communicated on the radio less frequently than other commanders, and that it was until sometime in 2005 that the Appellant would communicate on the radio himself without using a signaller. *See* Report of P-0403, UGA-OTP-0272-0446-0450, paras 9-12.
[980] Report of P-0403 UGA-OTP-0272-0446, at 0449-0451, paras 9, 11, 18.
[981] T-25 p. 8, l. 2 to p. 14, l. 1.
[982] Judgment, paras 1061-1064.

communications with logbook summaries of interceptors' recollections in order to convict the Appellant.

768. The Chamber relied on logbook summaries of the communications of Kony, Vincent Otti and LRA commanded to incriminate the Appellant by association despite the content being on matters which are unrelated to his individual criminal responsibility.[983]

769. The logbook records characterised as "contemporaneously memorialising the 21-22 May 2004 radio communications" and other logbook evidence relied on by the Chamber to inculpate the Appellant have no probative value and cannot be relied on by a reasonable trier of fact as an appropriate legal and evidentiary basis to convict or support a conviction of the Appellant. The logbook summaries were nothing more than a repackage of inconsistent rough notes of the recollection of interceptors' memories and were neither considered credible nor reliable by the interceptors or their superiors.

770. Their unreliability is supported by the fact that interceptors experienced significant difficulties in making these notes, with P-0003 explaining how the frailty of human memory affected the written records.[984] The witness agreed that they were not a comprehensive or accurate forensic record of the intercepted LRA communications and were not enough for senior commanders of the UPDF to make operational decisions. P-0003 also noted the challenges faced when drafting the summaries and that he did not have assistance from the LRA Chief of Signals.[985] The challenges included: a) too much information made it hard to record the relevant information;[986] b) difficulty making an accurate recording of a communication when a commander did not introduce his call sign;[987] c) bad weather;[988] and d) recording over the tape of another communication.[989] These limitations were conceded by the Prosecution. However, the Chamber ignored these limitations and made a general finding of credibility and reliability nonetheless.

771. In this regard, the rejection of a UPDF intelligence report of P-0403 in preference for intercept evidence was unreasonable when logbook summaries were merely secondary sources of

[983] Judgment, paras 558, 574 (fn.1019), 630, 633, 641, 643, 658, 664, 667-669, 1861-1862, (fn. 5525), 778, 1091, 1118, 1161 and 1180; fns 2417, 2308 and 2635.
[984] *See* P-0003; T-42, p. 35, lns 18-23.
[985] T-44, p. 81, lns 14-18.
[986] T-42, p. 40, lns 11-19.
[987] T-42, p. 35, lns 18-22.
[988] T-42, p. 42, lns 6-11.
[989] T-42, p. 40, lns 11-24.

interceptors recollections and inconsistent rough notes.[990] Without the corresponding longhand notes and original audios, and the intelligence report, these logbook summaries by themselves are not a comprehensive forensic record for the truthfulness of their contents.

772. The Defence further submits they should not have evidentiary value because the contemporaneous notes were coded and in languages the interceptors did not understand.[991] No reasonable trier of fact would have disregarded these problems to rely on the logbook summaries as contemporaneous written records, in particular to convict the Appellant.[992]

QQ. Ground 73 & 60: The Chamber erred in law and in fact by making erroneous findings based upon chains of inferences drawn from the intercept material

a) Introduction

773. The Chamber erred in law and in fact by making numerous findings based upon chains of inferences drawn from the intercept material. The individual inferences and cumulative effect of consequent findings introduced legal and factual errors to the Judgment that cut across the charges.

774. The Chamber erred in law and fact by first inferring that logbooks of intercepted communications were *in general* an accurate and reliable account of what was said in the period of 2002-2005, despite only examining a limited set of entries. The Chamber then erred in law and fact by drawing inferences from the texts of the logbooks. Considering other reasonable inferences about the reliability and content of the logbooks were available even drawing reasonable inferences from their contents was an error of law which led to errors of fact.

775. The effect of this chain of reasoning was the Chamber interpreted the logbooks to reach findings concerning: policies of the LRA concerning persecution of the civilian population, sexual and gender based violence not committed by the Appellant, and the conscription and use of children in armed hostilities.

b) Concluding that the logbooks were mutually corroborated and generally reliable was an error of law and fact

i) It was not reasonable to conclude that the logbooks were reliable based upon the limited sample discussed at trial

[990] Judgment, paras 668-669. *See* P-0003 T-44, p. 87, lns 10-16 and p. 90, l. 1 to p. 91, l. 5.
[991] *See* P-0440;T-40, p. 13 lns 8-12; p. 67 lns 1-14; p. 68 lns 3-6.
[992] Judgment, paras 642 and 644, fns 1317, 1342, 1352, 1363, 1378, 1407 and 1430. *See also*, Defence Closing Brief, paras 225(a) and 233.

776. To reach findings from the logbook material, the Chamber had to make inferences which were either not reasonable or not the only reasonable ones available.[993]

777. According to the jurisprudence of the ICC and ad hoc tribunals when, drawing inferences from circumstantial evidence, if only one reasonable conclusion can be drawn from particular facts, the Chamber *may* reach a conclusion beyond reasonable doubt.[994] This is to say that it is not sufficient that a conclusion reached by a Chamber is *merely a reasonable conclusion* available from that evidence. The conclusion pointing to the guilt of the accused must be the *only reasonable conclusion available*.[995]

778. The first inference the Chamber had to make concerns the *overall reliability* of the logbooks. Through analogy to logbook entries where it had testimony discussing interpretation and alleged corroborating audio. It stated:

> At the same time, the Chamber considers that the discussion of specific audio recordings further below also demonstrates the reliability of the logbook entries *in general*, irrespective of whether a related audio recording was translated and as such could be independently and in conjunction assessed by the Chamber.[996]

779. As discussed just above, the number of examples the Chamber used to reach the conclusion that all logbooks could be relied upon was remarkably limited.

780. It was not reasonable to conclude that all logbook entries were equally reliable, especially since for some logbook there are no audio recordings while others lack transcripts of the recording itself.[997] Hence, the Chamber could not assess whether a logbook entry was a reflection of what was said or an interpretation of jargon, proverbs, and codes.

781. Where audio recordings exist, they were not used by the Chamber and therefore had no corroborative value in the Judgment. The Chamber's own words illustrate the limitations that it was working under:

> The contents of the audio recordings are in non-working languages, predominantly Acholi or Luo. **They are impossible for the Chamber to understand without translated transcripts**, and **even then generally require further testimony from witnesses to understand their contents**. The Chamber **does not consider**

[993] Judgment, paras 2660, 2661 and 2663.
[994] ICC-01/04-02/06-2359 ('Ntaganda TJ'), para. 70 *citing* Bemba et al Appeals Judgment, paras 868 and 1166.
[995] Bemba et al Appeals Judgment, para. 868.
[996] Judgment, para. 643 (italics added).
[997] Judgment, paras 1108-1116, 1121, 2106-2107, 2323-2326, 2308, 2332, 2333 and 2337.

> **it has the requisite ability to identify voices** on these recordings itself, and has resorted to witness testimony for such identifications. What the Chamber has been able to discern from the original recordings is only the general impression that all intercepts concern men speaking in a non-working language over the radio.[998]

782. In the present case, it is accepted that there are gaps in the available intercepts.[999] However, the Chamber used this finding to explain away inconsistencies in the evidence and affirm the solidity of the inferences it was drawing.[1000] Moreover, the Chamber did not examine all available recordings. Where there were multiple logbooks for the same date and discrepancies were discovered,[1001] the Chamber did not exercise its powers[1002] to order transcripts or assistance from the witnesses who originally interpreted the audio[1003] nor did it refuse to rely upon these entries without corroboration of the specific events from other sources. Rather, logbook summaries are used as corroboration above primary sources of evidence on the facts in issue.[1004]

783. Based upon the Chamber's method of drawing inferences, it is therefore also reasonable to conclude that the logbooks contain errors *in general*. Just like the Chamber disregarded contradictions, inconsistencies and other factors raising reasonable doubts in its search for "overlapping content" which it considered "sufficient for it to conclude that each logbook is describing the same overall conversation"[1005] If limited instances of corroboration can be used to draw conclusions about the whole then identified discrepancies in the material can also be used to make conclusions about the whole. The Judgment itself demonstrates that differences of interpretation existed between the interceptors and creators of the logbooks.[1006] The different explanations and interpretations of the audio in testimony confirm that it is *also* reasonable to conclude that errors exist within the material *in general.*

784. The inconsistent approach of the Chamber to the logbook material shows that the Chamber's inference of reliability was unreasonable. In several cases, the Chamber resolved discrepancies

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[998] Judgment, para. 650 [emphasis added].
[999] "While it can be reasonably assumed that the intercept materials available in these proceedings do not cover the totality of LRA radio communications during the relevant time period" (Judgment, para. 642) *See also*, for example, fns 2138, 2299, 2416, 2417, 2459, 2460 and 5833.
[1000] *See* Judgment, fns 2138, 2299, 2416, 2417, 2459, 2460 and 5833.
[1001] *See*, for example, footnote 5835 and 5837.
[1002] Article 64(b) and (d).
[1003] This inaction by the Chamber is difficult to reconcile with Article 74(2) which requires a decision 'based upon the evaluation of the evidence' and also where the Judgment, when dismissing the Defence argument that material may not have been recorded, states: "the Chamber's obligation is to consider only evidence submitted and discussed at trial. It cannot speculate as to what further evidence there could have been." (Judgment, para. 644) This material was before the Trial Chamber but it declined to engage with it.
[1004] Judgment, para. 666.
[1005] Judgment, paras 661-664.
[1006] *See*, for example, Judgment, para. 1141 and fns 2258, 2272, 2299, 2303, 4915, 4916, 5835 and 5837.

between logbooks by noting that "interceptors at times would have focused on different details"[1007] or the likelihood that additional details in the logbooks can be relied upon rather than potentially being a misunderstanding by the interpreter.[1008]

ii) Reading the logbook entries as literal transcriptions of communications involved drawing unreasonable inferences and led to legal and factual errors

785. The Chamber reads the logbooks as though they were direct evidence but they are not direct evidence. This misconception resulted in the unreasonable inference that the logbooks were generally reliable on the basis that the logbook text reflects what was said with sufficient accuracy to make factual findings for a conviction.

786. The logbook entries are not verbatim transcripts. The Chamber itself acknowledges that the logbook entries are summaries.[1009] The entries are at best derivative of direct evidence and at worst anonymous hearsay.[1010] As noted in Ground 72, the interceptors who created the logbooks faced (i) technical challenges such as interference created by atmospheric conditions which distorted the character of the voices and made it hard for the interceptors to hear and understand what was being said[1011] and (ii) practical challenges resulting from the LRA seeking to obfuscate their message through jargon, proverbs, and codes.[1012] Thus, when one of the interceptors created a narrative summary in the logbook, they were *interpreting* and structuring the meaning of what was said.

787. Even if an interpretation of the text of a logbook itself is reasonable, the actual issue was whether it was reasonable to make factual conclusions based upon the entries. It was not possible to objectively know whether the text reflects the occurrence and order of the utterances in the conversation and also accurately captures the whole context[1013] of the utterances themselves.

iii) The evaluation and use of logbook entries in the Judgment departs from prior intercept evidence jurisprudence

[1007] *See* Judgment, fns 2138, 2299, 2416, 2417, 2459, 2460 and 5833.
[1008] The Defence recalls the Chamber's warning against speculation, *see* Judgment, para. 644
[1009] Judgment, para. 666.
[1010] The Chamber heard evidence concerning identifying authorship of some logbooks but even taken at its highest, this did not provide a basis for identifying the authors of all logbook entries and the Trial Chamber did not attempt to do this.
[1011] T-26, p. 50, lns 9-10.
[1012] Judgment, para. 616.
[1013] For example, tone of voice or casual repartee.

788. Prior ICC Chambers have given more scrutiny and care to the use of less indirect and unreliable material than appears in the Judgment. Such jurisprudence sets a minimum benchmark for how and when it is reasonable to rely upon intercept material.

789. In *Ntaganda*, for example, Trial Chamber VI noted "there are limitations to the conclusions that can be drawn from logbooks".[1014] This statement was made in relation to evaluation logbooks created by the Mr Ntaganda's own military. Those logbooks were not, in contrast to the present case, created by the adversary who was seeking to decode Mr Ntaganda's communications.

790. The present Chamber does not follow this precedent. Instead, it treats the logbook entries *as though they were* intercepts but does not apply the legal safeguards that this implies. Where the Judgment discusses a logbook entry, it concludes that the entry is a comprehensive indication of what was said and how it was said. This is treating the logbook entries analogously to direct evidence. If this evidence was direct recordings, then other ICC jurisprudence, such as in *Bemba et al*,[1015] should have been applied.

c) Inferring that the logbooks were reliable in general was not the only reasonable conclusion based upon the case record

791. Even if it was reasonable to conclude the logbooks were reliable *in general*, relying upon the logbook entries is still an error of law that impacted upon findings in the Judgment because other reasonable conclusions about them were possible. Among the inferences open to the Chamber were:

a. The logbooks are not generally reliable or it is simply impossible to know where any given entry can be relied upon without corroborating testimony or additional sources such as audio and transcripts;

b. The quality of intercepts and skill of the interceptors improved over time. Thus, earlier records are more subject to error. It could be more reasonable to rely upon later logbooks but not earlier ones. No discussion of this possibility or the further evidential difficulties that might flow from it are present in the Judgment. Moreover, the Chamber relied upon logbooks from 2002 where no audio or additional source was available.

c. The logbooks are somewhat reliable but a sufficient number of unidentifiable errors exist within the texts such that it they cannot be relied upon.

[1014] ICC-01/04-02/06-2359 ('Ntaganda TJ'), para. 66.
[1015] Bemba et al Appeals Judgment, para. 1003.

792. As concluding the logbooks were reliable in general was not the only available conclusion, the Chamber made a legal error which rendered the subsequent convictions unsafe.

d) The individual conclusions reached from the logbooks were errors of law and fact and impacted upon the Judgment

793. The inferences drawn from the material in general impact upon the secondary set of inferences that the Chamber makes concerning individual logbook entries. The Chamber relied upon the logbooks to establish important elements of a conviction or acquittal and not just facts that are auxiliary to core issues.[1016]

794. For each specific issue described below, it is submitted that the Appeals Chamber must evaluate both the reasonableness of the individual inference and whether, given the inference, the logbooks are reliable in general.

795. In respect of the persecution charges, the Chamber drew impermissible inferences from logbook summaries of intercepted radio communications detailing the persecutory policy of Kony, and as a consequence the LRA,[1017] to support the convictions against the Appellant.[1018] Two particular factual findings are core premises for numerous further convictions. These are the conclusion that the LRA as a whole perceived civilians as the enemy[1019] and that the Appellant himself perceived this as well.[1020] The Judgment makes clear that a pillar of these findings is the Appellant's participation or presence on radio calls.[1021]

796. In regard to the Appellant's subjective intent, what needs to be inferred is the Accused's knowledge, not that of others in the organisation.[1022] As listed in the attached Annex D,[1023] in many cases the logbooks were used to infer the Appellant's knowledge and awareness simply through his alleged presence on the radio.[1024] Inferring the Appellant's knowledge and awareness from this is not the only reasonable conclusion, thereby making the inference unreasonable. As already explained, signallers would often listen to calls in the place of commanders making it unfair to conclude that the Appellant heard all radio communications even

[1016] Although it also addressed more limited facts, s*ee*, for example, Judgment, para. 2279.
[1017] Judgment, paras 1091, 1108-1143, 1145-1146 and 2852.
[1018] Judgment, paras 2867-2868, 2921-2922, 2967-2968 and 3014-3015.
[1019] Judgment, para. 140.
[1020] Judgment, para. 141.
[1021] *See*, for example, Judgment, para. 1145.
[1022] ICC-01/05-01/08-3343 ('Bemba TJ'), para. 192
[1023] Annex D, Table of Intercepts and Persecutory Intent.
[1024] Judgment, paras 1114, 1117-1118, 1120, 1123, 1125, 1134-1137, 1141-1142, and 1145. Mr Ongwen is not found to be online for paras 1108-1113, 1115-1116, 1121-1122, 1124, 1126-1133 and 1140.

if his name was indicated as online.[1025] Secondly, as noted, there was testimony concerning interference which means it is reasonable to infer that not all individuals on the radio heard everything. Moreover, it cannot be reasonably concluded that the Appellant was always paying attention.

797. In order to support a conviction for SGBC not perpetrated individually by the Appellant, the Chamber again made legally impermissible inferences based upon logbook entries. The finding that 'Dominic Ongwen, Joseph Kony and the Sinia brigade leadership engaged in a coordinated and methodical effort, relying on the LRA soldiers under their control, to abduct women and girls in Northern Uganda'[1026] was cited to make findings in relation to the existence of an agreement or common plan,[1027] the Appellant's control over the crime,[1028] and to demonstrate that the Appellant held the *mens rea* necessary for a conviction.[1029] The logbook material forms the majority of the material leading to the core finding in paragraph 212 that supports all other findings.

798. To make the finding in paragraph 212, the Judgment resolved ambiguities and inconsistencies in the logbook evidence against the Appellant. One example of this is when it interprets certain logbooks as inferring that Vincent Otti told Kony that he was leaving some women with Dominic Ongwen.[1030] One logbook lacks an entry for the date and three logbooks contain information that contradicts the inference drawn by the Chamber. Three of the log books refer to Vicent Otti coming across an 'old hunter'. The Chamber infers that the sole logbook where the interceptor understood this to refer to women was the accurate one.[1031]

799. Another prejudicial example concerns where the Chamber has inferred that a conversation occurred between Kony and Dominic Ongwen where the Appellant claims that he will bring 'new recruits' in the context of a discussion about women. One of the three log books indicates that 'Odongo Anaka' was the speaker to whom Kony was speaking.[1032] The Chamber concludes that since the two incriminating log books are similar and contain more detail, they are reliable and the odd one out is not.[1033] The Chamber provides no further reason for concluding this.

[1025] Report of P-0403 UGA-OTP-0272-0446, at 0450, paras 9-12 and 18.
[1026] Judgment, para. 212.
[1027] Judgment, para. 3089.
[1028] Judgment, para. 3093.
[1029] Judgment, para. 3097.
[1030] Judgment, para. 2103.
[1031] Judgment, para. 2103, fn. 5835.
[1032] Judgment, para. 2104.
[1033] Judgment, para. 2104, fn. 583.

800. The legal errors of the two stages of inferences also impact upon the findings on charges related to the conscription and use of child-soldiers. The "evidence of orders for abduction"[1034] was a particular decisive element necessary to the Chamber identifying a "coordinated and methodical nature of the abductions" by Dominic Ongwen, Kony, and the Sinia brigade leaders.[1035] The finding of "a coordinated and methodical effort" is the only factual finding that the Chamber raises to find the existence of an agreement or common plan.[1036] The Judgment also cites this finding to find that the Appellant had control over the crime,[1037] and had the requisite *mens rea*.[1038]

801. The Chamber relied heavily upon the ISO 2002 logbooks for such inferences, which are mostly lacking audio recordings or UPDF logbooks against which the Chamber could examine any consistency.[1039] The jurisprudence of the ICC requires that such material requires corroboration. The extent to which a piece of evidence, standing alone, is sufficient to prove a fact at issue is entirely dependent on the issue in question and the strength of the evidence under consideration.[1040] The Appeals Chamber has found that '[d]epending on the circumstances, a single piece of evidence […] may suffice to establish a specific fact. However, […] this does not mean that any piece of evidence provides a sufficient evidentiary basis for a factual finding'.[1041] Here, the logbooks are the source of inferences which are used to support major pillars of the conviction for the conscription or use of child-soldiers. For the reasons argued previously before the Chamber and here, the logbooks require corroboration due to issues intrinsic to their creation. At the macro level, the reliability of these entries is not the only reasonable conclusion. At the micro level, the reliability of the individual entries, which again, are not corroborated by other sources, are not the only reasonable conclusion.

RR. Grounds 74, 75 & 76: The Chamber erred in law and in fact realted to findings on Pajule IDP camp

a) Introduction

802. The Appellant's conviction under Article 25(3)(a) direct perpetration, indirect perpetration and indirect co-perpetration[1042] was inconsistent with the confirmed charges and modes of liability

[1034] Judgment, para. 2312
[1035] Judgment, para. 2312.
[1036] Judgment, para. 3106.
[1037] Judgment, para. 3110.
[1038] Judgment, para. 3113.
[1039] Judgment, paras 2322-2327. The Trial Chamber mentions its reason for relying solely upon ISO logbooks for the year 2002 but it also relies upon single logbooks in other instances without a full explanation, *see* Judgment, para. 2105.
[1040] Ntaganda TJ, para. 75 *citing* ICC-01/04-01/06-2842 ('Lubanga TJ'), para. 110; Bemba TJ, para. 245; ICC-01/04-01/07-3436-tENG ('Katanga TJ'), para. 110; and ICC-01/04-02/12-3-tENG ('Ngudjolo TJ'), para. 72.
[1041] ICC-01/04-01/06-3121-Red ('Lubanga AJ'), para. 218.
[1042] Judgment, para. 2780.

retained, was not supported by the evidence on the trial record and was not proved beyond a reasonable doubt.

b) The conviction of the Appellant in the attack and resulting crimes in Pajule is inconsistent with the findings on the structure of the LRA

803. The confirmed charges alleged the hierarchical structure of the LRA as an essential contextual element of the fact crimes against humanity.[1043] The Defence strongly challenged this allegation during the confirmation procedure and during trial.[1044] For example, the Defence pointed to the irregular nature of the LRA structure which was dominated, controlled and commanded entirely by Kony. The Defence pleaded that Kony "successfully invoked possession of mystical powers" to "maintain his tight grip on the organisation."

804. The Chamber, notwithstanding strong factual and legal challenges by the Defence, found that during the period relevant to the charges, the LRA had a hierarchical structure.[1045] The Chamber relied on this finding to conclude that the organisational requirement under Article 7(2)(a) of the Statute was satisfied. Once this purpose was attained, the Chamber proceeded to deconstruct this finding. The Chamber embarked on this in order to enter multiple convictions against the Appellant for crimes which the Chamber found were perpetrated by and within the hierarchical structure of the LRA under the command and control of Kony, who ordered and supervised every stage of the crimes from execution to reporting back.

805. The Chamber, in contrast with its finding in paragraphs 123-125 and 854, mischaracterised the evidence of the command and control mechanism put in place by Kony.[1046] The Chamber found that "the LRA was a collective project" and did "not accept the proposition of the Defence that the LRA should be equated with Joseph Kony alone, and all its actions attributed only to him."[1047]

806. The findings on the imposition of rules[1048] by Kony, orders imposed by him and the reporting mechanism for attacks and the resulting crimes under which the Chamber placed the attacks on

[1043] CoC Decision, paras 54-59.
[1044] Defence Closing Brief, paras 22-23.
[1045] Judgment, para 123-125, 854 "It is agreed between the parties that Joseph Kony was 'in charge' of the LRA between 1 July 2002 and 31 December 2005. Witnesses with knowledge of the internal structure of the LRA refer to his position as 'overall leader', 'overall commander', 'chief commander', 'chairman', or to him being 'like the president of the LRA'; *See also*, para. 2799.
[1046] Judgment, paras 123-125 and 854.
[1047] Judgment, para. 873.
[1048] Application for Warrants, paras 100-101; Judgment, paras 1128, 1138, 1180, 1188, 2312, 2343 and 2365.

Pajule, Odek, Lukodi and Abok,[1049] indisputably placed command responsibility on Kony for all the alleged crimes.

807. As a matter of law and fact, no reasonable trier of fact would have found the Appellant, who functioned as a tool of Kony from his abduction, initiation, indoctrination and subjection to the mentally constraining LRA structure from the age of nine[1050] to the age of adolescence, individually responsible as a co-perpetrator with Kony, Vincent Otti, Raska Lukwiya, unidentified LRA Commanders and Sinia leadership

808. The Chamber made no findings on the contribution of named and unnamed co-perpetrators to ascertain the nature and extent of contribution of the Appellant and determine whether his contribution was essential and had the capacity to frustrate the crime. Having failed to make these findings, the decision that the Appellant controlled the crimes was without merit, unreasonable, and unwarranted. Particularly, the means by which he could have frustrated the crimes were not pleaded and the Chamber made no factual finding, apart from a declaratory standard finding that he failed to frustrate the crime.

c) No proof beyond a reasonable doubt that the Appellant engaged in an agreement or a common plan to attack the IDP camp in Pajule and to commit the multiple crimes charged

Vincent Otti ordered the attack on Pajule

809. The Defence recalls the confirmed forms of commission against the Appellant.[1051] The Defence submits that the CoC Decision did not confirm ordering, common purpose or command responsibility against the Appellant. The Defence incorporates its submissions contesting the finding that the LRA fighters who attacked the Pajule IDP camp functioned as a tool of the Appellant.

810. The Chamber found that Vincent Otti ordered an attack on Pajule IDP camp and that he summoned different units of the LRA to execute the order.[1052] Vincent Otti informed Kony that Abudema, the brigade commander of Sinia and his group, and Bogi joined him. The Chamber also found that the

[1049] Judgment, paras 1371, 1642, 1846, 1848, 2001 and 2927.
[1050] Judgment, paras 27-28.
[1051] Statement of Facts regarding Common Elements of Modes of Liability, para. 9. This statement of facts addresses elements of Dominic Ongwen's individual criminal responsibility pursuant to Articles 25(3)(a) (indirect perpetration and indirect co-perpetration), 25(3)(b) (ordering), 25(3)(d)(i) and (ii), and 28(a) (command responsibility) that are common to multiple categories of charges in this document. The statements of material facts and circumstances and legal characterisations in each category of charges should be read in conjunction with this section.
[1052] Among the commanders summoned were Charles Kapere, brigade commander of Trinkle, Rask Lukwiya, Charles Tabuley, Tolbert Nyeko Yadin. Opio Markas and Opiro Linvingstone.

Appellant was with Vincent Otti. The purpose of the operation, according to P-0144 and D-0032, was to collect food.[1053]

811. However, the Chamber misinterpreted Vincent Otti's statement to Kony that the Appellant was with him. The Chamber interpreted this statement as meaning that the Appellant was not moving with Vincent Otti with the Sinia unit under his command. In particular, the Chamber mischaracterised the testimony of P-0070, P-0101, P-0309 and P-0330 and arrived at this unreasonable conclusion.[1054]

812. It is significant for the Appeals Chamber to take special note of the fact that Kony, who was not charged as a Pajule co-perpetrator, took special interest in the situation of the Appellant, whom he ordered Vincent Otti to arrest and detain because of the Appellant's contacts with the Lt. General Salim Saleh. This interest prompted Vincent Otti to state that the Appellant was with him. The inference made by the Chamber that the Appellant was with Oka battalion forces under his command was not a reasonable inference based on the communication between Kony and Vincent Otti.

813. There are other available inferences that were reasonable and open to the Chambe, which the Chamber did not consider. For example, the Chamber identified the fact that one Sinia brigade soldier was identified during the large attack and used this fact to incriminate and make unreasonable inferences about the participation of the Appellant as a commander. The Chamber also found that about 20-25 Oka battalion LRA fighters remained with the Appellant in the sickbay,[1055] and a larger contingent were under the command of another commander.[1056]

814. The evidence that the Appellant was relieved of his command and arrested and detained by Vincent Otti[1057] on the instructions of Kony is uncontested. It is also uncontested that Kony wanted confirmation that his orders were executed. Kony received this confirmation.

815. The Chamber pointed to no evidence on record where a commander of the LRA who came under control alter, as the answer provided by Vincent Otti shows, retained command over any other unit while under the Control Altar.

[1053] Judgment, paras 1177-1178 and 1187-1188.
[1054] Judgment, para. 1185.
[1055] Judgment, para. 1034.
[1056] Judgment, para. 1025.
[1057] Judgment, para. 1019.

816. The reported presence of Sinia members, named by P-0330, who participated in the attack cannot reasonably be attributed to the Appellant without clear and unambiguous evidence establishing that they were members of Sinia battalion at the time of the attack and were under the command of the Appellant during the operation. The Chamber did not make this enquiry and provided no reasoned opinion.

d) Sinia brigade and Oka battalion soldiers seen in Pajule were not deployed by the Appellant and were not under his command

817. The mischaracterisation and misrepresentation of Vincent Otti's statement did not arise from credible evidence on the trial record. The interpretation of the testimony of D-0032's evidence on the presence of the Appellant, as a matter of law, cannot be relied on as corroborating evidence that the Appellant joined Vincent Otti with soldiers under his command at the time of the Pajule IDP camp attack**.**

818. The conclusion that the Appellant was one of the commanders who moved with forces under his command, is contradicted by the logbook information which recorded Vincent Otti informing Kony that Buk Abudema, the brigade commander of Sinia, with his "grps" had joined (him) Vincent Otti and other commanders on the ground on or around 5 October 2003. Buk Abudema was the superior commander of the Appellant. [1058]

819. The Sinia fighters who were found in Pajule may have been deployed by Abudema and not by the Appellant, who was with Vincent Otti and remained with Vincent Otti on the orders of Kony. The Appellant was already with Vincent Otti in Control Altar. The Chamber did not point to a scintilla of evidence to establish that the Appellant was in Control Altar with his unit, as the Chamber wrongly imputed.[1059]

820. The Chamber noted that P-0209 and P-0144 testified that the Appellant was in Control Altar.[1060] However, the Chamber found that the witnesses did not have comprehensive information about the Appellant's presence in Control Altar. Rather, information from various sources supported the fact that the Appellant was with Vincent Otti. The Chamber provided no reasoned opinion establishing that the Appellant was in Control Altar with Vincent Otti as a commander of his unit with soldiers and not as an individual.[1061]

[1058] Judgment, para. 1187.
[1059] Judgment, para. 1179.
[1060] Judgment, para. 1182.
[1061] Judgment, para. 1188.

e) Injury and alibi of Dominic Ongwen

821. The Chamber found that the Prosecution and Defence agreed that the Appellant suffered an injury during combat operations in 2002 and that he was arrested by Vincent Otti in 2003.[1062] The Chamber discussed first-hand accounts of witnesses who described the circumstances and severity of the injury the Appellant sustained. Witnesses, in particular Kidiga, who was arrested with the Appellant, testified that the Appellant was arrested and taken to Control Altar due to the contacts he established with Lt General Salim Saleh of the UPDF to facilitate his escape from the LRA.[1063]

822. The Chamber found that the two traumatic events occurred but minimised their effect on the ability of the Appellant to command his troops and lead them in active operational combat activities.[1064] To do this, the Chamber disregarded the evidence of Prosecution witnesses that favoured the Appellant or raised reasonable doubt. Instead, the Chamber relied on logbook summaries of intercepted LRA communications.

f) The reason of the Appellant's presence in Control Altar was was pleaded and confirmed

823. No reasonable trier of fact would have found that the reason the Appellant was in Control Altar was not clear[1065] and that he carried out military operations from the sickbay. The presence of the Appellant in Control Altar under the command of Vincent Otti was not hypothetical because it is part of the pleadings in this case, and is therefore a central issue in the case. The confirmed charges alleged that the Appellant also served sometime within the LRA headquarters, Control Altar.[1066]

824. The Defence evidence establishing that the Appellant was relieved of his command, arrested from the sickbay, and taken to Control Altar to serve his sentence at the direction of Kony and Vincent Otti [1067] was supported by the communication between Kony and Vincent Otti. In the communication, Vincent Otti consistently stated that the Appellant was with him.

g) The *mens rea* element was not proved beyond a reasonable doubt

825. The Chamber addressed the contextual elements of the crimes against humanity crimes in paragraphs 2790, 2798-2804 of the Judgment. Based on these contextual elements, the Chamber

[1062] Judgment, paras 1018-1021.
[1063] Judgment, paras 1022-1024.
[1064] Judgment, paras 1057-1061.
[1065] Judgment, para. 1065.
[1066] Statement of Facts regarding Common Elements of Modes of Liability, "12. Between 1 July 2002 and 31 December 2005 Dominic Ongwen was a military commander in the LRA, commanding units first at the battalion, and then at the brigade level. He spent the majority of this time in Sinia brigade, **but also served for some time within the LRA headquarters, Control Altar**. He commanded a battalion in Sinia brigade for much of mid-2002 to March 2004. On or about 5 March 2004, Dominic Ongwen became the commander of the Sinia brigade."
[1067] Judgment, paras 1057-1060.

inferred the element of knowledge of killing of civilians.[1068] The Chamber also addressed contextual elements of war crimes at paragraphs 2807-2815. Based on these contextual elements, the Chamber inferred knowledge of war crimes by the Appellant.[1069]

826. The Chamber did not find it necessary to analyse and make separate findings on the *mens rea* element of each of the crimes. Rather, the Chamber found that it did "not consider that contextual elements are qualitatively different from the specific elements of the crimes."[1070] Instead, the Chamber inferred the *mens rea* of the Appellant and found that "his participation in the planning, in the execution of the attacks, is of such a nature that it could only have been undertaken intentionally".[1071]

827. In contrast, the *Bemba* Trial Chamber held that knowledge of the contextual elements on the part of the commander is not a requirement to determine whether or not the alleged underlying crimes against humanity were committed. What is relevant for this purpose is to analyse the *mens rea* of the perpetrators of the crimes.[1072] The Chamber did not analyse the *mens rea* of the perpetrators of the crimes. Therefore, the *mens rea* element was not proved beyond a reasonable doubt.

h) Finding on the Appellant's engagement in a common plan, on his essential contribution, and his ability to frustrate the crime

828. The Defence incorporates by reference the pleading defects in the defects on common plan, essential contribution, ability to frustrate the crimes and *mens rea* elements of the charged crimes. The finding that the Appellant engaged in an agreement or common plan with Vincent Otti, Raska Lukwiya, Boggi and unspecified LRA commanders was not proved beyond a reasonable doubt. Additionally, the finding on essential contribution, ability to frustrate the crimes and control of the crimes by the Appellant did not meet the statutory evidentiary standards.

829. The Chamber made no finding on the contributions of the co-perpetrators. Such findings would ascertain the whether the contribution of the Appellant was essential and whether the crimes would still have been realised even without the Appellant's contribution. Based on the totality of the evidence, no reasonable trier of fact could come to the same conclusion as the Chamber. The findings were declaratory only and no reasoned statement was provided.

[1068] Judgment, para. 2805.
[1069] Judgment, para. 2816.
[1070] Judgment, para. 2820.
[1071] Judgment, paras 2865 (Pajule), 3012 (Abok), 2965 (Lukodi), 2919 (Odek).
[1072] *Bemba* case, Trial Chamber: Judgment, (21 March 2016), para. 168.

A. Grounds 77, 78 & 79: The Chamber erred in law and in fact in findings on Odek IDP camp

a) On common plan

830. The Defence recalls the forms of commission confirmed against the Appellant in the decision committing him to trial,[1073] which did not include common purpose, ordering and command responsibility. The Defence also recalls its submissions against the findings of the Chamber that LRA fighters who attacked Odek functioned as a tool of the Appellant.[1074]

831. The Chamber relied on the testimony of witnesses P-0410 and P-0205, which it found to be corroborated by witness P-0054. Based on this, the Chamber found that the Appellant engaged in a common plan to attack and commit crimes in Odek IDP camp.[1075]

832. The Chamber also found witness P-0410 not credible on central issues in the case. These concerned his testimony incriminating Vincent Otti and Abudema in the attacks on Odek and Lukodi. Despite these findings, the Chamber found the witness generally credible, without providing a reasoned statement.[1076]

833. The Chamber found that P-0205 was [REDACTED].[1077] In this capacity, P-0205 [REDACTED] fighters, and [REDACTED] on Odek and Lukodi. However, he concealed his criminal involvement in these attacks. Despite this finding, the Chamber relied on his evidence to convict the Appellant in both attacks.[1078] The Defence recalls the findings by the Chamber that battalions brigade commanders exercised free will in the LRA and that Kony bypassed the chain commander to give orders to battalion commanders.[1079] On the basis of this finding, [REDACTED] the battalion commanders who carried out the attacks in Odek, Lukodi and Abok did not function as tools of the Appellant. [REDACTED],[1080] while Labongo was deputy commander of Sinia.

834. The Chamber also found that witness P-0054 provided inconsistent statements about the order which was allegedly given by the Appellant to fighters who attacked Odek. In his prior statement,

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[1073] CoC Decision, pp. 72-73 (paras 9-13).
[1074] See above, Ground 68.
[1075] Judgment, paras 2910-2912.
[1076] Judgment, paras 363 and 365-374 (where the Chamber found that P-0410 falsely incriminated Vincent Otti and Abudema in the common plan to attack Odek, participating in the attack on Odek and planning the attack on Lukodi); *See also* para. 1394, fn. 3206.
[1077] Judgment, para. 2126.
[1078] Judgment, paras 1396 and 1407.
[1079] Judgment, paras 872, 2118, 2158, 2338 and 2665
[1080] Judgment, paras 890.

and in Court, the witness stated that the Appellant ordered fighters to go to Odek to collect food. Only later, however, he added that he was also ordered to attack civilians.[1081] Thus, P-0054 falsely incriminated the Appellant regarding the Appellant's presence at and actions in the attack on Odek IDP camp.[1082]

b) No reasonable trier of fact would have relied on the testimony of these witness to come to the conclusions of the Chamber

835. Witness P-0410 did not know the Appellant before the meeting at the RV, to plan the attack on Odek. The witness testified that he learned the Appellant was at the assembly when he introduced himself to the soldiers who were assembled for the attack on Odek.[1083]

836. The Chamber found the witness credible when he testified that he heard the Appellant say that there would be an operation in Odek, that the intention was "to exterminate everything, everything in Odek" and that other commanders also spoke, saying "nothing should be left alive" and that "everything should be exterminated, even ants, even flies", "and that anything alive, anything you see in front of you that is alive should be shot and killed."[1084] The witness testified that the Appellant also explained "how the attack was going to be done, and ordered to bring food from the camp."[1085] The witness located the RV where these orders were given, a location before one crossed Aswa river.[1086]

837. Nevertheless, the Chamber found that "this corresponds to the testimony of P-0205, who stated that after crossing the Aswa River," he heard Dominic issue the order to 'go and destroy Odek completely' and to 'only leave bare ground.'"[1087] The witness "also testified that Dominic Ongwen asked to abduct 'good girls' and boys and said that those who were not fit to be in the army should be killed instead."[1088]

838. Therefore, after finding that they were corroborated by witness P-0054, the Chamber found both P-0410 and P-0205 credible and relied on them to attribute responsibility to the Appellant.

c) The decision crediting the evidence was unreasonable, unwarranted and should be reversed

[1081] Judgment, para. 1397.
[1082] Judgment, para. 1417.
[1083] Judgment, para. 1395.
[1084] Judgment, para. 1395.
[1085] Judgment, para. 1395.
[1086] T-151, p. 30, lns 16-19.
[1087] Judgment, para. 1396.
[1088] Judgment, para. 1396.

839. The witnesses were not credible, were not corroborated and were discredited by credibility findings on key central aspects of their testimony and evidence which raised reasonable doubt.

840. The decision of the Chamber, who found P-0410 credible and reliable, contradicts its prior finding that the same witness was not credible when implicating Vincent Otti, Abudema and other commanders, for their participation in a common plan for the attack on Ode, at an RV.[1089]

841. The Chamber also noted that P-0410 testified "specifically that the LRA did not cross the Aswa River on the day of the attack" and that he had difficulties pinpointing the direction of Odek from the gathering place.[1090]

842. No reasonable trier of fact would have found P-0410 credible based on the evidence on the trial record and the findings which found him not credible on the central, ultimate issues in the case.

843. The finding regarding the identification of the Appellant from an alleged introduction at the RV, which the Chamber found not credible, and alleged orders given by him and the commanders who the Chamber found were falsely incriminated by P-0410 in the attacks in Odek and Lukodi was unreasonable, unwarranted, prejudicial and a miscarriage of justice.

d) There was no corroboration based on largely inconsistent and unreasoned findings

844. The Chamber found that P-0410 and P-0205 were corroborated by P-0054. P-0054 testified that "when we were at a place called Orapwaoyo, Ongwen instructed people to go and collect food from Odek"[1091] and that "at that time there was a big problem of hunger so he invited Kalalang and other commanding officers and instructed them that since we do not have food people should go to Odek".[1092] This statement did not corroborate P-0410 and P-0205 in any material particular. It significantly contradicts these witnesses and the common plan. The Chamber also found that the testimony of P-0054 incriminating the Appellant for leading fighters to attack the centre of Odek was without merit.[1093]

845. Kalalang and the other commanding officers, including P-0205, who were summoned and asked to go to Odek did not function as a tool of the Appellant. They were battalion commanders exercising control over fighters in their respective battalions who they deployed to Odek for food. None of the witnesses testified about the presence or the involvement of Kony or Okwonga Alero.

[1089] Judgment, para. 1394.
[1090] Judgment, fn. 3205, referring to T-151, p. 30, lns 10-22; p. 32, ln. 25; p. 33, ln. 16; p. 25, lns. 2-10.
[1091] Judgment, para. 1397.
[1092] Judgment, para. 1397.
[1093] Judgment, para. 1416.

Also, none of the witnesses corroborated each other on the location of the RV, the commanders who were present and the precise orders which the Appellant allegedly gave. P-0205 testified that the gathering or RV took place at a place across River Aswa called Lalage.[1094]

e) The Chamber disregarded evidence which raised reasonable doubt

846. The Chamber disregarded reasonable doubt on central issues which fell for determination. P-0264 learnt from his immediate commander Ben Acellam, and informed his escorts and security, that there "was going to be an operation involving looting food, warned that there would be government soldiers present, and told that if they found a weapon they should recover it."[1095]

847. None of the following witnesses whom the Chamber assessed corroborated P-0410 and P-0205 on their testimony about the common plan and the orders allegedly given by the Appellant. P-0264 and P-0142 concordantly testified that the orders given to the commanders was to attack soldiers and loot food.[1096] P-0314 testified that the order was to go and collect food.[1097] Similarly, P-0340 testified that the order was to go and collect food.[1098] Witnesses P-0320 and P-0340 testified that the order to attack came to them through their unit commanders.[1099] P-0352 heard about it from her so-called husband Okwee.[1100]

848. The Chamber acknowledged and justified the inconsistencies on the inability of almost all the witnesses to provide corroborative evidence about the location of the RV where the common plan or planning was engaged. The Chamber also endorsed the contradictions in the evidence on the orders which were given and, rather than find reasonable doubt, it endorsed the testimony of witness it found not credible and reliable on central issues in the case and about the which they testified.[1101] Rather than resolve these inconsistencies in favour of the Appellant, the Chamber rejected directional finding evidence.[1102]

849. The decision of the Chamber, in which it found directional findings not credible, contradicts the evidence of a Prosecution witness who the Chamber found credible. Prosecution witness P-0003

[1094] Judgment, para. 1396 fn. 3211, referencing T-47, p. 41 ln 25 – p. 42 ln 4.
[1095] Judgment, para. 1398.
[1096] Judgment, para. 1399.
[1097] Judgment, para. 1401.
[1098] Judgment, para. 1402.
[1099] Judgment, paras 1398 and 1402.
[1100] Judgment, para. 1403.
[1101] Judgment, para. 1407.
[1102] Judgment, para. 1406.

testified that directional findings were very effective in identifying the location of LRA commanders, the purpose of UPDF bombardments.

850. The witness testified that once their commanders "have read the information from the notebooks, they would compare the information with the directional findings groups or the team and then they world use the same information that he intercepted and they would use this information to follow the LRA or to set up an ambush or to deal with the LRA".[1103]

851. Based on the cumulative or individual prejudice caused as a result of the inconsistent findings, selective prejudicial inculpatory determinations, unreasoned disregard for favourable evidence or evidence that raised reasonable doubt, no reasonable trier of fact would have arrived at the same conclusions based on the evidence on the trial record.

f) Common plan was not proved beyond a reasonable doubt

852. The CoC Decision provided notice to Dominic Ongwen that together with Kony, Okwonga Alero and Trinkle brigade and Sinia leadership, he engaged in a common plan to attack Odek IPD camp to commit crimes.[1104] The Appellant was not charged for purpose liability. He was charged under common plan liability. Gilva brigade was not charged as participants in the common plan.

853. The Chamber found, in respect of common plan, that two fighters of Gilva brigade did not take part in the attack on Odek, and that P-0410 was not credible when he testified that "most groups participated and all the senior commanders went".[1105] The Chamber decided that Okwonga Alero and Trinkle brigade did not participate in the common plan and the attack on Odek.[1106]

854. The Chamber found the evidence of Prosecution witnesses inconsistent and contradictory about the role played by the Appellant in the attack on Odek, with some testifying that he did not go to Odek. Particularly, the Chamber found witnesses who testified and implicated the Appellant for

[1103] T-42, p. 21, lns 10-13.
[1104] CoC Decision, Section 5. Attack on Odek IDP Camp on or about 29 April 2004 (Counts 11-23).
[1105] Judgment, paras 1394, 1411 fn. 3273. *See also*, T-72, p. 67 lines 5-7; Judgment, fn. 3274 ("The Chamber notes its assessment of P-0410's testimony above. The Chamber also notes that P-0410 is the only witness to testify to the presence of these other commanders and groups. In the Chamber's view, the witness's testimony is not reliable in this regard."); T-151, p. 30, lns. 15-21, p. 41 lines 5-11, p. 42 lines 1-11.
[1106] Judgment, fn. 3276, where the l Chamber found that P-0245 was the only witness cited in the Prosecution's Pre-Trial Brief for the proposition that Okwonga Alero participated and that the attack on Odek was a joint attack between Sinia and Trinkle brigades.

personally leading LRA fighters to attack the trading centre of Odek to have been unreliable.[1107] The Chamber found that the Appellant did not personally go to Odek.[1108]

855. These significant conflicting accounts and the findings of unreliability of key witnesses who the Chamber relied on enter convictions on the attack and crimes in Odek, warranted a finding of reasonable doubt and an acquittal of the Appellant on all the crimes charged on the attack on Odek. The Prosecution did not discharge the statutory evidentiary burden of proof beyond a reasonable doubt.

856. Findings by the Chamber on the mental elements in paragraphs 2919 and 2920 of the Judgment relating to the Appellant and his subordinates as opposed to the co-perpetrators alleged pointed to command responsibility which the Chamber did not retain and made no findings. The inferences made are impermissible and legally unjustified.

g) Findings on the Appellant's engagement in a common plan, on his essential contribution, and his ability to frustrate the crime

857. The Defence incorporates by reference its pleading in the defects series on common plan, essential contribution, ability to frustrate the crimes and *mens rea* elements of the charged crimes. The finding that Dominic Ongwen engaged in an agreement or common plan with Kony, Okwonga Alero and unspecified Sinia brigade leaders was not proved beyond a reasonable. Additionally, the finding on essential contribution, ability to frustrate the crimes and control of the crimes by the Appellant did not meet the statutory evidentiary standards.

858. The Chamber made no finding on the contributions of the co-perpetrators, in other to ascertain the whether the contribution of the Appellant was essential and whether without his contribution, the crime would have been realised nevertheless.

859. On the basis of the totality of the evidence, no reasonable Trial Chamber could come to the conclusion the Chamber did to convict the Appellant. The findings were declaratory only and no reasoned statement.

B. Ground 80: The Chamber erred in law and in fact realted to findings on Abok IDP camp

a) Introduction

[1107] Judgment, paras 1415-1425.
[1108] Judgment, paras 1426-1427.

860. The Appellant was charged for launching an attack on Abok IDP camp on or about 8 June 2004. As a result, the Appellant is held accountable for the resulting crimes against the civilian victims of the attack.[1109]

861. The Chamber impermissibly changed the nature of the confirmed charges in the Judgment, which caused prejudice. The prejudice suffered is that the Appellant was convicted for multiple crimes committed by his alleged subordinates for which he was not provided notice in the CoC Decision. The Appellant was also not provided notice of charges resulting from attacks and resulting crimes committed by his subordinates, whom the Chamber found functioned as his tool.

862. While the confirmed charges alleged that the Appellant launched the attack, the Chamber reclassified the charge as an attack that was launched by LRA fighters subordinate to the Appellant.[1110] However, there was no proof beyond a reasonable doubt that the Appellant launched an attack on the Abok IDP camp.

863. The Defence incorporates by reference its submissions challenging the finding of the Chamber that all LRA fighters who participated in the attack on Abok functioned as a tool of the Appellant.[1111]

864. Additionally, the Chamber placed the attack within the context of the order by Kony and Vincent Otti for civilians in IDP camps to be attacked.[1112] The Appellant was not provided notice of these persecutory orders by Kony and Vincent Otti in relation to the attack on Abok.

865. There was no proof beyond a reasonable doubt that the Appellant attacked Abok IDP camp with the required special intention to execute the persecutory policies of Kony and Vincent Otti against civilians in the IDP camp.

b) The Chamber relied on impermissible inferences to convict or support the conviction of the Appellant for the attack on Abok

866. The Chamber made impermissibly wrong inferences from the logbook communications and orders by Kony, Vincent Otti to LRA commanders. These impermissible inferences wrongly attribute

[1109] CoC Decision, paras 81-85 and p. 86 (para. 54).
[1110] Judgment, paras 190 and 192.
[1111] See above, Ground 68.
[1112] Judgment, para. 191.

criminal responsibility to the Appellant for the attack on Abok IDP camp and the resulting crimes, which the Chamber found the Appellant was not present for and did not personally commit.[1113]

867. The Appeals Chamber has held that where a factual finding is based on an inference drawn from circumstantial evidence, the finding is only established beyond reasonable doubt if it was the only reasonable conclusion that could be drawn from the evidence.[1114] The logbook memorialising of alleged radio communications from which the Chamber made impermissible inferences to make inculpatory findings and to convict or support the conviction of the Appellant, were circumstantial evidence and the inferences made by the Chamber were not the only reasonable inferences in the circumstances.

868. There were many other available inferences. The orders of Kony and Vincent Otti were not directed to any particular operation. The Chamber found that the Appellant did not go to Abok and did not personally participate in the attack. This decision has great significance. The the charges laid out in the CoC Decision were not proved beyond a reasonable doubt.

869. The Chamber found that Dominic Ongwen did not personally go to Abok but that Kalalang led the attack.[1115] Kalalang was a battalion commander and that he led the attack on Abok.[1116] The Chamber found that brigade commanders and battalion commanders exercised free will and took their own initiatives.[1117] For this reason, the imputation that Kalalang and the fighters under him functioned as a tool of Dominic Ongwen who was not present in Abok is not supported by the evidence.

870. Therefore, the conviction was based on evidentiary findings and legal analysis and characterisation that did not meet the statutory standard and burden of proof beyond a reasonable doubt. Thus, the conviction should be reversed.

C. Grounds 81 & 82: The Chamber erred in law and in fact realted to findings on Lukodi IDP camp

a) Introduction

871. The Defence recalls that the Appellant was convicted under Article 25(3)(a), and not for common purpose or command responsibility and incorporates by reference its submissions challenging the

[1113] Judgment, paras 191-192.
[1114] Bemba et al AJ, para. 868; Reasons of Judge Geoffrey Henderson para. 51.
[1115] Judgment, para. 1873.
[1116] Judgment, para. 890.
[1117] Judgment, paras 872, 2118, 2158, 2338 and 2665.

finding of the Chamber that all LRA fighters who participated in the attack on Lukodi functioned as a tool of the Appellant.[1118]

b) No proof beyond a reasonable doubt that the Appellant attacked Lukodi and committed the charged crimes

872. The charges alleged that the Appellant exerted control over the crimes through LRA fighters who carried out the attack,[1119] and that as the commander of the Lukodi attack, Dominic Ongwen exerted control over the crimes through the LRA fighters who carried out the attack.

873. The Chamber found that Dominic Ongwen ordered LRA fighters from Sinia brigade and Gilva Sickbay under the command of Major Tulu to attack Lukodi IDP camp.[1120]

874. Although the Chamber found that the location of the gathering where the Appellant and the fighters assembled and were given instructions and deployed for the attack by the Appellant was precise, this finding was not supported by the evidence.[1121]

875. The witnesses did not provide consistent evidence about the location of the gathering. These inconsistencies raised reasonable doubt about the truthfulness of the testimony of the witnesses on the location where the gathering took place. The Chamber failed to apply the correct legal standard. Instead, the Chamber made finding about the location of the RV from which the Appellant gave the orders to attack Lukodi IDP camp and the location of the Lukodi IDP camp, which was not based on the evidence on the record. The decision of the Chamber was prejudicial and unfair. The location was not identified or proved with the statutory certainty required by law.

c) The Chamber failed to apply the legal standard and evidentiary burden in its assessment of evidence of prosecution witnesses

876. Prosecution witness P-0205, [REDACTED], told investigators of the OTP, that the order he and the soldiers deployed to Lukodi were given by the Appellant, was to attack soldiers who were present in Lukodi.

877. During the trial, he made a drastic change and testified that the order was to kill civilians in Lukodi.[1122] The statement which the witness made to investigators in 2015 was a prior inconsistent statement which had all indicia of reliability. The witness did not deny that he made the statement

[1118] See above, Ground 68.
[1119] CoC Decision, p. 82 (para. 42).
[1120] Judgment, paras 179, 1647-1648 and 1650.
[1121] Judgment, paras 1667-1672.
[1122] Judgment, para. 1675.

nor allege that he made it under compulsion, threats or other factors which should have made the statement unreliable. The statement was central to the very purpose of the investigation and the case.

878. P-0205 was the physical perpetrator of the crimes for which the Appellant was charged and convicted. He was reminded by the Prosecutor about his rights to remain silent, not to self-incriminate and his right to counsel. With these safeguards, the witness told the investigators that the orders which he was given by Dominic Ongwen was to target the soldiers for attack in Lukodi and that the mission was not to kill civilians.

879. The witness provided no cogent reasons for a drastic change to testify that the order was to kill civilians. The Chamber was not satisfied with this explanation[1123] but contradicted itself by finding the witness reliable and accepting his testimony in court as truthful due to the following reasons: a) he insisted on his in-court testimony, b) he self-incriminated which the Chamber found to be a vector of credibility, c) his statement was at odd with the rest of the evidence on the given orders, d) his account in Court is in accord with other reliable evidence, e) he testified on oath and did so after assurances under Rule 74 against self-incrimination.[1124]

880. Upon ruling that it was not satisfied with the explanation given by the witness about his prior inconsistent statement, it was no longer reasonably open for the Chamber to revise its decision to find the witness credible and to rely on his inculpatory testimony to support the conviction of the Appellant. Although the Court was not convinced about the reason provided by the witness for his change of testimony, it relied on the factor of the witness insistence to believe his in court incriminating evidence. The decision of the Chamber caused prejudice to the fair trial rights of the Appellant.

881. The fact that he changed his story before the Court, under oath, could not reasonably be construed as a vector of reliability. It could reasonably be construed to be perjury for changing the evidence he provided to the Prosecutor in order to incriminate the Appellant. A reasonable trier of fact would

[1123] Judgment, para. 1675. The dissatisfaction of the Chamber with the explanation the witness provided for the change of his statement is inconsistent with the predetermination or presumption of credibility and reliability of witness P-0205, in para. 272, as "a calm, restrained and forthcoming witness. His recollection was detailed and precise. His testimony was comprehensive and included the kind of details that the Chamber would expect from a witness with his rank and time spent in the LRA".
[1124] Judgment para. 1675.

have relied on this drastic change to find reasonable doubt; in particular, after finding his explanation for the change unconvincing as the Chamber did.

882. The Chamber decision on the testimony of P-0205 was inconsistent with its statutory duty under Article 67(1) to guarantee the fairness of the proceedings. The Chamber disregarded the evidence of P-0205 which raised reasonable doubt or favoured the Appellant and gave credit P-0205's perjured evidence which the Chamber relied on to incriminate and support convictions against the Appellant.

883. The Chamber found that P-0205's testimony that he did not go to Odek was contradicted by another witness. The Chamber also found that P-0205 testified in a manner to conceal or minimise his involvement in the attack on Odek IDP camp. Nevertheless, the Chamber disregarded this perjury and decided that it was not "necessary for the present purposes to resolve this discrepancy in the evidence".[1125] The Chamber did not consider the oath and assurances which were administered on the witness as the basis of credibility and reliability about the orders which Ongwen gave but which he did not execute by not going to Odek. However, a finding that he participated in the attack on Odek provided an opportunity for the Chamber to elicit evidence from the witness whether he functioned as a of the appellant, during the attack on Odek.

884. [REDACTED].[1126] Without more specific findings, the Chamber concluded that in addition to Ocaka as commander on the ground, Ojok Kampala, Oyenga [REDACTED], Kobbi, Ojara and Abonga Won Dano participated in the attack in leadership roles.[1127] None of these commanders who participated in leadership roles testified that they functioned as a tool of the Appellant. The Chamber made no specific decision relating to any of these commanders providing evidence of functioning as tools of the Appellant. The Chamber made no finding about the *mens rea* of these physical perpetrators.

885. During his testimony on oath, P-0205 despite his reversal and testimony on oath that the Appellant gave orders for civilians to be killed, P-0205 testified that he did not see any civilian casualties during the attack. The Chamber found the evidence provided P-0205, P-0172 and P-0142 about not seeing civilian casualties speculative, their testimony on oath notwithstanding.[1128]

[1125] Judgment, para. 1396.
[1126] Judgment, para. 1688.
[1127] Judgment, para. 1688.
[1128] Judgment, para. 1737.

886. Contradicting the inconsistent evidence provided by P-0205, P-0142 and other witnesses, that the Appellant ordered them to kill civilians in Lukodi, P-0205 admitted under cross-examination that he told the Prosecutor during the investigation that the Appellant confronted him when he heard about civilian casualties during the attack in Lukodi.[1129] The witness told the Appellant that he did not see any civilian casualties and did not know if any occurred.[1130] The witness reported that the Appellant stated, "[i]f the civilians had died then they have died, but what he knows is that he did not kill them".[1131] The Defence pressed the witness about the statement he made to the Prosecutor that the LRA did not report any casualties to the Appellant. The witness replied that indeed he did not provide information to the Appellant regarding civilian casualties.[1132]

887. Witness P-0205 [REDACTED] which provided the Sinia fighters who together with soldiers from Gilva went for the attack. He and soldiers [REDACTED] were the physical perpetrators [REDACTED]. [REDACTED] Appellant about casualties. Again, the Chamber justified his action: "The Chamber notes that P-0205 testified that he did not personally see any civilian deaths and did not report seeing any civilian deaths and that if there were civilian deaths in Lukodi then perhaps the group that went to collect food carried out the killing but did not tell the others."[1133]

888. The Defence submits that when the Appellant heard over the radio that there were civilian casualties and asked the witness if indeed that report was true, the answer of the witness that there were no civilian casualties establishes that: the conduct of P-0205 negates the fact that the Appellant instructed him and other commanders whose names the Chamber provided in paragraph 1386 of the judgment to kill civilians.

889. [REDACTED]. P-0205 testified some attacked the military barracks, while P-0142 and Sinia brigade officer Kobbi and a soldier from Gilva known as Ojora sent to the centre to "look for food".[1134]

890. The footnoted referenced by the Chamber to the testimony of P-0205 on oath that Kobbi was a Sinia brigade officer adds to the catalogue of lies presented to the Court by the witness whom the Chamber found credible and reliable when he incriminated the Appellant. The presence of Kobbi [REDACTED] leading the attack in the centre with Ojora of Gilva brigade established that

[1129] T-51, p. 12, ln. 5 to p. 17, ln. 15.
[1130] Judgment, para. 1843.
[1131] Judgment, para. 1843.
[1132] T-51, p. 12, ln. 5 to p. 17, ln. 15.
[1133] Judgment, para. 1843.
[1134] [REDACTED].

[REDACTED] to go to the centre of Lukodi and was in a position to provide information about casualties to Mr Ongwen if indeed he gave the order for civilians to be targeted. Dominic Ongwen did not give orders for civilians to be targeted in Lukodi. Witness P-0101 testified that Ongwen was very angry and "continued to scold Ocaka that Ocaka was spoiling his name on the radio… I understand that he meant that he meant they would be spoiling his name, as they would say that Ongwen the one killing people at Lukodi".[1135]

891. The fact that the witness testified on oath and incriminated himself should be considered with caution when assessing his motivation for providing a statement, which is internally inconsistent with his testimony in Court. The Chamber did not accept P-0205's reason for changing his statement and did not exercise caution in this regard when making a finding of credibility and reliability.

d) Finding on *mens rea* the Appellant ordering and attacking Lukodi and his ability to frustrate the crime

892. The Defence incorporates by reference its pleading regarding the defects on *mens rea* elements of the charged crimes. The findings were declaratory only and no reasoned statement was provided. On the basis of the totality of the evidence, no reasonable trial chamber could come to the same conclusion as the Chamber.

D. Grounds 83, 84, 85 & 86: The Chamber erred in law and in fact related the conscription and use of child soldiers under the age of 15

a) Introduction

893. These joint grounds of appeal allege errors of law, procedure and fact. The Chamber found that the Appellant, Kony and Sinia brigade leadership engaged in a "coordinated and methodical effort" to implement a common plan. The plan was implemented through the hierarchically organised structure of the LRA using fighters who were jointly controlled by the leaders to abduct and conscript children below the age of 15 into Sinia Brigade between at least 1 July 2002 and 31 December 2005.[1136]

[1135] T-13, p. 33, lns. 6-11.
[1136] Judgment, paras 222, 2312-2328, 3106-3111.

894. The Defence incorporates by reference its submissions on defects in the pleading,[1137] Defence Closing Brief,[1138] and the Appellant's submissions on LRA soldiers functioning as tools of the Appellant.[1139]

b) The Chamber made significant legal and evidentiary determinations and findings which did not fulfil the statutory legal and evidentiary standards

895. As a matter of law, the Chamber did not apply the appropriate standard of proof beyond a reasonable doubt to its findings and conclusions. It reversed the burden of proof and disregarded evidence that raised reasonable doubt. It relied on unreliable interceptors' logbook summaries, which the Chamber inappropriately substituted and misrepresented as accurate contemporaneous records of LRA radio communications.[1140]

c) No consistent criteria for the determination of age below 15 years was established or proved beyond a reasonable doubt

896. The Chamber failed to establish a discernible, credible criterion for the establishment of the ages generally and ages below 15 years in particular.[1141] The "mere estimates" and inconsistent variable factors applied by the Chamber in determining the ages of child soldiers did not fulfil the age requirement of Article 8(1)(2)(a)(vii). For this and other reasons submitted in this appeal, the statutory legal and evidentiary standard for the conviction of the Appellant was not met.

897. The Prosecution had a statutory obligation to investigate and establish proof of the ages in fulfilment of Article 8(1)(2)(a)(vii) of the Statute beyond a reasonable doubt.

898. The official record to ascertain the age of a child is a birth certificate. The CRC recommends that States Parties shall take measures to establish and record the birth of a child if this was not done at birth for any reason whatsoever.[1142]

899. The Prosecution failed to conduct an effective investigation to obtain evidence of probative value establishing the ages of the children it alleged were children below the age of 15. Some of the witnesses produced their hospital birth records which contradicted the ages they provided to the Court,[1143] for example, in GUSCO records. The Court, rather than find reasonable doubts based on the discrepancies in age, arbitrarily made an age estimation which inculpated the Appellant

[1137] Defects Series Part III, paras 31-63.
[1138] Defence Closing Brief, paras 486-528.
[1139] See above, Ground 68.
[1140] Judgment, paras 558, 574 (fn. 1019), 630, 633, 643-644, 658, 664, 667-669.
[1141] Judgment, paras 30, 330, 334-339, 357, 2314-2316, 2352, 2391, 2401 and 2425.
[1142] CRC, Article 8(2).
[1143] See for example, Judgment, paras 299 (P-0097), 322 (P-0252), 334-337 (P-0307), 345 (P-0399), 374 (P-0410).

without a reasonable criterion and/or opinion. Generally, the Chamber attributed ages arbitrarily based on mere estimates in a manner which was adverse and prejudicial to the Appellant.

900. The Prosecution failed to pursue information about the ages of the children from the Ugandan authorities. Under Article 8(2) of the CRC,[1144] Uganda has an obligation to assist in establishing the identities of the returnee child soldiers. The evidence established that many of the returnees were conscripted into the UPDF, which suggested that age information was available. Despite the LRA being responsible for sourcing over 46 Prosecution witnesses through P-0078 who was its one of its liaisons and intermediaries, as well as P-0038, who was another liaison in this case, the Prosecution did not explore this possibility. As a result, the ages of the witnesses who were presented as children below the age of 15 was not proved beyond a reasonable doubt.

901. The Prosecution failed to provide credible evidence to establish that the Appellant abducted persons, a majority of whom did not appear before the Court and were not identified to the Court by any legally permissible manner or procedure. Rather, the Court relied on "mere" estimates and variable conjectures to find that they were below the age of 15 years.[1145] This decision of the Chamber was internally inconsistent with its decision establishing that it would not rely on "mere" estimates to establish the age of the Appellant.

902. The Chamber's approach on age evidence was inconsistent: it discounted and rejected the evidence of a "mere estimate" based on a personal observation regarding a witness's general knowledge about the ages of children at the Appellant's school to establish Appellant's age. However, it accepted evidence of a close family member of the Appellant as being reliable because of the family relationship and the witness' good knowledge of family history.[1146] Thus, the Chamber contradicted this criterion of age determination by relying on a "mere estimate" of laymen to establish the ages of children whom the Prosecution alleged the Appellant abducted in Northern Uganda from 1 July 2002 to 31 December 2005.

903. While the Chamber noted[1147] the Defence arguments[1148] that a witness's estimation of a person's age (when the person has not appeared before the Court) is more susceptible to error, that lay

[1144] Article 8(2), CRC provides: Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity. *See also*, Articles 7 and 8(1), CRC regarding rights of children from birth.
[1145] Judgment, paras 330, 334-339, 357, 2314-2316, 2352, 2391, 2401 and 2425.
[1146] Judgment, para. 30.
[1147] Judgment, para. 2314.
[1148] Defence Closing Brief, para. 508.

persons were not experts in age determination, and the Chamber has no information about the witness's standards or criteria, the Chamber found no merit in the Defence arguments. Instead, if the lay witness provided an explanation for the age determination, this provided the Chamber with information to evaluate the conclusion, on a case-by-case basis.[1149]

904. In a strong dissenting opinion in *Lubanga*, Judge Anita Ušacka pointed out that the lack of detail in the charges at the outset of the trial directly reflected in the Conviction Decision.[1150] This is exactly the situation in this Judgment. In *Ongwen*, the Chamber relied on impermissible hearsay evidence, untested logbooks summaries of LRA radio intercepts without the corresponding originals of audio recordings, and speculative attributions of ages of the persons based on physical features and variable features allegedly observed during unspecified moments and events. The Chamber used this hearsay evidence to base its opinion on the conscription, enlistment and use of children by the Appellant, Kony, and Sinia brigade leadership through a coordinated and methodical plan using LRA soldiers whom they jointly controlled in a common plan between 1 July 2002 and 31 December 2005. Judge Anita Ušacka strongly rejected these factors as credible and reliable factors to establish the ages of children below the age of 15.[1151]

d) Age attribution was arbitrary, speculative, inconsistent, unreasonable and prejudicial

905. The age attribution by the Chamber was arbitrary, unreasonable, speculative and inconsistent. For example, when considering the age of members of the LRA, the Chamber states that witnesses "provided credible, consistent and overlapping testimony that there were children younger than 15 years old among the LRA forces that attacked Odek."[1152] The Chamber also accepted as true without a reasoned statement Prosecution witness testimony which provided no details concerning how such ages were determined, or on what basis age attributions were made, or whether it was purely on guesswork.

[1149] At Judgment, para. 2314, the Chamber used examples from P-0054 and P-0264.
[1150] *Lubanga* AJ, Dissenting Opinion of Judge Anita Ušacka, ICC-01/04-01/06-3121-Anx2, 1 December 2014, paras 1, 3, 19.
[1151] *Lubanga* AJ, Dissenting Opinion of Judge Anita Ušacka, ICC-01/04-01/06-3121-Anx2, 1 December 2014, paras 46-79.
[1152] Judgment, para. 1433.

906. The inconsistent and largely speculative evidence of the ages of persons below 15 years, most of whom were not before the Chamber, were not clearly identified, and characterised many in descriptive teams, raised reasonable doubt and was insufficient to establish ages.[1153]

907. In addition to the ambiguity and fatally defective pleading of the alleged conscription and use of child soldiers in hostilities,[1154] the findings relied on to incriminate and convict the Appellant were general in nature, based on the policies and practices that occurred in the LRA pursuant to the standing rules and orders of Kony. They were not specific in terms of evidence, time frames, geographic parameters, locations, persons, and the specific actions of the Appellant.

908. As noted above, the Chamber impermissibly relied on untested logbook summaries of intercepted LRA communications of abductions in the LRA to impermissibly infer by association and incriminate and convict the Appellant. The Chamber also relied on evidence on the abduction of civilians generally to make impermissible inferences regarding the involvement of Sinia brigade and the guilt of the Appellant. Apart from the general statements that some of the abductees were children below 15 years, the Chamber received no evidence establishing their identity or their ages.[1155]

909. The attribution of responsibility by inference and by association on the Appellant due to the presence of children in Sinia brigade between 1 July 2002 and 31 December 2005 amounted to a miscarriage of justice because the Appellant was not the commander of Sinia brigade during the entirety of the charged period. The charge as laid out and the findings of the Chamber, therefore, were not proved beyond a reasonable doubt and should be reversed.

e) The Appellant was not provided notice of the identity of the alleged co-perpetrators so-called Sinia leadership and LRA commanders

910. The confirmed charges against the Appellant did not provide notice of the identity of the senior leadership of Sinia and LRA commanders who were alleged to be members of the common plan.

[1153] In *Lubanga*, the Trial Chamber held that a witness's testimony and evidence which was tainted by internal contradictions, including unexplained differences as to date of birth in both the witness's testimony and the documentary evidence, together with the strength of the conflicting external evidence, made the evidence unreliable for many aspects of the relevant detail of the witness's account. *Lubanga* TJ, para. 262.
[1154] Defence Closing Brief, paras 490-491.
[1155] Judgment, para. 1369.

Additionally, the request for the disclosure of their identity was rejected by the Chamber, causing prejudice and making the trial and conviction unfair.[1156]

f) Joseph Kony: the LRA, his authority, his standing rules; his orders and punishment

911. The confirmed charges alleged that Kony was the undisputed leader of the LRA from whom all decisions emanated and that to consolidated his grip on the organisation, he successfully invoked possession of mystical power.[1157] Contrary to the finding of control of the hierarchical control of the LRA, against the Appellant, the Chamber found that whereas the LRA was an effective, hierarchically structured organisation, it is not under the absolute control of Kony, and Kony relied on the cooperation of various LRA commanders to execute LRA policies.[1158]

912. The Chamber found that higher ranking commanders such as battalion commanders and brigade commanders, including the Appellant, did not always execute the orders of Kony.[1159] Nevertheless, the Chamber contradicted this finding by emphasising the capricious and sagacious, but brutal exercise of absolute command and control by Kony over all structures of the LRA.

913. The Chamber, relying on logbook summaries of the intercepts of the communications of LRA and the communications of Kony, identified the orders of Kony for the abduction of children below the age of 15 and orders for the abduction to be suspended. Vincent Otti also made orders to abduct.[1160]

914. The Chamber occasionally noted discrepancies and inconsistencies in the evidence of ages provided by witnesses.[1161] A reasonable trier of fact would have found reasonable doubt, but the Chamber resolved the discrepancies and inconsistences against the Appellant. The Chamber relied on general evidence on the attacks in the IDP camps to make impermissible incriminating inferences against the Appellant. For example, the Chamber concluded that several witnesses testified that children under the age of 15 were also abducted during the attack on Abok without

[1156] Trial Chamber IX, Decision on Defence Request for Disclosure and Remedy for Late Disclosure, 28 September 2018, ICC-02/04-01/15-1351. *See also*, Corrected version of 'Defence Request for Disclosure Pursuant to Rule 77 and Article 67(2) and Request for a Remedy in Light of Late and Untimely Disclosure' (ICC-02/04-01/15-1329-Conf), filed 4 September 2018, 17 September 2018, paras 25-26
[1157] CoC Decision, para. 56.
[1158] Judgment, paras 866-873, 2590.
[1159] Judgment, paras 866-873, 2593.
[1160] Judgment, paras 2331-2334, 2337.
[1161] Judgment, paras 2343-2344, 2348.

providing a reasoned statement on the "several witnesses" and their accounts or evidence of the abductions.[1162]

915. The Chamber found that children below the age of 15 were present in all parts of the LRA and inferred that they were also in Sinia brigade.[1163] The attribution of responsibility on the Appellant due to the presence of children below the age of 15 years in Sinia brigade by virtue of the general presence of children below that age bracket in the LRA occasioned a miscarriage of justice. First, it amounts to guilt by association. Second, the finding is not supported by the evidence establishing the various positions the Appellant held within the LRA organisational structure during the charged period.

g) No proof beyond a reasonable doubt that the Appellant jointly controlled the organisational hierarchical structure of the LRA with Kony and Sinia leadership from 1 July 2002 to 31 December 2005

916. The CoC Decision alleged that in August 2002 the Appellant was reported to have been the commander of Oka battalion. In September 2003, he progressed to the position of second in command of the Sinia brigade, and in March 2004 he became the brigade's commander.[1164] The Chamber established that the Appellant was the battalion commander of Oka battalion in Sinia brigade, was promoted to the rank of a major on 1 July 2002 and did not become brigade commander of Sinia until 4 March 2004.[1165] Buk Abudema was the commander of Sinia brigade before 4 March 2004.[1166] During this period, the Appellant suffered a serious injury and was interned in a sickbay from where he was arrested and held in detention at Control Altar by Vincent Otti on the orders of Kony.[1167]

917. Therefore, the Chamber failed to provide a full and reasoned statement demonstrating the existence of a common plan through which the Appellant, Kony and Sinia brigade leadership used the hierarchical organisational structure of the LRA to coordinate the abduction and distribution of children below the age of 15 in hostilities in Northern Uganda from 1 July 2002 to 31 December 2005.

[1162] Judgment, paras 2357-2358, 2360, 2362.
[1163] Judgment, para. 2366.
[1164] CoC Decision, para. 58.
[1165] Judgment, paras 134, 137.
[1166] Judgment, para. 890.
[1167] Judgment, paras 1017-1070; Defence Closing Brief, paras 313-314, 317-321, 325, 330-331 and 336; T-47, p.22, lns 2-22.

E. Grounds 66 (in part), 87 & 89: The Chamber erred in law and in fact in respect to findings on the abduction and distribution of women and girls

a) Introduction

918. The Defence challenges the Chamber's finding that the Appellant, Joseph Kony and Sinia brigade leadership engaged in an agreement and a coordinated and methodical effort to abduct and distribute women and girls in Northern Uganda between 1 July 2002 and 31 December 2005.

919. The conviction of the Appellant was based on evidence outside the temporal and geographic scope of the case, impermissible inferences, and unreliable testimony which disregarded evidence that raised reasonable doubt. The Defence further incorporates by reference its submissions regarding LRA soldiers functioning as a tool of the Appellant[1168] and the unreliability of logbook summaries which the Chamber used to support its finding.[1169]

b) The Chamber erred in law by relying on evidence of acts not charged which lay outside the temporal and geographical scope of the charges

920. To support the convictions for sexual and gender based crimes, the Chamber refers to evidence of conduct outside the scope of the charges on the basis that:

> [c]ertain events concerning […] - even if outside the parameters of the charges as such – may still be of relevance, as circumstantial evidence, to establish facts and circumstances described in the charges, or may otherwise be necessary to contextualise and fully articulate the facts of the charges.[1170]

921. P-0235 and P-0236 became the Appellant's 'wives' after the time relevant to the charges, but were considered in the Chamber's analysis nonetheless.[1171] Since P-0099, P-0101, P-0214, P-0226 and P-0227 were 'wives' during the charged period and provided testimony deemed credible by the Chamber, there is no justification for a reliance on additional incriminatory evidence for context or articulation of the facts. Just three paragraphs later, the Chamber also relies on alleged conduct that took place two years after the charged period in order to demonstrate the exclusive nature of the relationship.[1172]

922. This is also the case for sexual and gender based crimes not directly perpetrated by the Appellant, with the Chamber stating that "some evidence received during the trial speaks more generally of

[1168] See above, Ground 68.
[1169] See above, Grounds 72-73.
[1170] Judgment, para. 2009.
[1171] Judgment, para. 2036.
[1172] Judgment, para. 2039: Details an LRA member being killed for sleeping with P-0236, 'wife' of the Appellant.

the LRA rather than being limited to the Sinia brigade" and is relied upon to "the extent that it is relevant for the Chamber's findings".[1173] This broad statement fails to uphold proper legal and evidentiary standards, with no outlined criteria governing what may be deemed as relevant.

923. Aside from the ambiguity concerning potentially admissible evidence beyond the temporal and geographical scope, the Chamber also makes reference to the testimonies of P-0351, P-0352, P-0366, P-0374 and P-0396 who are considered as "simply *examples* of a much *larger* group of women" who are victims of some of the crimes charged, despite being "outside one or more of the parameters" of the charges.[1174] Therefore, the Chamber has applied by analogy the experiences of a small number of witnesses to all members of a much larger group. The Chamber also relies on evidence that exceeds the ambit of the present case for corroboration of testimony relating to forced marriage and sexual violence.[1175]

924. This clear abuse of judicial discretion and excessive reliance on evidence of acts not charged for corroboration, relevance, inferences, modes of liability and factual determinations of guilt has resulted in a miscarriage of justice, rendering the related convictions unsafe.

c) The Chamber erred in law and fact by finding, without a reasoned statement or proof beyond reasonable doubt, that the Appellant was one of the commanders who developed and implemented the LRA policy of abduction

925. Firstly, it is important to note that the policy of abduction of women in Northern Uganda took place even prior to the Appellant's own abduction[1176] and continued long after the charged period.[1177] Hence, the finding that the Appellant was involved in defining this system of abuse is fundamentally flawed.

926. Secondly, the positions held by the Appellant during the charged period negate an attribution of individual criminal responsibility for said policy.[1178] Kony has been identified by various witnesses as the overall commander, chairman, or President of the LRA who exercised effective control over the organisation.[1179] The Chamber found that orders were generally issued through Vincent Otti to brigade commanders who would communicate them to their subordinates, with

[1173] Judgment, para. 2096. For an example, see Judgment, para. 2308.
[1174] Judgment, para. 2097.
[1175] Judgment, paras 2216-221.
[1176] Judgment, paras 27, 30, 1014.
[1177] Judgment, para. 2136: P-0233 stated that abductions took place throughout his stay in the LRA, from 2002-2013.
[1178] Judgment, paras 134-138, 1014.
[1179] Judgment, paras 854, 864.

this hierarchical structure only being bypassed on occasion.[1180] This is discussed in more detail by Daniel Opiyo, who outlined two channels of communication – in Sudan, Kony held meetings with brigade commanders with some of the information later trickling down to lower-ranking officers. In Uganda, information would go directly from Kony to Vincent Otti, or to a brigade commander if he wanted to send a message personally.[1181] Although this system is explicitly mentioned by the Chamber in its assessment, it fails to be reflected in its conclusion that Dominic Ongwen was involved in the agreement or common plan for the duration of the charged period as he was not appointed to brigade commander until March 2004.[1182]

927. Daniel Opiyo's testimony also raises reasonable doubt in the finding that when Kony was "geographically removed from LRA units, brigade and battalion commanders took their own initiatives".[1183] Kony ensured these orders were executed by monitoring commanders' activities by short-wave radio[1184] and establishing a communication protocol and a disciplinary regime to punish those who failed to respect his orders.[1185]

928. Despite this high degree of supervision, the Chamber concluded that Kony's role in the system of sexual and gender based violence, more specifically that of 'distribution', was of "little relevance to the disposal of the charges" brought against the Appellant.[1186] In light of the LRA being a hierarchical organisation, this statement allowed the Chamber to avoid answering the critical question of who possessed the ultimate authority to order abduction or 'distribution'. Instead, the involvement of the Appellant in defining and sustaining the system of abduction and victimisation of civilian women and girls is inferred by association in light of the hierarchical relationship between Kony and high-level commanders of the LRA.[1187]

929. However, upon review of the evidence it is clear that this authority lay with Kony, not the Appellant. During the charged period there is ample evidence of standing orders for abductions being both issued and revoked by Kony.[1188] Although there is evidence that orders for abductions were also given at lower levels,[1189] the form of systemic policy focussed on in the Chamber's

[1180] Judgment, paras 866-868, 873.
[1181] Judgment, para. 868.
[1182] Judgment, para. 137.
[1183] Judgment, paras 865-866, 2799.
[1184] Prosecutors Amended Application for Warrants of Arrest Under Article 58, ICC-02/04-01/15-Conf-Red2, para. 105.
[1185] Prosecutors Amended Application for Warrants of Arrest Under Article 58, ICC-02/04-01/15-Conf-Red2, paras 110-111.
[1186] Judgment, para. 2157.
[1187] Judgment, paras 3094-3095.
[1188] Judgment, paras 2114-2120.
[1189] Judgment, para. 2121.

analysis was not dictated by anyone other than Kony himself. This is also the case for 'distribution',[1190] yet the Chamber once again disregards favourable testimony indicating that Kony was the sole competent authority as it is inconsistent with the narrative developed by the Prosecution and the Chamber in their attempt to convict the Appellant.[1191]

930. Even more problematic is the Chamber's view that "the question is not whether Joseph Kony himself 'distributed' women […] the question is whether Joseph Kony's power to decide on the 'distribution' of abducted women and girls was exclusive".[1192] From this reasoning, it appears that the Chamber has equated carrying out orders in a coercive environment with being an architect of a common plan amongst members of equal rank as it merely looked for an authority to 'distribute' – thereby ignoring the fact that it was Kony who granted the authority.[1193]

931. Allocating responsibility to the Appellant for his alleged involvement in creating the system of sexual and gender based violence is unsupported by the Chamber's reasoning, as it fails to explain how Dominic Ongwen had a role in the creation of such policies or institutionalised rules.[1194] Instead, it is based on unreliable summaries of interceptor's recollections which it mischaracterised as contemporaneous written records[1195] and impermissible inferences which support the findings that the Appellant "meant to engage" in the alleged conduct and common plan.[1196]

932. The Chamber failed to make specific evidentiary findings on the individual criminal responsibility of the Appellant in respect of each of the multiple crimes and convictions or on the alleged agreement and coordinated effort to abduct and victimise women and girls in Northern Uganda. Its decisions on *mens rea* were not proved beyond reasonable doubt as specific and special intent were general and declaratory in nature and based on impermissible imputations by association of its findings against the LRA.[1197]

[1190] *See* Judgment, para. 2170: P-0070, a witness extensively relied upon, testified that Kony was the only one allowed to issue orders to 'distribute' wives – but the Chamber "does not attribute much value" to this testimony. *See also* Judgment, para 2154, 2162.
[1191] Judgment, para. 2159.
[1192] Judgment, para. 2160.
[1193] Judgment, paras 2161-2182.
[1194] Judgment, para. 2228.
[1195] See above, Ground 72.
[1196] *See* Judgment, paras 3025, 3032, 3042, 3048, 3054, 3067, 3089.
[1197] Judgment, paras 3021-3026, 3027-3034, 3035-3043, 3044-3049, 3050-3055, 3056-3062, 3063-3068.

933. Thirdly, the Defence recalls its arguments regarding the alleged degree of free will enjoyed by commanders in the LRA which directly contradicts an attribution of criminal responsibility to the Appellant.[1198]

934. The Chamber ultimately placed responsibility for the abduction and distribution of women on the Appellant, Kony and the LRA – over which Kony exercised full sovereignty, command and control.[1199] The finding of an agreement and a coordinated and methodical effort to abduct women and distribute girls in Northern Uganda between 1 July 2002 and 31 December 2005 was not supported by the evidence on the record and was not proved beyond a reasonable doubt. The Chamber provided no reasoned statement, and thus violated Article 74(5) of the Statute and its fair trial obligations under Article 67(1) of the Statute.

F. Ground 88: The Chamber erred in law and in fact regarding forced pregnancy

a) Introduction

935. The Chamber convicted the Appellant under Counts 58-59 for forced pregnancy as a crime against humanity, pursuant to Article 7(1)(g) of the Statute, and forced pregnancy as a war crime, pursuant to Article 8(2)(e)(vi) of the Statute, of [REDACTED] (P-0101, two pregnancies), between 1 July 2002 and July 2004 and [REDACTED] (P-0214), sometime in 2005.[1200] This ground of appeal challenges the legal, procedural and evidentiary basis of the Judgment and conviction of the Appellant when the legal and evidentiary standard and burden of proof beyond a reasonable doubt were not met.

936. Additionally, the ground of appeal challenges the creation of new jurisprudence founded on fair trial violations, legal uncertainty and lack of clear reasoning or motivation.[1201]

b) The burden of proof beyond a reasonable doubt

937. The Chamber determined that for the *actus reus* requirement of the crime to be proved, the perpetrator must be shown beyond a reasonable doubt to have confined one or more women forcibly made pregnant before or during the pregnancy and the perpetrator need not have personally made the woman forcibly pregnant, it sufficed that he confined a woman made pregnant by someone else.[1202] The Chamber identified the two material elements as 1) the restriction of the

[1198] See above, Ground 64.
[1199] Judgment, para. 2010.
[1200] Judgment, paras 3056-3062.
[1201] Judgment, paras 2717-2729.
[1202] Judgment, para. 2723.

physical movement of the woman made pregnant contrary to standards of international law and 2) the woman was "forcefully made pregnant."[1203]

938. The Chamber identified the mental element as specific intent to affect the ethnic composition of any population or carrying out other grave violations of international law.[1204]

939. The Chamber convicted the Appellant when the *actus reus* and *mens rea* of the crime were neither established nor proved beyond a reasonable doubt. Furthermore, the Chamber relied on evidence of acts not charged and crimes out of the temporal and geographic scope of the charges to convict the Appellant.

940. The Chamber relied on impermissible inferences and transposition on the general circumstances within the LRA and evidence of crimes not specifically committed by the Appellant or shown by clearly reasoning to apply to the victims in the discrete parameters of the crime charged to convict the Appellant.

c) Acts not charged and evidence out of the temporal and geographic scope of the case

941. The Chamber relied on evidence of evidence out of the temporal and geographic scope of the charges to convict the Appellant for forced pregnancy. In doing so, the Chamber violated its own pledge that it would confine itself to the temporal and geographic scope of the case.[1205]

942. This assurance was noted by the Appeals Chamber in its judgment in the *Ongwen* interlocutory appeal. The Appeals Chamber stated that, "[h]aving regard to the need to ensure the fair conduct of proceedings, the Appeals Chamber finds it important to note that in the Impugned Decision, the Trial Chamber recalled that 'no evidence will be used against the accused in a manner which would exceed the scope of the charges or could not have been reasonably anticipated.'"[1206] The breach of this pledge in this Judgment makes the trial significantly unfair and the convictions unsafe and should be reversed.

[1203] Judgment, paras 2724-2725.
[1204] Judgment, para. 2726-2729.
[1205] Judgment, para. 122.
[1206] Appeals Chamber, *Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision*, ICC-02/04-01/15-1562, para. 159.

943. In addition to notice violations, some of the acts not charged occurred before the entry into force of the Statute. This violation permeates the entire Judgment and violates the letter and spirit of Article 28 the CVLT on non-retroactivity of treaties.[1207]

944. The Appellant recalls paragraph 160 of the Prosecution Closing Brief, which submits that the acts charged against the Appellant regarding the witnesses heard pursuant to Article 56 of the Statute fall out of the temporal and geographic scope of the case and the evidence should be used only for context.

d) The Chamber disregarded and/or mischaracterised the evidence on the trial record which raised reasonable doubt

945. The Chamber used different standards when discussing confinement, detention or imprisonment in the LRA. The Chamber minimised the confinement, detention or imprisonment of the Appellant despite firsthand evidence detailing his arrest and confinement in Control Altar by Vincent Otti.[1208] The magnified the evidence of the general conditions life in the LRA which did not target any of the victims and her circumstances of impregnation and confinement for impermissible inferences to convict the Appellant for forced pregnancy (Article 7(1)(g) and Article 8(2)(e)(vi)).

946. The Chamber relied on the general conditions of life in the LRA and its coercive environment to find that the victims were confined, and their movements were restricted after having been forcible impregnated by the Appellant. This finding is not supported by the evidence adduced by the victims and does not represent a complete picture of the life within the LRA regarding the rules relating to women.

947. While the women were distributed to the Appellant, Kony retained command and control over them. He created a department under a commander who answered only to him. This ensured compliance with the standard rules and orders of Kony. Women brought complaints of violations against them to that department or directly to Kony for sanctions. Kony appointed Brigadier Banya commander of the unit with a woman deputy commander.[1209]

948. Witness P-0101 testified that she was abducted in 1996 at the age of 15.[1210] The witness testified that Abudema was Ongwen's commander on the day she was abdcuted.[1211] The witness testified

[1207] VCLT, Article 28.
[1208] Judgment, paras 1057, 1061 and 1063-1064.
[1209] T-105, p.4, ln 20 – p. 6, l. 4.
[1210] T-13, p.16, lns 11-20.
[1211] T-13, p.49, lns 2-7.

that she stayed with the Appellant through the birth of her two children and had a third one at [REDACTED].[1212] She was taken to Sudan for military training She was not a soldier for long because she conceived and had a baby and as a mother, she did not have a gun.[1213] She testified that during the eight years she stayed with the Appellant, she was not forced to sleep with him anymore because she was now his wife.[1214] She escaped from the bush because they were attacked and the baby was taken by the UPDF, so she followed and went with her baby.[1215] [REDACTED].[1216] The witness explained that "I wanted him to release them from the bush so that they could come home just to come home. They were not tied to anything, but I just wanted them to come home".[1217]

949. Witness P-0214 was abducted in June 2002.[1218] The period is outside the temporal scope of the charges and of the Court. She was abducted and taken to Kony in Sudan.[1219] She was distributed to the Appellant in 2004 by Kony, who she met with Raska Lukwiya at Abatalanga in Sudan.[1220] She testified that the Appellant calmed her fears and "said that I should not care, he would take care of me and eventually he would take me home".[1221] Security was present to serve the commander and to perform tasks, but was not armed.[1222] The witness testified that while in Uganda, her tasks as the Appellant's wife did not continue.[1223] She cooked, did laundry and when he was injured, she was nursing him.[1224]

950. The wtiness testified that she voluntarily had sexual relations with the Appellant while in Uganda because she was already in his household, and he assured her that he would take care of her. She had children with the Appellant during this period.[1225] Her first pregnancy was in 2005. Her second pregnancy was in 2006 in Garamba Park in DRC.[1226] She miscarried her third pregnancy in Garamba in 2007.[1227] The witness testified that she was experiencing paralysis of the thighs as her

[1212] T-13, p.16, lns 11-16.
[1213] T-13, p.65, lns 10-11.
[1214] T-13, p.19, ln. 24 to p. 20, ln. 3.
[1215] T-13, p.43, lns 1-10.
[1216] T-13, p.11, lns 16-25.
[1217] T-13, p.12, lns 13-15.
[1218] T-15, p.5, lns 9-11.
[1219] T-15, p.12, lns 8-22.
[1220] T-15, p.18, lns 7-10.
[1221] T-15, p.25, lns 13-14.
[1222] T-15, p.25, ln. 22 – p.26, ln. 3.
[1223] T-15, p.26, lns 24-25.
[1224] T-15, p.27, lns 1-2; p.28, lns 1-3.
[1225] T-15, p.27, lns 20-21; p.28, lns 1-3.
[1226] T-15, p.28, ln. 8; p. 29, lns 15-18.
[1227] T-15, p.29, lns 24-25.

date of delivery approached and the Appellant carried her around for one week on his shoulders.[1228]

951. Additionally, the witness testified that the Appellant sent all the mothers home.[1229] This contradicts the finding that he confined them, as the Chamber found without evidentiary basis and without a reasoned statement.

952. [REDACTED].[1230]

953. In answer to the crucial question of whether the Appellant had a choice on accepting her as a wife when she was distributed to him, she answered: "No he did not have a choice because if he did, they would say he had some plans."[1231]

954. Witness P-0226 was abducted and taken to Kony in Sudan. She was injured in 2003 and returned home.[1232]

955. Witness P-0227 testified that she was abducted on 5 April 2005. The LRA was under tremendous pressure from the UPDF so much that they were on move.[1233]

956. Witness P-0235 was abducted in September 2001 and had sex with the Appellant in 2006, out of the temporal scope of the case.[1234] The witness became pregnant in Nabanga in the Democratic Republic of Congo in 2006.[1235] There, according to the witness, the Appellant released all the women to go back with the children.[1236] P-0235 testified that guards protected the "women who had given birth so that nothing would happen to them".[1237]

957. Witness P-0236 was abducted in September 2002 and became the Appellant's wife in 2007.[1238]

[1228] T-15, p.34, ln. 17 – p.35, ln. 20.
[1229] T-15, p.30, lns 22-24.
[1230] T-15, p.31, lns 16-22; p.32, lns 18-19.
[1231] T-15, p.36, lns 8-11.
[1232] T-8, p.13, ln. 7.
[1233] T-10, p.34, lns 11-13.
[1234] T-17, p.32, ln. 8-10.
[1235] T-17, p.50, ln. 20 – p.51, ln. 1.
[1236] T-17, p.61, lns 18-20.
[1237] T-17, p.37, lns 9-10.
[1238] T-16, p.20, lns 19-25.

958. Therefore, the finding by the Chamber that it arrived at its decision based on the mutually corroborative account of the seven women is inconsistent with the testimony of these seven women.[1239]

959. The findings in paragraphs 2069 and 2070, which are based on speculative timeframes and geographic parameters, are significantly undermined by the following factors: a) the decision by the Chamber to rely on uncharged facts in violation of its pledge which was endorsed by the Appeals Chamber in its decision on the *Ongwen* interlocutory appeal; b) the disregard by the Chamber for the respect of its own decision and that it would comply with the temporal and geographic scope of the charges pursuant to Article 74(2) of the Statute which it has violated; and c) by disregarding evidence which raised reasonable doubt or was favourable to the Appellant. These factors, in aggregate or alone, vitiate the convictions warranting a reversal and an acquittal.

e) Interpretation of Article 7(1)(g) and the legal characterisation of the facts

960. The legal analysis made by the Chamber and the references relied on in footnote 7091 of paragraph 2675 are irrelevant and inapplicable to the factual findings. This made its jurisprudence on forced pregnancy flawed on an evidentiary, procedural and legal basis. It failed to clearly establish the boundaries between the established jurisprudence and the elements of the crimes, which it discussed and forced pregnancy under Article 7(1)(g). It creates legal uncertainty and is inconsistent with the intent of the founding principles of the Statute in all respects.

961. The finding that "the crime of forced marriage is grounded in the woman's right to personal and reproductive autonomy and the right to family" brings forced pregnancy into the political and ideological debate on women's personal and reproductive autonomy and the right to family, which the State Parties hoped to avoid through passionate debate and cautious safeguards. Therefore, it is debatable whether the references in footnote 7164 of paragraph 2717 are a safe foundation on which to lay the jurisprudence of this Court.

962. The Chamber failed to make a reasoned enquiry about whether its interpretation of the crime in the context of this case is grounded in how a woman's right to personal and reproductive autonomy and the right to a family affects the national law of Uganda on abortion for it to satisfy the letter and spirit of the Statute.[1240] The Chamber provided no reasoned opinion for failing to make this enquiry. Disregarding a specific requirement in the Statute is not legally justified and defeats the

[1239] Judgment, para. 2041.
[1240] Judgment, para. 2721.

purpose for which the provision was added. The provision was added to provide guidance in the interpretation of the Statute and to avoid importing divisive contentious political, religious, cultural and ideological issues into the jurisprudence of the Court. Disregarding this provision in establishing jurisprudence is a tacit invitation to legal uncertainty regarding these sensitive and divisive issues.

963. The two women victims and their children belong to the Acholi culture within which the Defence and Victim's expert Professor Masisi provided evidence on the Acholi cultural perspective, sensitivity and solutions. The Chamber failed to take this Acholi cultural sensitivity on the trial record, as evidence for context, to assess the *mens rea* element requirement, to interpret the evidence of the victims and the Defence and potentially legal status of the children whose future this judgment may define and impact in significant ways.

964. The literature, legal and activist opinion and recommendations on women reproductive autonomy and the right to family was not submitted into the trial record as evidence nor was it provided as expert evidence or *amicus curiae* opinion. The parties, in particular, the Defence was not provided an opportunity to respond to a variety of opinion cited in establishing the new jurisprudence in this case. While the Defence supports the development of the law and the establishment of new jurisprudence by the Court, the present perspective of the jurisprudence on this case is based on a flawed legal, procedural and evidentiary foundation. The VCLT recommends that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[1241] The Chamber did not interpret Article 7(1)(g) pursuant to Article 31 of the VCLT. Rather, it imported meanings from a variety of non-binding sources which were inconsistent with the intendment of the Statute.

f) Lack of reasoning or motivation

965. The evidentiary basis for the convictions and the jurisprudence was not properly motivated. The Chamber failed to articulate a reasoned statement establishing dates, location and circumstances of the alleged crimes. The Chamber pointed to no evidence on the trial record on the confinement of the P-0101 and P-0214 before, prior to and during their pregnancies.

966. The Chamber provided no reasonable explanation for the interpretation it made or and the legal characterisation of the facts of the crime of forced pregnancy to justify the convictions.[1242] This

[1241] VCLT, Article 31(1).
[1242] Judgment, paras 3056-3062.

was a travesty of justice which made the trial and the convictions unfair, warranting a reversal of the Judgment.

967. The Prosecution did not present evidence to establish that the forced pregnancies were intended to affect the ethnic composition of the Acholi or any population or to carryout grave violations of international law. The Chamber found that the forced pregnancy was a grave violation of international law but provided no reasoning on a specific grave violation within the international law regime or value system which was violated.

968. The lack of reasoning by the Chamber was compounded by the fact that the Chamber relied on evidence that did not arise from the charged crimes of forced pregnancy, which was out of context, not charged and not reasoned against the Appellant for impermissible inferences of specific intent.[1243] The Chamber also failed to provide a reasoned opinion establishing that the women were forcibly impregnated and placed under heavy guard while pregnant and threatened with death while in that state that they would be killed if they attempted to escape which is a grave violation of international law.

g) The constituent elements of forced pregnancy, as well as contextual elements as a crime against humanity and as a war crime, were not proved beyond a reasonable doubt

969. The Chamber made no discrete finding on the contextual elements of forced pregnancy as a crime against humanity. The discussion of the material elements is in descriptive terms only. It reiterates the confinement of the victim in a manner in which she is not capable of giving genuine consent.

970. The Chamber made no factual determination about: i) the lack of genuine consent of each of the victims, ii) the policy requirement of forced pregnancy as a crime against humanity, iii) as a war crime, or iv) about the specific international human right. In this respect, the Defence recalls the findings that the Appellant committed these crimes in outside the organisational policy of the LRA and the free will of LRA commanders even after Kony suspended abductions.

971. The Chamber discussed the elements of what constitutes forced pregnancy, but it failed to establish that these applied to the Appellant within the circumstances of this case. The Chamber also failed to specify the grave violation and provide a discussion about whether the discrete elements of the grave violations were proved beyond a reasonable doubt. Failing to specify the grave violations

[1243] Judgment, para. 3061.

made it impossible to make a distinction between the forced pregnancy and other violations, such as torture, for which the Appellant has been convicted or other inhume acts.

972. Additionally, the *mens rea* element is not proved beyond a reasonable doubt. It is discussed in the abstract and no specific finding is made against the Appellant with regard to each victim and within the context of crimes against humanity or war crimes. The general discussion on the contextual elements of war crimes[1244] and the widespread and systematic nature of an attack against a civilian population for crimes against humanity[1245] were not shown to be applicable to the cases of each of the two victims and cannot reasonably be imputed to the accused for crimes of a personal nature.

973. The Chamber made no determination with regard to the accused and each of the victims. General imputation of knowledge and awareness based on the circumstances in the LRA are impermissible and do not raise to the fulfilment of the statutory legal and evidentiary burden of proof.

974. On the basis of the foregoing, the Defence urges the Appeals Chamber to reverse the conviction and enter an acquittal.

G. Ground 90 & 66 (in part): The Chamber erred in law and in fact in respect to "forced marriage"

a) Introduction

975. The Appellant was charged for the crime of forced marriage as another inhumane act under Article 7(1)(k) of the Statute, committed both directly and indirectly (Counts 50 and 60).[1246] The Defence objected to the charge on the ground that forced marriage is not a cognizable crime under the Statute. This objection preserved the errors for determination on appeal, and the Defence respectfully urges the Appeals Chamber to reverse the convictions and judgment on forced marriage, sexual violence and all the sexual and gender-based crimes arising from the Chamber's evidentiary finding on forced marriage.[1247]

[1244] Judgment para. 2679.
[1245] Judgment paras 2680-2682.
[1246] CoC Decision, paras 87-95. The allegations against the Appellant were brought under SGBC, paras 136-140 of the CoC Decision.
[1247] Judgment, paras 2202-2247.

976. The Defence incorporates its submissions in the Closing Brief by reference.[1248] The Defence also incorporates the Defence defects series,[1249] Request for leave to appeal the Confirmation of Charges Decision[1250] and the submissions made in respect of Grounds 87, 88 and 89 of this Brief.

977. In its evidentiary assessment, the Chamber found that the facts constituting forced marriage also led to sexual crimes,[1251] forced labour,[1252] and increased the extent of suffering.[1253] The Chamber also found evidence on the basis of which its finding on the element of exclusivity of ownership is based.[1254] The Defence notes that the charges in respect of the SGBC not committed directly by the Appellant allege a common plan,[1255] but that is not the case for the forced marriage allegations.

b) Forced marriage is not a crime under the Statute

978. There is a comprehensive record of litigation in this case on the issue of whether forced marriage is a crime against humanity under the Statute. The Defence urges the Appeals Chamber to consider the arguments raised prior to the Judgment.[1256] The Chamber's disregard for the issue of legality of this offence, and its rejection of Defence's repeated obections in this regard led to egregious fair violations against the Appellant in this case.

c) Position and authority of Kony over the LRA and the women

979. The Appellant contests the Chamber's interpretation of the evidence on the so-called marital status of the women *vis-à-vis* the Appellant, his status *vis-à-vis* Kony and the women and the Appellant's role in the establishment and execution of the LRA policy on women.[1257] The Chamber failed to meet the statutory legal and evidentiary standard of proof beyond a reasonable doubt and the *mens rea* requirement.

980. As previously noted,[1258] Kony was the highest authority in the LRA, retained command and control authority of the organisation, communicated orders through Vincent Otti, enforced a violent disciplinary system, and his orders were generally complied with. He also invoked mystical

[1248] Defence Closing Brief, paras 471-482.
[1249] See in particular, SGBC Defects.
[1250] *Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision*, ICC-02/04-01/15-423, paras 40-44.
[1251] Judgment, paras 2256-2274.
[1252] Judgment, paras 2289-2308.
[1253] Judgment, para. 2309.
[1254] Judgment, paras 2287-2288.
[1255] CoC Decision, paras 137 and 140.
[1256] Defence Closing Brief, para. 471; *Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision*, ICC-02/04-01/15-423, paras 40-44. *See also* ICC-02/04-01/15-404-Red3, paras 128-130 and T-23, pp. 13-17.
[1257] Judgment, paras 2098-2182, 2202-2247.
[1258] See *inter alia*, Ground 46 a) and Ground 65 c).

powers to tighten his control over the organisation. In addition, Kony maintained control over women by establishing standing orders for the abduction and distribution of women and girls. Kony established an additional set of standing rules for the abduction and distribution of women and girls. It was a long-standing policy which was established and enforced by him.[1259] This policy predated the abduction of the Appellant, and could not have been changed, or disobeyed by him.

981. The Chamber found that Kony imposed the LRA system of abduction and abuse of women.[1260] The Chamber also found that Kony articulated his policy in general terms to the LRA membership and the public at large over Mega Radio.[1261] This finding eviscerates the allegation of an agreement or common plan between Kony, the Appellant and Sinia leadership as well as the *mens rea* for the crime of forced marriage.

982. The finding by the Chamber that the policy was a result of co-ordination among LRA leadership including the Appellant[1262] constitutes a finding of guilt by association, which is wholly inconsistent with other findings on Kony's system of abduction and abuse of women. The Chamber provided no reasoned statement substantiating its finding about co-ordination with LRA leadership including the Appellant, in light of its other inconsistent findings.

983. In addition pursuant to the finding that Kony occasionally gave orders to battalion commanders and brigade commanders to distribute women and report to him, the attribution of responsibility by the Chamber on the Appellant for the so-called wives who were found with these commanders was legally and factually unjustified and unwarranted.

d) The Appellant was not the commander of Sinia brigade between 1 July 2002 and 4 March 2004 and therefore could not be liable for forced marriages "as brigade commander of Sinia"

984. The Appellant was convicted for forced marriages in Sinia brigade and sexual violence committed in Sinia brigade from 1 July 2002 and 31 December 2005 and for forced marriages and sexual violence committed by him during the same period. The Chamber however found that the Appellant was the brigade commander of Sinia brigade for only a portion of that time, from about March 4, 2004. As such, the Appellant could not be found responsible for forced marriage as Sinia brigade commander before 4 March 2004.

[1259] Application for Warrants, paras 86-87, 92-94.
[1260] Judgment, paras 214, 2114-2115.
[1261] Judgment, para. 2100.
[1262] Judgment, para. 2101.

985. The timeframe of the abduction of P-0351 in December 2002[1263] falls within the timeframe which the Chamber found the Appellant was injured and was in the sickbay.[1264] The Chamber made no finding about the timeframe and geographic location of P-0351's distribution to [REDACTED]. The Appellant was found responsible for this violation as the commander of Sinia brigade, which he was not. P-0351's testimony about the experience of girls in the LRA cannot be attributed to the Appellant as a matter of law.

986. P-0325 was abducted in March 2003 and joined the Appellant's group as a ting-ting "five to six months" later.[1265] This is problematic because the Appellant was in sickbay in March 2003. According to the Judgment, Okwer and Buk Abudema were commanders of Sinia Brigage.[1266] Thus, the Appellant was not responsible for this abduction as the commander of Sinia brigade.

987. The timeframe and location of the abduction and distribution of P-0366 to [REDACTED] is not specified. The only connection to the Appellant was that [REDACTED].[1267] The Prosecution called [REDACTED] as a witness but did not ask him about this allegation. The Chamber found uncertainty about the time the witness was assigned to [REDACTED] and her testimony about her age.[1268] This should have raised reasonable doubt.

988. The timeframe and location which [REDACTED] forced P-0374 to become his so-called wife is also not specified. No further details are provided about [REDACTED] or the witness.[1269]

989. P-0396's alleged distribution occurred in Wii-Polo.[1270] The Chamber did not specify the date when the witness became the wife of [REDACTED].[1271] The Chamber found the Appellant responsible as commander of Sinia brigade, when this was not proved beyond a reasonable doubt to be the case.

e) Acts not charged, and out of the temporal scope of the case

990. The Chamber impermissibly relied on acts not charged for corroboration. The uncharged evidence was used to corroborate the truthfulness of the evidence, when the evidence it purportedly

[1263] Judgment, paras 351, 2203.
[1264] Judgment, paras 1017-1033.
[1265] Judgment, para. 2205.
[1266] Judgment, para. 890.
[1267] Judgment, paras 411, 2208.
[1268] Judgment, paras 411, 2208.
[1269] Judgment, paras 417, 2210-2211.
[1270] Judgment, para. 2188.
[1271] Judgment, paras 418, 2127, 2188, 2212.

corroborated was itself deficient. The evidence of acts not charged and outside the temporal and geographic scope of the case therefore did not qualify as corroborative evidence.[1272]

991. The acts not charged, which the Chamber used as corroboration, significantly impacted on the decision to convict the Appellant, making the conviction unsafe and unfair. The conviction should be reversed.

f) The Appellant had no notice of the charges for the crimes of Kony and the LRA

992. The Appellant was not provided notice that uncharged acts, acts outside the temporal and geographic scope of the charges and charges of forced marriages and sexual violence by Kony, Sinia leadership and Sinia brigade, which occurred during the period when he was not the commander of Sinia brigade, would be relied on to incriminate and convict him for forced marriages and crimes of sexual violence.[1273] On the basis of this notice violation, the Appellant urges the Appeals Chamber to invalidate the convictions.

g) The Chamber did not provide a reasoned statement on marital status of the women *vis-à-vis* the Appellant, Kony and the LRA policy on women

993. The pleadings and the Judgment lay out the standing rules and LRA policies on abduction generally and the abduction and distribution of women for which the Appellant was convicted. There was no credible evidence or finding connecting the Appellant to the formulation, establishment and imposition of LRA rules on abduction and distribution of women, girls and boys in the LRA.

994. The elaborate disciplinary LRA regime, the initiation rituals, the spiritualism, indoctrination and the execution of LRA and Orders of Kony was overseen by Kony through a strict reporting regime and intelligence and spiritual network.[1274]

995. The Defence refers to the pleadings and the Prosecution and Defence evidence which established that women and men were used by Kony to sustain the LRA and to re-enforce his command-and-control authority.[1275] He did not share this authority with anyone.

996. The Chamber did not provide a reasoned statement on the nature and status of the marriages which it characterised and criminalised as forced marriages to convict the Appellant. The Chamber

[1272] *See* above, Ground 6. *See also*, Reasons of Judge Geoffrey Henderson, paras 46-50.
[1273] Judgment, paras 2202-2288. See also, above, Ground 5 d) and Ground 6.
[1274] Application for Warrants, paras 31, 78-82.
[1275] Application for Warrants, paras 68-96. *See also* Defence Closing Brief, paras 475-476 and 478.

established the jurisprudence on forced marriage in the abstract and failed on the facts of this case to establish that the Appellant violated a protected interest of false marriage under the Statute.

997. The so-called married couple were the property of Kony over which he exercised complete and unchallenged ownership and authority. The purported husbands held them in trust for Kony who could and did determine the fate of the alleged conjugal unions at his pleasure.[1276]

h) Exclusive ownership of the women

998. The element of exclusivity of ownership of the women was not proved beyond a reasonable doubt against the Appellant. The Chamber found that the so-called wives were not allowed have sex with any other man other than their so-called husbands. The penalty for violating the rule was death or severe punishment.[1277]

999. This exclusivity of ownership of the women belonged to Kony, and not Dominic Ongwen, who himself was subjected to it. The decision of the Chamber finding the Appellant liable for forced marriages in Sinia brigade between 1 July 2002 and 31 December 2005 was unwarranted and unfair. The Chamber failed to provide a reasoned statement establishing that the Appellant exercised an exclusive right of ownership over the so-called wives to justify its decision. The exclusivity of ownership element of forced marriage as a crime against humanity was therefore not proved beyond a reasonable.

i) The *mens rea* of forced marriage was not proved beyond a reasonable doubt

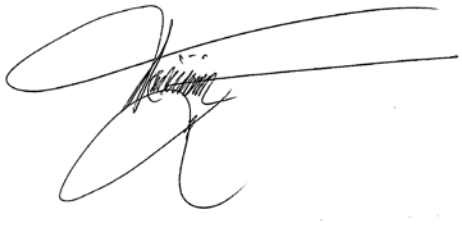
1000. The Chamber failed to properly define and apply the constitutive elements of forced marriage as an "other inhumane act".[1278] The Chamber in particular failed to articulate the *mens rea* element of the crime of forced marriage, and to show, beyond reasonable doubt, that the Appellant possessed the required *mens rea* for the offence.[1279] The Chamber should have considered that the LRA rules on women and marriage, which were imposed by Kony, obliterated the possibility for the Appellant to form the *mens rea* required for conviction. For these reasons, the Chamber erred in law and in fact when convicting the Appellant of the crime of forced marriage.

III. RELIEF SOUGHT

[1276] Defence Closing Brief, paras 475-476 and 478.
[1277] Judgment, paras 2275-2288.
[1278] Judgment, paras 2741-2753.
[1279] Judgment, para. 3025.

1001. For the foregoing reasons, the Defence respectfully requests the Appeals Chamber to reverse the 61 convictions against the Appellant and enter a verdict of acquittal.

Respectfully submitted,



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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 19th day of October 2021

At The Hague, Netherlands