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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

Public Redacted Version of "Victims' Observations on the 'Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021'", ICC-02/04-01/15-1883-Conf, filed on 21 October 2021

Source: Legal Representatives of Victims

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

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I. INTRODUCTION

1. The Legal Representatives for Victims (“LRVs”), pursuant to the Appeals Chamber’s Decision on the modalities of victim participation of 11 June 2021¹ and Decision on the Prosecutor’s request for an extension of the time limit to file a response to the appeal brief of 17 June 2021,² hereby submit their Observations on the ‘Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021’ (hereafter referred to as “Defence Appeal Brief” or “Appeal Brief”).³
2. The LRVs submit that the Defence Appeal Brief, in most instances, either re-litigates issues already raised and decided upon during the trial proceedings or present disagreements with Trial Chamber’s assessment of the evidence.
3. The LRVs submit that the Defence has failed to demonstrate any error of law, fact or procedure or any fair trial violation that would materially affect the outcome of the trial Judgment. Therefore, The LRVs submit that the Defence appeal should be dismissed in its entirety.
4. Due to page limit constraints, the LRVs will address selected grounds of appeal raised by the Defence that are most pertinent to the interests of the victims represented by the LRVs.

II. PROCEDURAL HISTORY

5. On 4 February 2021, the Trial Chamber IX issued the Trial Judgment, by which it found Dominic Ongwen guilty of 61 out of 70 counts of war crimes and crimes against humanity (“Trial Judgment”).⁴
6. On 24 February 2021, the Appeals Chamber issued a decision by which it extended the deadlines for the Defence’s notice of appeal and appeal brief to 21 April and 21 June 2021, respectively.⁵

¹ Decision on the modalities of victim participation, ICC-02/04-01/15-1859, 11 June 2021.

² Decision on the Prosecutor’s request for an extension of the time limit to file a response to the appeal brief, ICC-02/04-01/15-1861, 17 June 2021.

³ Confidential with public Annexes A-B, D and confidential Annex C, Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021, ICC-02/04-01/15-1866-Conf, 21 July 2021.

⁴ Trial Judgment, ICC-02/04-01/15-1762-Red, 4 February 2021.

⁵ Decision on Mr Ongwen’s second request for time extension, ICC-02/04-01/15-1811, 9 April 2021. See also Decision on Mr Ongwen’s request for time extension for the notice of appeal and on translation, ICC-02/04-01/15-1781, 24 February 2021.

7. On 21 May 2021, the Defence filed its Notification of its Intent to Appeal the Trial Judgment (“Notice of Appeal”).⁶
8. On 11 June 2021, the Appeals Chamber issued the Decision on the modalities of victim participation⁷ and on 17 June 2021, it extended the deadline for the prosecutor and for the participating victims to submit their response and observations, respectively, by 21 October 2021.⁸
9. On 21 July 2021, Defence filed its Appeal Brief Against the Conviction in the Judgment.⁹

III. CLASSIFICATION

10. Pursuant to regulation 23*bis* (1) and (2) of the Regulations of the Court, the present submissions are classified as confidential, since they refer to the content of documents likewise classified as confidential. A public redacted version of these submissions will be filed in due course.

IV. SUBMISSIONS ON THE STANDARD OF REVIEW

11. The LRVs submit that the principle of legal certainty necessitates that the Appeals Chamber apply the well-established standards of appellate review that have been authoritatively formulated by this Court. The Appeals Chamber’s primary function is corrective and as such, the Appeals Chamber should only intervene if the error of law or fact in question materially affected the impugned decision.¹⁰
12. In line with the established jurisprudence of this Court, the LRVs submit that the Appeals Chamber should not interfere with a Chamber’s discretionary decision merely because the Appeals Chamber, if it had the power, might have made a different ruling.¹¹ It should only interfere with the Trial Chamber’s discretion where it is shown that an error of law, fact or procedure was made.¹²

⁶ Defence Notification of its Intent to Appeal the Trial Judgment, ICC-02/04-01/15-1826, 21 May 2021.

⁷ Decision on the modalities of victim participation, ICC-02/04-01/15-1859, 11 June 2021.

⁸ Decision on the Prosecutor’s request for an extension of the time limit to file a response to the appeal brief, ICC-02/04-01/15-1861, 17 June 2021.

⁹ *Supra* 3.

¹⁰ Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s ‘Decision on the Application for Judicial Review by the Government of the Union of the Comoros’ (Appeals Chamber), ICC-01/13-98, 2 September 2019, para. 26.

¹¹ Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled “Order for Reparation pursuant to Article 76 of the Rome Statute” (Appeals Chamber), No. ICC-01/04- 01/07-3778-Red, 9 March 2018, para. 43 (internal references omitted).

¹² *Ibid.*

13. With regard to errors of law, the Appeals Chamber has held that it

[...] will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.¹³

14. As to procedural errors, the Appeals Chamber has clarified that these "often relate to alleged errors in a Trial Chamber's exercise of its discretion" and held that¹⁴

[...] it will interfere with a discretionary decision only under limited conditions [...] it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abused of discretion.¹⁵

15. An error of law or procedural error may lead the Appeals Chamber to reverse a trial chamber's decision if it is materially affected by the error in question.¹⁶

16. As regards alleged errors of fact, it has been previously held by the Appeals Chamber that:

[...] will determine whether a trial chamber's factual finding were reasonable in the particular circumstance of the case. In assessing the reasonableness of factual findings, the Appeals Chamber will consider whether the trial chamber's evaluation was consistent with logic, common sense, scientific knowledge and experience, and whether the trial chamber took into account all relevant and connected evidence, and was mindful of the pertinent principles of law (including, as applicable, the standard of proof beyond reasonable doubt). Beyond the foregoing considerations, the Appeals Chamber will not disturb a trial chamber's factual finding only because it would have come to a different conclusion.¹⁷

The Appeals Chamber may interfere with a trial chamber's factual finding if it is shown to be attended by errors including the following: insufficient support

¹³ Prosecutor v. Jean-Pierre Bemba Gombo, 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, 8 June 2018, para. 36.

¹⁴ Ibid., para. 45.

¹⁵ Ibid., para 45.

¹⁶ Ibid., para. 44.

¹⁷ Prosecutor v. Bosco Ntaganda, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', ICC-01/04-02/06-2666-Red, 30 March 2021, para. 39.

by evidence, reliance on irrelevant evidence, failure to take into account relevant evidentiary considerations and facts; failure property to appreciate the significance of the evidence on record; or failure to evaluate and weigh properly the relevant evidence and facts. The Appeals Chamber may interfere where it is unable to discern objectively how the trial chamber's conclusion could have reasonably been reached from the evidence on the record.¹⁸

17. Finally, "a convicted person seeking to appeal his or her conviction on grounds of unfairness [pursuant to Article 81(1)(b)(vi) and Article 83(2) of the Statute] is required to set out not only how it was that the proceedings were unfair, but also how this affected the reliability of the conviction decision."¹⁹
18. The LRVs submit that there exist no cogent reasons to depart from any of the above standards of appellate review in the present case.

V. SUBMISSIONS ON THE GROUNDS OF APPEAL

A. Alleged violations of fundamental rights of Dominic Ongwen during the arrest and surrender

19. In relation to this ground of appeal, the LRVs note that in the Notice of Appeal the Defence failed to raise any alleged error of the Chamber in relation to its finding that no fundamental rights of Dominic Ongwen were breached during his arrest and surrender. However, in the Appeal Brief, the Defence raise this as a ground of appeal without prior request to modify the grounds of appeal.
20. Therefore, for this reason the LRVs submit that the Appeals Chamber should dismiss this ground of appeal at the outset. Should the Appeals Chamber be inclined to consider this ground of appeal in a substantive manner, the LRVs submit that the Defence failed to explain the alleged error of the Chamber, and presents a disagreement with the Chamber's findings, repeating its previously litigated submissions on the issue.

¹⁸ Ibid., para. 41.

¹⁹ Prosecutor v. Jean-Pierre Bemba Gombo, 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, 8 June 2018, para. 62.

B. Alleged errors concerning evidence obtained through the Article 56 hearings (grounds 1-3)

21. Under the first three grounds the Defence repeats its arguments presented at trial and pertaining to the alleged violations that occurred in relation to Article 56 proceedings.²⁰
22. The Appeal Brief repeats arguments made by the Defence in the its Closing Brief, which were exhaustively addressed by the Chamber in the Trial Judgment and earlier during the course of trial.²¹ The Defence fails to substantiate how the Chamber erroneously exercised its discretion when considering these allegations in the Judgment. Specifically, it failed to show that the Chamber based its decision upon erroneous interpretation of the law, a manifestly incorrect conclusion of fact, or that the decision amounted to an abuse of discretion. Therefore, these arguments should be dismissed.
23. Should the Appeals Chamber nevertheless consider these grounds, the LRVs submit that the Pre-Trial Chamber did not violate Dominic Ongwen's fair trial rights in the course of Article 56 hearings.
24. The LRVs submit that according to the standard established by the European Court of Human Rights ("ECtHR"):

...in determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubts on its reliability or accuracy.²²

25. The LRVs submit that the Defence had the opportunity to examine all of the witnesses who testified in the course of Article 56 hearings, and to oppose the use of this evidence. Moreover, the evidence in question is of unquestionable quality

²⁰ Appeal brief, paras 16-49; Defence Closing Brief, paras 42, 61-70. The Defence raises: lack of notice as to the charges for which evidence was being preserved at the Article 56 hearings; the dual role of the Single Judge, presiding over both the Article 56 hearings and the confirmation of charges hearings; the refusal of the Single Judge to hear procedural violations; and the failure of the Single Judge to investigate and properly determine the status of witnesses at the hearing.

²¹ Trial Judgment, paras 62-72; Decision on Request to Admit Evidence Preserved under Article 56 of the Statute on 10 August 2016, ICC-02/04-01/15-520, 10 August 2016, ICC-02/04-01/15-520 10-08-2016.

²² ECtHR, the case of Jalloh v. Germany, Application no. 54810/00, GC Judgment of 11 July 2006, §96.

and it was taken in the course of Article 56 proceedings in order to ensure its untainted quality.

26. Article 56 regulates unique investigative opportunity which can take place even at the earliest stages of the proceedings. The Court's legal texts do not require the Pre-Trial Chamber or the Prosecutor to provide the defendant with the notice of the charges which are the subject of the unique investigative procedure.
27. The Defence was provided with relevant information necessary to adequately safeguard Dominic Ongwen's rights in Article 56 proceedings well in advance of these proceedings, including information about the general subject of the unique investigative opportunity. This information was set out in the statements of facts and in the Prosecutor's Article 56 applications.²³ Moreover, the Single Judge in deciding upon the Article 56 applications took into account the need of the Defence to prepare in order to meaningfully participate in this process.²⁴
28. The Defence alleges that Judge Tarfusser's involvement in both proceedings prejudiced Dominic Ongwen,²⁵ specifically, that "it created a strong perception of a conflict of interest and lack of independence and neutrality".²⁶ The Statute does not prevent the Pre-Trial Chamber from appointing the same single judge to preside over Article 56 and confirmation of charges proceedings in the same case.
29. Participation of a single judge in Article 56 proceedings does not *per se* create a conflict of interests resulting in prejudice to the defendant and said judge's inability to preside over confirmation of charges hearing. This is confirmed by the Rome

²³ 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); 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); 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); 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 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), paras 13-15; 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), para. 16.

²⁵ Defence Appeal Brief, paras. 29-42.

²⁶ Defence Appeal Brief, para. 30. In paras 39-41, in support of its argument, the Defence refers also to selected statements made by the Single Judge during Article 56 hearings and alleges that they "went beyond overseeing the collection and preservation of evidence for trial" constituted "substantive interventions and decisions which greatly influenced the confirmation and trial proceedings, causing significant prejudice and compromising the integrity of the trial".

Statute which does not prevent the Pre-Trial Chamber from appointing the same single judge to preside over Article 56 and confirmation of charges proceedings in the same case.

30. Jurisprudence of the ECtHR concerning judicial impartiality in instances when a judge in a criminal court made pre-trial decisions in the case, including decision concerning detention on remand, may be of assistance here. The ECtHR has held that such a situation does not in itself justify fears as to the lack of impartiality of the judge in question.²⁷ It specified that “[i]n each case, the relevant question is the extent to which the judge assessed the circumstances of the case and the applicant’s responsibility when ordering his or her detention on remand”.²⁸
31. As noted by the Trial Chamber in the Judgment, the Defence failed to substantiate its assertions and to explain where the purported conflict lies.²⁹ Similarly, the Defence fails to explain in the Appeal Brief how the involvement of the pre-trial judge in the Article 56 proceedings went beyond the role of a single judge indicated in Article 56(2)(e) of the Statute.
32. Regardless of the fact that Article 56(2)(e) does not list exhaustively the measures that may be applied by the Pre-Trial Chamber in Article 56 proceedings, the statements of the Single Judge referred to by the Defence in the Brief, when read in the context of the testimonies from which they are taken, should be understood as observing and making recommendations or orders regarding the questioning of witnesses. Nothing in these statements indicates the Single Judge’s prejudice towards Dominic Ongwen. Nor do these statements constitute the Judge’s assessment of Dominic Ongwen’s guilt in relation to the acts about which the witnesses in question testified.
33. Furthermore, the Defence misrepresents the Chamber’s assessment of the Defence’s allegation concerning the oral decision of the Single Judge, which supposedly prevented the Defence from raising procedural challenges concerning the Article 56 proceedings.³⁰ The Chamber rejected these allegations and explained in its reasoning (contrary to what the Defence suggests in para. 33 of its Appeal Brief) why it considered the Defence’s suppositions to be “based on false

²⁷ See: European Court of Human Rights, the case of Fey v. Austria, Application no. 14396/88, Judgment of 24 February 1993, § 30; European Court of Human Rights, the case of Nortier v. the Netherlands, Application no. 13924/88, Judgment of 24 August 1993, § 33.

²⁸ See: European Court of Human Rights, the case of Jasiński v. Poland, Application no. 30865/96, Judgment of 20 December 2005, §§ 54-58.

²⁹ Trial Judgment, para. 65.

³⁰ Appeal brief, paras 32-33.

interpretation of the statement of the Single Judge”.³¹ Analysis of the entire decision and of the written decisions on the Prosecutor’s applications to the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Statute, as well as of the record of these proceedings demonstrates that the Defence was not prevented from making any specific submissions in relation to the Article 56 proceedings.³²

C. Dominic Ongwen’s ‘not guilty’ plea on the basis of which the Chamber proceeded to trial was legal (ground 4)

34. The Defence repeats its arguments regarding the illegality of Dominic Ongwen’s “not guilty” plea already articulated in the Closing Brief,³³ which were exhaustively addressed by the Chamber in the Judgment.³⁴ The Defence fails to explain why, in its view, the Chamber had erroneously exercised its discretion when considering these allegations. Should the Appeals Chamber nevertheless consider the arguments raised based by the Defence under this ground, the LRVs submit that the Pre-Trial Chamber did not err by proceeding to trial.

35. Contrary to the Defence’s submissions,³⁵ nothing in the Statute or the Rules suggests that a “not guilty” plea should meet the same criteria as those provided for a “guilty” plea in the ICTY Rules of Procedure and Evidence for guilty pleas (Rule 62*bis*) or those specified in Article 65(1) of the Statute.³⁶ This proposition is unfounded. The consequences of a ‘guilty’ plea are different to those of entering a plea of ‘not guilty’. While the first results in a conviction without trial, the latter obliges the Prosecutor to prove guilt of the accused beyond reasonable doubt in the course of a fair trial. This is why the standards for submitting a ‘guilty’ plea are clearly set out, whilst this is not necessarily the case with a ‘not guilty’ plea as demonstrated by the relevant provisions of the Statute and the Rules.³⁷ In this regard it is also noteworthy that the Defence, while supporting its argumentation with a reference to Rule 62*bis* of the ICTY Rules, (applicable to ‘guilty’ pleas)

³¹ Trial Judgment, para. 66.

³² Trial Judgment, ftn 127-128; T-8, p. 4, lines 5-8.

³³ Defence Notice of Appeal, p. 5; Defence Appeal Brief, paras 50-76.

³⁴ Trial Judgment, paras. 73-82.

³⁵ Appeal brief, para. 54.

³⁶ Article 64(8)(a) of the Statute provides that the Chamber, at the commencement of the trial, shall “have read to the accused the charges previously confirmed by the Pre-Trial Chamber”, “satisfy itself that the accused understands the nature of the charges”, “afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty”. Article 65(1) specifies the criteria for a guilty plea under the Rome Statute.

³⁷ While Article 65 establishes a procedure for admission of guilt, the Statute does not regulate at all the ‘not guilty’ plea.

conveniently disregards existence of Rule 62(A)(iv) which envisages that the Trial Chamber may enter a plea of not guilty on the accused's behalf if he fails to enter a plea at the initial or any further appearance.

36. Contrary to the Defence's submission,³⁸ the Trial Chamber, correctly assessed that during the opening hearing that Dominic Ongwen was informed and understood the charges, among others, based on his earlier submissions made in this regard during the confirmation hearing on 21 January 2016.
37. The Appeals Chamber in the *Lubanga* case found that the decision on the confirmation of the charges "defines the parameters of the charges at trial".³⁹ At the same time, it clarified that "all documents that were designed to provide information about the charges, including auxiliary documents, must be considered to determine whether an accused was informed in sufficient detail of the charges, subject to the following."⁴⁰ It explained further that "only information made available before the start of the trial hearings may be taken into account".⁴¹
38. Dominic Ongwen was provided with Acholi language version of the Document Containing the Charges ("DCC") prior to the confirmation of charges hearing.⁴² During that hearing, Dominic Ongwen confirmed that he received the DCC, read it and understood it.⁴³ The Decision on the confirmation of charges against Dominic Ongwen confirmed verbatim all charges brought against him by the Prosecutor in the DCC with minor modifications identified by the Pre-Trial Chamber in paragraph 158. These modifications, as noted by the Trial Chamber, "consist[ed] exclusively in the removal of one section and of a few words, and the insertion of some pseudonyms to refer to some witnesses whose identity was confidential vis-à-vis the public".⁴⁴ Importantly, these modifications did not bring any new elements or information to the charges that would be previously unknown to Dominic Ongwen. Moreover, the counts read out to the Accused during the opening hearing included these modifications.⁴⁵
39. Therefore, despite the fact that Dominic Ongwen at the time of the trial opening was not provided with an Acholi translation of the entire Confirmation Decision,

³⁸ Appeal Brief, para. 63.

³⁹ *Lubanga* Appeals Judgment, para. 124.

⁴⁰ *Lubanga* Appeals Judgment, para. 124.

⁴¹ *Lubanga* Appeals Judgment, para. 125.

⁴² Prosecution's submission of the document containing the charges, the pre-confirmation brief, and the list of evidence, ICC-02/04-01/15-375, 21th December 2015

⁴³ T-20, p. 6 lines 4 – 14.

⁴⁴ Trial Judgment, para. 81, ftn 159.

⁴⁵ T-26, p. 8 line 19- p. 16 line 7.

and the fact that at the opening of the trial only counts from the operative part of that decision (which contained content of the charges) were read out to him without reference to the provision of the Statute,⁴⁶ it is impossible to conclude that Dominic Ongwen was not informed of the charges against him, in the language he speaks and understands, before he entered the ‘not guilty’ plea.

40. The Defence repeats on appeal, its submissions from trial concerning Dominic Ongwen’s alleged lack of understanding of the charges,⁴⁷ which the Trial Chamber found untenable.⁴⁸ The Defence claims that the Chamber in its assessment “factually erred in rejecting the evidence it heard from the Appellant, which resulted in the legal error of proceedings on the plea”.⁴⁹ However, the Defence failed to demonstrate that no reasonable chamber would have reached the same conclusion as the Trial Chamber did when assessing Dominic Ongwen’s depositions in question. In fact, the Chamber’s reasoning shows that its finding on Dominic Ongwen’s understanding of the charges was based on evaluation of all relevant statements given by Dominic Ongwen at the confirmation hearing and at the opening of the trial,⁵⁰ as well as on relevant circumstances of the proceedings; and that it was based on evaluation done in accordance with logic, common sense, scientific knowledge and experience.⁵¹ The Chamber correctly reasoned that the words chosen by Dominic Ongwen in response to the Presiding judge, made it clear that he fully understood the charges but was not willing to accept responsibility for the crimes he was accused of.
41. Finally, the Defence repeats on appeal that the Chamber should have postponed the opening of the trial and ordered medical examination pursuant to Rule 135 RPE due to Dominic Ongwen’s alleged lack of capacity to understand the charges.⁵²
42. However, nowhere in the Appeal Brief does the Defence explain how the Chamber erred other than by not granting the Defence’s request. Specifically, the Defence fails to explain how the medical condition of Dominic Ongwen prevented him from standing trial, and limits itself to referring procedural history and the fact that the Chamber denied its request.⁵³

⁴⁶ T-26, p. 8 line 8- p. 15 line 25.

⁴⁷ Appeal Brief, paras 64-66; Defence Closing Brief, paras 75-76.

⁴⁸ Trial Judgment, para. 78.

⁴⁹ Appeal Brief, para. 66.

⁵⁰ T-20, p. 6 line 4 - p. 6 line 14; T-26, p. 16 line 18 – p. 17 line 2.

⁵¹ Trial Judgment, paras 77-78; T-26, p. 17 line 12 – p. 19 line 15.

⁵² Defence Request for a Stay of the Proceedings and Examinations Pursuant to Rule 135, ICC-02/04-01/15-620-Red, 5 December 2016; Notice of Appeal, p. 5, ground 4, second sentence.

⁵³ Appeal Brief, paras 69-76.

43. In its Judgment, making reference to the Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen and in the oral Decision rejecting the Defence's request to stay the proceedings, the Trial Chamber explains that the Defence failed to provide the Chamber with any expert report substantiating its request before the hearing on 6 December 2016.⁵⁴ Lastly, it may be concluded that the alleged error is groundless as the Trial Chamber did not find that Dominic Ongwen suffered from any mental disability.

D. Alleged defects of the Confirmation of Charges Decision (ground 5)

44. The Defence Appeal Brief⁵⁵ repeats or refers to the arguments that the Defence had already made at pre-trial⁵⁶ and trial stage⁵⁷ of proceedings, which were considered and addressed either by the Pre-Trial Chamber,⁵⁸ the Trial Chamber⁵⁹ or the Appeals Chamber.⁶⁰

45. As to the insufficient specificity of the CoC Decision, the Appeals Chamber has found that, in the circumstances of this case, the Trial Chamber in rejecting *in limine* the Defence's allegations raised in the Defects Series "did not abuse its discretion or act arbitrarily, unreasonably or unfairly".⁶¹ On the contrary, as noted by the

⁵⁴ Trial Judgment, paras 79-80; Oral Decision issued by the Chamber on 6 December 2021, T-26, p. 3 line 3 – p. 7 line 12; *Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen*, ICC-02/04-01/15-637-Red, 16 December 2021.

⁵⁵ Appeal Brief, paras 77-163.

⁵⁶ Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision, ICC-02/04-01/15-423, 29 March 2016, paras. 25-44.

⁵⁷ Defence Closing Brief, paras 62-63, 83-85, 180-198; 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; 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; 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; 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'); Motions on Defects in the Confirmation Decision Regarding SGBC, ICC-02/04-01/15-1603-Red ('SGBC Defects'); Defence Request for Leave to Appeal 'Decision on Defence Motions Alleging Defects in the Confirmation Decision, ICC-02/04-01/15-1480; Defence Request for Leave to Appeal 'Decision on Further Defence Motion Alleging Defects in the Confirmation Decision, ICC-02/04-01/15-1636.

⁵⁸ Decision on the Defence request for leave to appeal the decision on the confirmation of charges, CC-02/04-01/15-428, 29 April 2016.

⁵⁹ Decision on Defence Motions Alleging Defects in the Confirmation Decision', ICC-02/04-01/15-1476, 7 March 2019; Trial Judgment, paras 37-41, 83-84.

⁶⁰ 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, 17 July 2019.

⁶¹ 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, 17 July 2019, paras 145-153.

Appeals Chamber, by doing so, the Trial Chamber ‘acted in a manner consistent with its duty under article 64(2) of the Statute to ensure the fair and expeditious conduct of the proceedings.’⁶²

46. With regard to the jurisdictional challenges raised in the Defects Series, the Appeals Chamber noted that these challenges were raised already at the pre-confirmation of charges stage and addressed in the CoC Decision.⁶³ Therefore, the Trial Chamber did not err when it declined to consider these challenges.⁶⁴ Regarding the crime of forced marriage, the Defence fails to counter the reasoning of the Pre-Trial Chamber,⁶⁵ which considered that the crime of forced marriage falls under the “other inhumane acts” qualification under article 7(1)(k) of the Statute.⁶⁶ With respect to “indirect co-perpetration”, the Defence in its submissions merely disagrees with the reasons provided by the Pre-Trial Chamber in the CoC Decision⁶⁷ and relies on opinions representing minority views within the Court’s jurisprudence⁶⁸ while ignoring the decisive majority interpretation of the Statute in this regard.⁶⁹
47. The Defence disagrees with the Trial Chamber’s dismissal *in limine* of the Defence’s motions alleging the defects in the CoC Decision⁷⁰ and with the lack of the Chamber’s conclusion that the CoC Decision failed to provide a reasoned opinion.⁷¹ However, in light of the reasons provided by the Chamber in the Trial Judgment, the Defence failed to substantiate its position. Since the Trial Chamber had decided

⁶² 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, 17 July 2019, para. 145.

⁶³ 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, 17 July 2019, paras 156-157.

⁶⁴ 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, 17 July 2019, paras 157-158.

⁶⁵ 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, 1 February 2019, paras 34-53.

⁶⁶ Decision on the Defence request for leave to appeal the decision on the confirmation of charges, ICC-02/04-01/15-428, 29 April 2016, paras 36-37.

⁶⁷ Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15-422-Red, 23 March 2016, paras 37-41.

⁶⁸ Defence Motion on Defects in the Confirmation of Charges Decision: Defects in the Modes of Liability (Part II of the Defects Series), ICC-02/04-01/15-1431 01-02-2019, paras 28-31; Defence Closing Brief, para. 183; Defence Appeal Brief, paras 119-122.

⁶⁹ Confirmation of Charges Decision, para. 41; Trial Judgment, paras 2786-2788; Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, ICC-01/04-02/06-2666-Red, 30 March 2021, paras. 1039 and ss.

⁷⁰ Defence Appeal Brief, paras 164-169.

⁷¹ Defence Appeal Brief, paras 170-173.

on the Defects Series the Defence has not identified any new “circumstances that would justify consideration of the same belated submissions as concerns the formulation of the charges”.⁷² Moreover, with regard to Dominic Ongwen’s right to notice the Defence relies on issues that were already decided by the Chamber and, other than disagreeing with the Trial Chamber’s findings, presents no new arguments going beyond its prior submissions.⁷³

48. The LRVs submit that the CoC Decision issued against Dominic Ongwen is sufficiently specific and reasoned. The Pre-Trial Chamber has “indicat[ed] with sufficient clarity the basis of the decision”⁷⁴ and its structure and content, complies with the ICC Chambers Practice Manual.⁷⁵ Moreover, a comprehensive analysis of the Judgment of the ECtHR in the *Pélissier and Sassi v. France* case referred to by the Defence in its submission,⁷⁶ indicates that the CoC Decision against Dominic Ongwen complies with the standard established by the ECtHR in the above mentioned case. The CoC informed Dominic Ongwen of the cause of the acts he is alleged to have committed and on which the Prosecutor’s accusation was based, as well as of the legal characterisation given to those acts. Moreover, it did so in sufficient detail, referring to evidence “to the extent necessary and sufficient to support the factual finding on the material facts”.⁷⁷

49. Even if, *arguendo*, one was to agree with the Defence that the CoC was defective, the Defence fails to explain how these defects affected the reliability of the Judgment.⁷⁸ Specifically, the Defence does not explain how did these alleged violations, i.e. lack of specificity and insufficient reasoning of the CoC Decision, or the jurisdictional challenges, affected in reality the ability of Dominic Ongwen and his defence to make use of his rights under Article 67(1) of the Statute, especially the rights provided for in Article 67(1)(e). Therefore, this ground should be dismissed.

⁷² Trial Judgment, para. 40.

⁷³ Trial Judgment, paras. 83-84.

⁷⁴ Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, ICC-01/04-01/06-773, 14 December 2006, para. 20.

⁷⁵ Chambers Practice Manual, February 2016, pp. 16-17, https://www.icc-cpi.int/iccdocs/other/chambers_practice_manual--february_2016.pdf (accessed 15.10.2021).

⁷⁶ Defence Appeal Brief, para. 86.

⁷⁷ Chambers Practice Manual, February 2016, p. 18, https://www.icc-cpi.int/iccdocs/other/chambers_practice_manual--february_2016.pdf (accessed 15.10.2021).

⁷⁸ See: Prosecutor v. Jean-Pierre Bemba Gombo, *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, 8 June 2018, para. 62.

E. Alleged violations of the right to notice (ground 6)

50. The Defence failed to substantiate its allegations that the Chamber expanded the material, temporal and geographic scope of the charges and erroneously relied on evidence of acts not charged.
51. As regards allegations of expansion of the scope of the charges the LRVs submit that there are no inconsistencies in the operative part of the CoC Decision,⁷⁹ which set out the parameters of the charges in the case against Dominic Ongwen. The Chamber has noted on multiple occasions that it is the operative part of the Decision which forms the parameters of the case against Dominic Ongwen. The charges confirmed against Dominic Ongwen to which the Defence refers to in the Appeal Brief (SGBC for which Dominic Ongwen was found indirectly responsible) concern Dominic Ongwen's alleged responsibility as part of "a common plan" pursued by Dominic Ongwen, Joseph Kony, and Sinia brigade leadership, who "acted through a hierarchically organised structure of the LRA". Therefore, contrary to the Defence's submission, the Trial Chamber had to "make determination about the acts and conduct of Kony and the entire LRA"⁸⁰ in order to establish, among others, existence of an agreement or common plan and execution of its elements.
52. Regarding the Defence argument concerning prejudicial expansion of the temporal and geographic scope of the charges, the LRVs submit that none of these allegations have been substantiated by the Defence.
53. The Defence's supposition that the Chamber's "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"⁸¹ is without merit.
54. Firstly, one must differentiate between the charges (understood as facts and circumstances and their legal characterisation⁸²) and the evidence presented to plead these charges.⁸³ Facts and circumstances and their legal characterisation

⁷⁹ CoC Decision, Operative part, Section 9, paras 118-124.

⁸⁰ See Appeal Brief, para. 181.

⁸¹ Appeal Brief, para. 185; see T-148, p. 5, lines 13-15. The decision verbatim: "we have ruled that we can also go beyond the confirmed charges and the facts and circumstances described in the charges for contextual elements, for modes of liability and, for example, conscription and use of child soldiers".

⁸² Otto Triferrer, Commentary to Article 74, paras 44-45.

⁸³ See Prosecutor v. Lubanga, ICC-01/04-01/06-2205, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change', Appeals Chamber, 16 December 2009, fn. 163.

which form the content of the charges cannot be expanded by the evidence. Careful analysis of the charges as formulated in the operative part of the CoC Decision as well of the Judgment shows that the Chamber did not expand the charges by reliance “on evidence of uncharged acts” and “evidence outside the temporal and geographic scope of the case”.

55. The Defence’s references to *Bemba* Appeals Judgment to support its argument that the Chamber in the case at hand exceeded the scope of the charges is inaccurate. The Appeals Chamber in that case dealt with a different issue than reliance on evidence of acts outside temporal /geographic scope of the charges.⁸⁴
56. Similarly, the Defence fails to explain why it considers the jurisprudential threshold or relevancy, credibility and independence from the *Gbagbo and Blé Goudé* case⁸⁵ relevant for its claim under this ground of appeal. The reference is inaccurate – the Defence refers here to para. 46 of the Reasons of Judge Geoffrey Henderson which concerns corroboration or corroborative evidence – an issue different than the question of reliance on evidence of acts beyond temporal/geographic scope of the charges.⁸⁶
57. The Defence does not cite a single reference that would support the notion that the Trial Chamber erred in law and procedure by its decision to rely on evidence of acts outside temporal/geographic scope of the charges. Meanwhile, the Trial Chamber followed established practice of the Court and other international tribunals. The ICC Chambers have found that evidence relating to facts outside of temporal and/or geographical scope of the charges is not as such inadmissible.⁸⁷
58. The ICTR Appeals Chamber has found that evidence relating to events falling outside of the temporal scope of the case may be admitted and relied upon “where such evidence is aimed at: ‘[C]larifying a given context; establishing by inference the elements (in particular, criminal intent) of criminal conduct occurring in [...]; demonstrating a deliberate pattern of conduct.’”⁸⁸ Furthermore, the ICTY Appeals

⁸⁴ Appeal Brief, para. 190.

⁸⁵ Appeal Brief, para. 193.

⁸⁶ Appeal Brief, para. 193, fn. 189; Prosecutor v. Laurent Gbagbo and Charles Blé, Trial Chamber I, Reasons of Judge Geoffrey Henderson, ICC-02/11-01/15-1263-AnxB-Red, at para. 46.

⁸⁷ Prosecutor v. Bosco Ntaganda, Trial Chamber VI, Decision on Prosecution’s first request for the admission of documentary evidence, ICC-01/04-02/06-1181, 19 February 2016, para. 14; Prosecutor v. Bosco Ntaganda, Pre-Trial Chamber II, Decision on Admissibility of Evidence and Other Procedural Matters, 8 June 2014, ICC-01/04-02/06-308, para. 30; Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision on the Prosecution’s Request for Admission of Documentary Evidence, ICC-01/09-01/11-1353, 10 June 2014, para. 28.

⁸⁸ ICTR, Prosecutor v. Nahimana et al., Appeals Judgment, ICTR-99-52-A, 28 November 2007, para. 315.

Chamber has found, amongst others, that “the Trial Chamber did not abuse its discretion by relying on evidence of acts committed outside of the period charged in the indictment insofar as it had probative value in defining the development of the Common Purpose which was in place during the relevant period of the Indictment as well as the role played by the accused during that period”.⁸⁹

59. The Chamber clearly explained, among others, in para. 2009 of the Judgment that “reference to certain events concerning one or more of the seven witnesses – even if outside of 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, in particular as concerns the beginning and the end of the temporal scope of the charges”.⁹⁰
60. In light of the above, the alleged violation raised by the Defence under ground 6 should be dismissed.

F. Alleged error in law in respect to legal standards and burden of proof (grounds 7, 8, 10 in part, 25 & 45)

61. The LRVs submit their response to grounds 7, 8, 25 and 45 together, as in fact they address the same core issue at hand.
62. The Defence reasoning concerning these grounds⁹¹ shows that it misunderstood the standard of proof beyond reasonable doubt and the process of its application by the Chamber.
63. The Trial Chamber articulated and explained the standard of proof beyond reasonable doubt in a separate section IV.A of the Judgment.⁹² The law on the standard of proof ‘beyond reasonable doubt’ is clear and it reflected in the Judgment. The Trial Chamber noted that the standard of proof beyond reasonable doubt “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” and it requires carrying out “a holistic evaluation and weighing of all the evidence taken together in relation to the facts at issue”.⁹³ Furthermore, the Chamber has explained

⁸⁹ ICTY, Prosecutor v Stakic, No. IT-97-24-A, Judgment (22 March 2006) at para. 123; ICTY, Prosecutor v Dordevic, No. IT-05-87/1-A, Judgment (27 January 2014) at para. 295.

⁹⁰ Trial Judgment, para. 2009.

⁹¹ Appeal Brief, paras 199, 201, 202.

⁹² Trial Judgment, paras 226-231.

⁹³ Trial Judgment, para. 227.

that in order to convict an accused the Court must be convinced not only of the guilt of the accused beyond a reasonable doubt but also that no grounds for excluding responsibility apply in the case, beyond a reasonable doubt.⁹⁴

64. Application of the standard of proof of beyond reasonable doubt in the fact-finding process conducted by a Trial Chamber has also been established in the jurisprudence. The ICTR Appeals Chamber explained this process in detail in the *Ntagerura et al. case*. First, the trial Chamber needs to assess the credibility of individual items of the evidence and it must do this in the light of the entire body of evidence presented in the case. Following an analysis of all the relevant evidence, “the standard of proof beyond a reasonable doubt is applied to establish the facts forming the elements of the crime or the form of responsibility alleged against the accused, as well as with respect to the facts which are indispensable for entering a conviction. At the final stage, the Trial Chamber has to decide whether all of the constitutive elements of the crime and the form of responsibility alleged against the accused have been proven.”⁹⁵
65. A careful reading of the Judgment leaves no doubt that the Chamber applied the standard of beyond reasonable doubt correctly. The Defence’s assumption that the Chamber should explicitly articulate with regard to each piece of evidence and each evidentiary finding or conclusion whether it was reached based on a proof beyond a reasonable doubt is erroneous and unfounded.⁹⁶ As regards the use by the Chamber of the phrase “ample evidence”, it is clear from the judgment that it was not used, as the Defence suggests, in place of proof beyond reasonable doubt. It is worth noting here that the term is mentioned in the Judgment only twelve times.
66. The Defence Appeal Brief fails to substantiate the alleged failure of the Chamber to articulate the burden of proof standard for grounds excluding criminal responsibility. The Defence makes only an indirect reference to the arguments it raised in the Closing Brief.⁹⁷ The Chamber has addressed these arguments in the Judgment, explaining clearly that no prejudice arose to the Defence due to the fact that the Chamber had not provided in advance its interpretation of the applicable law in this regard.⁹⁸ Therefore, this part of ground 8 should be dismissed.

⁹⁴ Trial Judgment, paras, 230-231, 2455.

⁹⁵ ICTR, Prosecutor v. Ntagerura et al., Appeals Judgment, ICTR-99-46-A, 7 July 2006, para. 174.

⁹⁶ Appeal Brief, paras 200-204.

⁹⁷ Appeal Brief, para. 208, ftn 198.

⁹⁸ Trial Judgment, paras 85-93. See also para. 2455.

67. As to the error concerning alleged shifting of the burden of proof regarding grounds for excluding criminal responsibility, the Defence fails to provide any reasoning explaining why it considers that one can infer from Articles 66(2) and (3) of the Statute the Prosecution's burden to disprove grounds excluding criminal responsibility beyond reasonable doubt.⁹⁹ Neither does the Defence explain how exactly has the Chamber shifted in the Judgment the burden of proof to the Defence or what is the exact burden of proof allegedly placed by the Chamber on the Defence.¹⁰⁰
68. Contrary to the Defence's submissions, nothing in the Court's legal texts suggests that "the Prosecution bears the burden to disprove grounds excluding criminal responsibility beyond reasonable doubt". The Chamber has stated clearly that in the absence of specific provision in the Statute related to the burden and standard of proof regarding grounds excluding criminal responsibility, the general provisions of the Statute apply, i.e. Articles 66(2) and 66(3). Furthermore, the Chamber has explained that while the burden to prove the guilt of the Accused beyond reasonable doubt is on the Prosecutor, it is the Court that must be convinced of the guilt of the accused beyond reasonable doubt.¹⁰¹

G. Alleged errors concerning rejection of the Defence's submissions on the prejudicial evidentiary regime (grounds 9 & 10)

69. The Defence fails to substantiate its allegations that the Chamber erred in law and procedure by implementing a prejudicial evidentiary regime, which deferred admissibility, relevance and probative value assessments until the Judgment, and in failing to provide a reasoned statement on many procedural and evidentiary objections raised by the Defence at trial.¹⁰² The Appeal Brief refers only to the pleadings and arguments the Defence had raised at trial which were already considered by the Trial Chamber, including in the Judgment. Importantly, the Defence does not point to any specific errors in the Trial Chamber's reasoning addressing in detail and refuting the arguments raised by the Defence with references to established jurisprudence of the Court.¹⁰³

⁹⁹ Appeal Brief, para. 211.

¹⁰⁰ Appeal Brief, paras 216-219.

¹⁰¹ Trial Judgment, para. 2455.

¹⁰² Notice of Appeal, ground 9.

¹⁰³ Trial Judgment, paras 94-102.

70. For example, the Defence, to support its position continues to rely on the decision of the Appeals Chamber in the *Bemba* case rendered in an interlocutory appeal,¹⁰⁴ even though the Chamber explained in the Judgment that reliance on that decision is erroneous in light of the Appeals Judgment in the *Bemba et al.* case.¹⁰⁵ Furthermore, Article 64 (9) of the Statute and rule 64 RPE in no way bar the Chamber from deciding on the admissibility, relevance and probative value of evidence in the Judgment. Therefore, this ground of appeal should be dismissed.
71. Ground 10 of the Appeal alleges that the Chamber erred in law and in procedure by concluding that the Defence failed to demonstrate prejudice to the fair trial rights of Dominic Ongwen and erred in refuting the Defence's allegations, *inter alia*, in respect to the admissibility of parts of the report of the PCV-0001, the rebuttal expert report of P-0447, and the role that P-0078 in obtaining evidence.¹⁰⁶
72. With regard to PCV-0001's expert report, the Defence alleges that admission of the full report violated Dominic Ongwen's fair trial rights.¹⁰⁷ The Defence in its argumentation disregards the fact that the expert report in question concerned the impact of SGBC on victims and is not a legal assessment of the evidence and facts in the case against Dominic Ongwen.¹⁰⁸ Therefore admission of the full report into the record did not violate any fair trial rights of Dominic Ongwen. Even if one was to reach a different conclusion, admission of the full report would cause no prejudice to the Accused.
73. In particular, the Defence takes issue with PCV-0001'S report which included the term 'sex-slave' which they argue is a legal conclusion. In addition, the Defence also contends that the Chamber should have informed the parties of how it

¹⁰⁴ Appeal Brief, para. 233; Defence Closing Brief, para. 104; See also Prosecutor v. Jean Pierre Bemba Gombo, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber II entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", ICC-01/05-01/08-1386, para. 37.

¹⁰⁵ Trial Judgment, para. 237, ftn 266; See also Prosecutor v. Bemba et al., 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, 8 March 2018, paras 593-594.

¹⁰⁶ Notice of appeal, ground 10. The Defence argues this ground of appeal under three separate headings in the Appeal Brief. With regard to alleged errors concerning expert report of PCV-0001 together with ground 9, with regard to the rebuttal expert report of P-0447 together with grounds 7,8, 25 and 45, and with regard to the role of P-0078 under ground 13.

¹⁰⁷ Appeal Brief, paras 227-233.

¹⁰⁸ Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, ICC-02/04-01/15-1199-Red, 6 March 2018, paras 33-37.

considered the relevance, probative value and potential prejudice of each piece of evidence, including PCV-0001's report.

74. The LRVs refer to the Trial Chamber's previous findings on this matter that 'it was never alleged that PCV-1's expertise extended to being able to provide substantive comments on the accused's responsibility or elements of the crimes charged. Therefore, even if certain comments inadvertently appear to do so- those comments cannot be relied upon to establish the accused's responsibility for the crimes.'¹⁰⁹ The LRVs concur with the Trial Chamber and submit that the Chamber did not err in rejecting the Defence submissions on the evidentiary regime.

75. As regards P-0447, the Defence argues 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"¹¹⁰ and that the rebuttal evidence of P-0447 was repetitive.¹¹¹

76. The LRVs submit that the Court's legal texts do not explicitly regulate rebuttal evidence, however, as noted by the Chamber "it is in principle possible to hear 'rebuttal evidence' under the Rome Statute system" and the Chamber enjoys wide discretion to limit it or preclude.¹¹² The Chamber has extensively explained its reasons for granting P-0447's rebuttal evidence.¹¹³ Specifically, the Chamber explained that:

- i. its decision was made in light of its obligations under Regulation 43 of the Regulations of the Court and the Prosecution's submission that it is "almost inevitable that [it] will ask the Trial Chamber for permission to call evidence in rebuttal";¹¹⁴
- ii. none of the experts called by the Prosecution had an opportunity to address the second report of the Defence Expert Witnesses, which contained new information;¹¹⁵ and

¹⁰⁹ 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

¹¹⁰ Defence Appeal Brief, para. 223.

¹¹¹ Defence Appeal Brief, para.221-224.

¹¹² Decision on Requests related to the Testimony of Defence Expert Witnesses D-0041 and D-0042, ICC-02/04-01/15-1623, 1 October 2019, paras 12, 16.

¹¹³ *Ibid.*, para. 14-16.

¹¹⁴ *Ibid.*, para. 13.

¹¹⁵ *Ibid.*, para. 14.

- iii. the subject matter of the evidence of the Defence Expert Witnesses was of high importance in this case;
- iv. the rebuttal evidence of P-0447 was not caused by any negligence or fault of the Prosecution.¹¹⁶

These reasons show that the Chamber's decision to grant P-0447 rebuttal evidence did not violate Dominic Ongwen's fair trial rights and caused no prejudice to him.

77. The Defence objects to P-0078's actions as an intermediary for the Prosecution given that he was involved in the collection of evidentiary items and locating insider witnesses. According to the Defence, P-0078's status as a member of the UPDF requires that the Chamber should have exercised caution when determining the admissibility of evidence provided by Article 56 witnesses procured by P-0078.¹¹⁷ The LRVs concur with the Chamber's findings that the Defence's objections are 'unsubstantiated and irrelevant'.¹¹⁸ The Defence fails to substantiate why or how P-0078's status as a member of the UPDF or his actions were fundamentally unfair to the Defence or materially affected the reliability of the Judgment.

H. Alleged failure to provide translation and interpretation (ground 11)

78. The Defence alleges that Dominic Ongwen's right to translation was violated what exacerbated the notice violations.¹¹⁹ Based on the Appeal Brief it is difficult to tell exactly which translation/interpretation of which documents/evidence has, according to the Defence, led to violation of Dominic Ongwen's rights. Neither does the Defence provide any legal basis from which it derives the right to translation of documents such as "Article 56 witness statements, and witness statements during trial."¹²⁰ To a large extent the Defence's reasoning of this ground overlaps with its other ground concerning the alleged error of proceeding to trial based on an illegal plea (ground 4).¹²¹ Therefore, the LRVs incorporate their observations presented in response to that ground (see paras 34 to 43 above).

79. Additionally, the LRV submit that the right to translation under Article 67(1)(f) is not absolute. To the contrary, the Court has adopted a rather restrictive approach to the right to translation and interpretation, specifying that "only those documents that are fundamental to ensuring that the accused fully understands the 'nature,

¹¹⁶ Ibid., para. 16.

¹¹⁷ Defence Appeal Brief, para 244.

¹¹⁸ Trial Judgment, para. 525.

¹¹⁹ Appeal Brief, paras 235, 237, 238.

¹²⁰ Appeal Brief, para. 236.

¹²¹ Compare Appeal Brief paras 235-237 with paras 59, 62.

cause and content of the charge and thus to adequately defend himself or herself must be translated.”¹²²

80. In light of this jurisprudence and the fact that the Defendant was provided with translation of documents that allowed him to understand the nature, cause and content of the charges against him, this ground of appeal should be dismissed.

I. Alleged errors concerning the Chamber’s conclusion that it did not discriminate against the Appellant based on mental disability (grounds 14 & 15)

81. The Chamber has addressed the Defence’s allegations concerning “discriminatory conduct of proceedings” in the Judgment and rightly decided that they are “entirely untenable” and “baseless”.¹²³

82. While alleging discriminatory treatment, nowhere has the Defence explained how the Chamber’s conduct of proceedings has put Dominic Ongwen in a disadvantageous position due to his alleged disability when compared to other defendants in a comparable situation before the ICC.

83. As regards the alleged refusal to accommodate the sitting schedule to the needs of Dominic Ongwen, the Defence conveniently omits in the Appeal Brief the Chamber’s analysis of the adaptations that were made in this regard.¹²⁴ The analysis of facts provided by the Chamber in the Judgment shows that the allegations made by the Defence are unfounded.

84. As to the alleged violation of Dominic Ongwen’s right to decide whether or not to testify, it is unclear why the Defence claims that the Chamber discriminated Dominic Ongwen by deciding not to grant the Defence request for a medical examination made pursuant to rule 135 RPE on 16 September 2019. The Chamber has addressed this allegations in the Judgment, noting that it based its assessment and ruling on information provided by independent medical experts, taking into account Dominic Ongwen’s specific situation.¹²⁵ The reasons for refusing the

¹²² *Prosecutor v. Bemba et al*, ICC-01/05-01/13-177, Decision on the Defence request for an order requiring the translation of evidence, 11 Feb. 2014, para. 6.

¹²³ Compare: Defence Closing Brief, paras 120-135; Trial Judgment, paras 106-115; Defence Appeal Brief, paras 247-255.

¹²⁴ Trial Judgment, para. 114, ftn 223-224.

¹²⁵ Trial Judgment, para. 112.

Defence's request were thoroughly explained in the Chamber's decision on the matter.¹²⁶

85. The Defence has failed to present, be it in the Closing Brief or the Appeal Brief, any reasons indicating that the Chamber's decision could not have reasonably been reached based on the relevant evidence in the record of the case. The Defence erroneously considered the decision in question as discriminatory only because it disagreed with the Defence submissions or assessed evidence differently than the Defence would have preferred.

J. Alleged violation of fair trial rights due to denial of requests for leave to appeal (ground 16)

86. The fair trial standards do not grant the defendant with a right to an interlocutory appeal as such. Comparison of the number of requests for leave to appeal and the number of decisions granting them does not calculate a fair trial standard. Each of the Defence's requests for leave to appeal was considered individually, either by the Pre-Trial Chamber or the Trial Chamber. Each request was assessed in light of the requirements set out in Article 82(1)(d) of the Statute and with regard to each a reasoned decision in writing was issued. The Defence fails to explain how and why the refusal to grant each of the requests for leave to appeal affected the fair trial rights of the Accused, what leaves the Defence's argument speculative and insufficiently substantiated.

K. Alleged violations concerning Defence's requests for permanent stay of proceedings (ground 17)

87. The Trial Chamber's Judgment did not find any of the violations alleged by the Defence in the Closing Brief with respect to this issue and therefore concluded that a permanent stay of proceedings was not justified.¹²⁷

88. According to the Court's jurisprudence, permanent stay of proceedings is available as a remedy "where it would be 'repugnant or odious to the administration of justice to allow the case to continue, or where the rights of the accused have been breached to such an extent that a fair trial has been rendered impossible'".¹²⁸

¹²⁶ Decision on Further Defence Request for a Medical Examination, ICC-02/04-01/15-1622, 1 October 2019, paras 10-29.

¹²⁷ Trial Judgment, paras 45, 72, 82, 84, 93, 105, 120.

¹²⁸ Decision on Defence request for stay of proceedings with prejudice to the Prosecution, ICC-01/04-02/06-1883, 28 April 2017, para. 20.

89. To justify a permanent stay of proceedings one must show that “(i) the rights of the accused have been violated to such an extent that the essential preconditions of a fair trial are missing; and (ii) there is no sufficient indication that this will be resolved during the trial process.”¹²⁹ A stay of proceedings is “an exceptional remedy to be applied as a last resort’, and that ‘not every violation of fair trial rights will justify the imposition of a stay’. The Appeals Chamber has emphasised that the threshold for a trial chamber to impose a stay of proceedings is high, and that a trial chamber ‘enjoys a margin of appreciation, based on its innate understanding of the process thus far, as to whether and when the threshold meriting a stay of proceedings has been reached.”¹³⁰ None of the situations described above arose in the course of proceedings against Dominic Ongwen.
90. The Defence’s claim as to the Chamber’s violation of Dominic Ongwen’s family life included in the Appeal Brief under ground 17 was not included in the Defence Notice of Appeal. In footnote 266 of the Appeal Brief, the Defence amends its Notice of Appeal to include this ground.
91. The LRVs submit that this ground of appeal should not be considered by the Appeals Chamber. Regulation 61 of the Regulations of the Court establishes a procedure concerning variation of grounds of appeal. According to the regulation “an application for variation of grounds of appeal shall state the name and number of the case and shall specify the variation sought and the reasons in support thereof” (regulation 61(1)). Furthermore, the application for variation shall be filed as soon as the reasons warranting it become known which was ignored by the Defence (regulations 61(2)). Participants may file a response within seven days of notification of the application for variation (regulation 61(3)).
92. The Defence should have applied for variation of grounds of appeal immediately after the Judgment was issued. This was not the case in question and therefore a variation is impermissible and this ground of appeal should be dismissed.
93. Regardless of the above, the Appeals Chamber should dismiss this ground as it constitutes repetition of the Defence arguments from trial which were already thoroughly addressed by the Chamber in the Judgment.¹³¹ The Defence does not explain why it considers the Chamber’s findings in this regard erroneous but explicitly repeats and refers to the arguments from its Closing brief.¹³²

¹²⁹ Ibid., para. 21.

¹³⁰ Ibid., para. 22.

¹³¹ Trial Judgment, paras 116-120.

¹³² Appeal Brief, para. 262.

L. Alleged violation of fair trial rights due to the Chamber's denial of a SGBC expert (ground 18)

94. The Defence repeats on appeal re-litigates the Chamber's denial of the Defence's request to call an expert on SGBC which were already addressed by the Chamber.¹³³ The Defence's argument mischaracterises the actual analysis performed by the Chamber in its decision denying the Defence request to call the expert witness on SGBC and ignores the remaining part of the Chamber's reasoning in this regard.¹³⁴
95. The Defence claims that the Chamber's decision was unfair and reflected a double standard that the Chamber allegedly applied to the Defence's and to the CLRV's request to call a SGBC expert witness.¹³⁵
96. This "double standard" argument, however, ignores the difference in the content of the evidence given by CLRV's SGBC expert and the one that was expected from the Defence's expert. The Defence instruction to the expert witness concerned largely the expert's knowledge about the functioning of the LRA in relation to marriages and sexual relations, issuing of orders within the LRA, sexual morality and concept of rape, as well as punishment regimes within the LRA.¹³⁶ The CLRV's expert was called to testify about the impact of SGBC on victims and not about specific facts concerning the case against Dominic Ongwen.¹³⁷
97. Moreover, the "double standard" argument misrepresents the substance of the Chamber's decision rejecting the Defence's SGBC expert. In that decision the Chamber considered also other important factors that influenced its decision. Specifically, the Defence request was filed over a year after the deadline set by the Chamber to submit final lists of witnesses, while the expert and his work were well known to the Defence at least from the beginning of the trial, the Defence did not provide any explanation of the delay. Finally, the Chamber rejected the Defence's request, however, it allowed it to submit "any existing academic work of [this expert –]D-158".¹³⁸

¹³³ Trial Judgment, para. 72.

¹³⁴ Ibid.

¹³⁵ Appeal Brief, para. 266-267.

¹³⁶ See 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. 6.

¹³⁷ Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, ICC-02/04-01/15-1199-Red, 6 March 2018, paras 33-37.

¹³⁸ 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, 13 August 2019, paras 13-22.

98. In conclusion, the Defence fails to explain in the Appeal Brief what legal error has the Chamber allegedly made. Furthermore, it fails to show that the Chamber has exercised her discretion based on an erroneous interpretation of the law or on patently incorrect conclusions of fact. Neither has the Defence shown that the decision of the Chamber was so unfair and unreasonable as to constitute an abuse of discretion.

M. Alleged errors concerning the report of Prof. de Jong (grounds 19 & 42)

99. The LRVs submit that the Chamber was correct in finding that the report of Prof. de Jong was not prepared for the purposes of assessing the state of Dominic Ongwen's mental health at the time of his conduct relevant for the charges.¹³⁹ The said expert report was prompted by the Chamber to establish whether Dominic Ongwen as of December 2016 suffered any mental condition or disorder.¹⁴⁰ As such the report has no material bearing on the elements of the affirmative defences under Article 31(a) and (d) of the Statute.

100. Furthermore, the Chamber noted that, according to Prof. de Jong's report, despite suffering mental health illnesses Dominic Ongwen "is oriented in time, oriented vis-à-vis his environment and himself. He has a good attention span and maintains his concentration after hours of interviewing".¹⁴¹

N. Alleged errors concerning impermissible concurrence of crimes (grounds 20, 21 & 22)

101. The Defence's argument as to applicability of the *ne bis in idem* principle as provided for in Article 20 of the Statute is erroneous. Most importantly, this provision should not and cannot be interpreted, as the Defence suggests, through application of the *ne bis in idem* principle by selected courts or tribunals in national jurisdictions. Literal, teleological and historical interpretation of Article 20 of the Statute shows that it is erroneous to aver that this provision may serve as "the foundation for assessing concurrence issues arising within a single trial".¹⁴²

102. Accordingly, the Chamber rightly relied on the *Bemba et al.* Appeals Judgment,¹⁴³ which "found no error in the application of the test based on materially distinct legal elements in the concrete circumstances", while noting that "there may be

¹³⁹ Trial Judgment, para. 2578; See also: paras 109-110.

¹⁴⁰ Trial Judgment, para. 109.

¹⁴¹ Trial Judgment, para. 110.

¹⁴² Defence Appeal Brief, para. 278.

¹⁴³ Trial Judgment, para. 2749, referring to *Bemba et al.* Appeals Judgment, para. 748.

situations in which crimes requiring *in abstracto* different legal elements may nevertheless be in impermissible concurrence".¹⁴⁴ Therefore, ground 20 of appeal should be dismissed/rejected.

103. Furthermore, the LRVs strongly object to any suggestion to the principle of consumption with respect to war crimes and crimes against humanity based on the same underlying conduct. Such suggestions present a complete overhaul of the current regime of international law. Victims oppose any attempt to subsume the different types of harm that they suffered into a single crime.¹⁴⁵
104. 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. Crimes against humanity and war crimes aim to deter different types of behaviour and any attempt to amalgamate the two must be rejected by the Appeals Chamber.
105. Furthermore, the LRVs object to the Defence suggestion that the crime of rape is consumed by the crime of sexual slavery. The different categories of crimes such as rape, sexual slavery and forced marriage accurately reflect the gravity of the harm suffered by victims. In addition, the LRVs disagree with the Defence assertion that both rape and sexual slavery are based on a single culpable intention.¹⁴⁶ Indeed, even if the Appellant was convicted of fewer crimes based on the Defence's arguments, the fact remains that the Appellant would be convicted of SGBC and none of these so-called errors would materially affect the impugned decision. Therefore, the Defence arguments on these issues do not meet the standard for appellate review.
106. The Trial Chamber explained clearly and exhaustively why the conviction of Dominic Ongwen for war crimes and crimes against humanity based on the same underlying conduct was permissible. In doing so the Trial Chamber relied on established jurisprudence and practice of the Court and rightly took into account contextual elements of crimes against humanity and war crimes in its assessment of whether concurrence of such analogous crimes is permissible.
107. The LRVs note that only cumulative conviction of Dominic Ongwen for war crimes and crimes against humanity will adequately take into account all aspects

¹⁴⁴ Trial Judgment, para. 2796, referring to Bemba *et al.* Appeals Judgment, para. 751.

¹⁴⁵ For example, the Defence's assertion that rape can be subsumed under the crime of sexual slavery, Defence Appeal Brief, para. 288.

¹⁴⁶ Defence Appeal Brief, para. 294.

of his criminal conduct and reflect the totality of the harm of the victims of the crimes in question.

108. Furthermore, the Trial Chamber rightly found that rape and sexual slavery are permissible concurrence and that the crime of sexual slavery does not consume the crime of rape. Although sexual slavery involves causing the person enslaved to engage in acts of sexual nature, these acts can include acts of rape but are not limited to them. As explained by the Chamber, the sexual character of the acts “may refer to acts carried out through sexual means or by targeting sexuality”. Specificity of the criminal conduct of Dominic Ongwen in question – facts of the case, including brutality of the individual acts of rape, indicate that the crimes of rape cannot be fully consumed by the crimes of sexual slavery, neither the crimes of rape are subsidiary to the crimes of sexual slavery. Only concurrence of these crimes can reflect the full scope of Dominic Ongwen’s culpable conduct.

109. Contrary to Defence’s assertions, the Trial Chamber analyzed in detail the relation between the crimes of the other inhumane act of forced marriage, sexual slavery and rape, explaining that these crimes exist independently of each other. The Chamber noted in particular that neither sexual enslavement nor the crime of rape penalize imposition of “conjugal association” as the crime of forced marriage does.

110. Additionally, the Chamber explained that victims of forced marriage suffer also from different aspects of harm than victims of rape or sexual enslavement. The Chamber specified in this regard that victims of forced marriage suffer harm which can include being ostracized from the community, mental trauma, the serious attack on the victim’s dignity, deprivation of fundamental right to choose his or her spouse. The facts of the case show that many victims of forced marriage participating in the case against Dominic Ongwen suffer from these types of harm, which can and passes on to the next generation.

O. Alleged error concerning evidentiary rulings (ground 23)

111. The LRVs submit that the decision of the Trial Chamber not to make evidential rulings does not warrant the intervention of the Appeals Chamber, as it does not materially affect the impugned decision.

112. The Defence Requests provide no authority for why a Chamber should be required or convinced to modify the rules for the conduct of proceedings part way through because those rules “prejudice” the defence. Rather than claiming a vague concept of prejudice, in order to require the modification of the procedural rule for

trial, the LRVs submit that the Defence would be required to show that those rules are inconsistent with the Statute or RPE.

113. Furthermore, in terms of fair trial rights, there is no right to a particular form of treatment or analysis of the evidence under the Rome Statute or international human rights law. This was established for the first time in 1988, in the *Schenk* case before the ECtHR.

114. The ECtHR stated that “[W]hile Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”) guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such...”.¹⁴⁷ This continues to remain the standard implemented by the ECtHR to date.

115. In *Van Mechelen and Others*, the ECtHR determined that admissibility of evidence is primarily a matter for regulation by national law and, as a general rule, it is for the national courts to assess the evidence before them. Therefore, implying that there is no human right standard as to the treatment of evidence by a tribunal. The ECtHR determined its role was “not to give a ruling as to whether treatment of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which the evidence was taken were fair.”¹⁴⁸

**P. Errors in respect to the Appellant’s childhood, Abduction and life in the LRA
(grounds 26 & 47)**

116. The LRVs oppose this ground in whole. The ground as framed is but a mere disagreement with the findings of the Chamber. There is no error of law or fact identified.

117. In dismissing Dominic Ongwen’s arguments about his childhood especially his abduction and life in the LRA, the Chamber justifiably found that evidence about the Appellant’s life in the LRA following his abduction was not relevant for the determination of whether a threat under Article 31(1)(d) of the Statute existed at the time of the conduct relevant to the charges.¹⁴⁹

¹⁴⁷ ECtHR, *Schenk v. Switzerland*, Application no. 10862/84, 12 July 1988, § 46.

¹⁴⁸ ECtHR, *Van Mechelen and Others v. The Netherlands*, Applications nos. 21363/93, 21364/93, 21427/93 and 22056/93, 23 April 1997, § 50

¹⁴⁹ Trial Judgment, para. 2592.

118. The Chamber further recalled and noted that with respect to Dominic Ongwen's mental development and status, based on the evidence assessed before it, there was no mental disease or defect that was identified hence no basis to rely on the said evidence.¹⁵⁰

Q. Alleged errors concerning Article 31(1)(A) affirmative defence (grounds 27, 29, 31, 32, 35-41)

i) Failure to Provide a reasoned statement

119. The LRVs oppose this ground in whole. The ground as framed is but a mere disagreement with the findings of the Chamber. There is no error of law or fact identified in the finding that there was no ground excluding criminal responsibility under Article 31 (1) (a) of the Statute thus materially affecting the Judgment.

120. The Chamber provided a reasoned statement for its conclusion. It set out the law and test to be met in an Article 31(1)(a) scenario. It followed this with a discussion of the expert evidence of both the Prosecution and Defence witnesses and other corroborative evidence from the trial¹⁵¹ finding amongst others that the Appellant's mental health experts:

- i. Blurred the roles of treating physician and forensic expert thereby negatively affecting the reliability of their roles.
- ii. Heavily relied on clinical interviews whilst disregarding the evidence from the trial on the one hand and the disregard for DSM 5 in preference for outdated scale DSM 4 without proper justification on the other undermines the reliability of their evidence.
- iii. Greatly contradicted themselves.
- iv. Failed to take into account other sources of information about the Appellant readily available to them.
- v. Excluded in their assessment malingering and use of other tools to establish malingering in the Appellant.
- vi. Analysis is generalised and their findings are not anchored on a specific period in the context of the charges against the Appellant.

121. The Chamber therefore did not err in its conclusions owing to the incompatibility of its findings with an Article 31(1)(a) defence.

¹⁵⁰ Trial Judgment, para. 2592.

¹⁵¹ Trial judgment, para. 2458 to 2574

ii) Total Rejection of the Defence Experts' reports

122. The Chamber rightly found that it was unable to rely on the Appellant's expert witnesses' report owing to the six factors identified and discussed in ground 28 above which made their reports incompatible with a finding excluding the Appellant from criminal liability.¹⁵²

iii) P-0446's Report and its Great Assistance to the Chamber

123. The LRVs oppose this ground in whole. The ground as framed is but a mere disagreement with the findings of the Chamber. There is no error of law or fact identified.

124. The Chamber's conclusion about the clarity and convincing nature of Professor Mezey's report was informed not by the impugned statement alleged by the Appellant under this ground but rather by the entire report. The Chamber particularly demonstrated the overwhelmingly convincing nature of her evidence by relying on the extracts of her testimony that clearly explained Post Traumatic Stress Disorder, Depressive Disorder, Dissociative Identity Disorder and their incompatibility with an adequately functioning and thriving in the LRA by the Appellant¹⁵³ one the first part and the fact that the said explanations are consistent with the rest of the evidence assessed by the Chamber.¹⁵⁴

iv) P-0447's Evidence

125. The findings and conclusions of the Chamber on the evidence of Professor Weierstall-Pust are informed foremost by his testimony that notwithstanding that he had not studied medicine, he had obtained additional qualifications to enable him diagnose and treat people moreover, there was nothing inconsistent with a Psychologist and Psychiatrist when applying international standards arriving at the same conclusion.¹⁵⁵ They were also informed by assessment of the witness' testimony to the effect that whilst Dominic Ongwen may have been exposed to a traumatic event and may suffer from some mental disorder, there is no evidence that shows that his functioning was impaired by any form of mental illness during the charged period.

126. The evidence rather convincingly shows that a disorder such as PTSD is characterised by avoidance of trauma reminders as well as not functioning

¹⁵² Trial Judgment, para. 2528 - 2574

¹⁵³ Trial Judgment, para 2471 - 2477.

¹⁵⁴ Trial Judgment, para. 2478.

¹⁵⁵ Trial Judgment, para. 2487.

normally amongst others.¹⁵⁶ This evidence of manifestations of a severe disorder/s contradicts the evidence that showed the Appellant being fearless, a good administrator, likeable and hardworking. It is thus incompatible with the conclusion that Dominic Ongwen suffered from severe mental illness in accordance with Article 31.

v) Methodological concerns with the Prosecution Experts

127. The LRVs submit that in arriving at its conclusions on the methodological approaches adopted by the Prosecution experts, the Chamber reviewed the issue related to the refusal by Dominic Ongwen to be psychiatrically examined on the one hand and the fact that the said experts in their respective reports acknowledged this limitation but at the same time recognised that their reports were not in any way impacted as they relied for their conclusions on material that was given to them.¹⁵⁷

vi) Evidence of the Defence Experts on Whether Lay Persons would have Noted Symptoms of Mental Illness

128. The Chamber does not misrepresent the evidence of the Defence experts. The conclusions the Chamber draws are based on a sound analysis of evidence about the Appellants personality as described by individuals who lived and stayed close to him on the one hand and other evidence received in the record of the case. This assessment is made against the evidence suggesting severe mental health on his part by the Appellant's experts. Nothing in the said evidence suggests that the individuals who lived with him identified a conduct or a symptom of mental disease or defect moreover that for such identification one did not have to be a mental health expert as suggested by the Appellant.¹⁵⁸

vii) Evidence from "ordinary LRA members" who Lived/Worked with the Appellant about his Mental Health

129. The evidence of LRA members who lived with the Appellant is evidence that the Chamber received in the course of witness testimonies especially when asked to comment about the personality of the Appellant within the charged period. The Chamber particularly considered the testimonial accounts of P-0142, P-0231, P-0205, P-0264, Daniel Opio, Joseph Okilan, D-0026, D-0027, D-0118, D-0032, P-0099, P-0101, P-0214, P-0226, P-0227, P-0235, P-0236. Four of these were Defence

¹⁵⁶ Trial Judgment, para. 2486-2496.

¹⁵⁷ Trial Judgment, para. 2458-2469.

¹⁵⁸ Trial Judgment, para. 2500-2521.

witnesses who had lived closely and associated with the Appellant. Moreover, the latter seven above were his so called “wives” and were therefore in a position to positively notice if any behavioural change or mannerisms symptomatic of mental ill health in the Appellant.¹⁵⁹

130. The Chamber was thus fortified in relying upon the evidence of the said individuals because it found their testimonies and rightly so to be corroborative of the findings of the Prosecution experts¹⁶⁰ and not the Appellant’s experts.

131. The Chamber in making conclusions about witnesses who lived in close proximity with the Appellant not observing symptoms suggesting the Appellant’s mental health disease or defect was informed by its consideration of, amongst others, the general questions put to the witnesses and the spontaneous answers as well as the coherence in their testimonies.¹⁶¹ There are no inferences outside the evidence of the witnesses and that of the experts that the Chamber makes to conclude that the witnesses did not identify any symptoms showing mental disease on the part of the Appellant.

132. The Chamber does not make any claims of looking for corroborative evidence as alleged. The Chamber noted that the mental health experts, and other witnesses are not qualified to make mental diagnoses. The Chamber relies on the accounts of the impugned witnesses as it explained because the said individuals who lived in close proximity to the Appellant might have descriptions of the conduct of the Appellant which correspond to symptoms of mental disorders¹⁶² and the descriptions provided were found not to suggest any symptoms pointing to any mental disorders.¹⁶³

viii) Defence Evidence about Masking and Resiliency

133. The Chamber in rejecting the Defence suggestion that the Appellant was masking and exercised resilience, considered the evidence before it particularly the failure of the Appellant’s experts to consider other corroborative sources,¹⁶⁴ on the one hand and the evidence of the Prosecution experts to the effect that masking of symptoms of severe mental health disorders over a long period of time is not possible, on the other. As explained by Professor Weierstall-Pust and accepted by

¹⁵⁹ Trial Judgment, para. 2497-2521

¹⁶⁰ Trial Judgment, para. 2518.

¹⁶¹ Trial Judgment, para. 2517.

¹⁶² Trial Judgment, para. 2501

¹⁶³ Trial Judgment, para. 2497-2521.

¹⁶⁴ Trial Judgment, para. 2522-2554.

the Chamber, in cases of severe mental health disorders the person suffering the disorder cannot control his thought processes, behaviours and feelings on the one hand and the fact that the person lacks insight in the problem with their feelings and behaviour and therefore cannot control them.¹⁶⁵ The said explanations by Professor Weierstall-Pust in the context of the other evidence on record confirm that it was impossible to mask the said symptoms or be resilient if the Appellant suffered any mental disease or defect.

ix) Defence Experts D-0041 and D-0042 and their diagnoses of the Appellant's mental disorders

134. The Chamber did not misrepresent the evidence on the record. In making its conclusions not to rely on the evidence of the Appellant's experts, it assessed the said evidence in the context of the other evidence and Prosecution expert testimony and found overwhelming evidence of factors militating against any such reliance. The Chamber justifiably relies on the following factors not to rely on the Appellant's experts evidence namely:

- i. Blurring of roles of a treating physician and a forensic expert which impacted on the reliability of their reports.
- ii. Failing to rely on scientifically validated methods and tools for the preparation of a forensic tool particularly; (a) the use of open ended questions and giving clues about what they were looking for was inadequate for establishing malingering in the Appellant and was not supported by evidence; (b) the exclusive reliance on clinical interviews as opposed to the wealth of assessment recommendation from scientific literature; (c) the lack of distinction between data and inferences; (d) and the use of DSM IV an outdated tool as opposed to use of the standard DSM V.
- iii. Unexplained contradictions between various statements and observations rendering their evidence incoherent and diagnoses inconsistent and ultimately unreliable. Evidence such as having long term good memory and no amnesia about events in the bush yet they diagnosed dissociative identity disorder whose symptoms include amnesia in the form of gaps in recollection of daily events among others
- iv. Failing to take into account other sources of information about the Appellant which were readily available to them. It is noted that the Appellant's expert Professor Ovuga acknowledged that corroboration of the account given by an accused person is important but in spite of the this the experts didn't source for other sources of information.

¹⁶⁵ Trial Judgment, para. 2555-2557.

- v. Failing to address the possibility of malingering. The Appellant's experts' explanations including that the Appellant had nothing to benefit from malingering and for not having sufficient time was found unconvincing in light of the obvious benefit "exclusion of criminal responsibility" as well as the wealth of other evidence.

Offering general analyses and findings not anchored on the relevant period and the factual contexts that the Appellant acted in.

135. The said factors render the Appellant's experts evidence totally unreliable in the face of more reliable evidence of the Prosecution experts and other evidence received in the record of the case.

R. Alleged errors concerning the Chamber's disregard of evidence of the abduction of the Appellant (ground 28)

136. The ground as drafted is simply a disagreement with the findings of the Chamber. The Defence failed to identify an no error of law or fact.

137. In dismissing evidence about Appellant's abduction, indoctrination and childhood experience relied upon by the Appellant in his defence the Chamber justifiably noted that this evidence is not relevant to the determination of the issue whether a threat under Article 31(1)(d) existed at the time of the conduct relevant to the charges. It further found justifiably that:

Even if the threat to Dominic Ongwen were to start at the time of his abduction, that threat would have to express itself at the time of his conduct during the period of the charges – and be discernible from the abundant evidence which relates to that time. Also, as concerns Dominic Ongwen's mental development and status, the Chamber recalls that, as discussed above, no mental disease or defect at the time of the conduct relevant to the charges was identified in Dominic Ongwen.

138. The Chamber in further addressing the Appellant's arguments that he should be acquitted owing to the cumulative effect from the combination of lack of capacity to appreciate the unlawfulness of the conduct or to conform to the conduct to law and the extensive threats under which he lived and acted, correctly observed that:

the two grounds for excluding criminal responsibility cannot coexist even in the abstract, given that one is premised on a destruction of the person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of

the law, and the other on a conscious choice to engage in conduct which constitutes a crime based on an evaluation of the harm that is caused.¹⁶⁶

S. Alleged errors in respect to the Chamber's conclusions related to culture and mental health issues, and its assessment of the Prosecution's Experts on culture (grounds 30, 34, 36 & 43)

i) The Chamber's assessment of evidence given by P-0446 and P-0447 (ground 30)

139. The LRVs submit that the Chamber correctly found that P-0446 and P-0447 did not ignore or dismiss cultural factors as it noted that there was a general agreement amongst all the experts that in the assessment of mental illness, cultural considerations have to be taken into account.¹⁶⁷ The Chamber further noted that P-0446 and P-0447 also explained how they arrived at their conclusions of the Appellant's mental health which conclusions do not show that cultural factors were ignored.¹⁶⁸

140. The question of termites as food rather than a joke and the word "blues" not being in many African languages was dismissed by the Chamber as trivial because it found that these concerns by the Appellant did not go to the issue alleged by the Appellant's experts that the Prosecution experts minimised and dismissed the role of culture in the assessment of the Appellant's mental health.¹⁶⁹ Accordingly no error of law or fact was occasioned by the Chamber.

ii) The Chamber's assessment of evidence given by P-0445 (ground 33)

141. The LRVs submit that the Appellant's premise in this ground is erroneous. The Defence simply relies on its submissions in its closing brief to allege errors of law and or fact. There is no selective use of Dr. Abbo's report by the Chamber to prejudice the Appellant.

142. The Chamber after reviewing the evidence of Dr. Abbo¹⁷⁰ found her evidence "pertinent and valuable for its findings."¹⁷¹ Nothing in the said conclusion of the Chamber remotely suggests that it selectively applied Dr. Abbo's report to dismiss

¹⁶⁶ Trial Judgment, para. 2671.

¹⁶⁷ Trial Judgment, para. 2462.

¹⁶⁸ Trial Judgment, para. 2462.

¹⁶⁹ Trial Judgment, para. 2458-2463

¹⁷⁰ Trial Judgment, para. 2479-2484.

¹⁷¹ Trial Judgment, para. 2485.

the Appellant's Article 31(1)(a). There's accordingly no error of law or fact occasioned by the Chamber.

iii) Admissibility objections as to evidence of P-0447 (ground 34)

143. The LRVs submit that it appears from the Appellant's Appeal Brief that this ground was abandoned by the Appellant as no submission can be deduced from the said appeal brief. In any event there is nothing in the Appellant's Appeal brief that suggests and points the Chamber occasioning a material error of law or fact.

iv) Defence experts on whether lay persons would have noted some symptoms of mental illness (ground 36)

144. The Chamber does not misrepresent the evidence of the Defence experts. The conclusions the Chamber draws are based on sound legal analysis of evidence about the Appellants personality as described by individuals who lived and stayed close to him on the one hand and other evidence received in the record of the case. This assessment is made against the evidence suggesting severe mental health on his part by the Defence experts. Nothing in the said evidence suggests that the individuals who lived with him identified a conduct or a symptom of mental disease or defect, moreover that for such identification one did not have to be a mental health expert as suggested by the Appellant.¹⁷²

145. The LRVs submit that it appears from the Appeal Brief that ground 36 was abandoned by the Appellant as no submission can be deduced from the Brief of its submission. In any event it is addressed elsewhere moreover there is nothing in the Appellant's Appeal brief that suggests and points the Chamber occasioning a manifest error of law or fact.

v) The Chamber's assessment of Prof. Musisi's (ground 43)

146. The LRVs oppose this ground in whole. The ground as framed is but a mere disagreement with the findings of the Chamber. There is no error of law or fact identified.

147. The Chamber justifiably does not rely on the impugned evidence of Professor Musisi. In concluding that the said evidence does not underlie the establishment of any part of the charges against the Appellant, the Chamber is guided by its statement on the review of evidence to the effect that its decision must be based on the evidence that the parties and participants have discussed at trial, including their

¹⁷² Trial Judgment, para. 2500-2521.

closing briefs and closing statements, on the one hand, and its reliability and coherence factors.

148. Accordingly, the Chamber was justified in finding that the evidence of the interplay of Acholi culture with traumas and PTSD as presented by Professor Musisi does not provide information as to whether the Appellant suffered a mental disease or defect within the charged period which is a factor to be established for the Article 31 affirmative defence.

T. Alleged error concerning the Chamber's statutory interpretation of Article 31(1)(d) and its findings that Article 31(1)(d) is not applicable (ground 44)

149. The LRVs oppose this ground in whole. The ground as framed is but a mere disagreement with the findings of the Chamber. There is no error of law or fact identified.

150. The Defence contends that the Chamber made a legal error in failing to indicate whether or not the Prosecution met its burden in respect to the elements of the mental health and duress defences under Article 31(1)(a) and (d) of the Statute. The Chamber has previously outlined that a) 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.¹⁷³

151. According to the Defence the legal error made by the Chamber in failing to assert whether or not the Prosecution met its burden in respect to the elements of mental health and duress defences resulted in the 'erroneous rejection of the evidence of the Defence experts, as well as the evidence of Professor de Jong and Professor Musisi.'¹⁷⁴ The Defence asserts that should the reasonable doubt standard been applied, the Chamber would not have reached such a conclusion. In relation to the defence of duress, the Defence refutes the Chamber's rejection of the duress defence and its conclusion that the Appellant chose not to escape.¹⁷⁵

152. In sum, the Defence asserts that 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.

¹⁷³ Judgment, para. 231; 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.

¹⁷⁴ Defence Appeal Brief, para. 213.

¹⁷⁵ Defence Appeal Brief, para. 213.

153. Furthermore, according to the Defence, at the heart of the Chamber's rejection of the Defence burden of proof arguments is the 'fundamental error' of shifting the burden of proof from the Prosecution to the Defence in contravention of Articles 67(1)(i) and 66(2) of the Statute.
154. However, the LRVs submit that at no point did the Chamber shift the evidentiary burden from the Prosecution to the Defence merely by stating that 'the Defence has every opportunity to present its evidence or legal submissions on any point of law.'¹⁷⁶ While there is no doubt that the Defence has no burden to 'disprove' the Prosecution case, when the defence does present an affirmative defence, it does have to demonstrate a reasonable doubt that the Prosecution has met its burden to prove its case.
155. Exclusion of criminal responsibility under article 31(1) or (d) of the Statute must be determined based on the substantial evidence basis in the record of the case. However, there is no indication in the Rome Statute that such evidential basis must be put forward by one party or the other. Indeed, such evidence could be sought and presented by the Trial Chamber alone.
156. Furthermore, Rule 79(1)(b) of the Rules of Procedure and Evidence does require the defence, when notifying the Prosecutor of its intent to raise a ground under article 31(1), to "specify the names of witnesses and any other evidence upon which the accused intends to rely to establish the ground." This rule supports the view that a ground for excluding criminal responsibility must be based on evidence, and expresses a common-sense expectation that some such evidence will ordinarily come from the defence.
157. Case law from the International Criminal Tribunal for the former Yugoslavia (ICTY) addressed a defence of insanity very similar to the article 31(1)(a) ground urged by the Defence in this case. Like the Rome Statute, the ICTY jurisprudence enshrined the principles that an accused must be proven guilty beyond reasonable doubt by the prosecution and that such burden may not be shifted upon the defence.¹⁷⁷ Nevertheless, ICTY chambers placed a burden upon the defence to prove insanity by a preponderance of the evidence.¹⁷⁸

¹⁷⁶ Judgment, para. 90.

¹⁷⁷ ICTY Statute, art. 21(3); ICTY Rules of Procedure and Evidence, rule 87(A); Prosecutor v. Milosevic, ICTY Case No. IT-98-29/1-A, Appeals Judgment, 12 Nov, 2009, para. 20-22, 231.

¹⁷⁸ ICTY, Prosecutor v. Delalic et al., IT-96-21-A, Appeals Judgment, para. 582; see also ICTY, Prosecutor v. Delalic, IT-96-21-T, Trial Judgment, 16 November 1998, para. 1157-1158, 1160 (holding that an accused raising a claim of diminished or lack of mental responsibility must bear the burden of

158. Every person charged with an offence is presumed to be of sound mind, unless and until the contrary is proven. Hence the burden is on the accused to rebut the presumption of sanity.¹⁷⁹ At the ICTY, the plea of diminished responsibility requires affirmative proof that the accused suffered from an abnormality of the mind which substantially impaired his responsibility for his acts or omissions. Proof of this defence is restricted to conditions which can be supported by objective medical evidence.¹⁸⁰
159. The LRVs submit that the Chamber's statutory interpretation of Article 31(1)(d) is sound and grounded in the Statute. The Trial Chamber identifies and lays out the three elements for the defence of duress to be established as applied to the Appellant.¹⁸¹ The Chamber makes a coherent assessment of the evidence before rejecting the defence of duress as not being applicable to the Appellant. The Chamber rightly finds that there is no reliable evidence suggesting that the Appellant was under threat of imminent death or imminent or continuing serious bodily harm on his person or another person within the charged period.¹⁸²

U. Evidence of Joseph Kony's control over the Appellant (ground 46)

160. The LRVs oppose this ground in whole. The ground as framed is but a mere disagreement with the findings of the Chamber. There is no error of law or fact identified.
161. The Chamber, in addressing the defence of duress as raised by the Appellant noted foremost that there is no specific provision in the Statute on the burden of proof relating to excluding criminal responsibility and therefore advised itself that the burden and general standard of proof is borne by the Prosecutor and is one of beyond reasonable doubt as set out in Articles 66(2) and 66(3) respectively.
162. The Chamber analysed the evidence in order to assess whether the Appellant's conduct during the relevant period of the charges was subject to threat of imminent death or of continuing or imminent serious bodily harm against himself or another person. In doing this the Chamber considered the evidence relating to the following;

proving that claim to a balance of probabilities since the relevant facts are "peculiarly within his knowledge and should be established by him").

¹⁷⁹ ICTY, Prosecutor v. Delalić et al., IT-96-21-T, Trial Judgment, 16 November 1998, paras. 1157-1158.

¹⁸⁰ ICTY, Prosecutor v. Delalić et al., IT-96-21-T, Trial Judgment, 16 November 1998, para. 1166,1170.

¹⁸¹ Trial Judgment, para. 2581-2585.

¹⁸² Trial Judgment, paras 2585-2672.

- i. The Appellant's status in the LRA Hierarchy and the applicability of LRA disciplinary regime to him.¹⁸³
- ii. Executions of senior LRA commanders on Joseph Kony's orders.¹⁸⁴
- iii. Possibility of escaping from the LRA.¹⁸⁵
- iv. Joseph Kony's alleged spiritual powers.¹⁸⁶
- v. Dominic Ongwen's personal loyalty to Joseph Kony and his career advancement.¹⁸⁷
- vi. Crimes committed in private.¹⁸⁸

163. The Chamber accordingly found and was satisfied to the standard of proof as set out at the commencement of its analysis of duress,¹⁸⁹ that the Appellant was not under any threat of imminent death or serious bodily harm to himself or another person when engaging in conduct underlying the charged crimes and therefore duress is not applicable to him.¹⁹⁰

V. No evidence on record to provide any basis for consideration of spies or a spy network as a separate phenomenon, thereby materially affecting the Article 31(1)(d) defence (ground 48)

164. The LRVs oppose this ground in whole. The ground as framed is but a mere disagreement with the findings of the Chamber. There is no error of fact identified.

165. In dismissing the Appellant's arguments about spies or a spy network in the LRA, the Chamber did not address the question whether there is a practice in all armed forces to maintain spies or a spy network rather it addressed itself to the evidence before it for the conclusion and rightly so that there is no such evidence on record. The Chamber noted further that the issue is properly addressed in the part of the judgment that discusses the hierarchical relationship between Joseph Kony and the LRA commanders inclusive of the Appellant¹⁹¹ and accordingly Article 31(1)(d) defence remains unsupported.

¹⁸³ Trial Judgment, paras 2590-2608.

¹⁸⁴ Trial Judgment, paras 2609-2618.

¹⁸⁵ Trial Judgment, paras 2619-2642.

¹⁸⁶ Trial Judgment, paras 2643-2658.

¹⁸⁷ Trial Judgment, paras 2659-2665.

¹⁸⁸ Trial Judgment, paras 2666-2667.

¹⁸⁹ Trial Judgment, para. 2588.

¹⁹⁰ Trial judgment, paras 2668-2672.

¹⁹¹ Trial Judgment, para. 2607.

W. Alleged errors concerning evidence on record that neither men nor women had choice when partners were distributed, and acceptance of the Prosecution argument that evidence on SGBC had “persuasive force” for the Chamber’s conclusion that duress does not apply (ground 49)

166. The LRVs oppose this ground in whole. The ground as framed is but a mere disagreement with the findings of the Chamber. There is no error of law or fact identified.

167. The Chamber did not misrepresent the evidence on record. The evidence before the Chamber supports the reliance on the persuasive submissions and evidence from the Prosecution that SGBC were committed in the privacy of the Appellant’s household and the Appellant was at liberty to refrain from participating in the conduct charged,¹⁹² on the one hand and the conclusion of the Chamber, that imposing “so called” marriage on men in the LRA was not an issue.¹⁹³ The Chamber found that forced marriage was a common fact in Sinia at the time relevant to the charges;¹⁹⁴ women and girls were held captive and under oppressive control and coercion in order for them to submit to sex.¹⁹⁵ Accordingly the defence of duress does not apply.

X. Alleged error concerning the Chamber’s assessment of threats of Kony and his killing of senior commanders (grounds 50 & 56)

i) Rejection of Defence evidence that senior LRA commanders were executed on Joseph Kony’s orders.

168. The LRVs oppose this ground in whole. The ground as framed is but a mere disagreement with the findings of the Chamber. There is no error of law or fact identified.

169. The LRVs submit that this ground is a repetition of grounds 45 and 46. The LRVs accordingly adopt their observations in those grounds.

¹⁹² Trial Judgment, paras 2666-2667.

¹⁹³ Trial Judgment, para. 2608.

¹⁹⁴ Trial Judgment, paras 2630; 2665.

¹⁹⁵ Trial Judgment, para. 2270.

ii) Appellant's Conduct and Being Under Threat of Joseph Kony

170. In arriving at its conclusion that the Appellant's conduct during the relevant period is incompatible with him being under threat of Joseph Kony, the Chamber made a number of evidentiary considerations as follows;

- i. The performance of the Appellant during period relevant to the charges was highly valued by Joseph Kony in the context of criticism of other LRA commanders namely Lapanykwara, Pokot and then Sinia Brigade commander Abudema. Moreover poor performance of these commanders did not amount to anything other than threats of demotion. The praise for the Appellant and eventual promotion was based on his alleged 'good plans' by Joseph Kony.¹⁹⁶
- ii. The evidence of the Appellants report after the attack on Lukodi.¹⁹⁷
- iii. The evidence of the Appellant's conduct relevant to the charges.¹⁹⁸

Y. Alleged errors concerning the evidence regarding the Appellant and Salim Saleh (ground 51)

171. The LRVs oppose this ground in whole. The ground as framed is but a mere disagreement with the findings of the Chamber. There is no error of law or fact identified.

172. The Chamber in its decision provided a narrative of the assessment of evidence.¹⁹⁹In particular, the Chamber noted that it is required in the determination of the guilt or innocence of the Appellant, to assess the relevance and reliability of all evidence before it that has not been excluded.²⁰⁰ Consequently, the Chamber in dismissing the report relied upon by the Appellant to the effect that the Appellant *narrowly survived a firing squad* found that it had no independent evidence from which it could ascertain the assertion attributed to a UPDF intelligence officer.²⁰¹ The lack of such independent evidence justifies the conclusions of the Chamber, moreover, it was disposed to evidence about the Appellants arrest from logbooks and witness P-0231 upon which it could make an assessment of relevance and reliability.

¹⁹⁶ Trial Judgment, paras 2660-2665.

¹⁹⁷ Trial Judgment, para. 2662.

¹⁹⁸ Trial Judgment, para. 2665.

¹⁹⁹ Trial Judgment, paras 226-248.

²⁰⁰ Trial Judgment, para. 244.

²⁰¹ Trial Judgment, para. 1054.

Z. Alleged errors concerning application of the standard of proof beyond a reasonable doubt to conclusions about the possibility of escape in the LRA and rejection of credible evidence that escape occurred because of opportunity (ground 52)

173. The LRVs oppose this ground in whole. The ground as framed is but a mere disagreement with the findings of the Chamber. There is no error of law or fact identified.

174. Foremost, the Trial Chamber set out the test for the assessment of evidence²⁰² and also where grounds excluding criminal responsibility²⁰³ arise. Bearing this in mind, the Chamber discussed the evidence relating to escape from the LRA noting that the arrest of the Appellant by Joseph Kony sometime around April 2003, was not as a result of his attempt to escape.²⁰⁴ Crucially, the Chamber justifiably in concluding that the Appellant was not under threat of death or physical harm necessary under Article (31)(1)(d), noted that whilst threats about escape were widely known it did not prevent escapes from LRA ranks. More so, the Appellant knew about the escapes and contributed to them; and had several opportunities to escape as a commander but never exercised the option relying as it did on the evidence of several witnesses.²⁰⁵

AA. Alleged error concerning the Chamber's conclusion that escaping from or otherwise leaving the LRA was a realistic option available to the Appellant (ground 53)

175. The LRVs oppose this ground in whole. The ground as framed is but a mere disagreement with the findings of the Chamber. There is no error of law or fact identified.

176. The Chamber's conclusions about the realistic option of escape from the LRA for the Appellant were well founded. The Chamber assessed and considered the evidence of LRA fighters with some status including Odong Cow, Charles Lokwiya, P-0070, P-0440, P-0085, P-0209 and evidence of other LRA senior commanders like Onen Kamdulu, Sam Kolo who escaped without consequences²⁰⁶

²⁰² Trial Judgment, paras 226-229.

²⁰³ Trial Judgment, paras 230-231.

²⁰⁴ Trial Judgment, paras 2619-2620.

²⁰⁵ Trial Judgment, paras 2621-2642.

²⁰⁶ Trial Judgment, paras 2619-2631.

on the one hand and the evidence of persons of low hierarchy in the LRA moreover who were under much severe control than the Appellant²⁰⁷ on the other.

BB. Alleged failure to give a reasoned statement as to why the possibility of collective punishment for escape did not apply to the Appellant (ground 54)

177. The LRVs oppose this ground in whole. The ground as framed is but a mere disagreement with the findings of the Chamber. There is no error of law or fact identified.

178. The Chamber gave a reasoned statement for its conclusion that collective punishment was not applicable to the Appellant. In doing so, the Chamber considered the evidence on escape or leaving the LRA.²⁰⁸ It further considered evidence which showed that collective punishment was applied as a general threat to the LRA fighters and such punishments occurred prior to the relevant period of the charges and only in one occasion during the relevant period. In this instance punishment was distinguishable from that of escape. Moreover, the said findings were also informed by the absence of any evidence that showed that the Appellant was a subject of collective punishment.²⁰⁹

179. There was no contradiction in the Chamber's findings as it properly assessed the evidence about collective punishment in the LRA and the particular incident involving [REDACTED].²¹⁰

CC. Alleged errors concerning the evidence pointing to Commanders who successfully defied Kony without serious consequences, and failure to consider the evidence on record of Kony's unpredictability and his claims spirits could order that there should be no killing, or abduction (ground 55)

180. The LRVs oppose this ground in whole. The ground as framed is but a mere disagreement with the findings of the Chamber. There is no error of law or fact identified.

181. The Chamber in resolving the issue whether Kony's spiritual powers contributed to the threat of death or harm on the Appellant hence preventing from escape from the LRA, examined overwhelming evidence from the witness

²⁰⁷ Trial Judgment, paras 2632-2642.

²⁰⁸ Trial judgment, paras 2619-2641.

²⁰⁹ Trial Judgment, para. 2642. See also paras 991-998.

²¹⁰ Trial Judgment, paras 991-998.

testimony of both the Prosecution and a Defence witnesses. The evidence points to the fact that the belief in Joseph Kony's spiritual powers held strongly in newly abducted recruits who were impressionable however the same was not true individuals who had long served in the LRA. Moreover the Chamber also relied on the evidence of the Appellant's relationship with Joseph Kony in which the former was praised and singled out as an outstanding commander for the conclusion that these events are incompatible with the proposition by the Appellant that he was under fear of death or harm.

182. The Chamber did not ignore the evidence of the Appellant that he was under threat of being killed by Joseph Kony. The Chamber recalled the Appellant's arguments regarding the threat to his life owing to the execution by Joseph Kony of other senior LRA commanders, however, the Chamber in dismissing the Appellant's arguments, relied upon the compelling evidence that the executed senior LRA commanders were not killed for failing to execute Joseph Kony's orders by undertaking operations or remaining passive, but, rather each challenged his [Joseph Kony] political authority, resulting in their execution. Moreover, the Chamber also found that the Appellant did not offer any other evidence about the said threat that was more compelling.

DD. The Chamber erred by failing to respond to Defence arguments that Uganda had a legal duty to protect the Appellant as a child (ground 58)

183. The LRVs adopt their observations in ground 28 above.

EE. Alleged errors regarding the expert evidence of D-0133 (grounds 61, 62 & 63)

i) D-0133's Expert Evidence

184. The LRVs oppose these grounds of appeal. The grounds as drafted are simply a disagreement with the conclusions of the Chamber. There is no error of law or fact identified in which the Chamber erred in its conclusions and reliance on D-0133's evidence.

185. The assessment of testimonial evidence for its probative and reliability value was based on a whole range of non-exhaustive factors that the Chamber outlined.²¹¹ D-0133 was by no means an exception to the said factors. The Chamber exercised its discretion as it is entitled to in not considering him an expert because he testified about his personal experience of being abducted, provided evidence about children

²¹¹ Trial Judgment, paras 251-260.

in the LRA but the rest of his evidence was not relevant for the Chamber's determination of issues before it.²¹² Moreover, there is nothing in the Appeal Brief that shows that the discretion exercised by the Chamber amounts if at all to a material error of law, fact or discretion as per the jurisprudence of the Appeals Chamber.²¹³

186. The Chamber gave a reasoned statement of its decision in finding Pollar Awich's testimony to be credible, but, at the same time noted its decision not to rely on his general conclusions about the *enduring effect on the mental health of having been a child soldier*. In particular the Chamber found that Mr. Awich was not a mental health expert and further that only the trial chamber is best placed to determine questions arising from Article 31(1)(a) and (d) of the Statute.²¹⁴

187. The Chamber therefore rightly exercised its discretion not to rely on the evidence of Pollar Awich owing to its lack of probative value²¹⁵ and in light of the overwhelming mental health expert testimony that was received in evidence, on the one hand, and its decision not to rely on the other evidence of the witness since it was of no relevance,²¹⁶ and accordingly no further evidence has been identified by the Appellant.

ii) D-0133's Evidence about Escape

188. The Chamber noted that it was required to base its decision on evidence submitted and discussed before it.²¹⁷ Accordingly, in finding that D-0133' testimony to the effect that *there are no cases where children escaped [...] voluntarily* was incredible in light of the other evidence before it, the Chamber was aware that it reviewed testimonial evidence and particularly discussed the credibility and reliability of each witness.²¹⁸ In its assessment of the evidence, the Chamber noted a number of witnesses including P-0138, P-0018, D-0118, P-0145, P-0097 and others voluntarily escaped.²¹⁹ The Chamber thus made a finding of fact that escape happened notwithstanding that this was not the issue to be considered²²⁰ and

²¹² Trial Judgment, para. 612.

²¹³ Prosecutor v. Uhuru Muigai Kenyatta, Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute", ICC-01/09-02/11-1032 19 August 2015, para. 22.

²¹⁴ Trial Judgment, para. 612.

²¹⁵ Trial Judgment, para. 257.

²¹⁶ Trial Judgment, para. 260.

²¹⁷ Trial Judgment, paras 249-250.

²¹⁸ Trial Judgment, paras 261-612.

²¹⁹ Trial Judgment, para. 2632.

²²⁰ Trial Judgment, paras 971-1004.

contrary to the D-0133's general conclusions about escape in the LRA. Therefore whilst the Chamber may not have provided references to specific evidentiary material on which it based its finding, it nonetheless noted that the evaluation of the testimonial evidence must be read together with its *evidentiary discussion* and findings in the rest of the Judgment.²²¹

189. The Defence's explanation for the term "voluntary escape" in the context of culture and the LRA,²²² is a misrepresentation of the testimonial evidence the Chamber assessed. The Chamber found that there was sufficient evidence to conclude that voluntary escape or leaving the LRA was possible as noted above. Thus, the Chamber considered escape as a form of leaving the LRA in accordance with the evidence. It accordingly distinguished this finding from the finding on escape by the Appellant which goes to his defence of duress.²²³

iii) Evidence from Certain Witnesses

190. The Chamber in addressing the question of escape as a defence under Article 31 (1)(d), outlined the elements of the crimes necessary to satisfy duress as an affirmative defence.²²⁴ It considered the conduct and status of the Appellant as a high ranking member of the LRA in the context of the disciplinary regime therein and the authority of Joseph Kony over the commanders and concluded that notwithstanding that the LRA was an *effective hierarchically structured organisation*, it was not absolutely under the control of Joseph Kony, and as such Joseph Kony relied on other commanders, including the Appellant as co-perpetrators to fulfil LRA policies.²²⁵ It also considered the testimonies of witnesses Odong Cow, Charles Lokwiya, P-0070, P-0440, P-0085, P-0209 and evidence of other LRA senior commanders like Onen Kamdulu, Sam Kolo, who escaped,²²⁶ and concluded that the Appellant was in a far better position to escape than low ranking fighters and as such escape was real possibility for him and his failure to take the option of escape points to the fact that there was no serious threat against him in *engaging in the conduct relevant for the charges*.²²⁷

191. The LRVs submit that the non-reference of the said evidence by the Chamber when assessing the reliability of D-0133, does not necessarily amount to an error of law or fact nor does it materially or substantially affect the findings of the Chamber

²²¹ Trial Judgment, paras 648-651.

²²² Defence Appeal Brief, paras 641-650.

²²³ Trial Judgment, para. 2619.

²²⁴ Trial Judgment, paras 2581-2589.

²²⁵ Trial Judgment, paras 2590-2618.

²²⁶ Trial Judgment, paras 2619-2631.

²²⁷ Trial Judgment, paras 2634-2635.

against the Appellant in any way. In any event no error of law or fact has been identified.

FF. Alleged errors regarding control over the crimes, (Counts 61-70) essential contribution and resulting power to frustrate commission of the crimes (ground 64 (part))

192. The LRVs submit that the Chamber in concluding and finding the Appellant criminally responsible for the attacks on IDP camps was fortified by reason of its assessment of the evidence and findings which pointed to the Appellant, Joseph Kony and the Sinia Brigade leaderships' engagement in a coordinated and methodical effort of relying on LRA soldiers under their control to abduct children and force them into LRA ranks.²²⁸ The Appellant personally:

- i. Ordered abduction of children to serve as Sinia soldiers
- ii. Abducted children
- iii. Assigned abducted children to serve in different places within Sinia.²²⁹

193. The Chamber correctly found that the Appellant had control over the crimes by reason of his essential contribution and the resulting power to frustrate the crime. Accordingly there is no error of law and fact occasioned by the Chamber.²³⁰

GG. Alleged error regarding the structure of the LRA and the Appellant's role (ground 65)

194. The LRVs submit that contrary to the Appellant's allegations that he did not have notice by which he could have frustrated the crimes owing to the involvement of numerous commanders in the planning of the attack against Pajule, the question of notice was addressed by the Chamber and promptly dismissed for untimeliness.²³¹

195. The LRVs submit that the Chamber's findings taking into account all factors namely; the Appellant's position in the LRA at the relevant time of the charges; his participation in the meeting of the commanders summoned by Vincent Otti to attack Pajule; and his command of the LRA fighters for the attack support the

²²⁸ Trial Judgment, paras 3107-3110.

²²⁹ Trial Judgment, para. 3110.

²³⁰ Trial Judgment, para. 3111.

²³¹ Trial judgment, para. 37-40.

Chamber's conclusion that the Appellant had control over the crimes by reason of his essential contribution and resultantly he possessed the power to frustrate their commission.²³² Accordingly there is no error of law and fact identified warranting the Appeals Chamber's intervention.

HH. Alleged errors regarding the evidence of the Appellant's "conditions of recruitment, initiation, training, and service in the LRA" which made him function as a tool of Kony (ground 68)

196. The LRVs oppose this ground in whole. The ground as drafted is simply a disagreement with the findings of the Chamber. There is no error of law or fact identified in which the erred in its finding.

197. The LRVs observe that this ground is a regurgitation of ground 28 presented in a different form. The LRVs adopt their observations in the said para. 28.

II. Alleged errors regarding the Chamber's finding that there was a common plan regarding the conscription of children below the age of 15 (ground 69)

198. The LRVs submit that the conclusion of the Chamber that there was a common plan regarding the conscription of children below the age of 15 is grounded foremost in evidence received by the Chamber to the effect that Joseph Kony issued general orders to abduct children and it was often up to the commander on the ground to bring to fruition the said order.²³³ The Chamber additionally found that the LRA had a functional hierarchy but it also relied upon independent actions and initiatives of commanders at division, brigade and battalion levels for its survival.²³⁴

199. The justification and basis for the Chamber's conclusions are well set out in the Judgment as seen from the evidence of the coordinated and methodical nature of abductions of both boys and girls by the Appellant, Joseph Kony and other Sinia Brigade leadership through their reliance on LRA soldiers to bring about the abductions.²³⁵ No error of law and fact thus arises from the Chamber's conclusions.

JJ. Alleged errors concerning the Chamber's disregard of favourable evidence or evidence raising reasonable doubt on corroborative evidence, impermissible

²³² Trial Judgment, paras 2859-2864.

²³³ Trial Judgment, paras 866-872.

²³⁴ Trial Judgment, para. 873.

²³⁵ Trial Judgment, paras 2312-2328.

**inferences, hearsay, evidence of self-incriminated witnesses and witnesses
who concealed their criminal involvement in the crimes (grounds 60 & 70)**

200. The LRVs oppose this ground in whole. The ground as drafted offends Rule 152 read together with Regulation 57(e) and the jurisprudence of the Appeals Chamber. According to the standard of review in Appeals before the Appeals Chamber, ground 70 as drafted fails the test of identifying the error in law occasioned by the Trial Chamber in the impugned decision in which it disregarded favourable evidence or evidence raising reasonable doubt that led to the conviction of the Appellant and on multiple convictions on the basis of corroborative evidence, impermissible inferences, hearsay, evidence of self-incriminated witnesses who concealed their criminal involvement in the crimes.

201. The LRVs further submit that there is no error of fact identified in this ground by the Appellant in the impugned decision where the Trial Chamber in an omnibus fashion as per the alleged error, relied upon corroborative evidence, impermissible inferences, hearsay, evidence of self-incriminated witnesses who concealed their criminal involvement in the crimes to convict and or enter multiple convictions against the Appellant.

202. To the contrary, the Trial Chamber systematically reviewed the evidence including witness testimony and other documentary evidence submitted in the record of the case informing its conclusions on the reliability of each witness account and corroboratory nature of the evidence adduced for each attack in the impugned decision. The Trial Chamber in its systematic review of the evidence considered; the attack on the respective IDP camp;²³⁶ LRA attack against a civilian population;²³⁷ report of the attack;²³⁸ and separately; LRA commanders, including Dominic Ongwen planned and prepared for the Pajule attack;²³⁹ Joseph Kony's order to attack Odek IDP;²⁴⁰ Senior LRA commanders, including Joseph Kony and Vincent Oti encouraged attacks on IDP camps.²⁴¹

²³⁶ Trial Judgment, para. 1172-1175 (Pajule IDP Camp); para. 1384-1386 (Odek IDP Camp); para. 1643-1646 (Lukodi IDP Camp); para. 1858-1863 (Abok IDP Camp).

²³⁷ Trial Judgment, paras 1233-1369 (Pajule IDP Camp); paras 1429-1614 (Odek IDP Camp); paras 1700-1845 (Lukodi IDP Camp); paras 1877-2000 (Abok IDP Camp).

²³⁸ Trial Judgment, paras 1370-1383 (Pajule IDP Camp); paras 1615-1642 (Odek IDP Camp); paras 1846-1857 (Lukodi IDP Camp); paras 2001-2008 (Abok IDP Camp).

²³⁹ Trial Judgment, paras 1176-1232.

²⁴⁰ Trial Judgment, paras 1387-1408.

²⁴¹ Trial Judgment, paras 1861-1863.

203. The Trial Chamber considered intercepted radio communication from Tape 693 in which Vincent Otti, Joseph Kony and other LRA commanders' prosecutorial policies against civilians is borne out including an accusation that civilians were 'very bad people' by Joseph Kony.²⁴²
204. Moreover, the Appellant does not argue that he was denied an opportunity to question the witnesses. Indeed, the Defence questioned each witness called by the Prosecution and the Victims' Representatives and exercised the Appellant's right to defend himself by calling their own witnesses to counter the Prosecution and Victim Representatives' evidence. The Trial Chamber was not convinced by any such counter evidence when presented by the Appellant's Defence.
205. The Trial Chamber thus did not disregard any favourable evidence or evidence raising reasonable doubt and non has been shown as such.

KK. Alleged error regarding the Chamber's credibility and reliability assessments and predeterminations detached from the facts of the trial record without a discernible criterion or statutory evidentiary standard (grounds 71 & 24)

206. In addressing the credibility and reliability of a witness, the Appeals Chamber in the Lubanga Appeal Judgment held as follows:

In assessing the weight to be given to the testimony of a witness, a Trial Chamber needs to assess the credibility of the witness and the reliability of his or her testimony. While the Statute and the Rules of Procedure and Evidence do not specifically refer to these concepts, they are part of the evaluation of evidence required of a Trial Chamber by article 74 (2) of the Statute. The Appeals Chamber notes that there is a strong link between the two concepts, as reflected in the jurisprudence of the ad hoc international criminal tribunals. This jurisprudence shows that, while credibility is generally understood as referring to whether a witness is testifying truthfully, the reliability of the facts testified to by the witness may be confirmed or put in doubt by other evidence or the surrounding circumstances. Thus, although a witness may be honest, and therefore credible, the evidence he or she gives may nonetheless be

²⁴² Trial Judgment, paras 1370-1383.

unreliable because, inter alia, it relates to facts that occurred a long time ago or due to the “vagaries of human perception.”²⁴³

207. The LRVs submit that, consistently with the standard articulated by the Appeals Chamber above, the Chamber identified a host of factors for the determination of reliability of a witness²⁴⁴ and it went further and noted that the said factors were by no means exhaustive.²⁴⁵

208. The LRVs submit that nothing in the Appeal Brief demonstrates that the Chamber, in accepting or rejecting portions of testimony and accepting others for witnesses P-0205, P-0410, P-0054 and P-0309, rendered the witnesses unreliable and not credible. The Chamber was best placed to assess the entire body of evidence and did find particular witnesses credible and reliable where it was incumbent upon it to do so on the strength of the evidence. There is therefore no error of law and or fact identified.

LL. Alleged errors concerning the intercepts, logbook entries and shorthand notes (ground 72)

209. The LRVs submit that the ground as framed is but a mere disagreement with the findings of the Chamber. There is no error of law or fact identified.

210. The Chamber in its assessment of intercept LRA radio communication first set out the intercept process including by: Uganda Peoples Defence Forces;²⁴⁶ Internal Security Organisation;²⁴⁷ Police.²⁴⁸ It then discussed the process of transfer of the intercept material to the Prosecution.²⁴⁹

211. The Chamber noted that whilst the Appellant had objected to the submission into evidence prior to the trial, the Chamber overruled the Defence and allowed the submission notwithstanding it received testimony from over 20 witnesses on the said intercept evidence.²⁵⁰

212. The Chamber notes additionally that not all recordings have translated transcripts and owing to this imitation it focussed on those recordings that were in

²⁴³ *Lubanga* Appeal Judgment, ICC-01/04-01/06 A 5, para. 239.

²⁴⁴ Trial Judgment, paras 255-259.

²⁴⁵ Trial Judgment, para. 260.

²⁴⁶ Trial Judgment, paras 616-624.

²⁴⁷ Trial Judgment, paras 625-628.

²⁴⁸ Trial Judgment, paras 629-632.

²⁴⁹ Trial Judgment, paras 633-636.

²⁵⁰ Trial Judgment, para. 640.

the working language of the court. It also found that most audio cassettes were not dated and this necessitated its reference to the logbooks in order to date the tape in issue.²⁵¹

213. The Chamber also considered logbooks and found them to be authentic based on accounts of witness testimonies and identification entries.²⁵² The Chamber received other forms of evidence including: short hand notes;²⁵³ copies of ISO logbooks;²⁵⁴ intelligence reports;²⁵⁵ miscellaneous intercept evidence;²⁵⁶ which it either excluded or relied upon minimally to corroborate other sources.

214. The Chamber further considers and discusses the foundational assessment of the recordings it considered necessary for its judgment and the points applied in its assessment.²⁵⁷

215. The LRVs submit that the process above is reasonable criteria for addressing radio intercept evidence in the Judgment. Moreover, the Chamber discusses particular corroborative aspects of this evidence thus providing a reasoned statement for its reliance on the intercept evidence in the deliberation of its Judgment. Therefore, the Defence's claim that the Chamber relies on impermissible inferences to arrive at multiple convictions of the Appellant is baseless.

MM. Alleged errors of erroneous findings based upon chains of inferences drawn from the intercept material (grounds 73 & 60)

216. The LRVs submit that the ground as framed is but a mere disagreement with the findings of the Chamber. There is no error of law or fact identified

217. The LRVs submit that inferences alleged by the Appellant to have been relied upon in resolving ambiguities and inconsistencies between various sources thereby incriminating the Appellant by the Chamber are unfortunate misconstructions of the Chamber's findings. With respect to the crimes of persecution, the Chamber exhaustively discussed evidence from witness accounts,²⁵⁸ before reverting to the

²⁵¹ Trial Judgment, paras 648-649.

²⁵² Trial Judgment, fn. 1196-1227; paras 660-666.

²⁵³ Trial Chamber, paras 667-669.

²⁵⁴ Trial Chamber, paras 670-672.

²⁵⁵ Trial Chamber, paras 673-676.

²⁵⁶ Trial Chamber, paras 677-685.

²⁵⁷ Trial Judgment, paras 686-810.

²⁵⁸ Trial Judgment, paras 1092-1106.

logbook evidence and in any event the contents of the logbooks were as noted by the Chamber discussed in court during trial.²⁵⁹

218. With respect to SGBC, the Chamber noted that it had before it ample evidence²⁶⁰ of abuse of women by Joseph Kony and the LRA leadership. The said evidence is inconsistent with the allegations raised in the Appeal Brief or any conclusion that the Chamber relied solely on logbook evidence to incriminate the Appellant.

219. With respect to the conscription and use of children in hostilities, the Chamber considered evidence from several witnesses²⁶¹ before it considered logbook evidence. The logbook evidence on conscription of children to engage in hostilities, the Chamber noted that this went to corroborate the already established witness testimonies.²⁶² It is therefore erroneous and misleading for the Appellant to allege that the Chamber relied on such inferences to incriminate the Appellant.

NN. Alleged errors related (sic) to findings on Pajule IDP camp (grounds 74, 75 & 76)

i) Evidence of Command and Spiritual of Joseph Kony over the LRA and the Appellant

220. The LRVs oppose these grounds in whole. The ground misrepresents the findings of the Trial Chamber in the impugned decision. There is no error of law or fact in which the Trial Chamber disregarded the evidence on the command and spiritual authority of Joseph Kony over the LRA as alleged.

221. The Trial Chamber in the impugned decision identified and set out the standard of proof to be applied in the case against the Appellant.²⁶³ It specifically noted in paragraph 227 that the standard of beyond reasonable doubt must be “*applied to any fact indispensable for entering a conviction*”.

222. The Appellant relies upon paragraphs. 950-970 of the impugned decision in which the Trial Chamber outlines conduct of persons within the LRA and disciplinary measures applicable to such individuals under the subtitle *Rules of obedience and disciplinary system* and the role of Dominic Ongwen in the LRA under the sub title *Dominic Ongwen’s Position within the LRA* to argue that the Chamber disregarded this evidence in convicting Mr. Ongwen absent evidence of him and

²⁵⁹ Trial Judgment, para. 1107.

²⁶⁰ Trial Judgment, paras 2098-2138

²⁶¹ Trial Judgment, paras 2310-2321.

²⁶² Trial Judgment, para. 2322.

²⁶³ Trial Judgment, paras 226-231.

other senior LRA commanders executing an agreement to attack Pajule IDP camp. The Appellant further argues that there was no finding of him ordering the attack in accordance with Article 25.

223. The LRVs note with respect to the attack on Pajule IDP camp, that the Appellant was charged under various modes of liability as stated by the Trial Chamber.²⁶⁴ Under the charged provisions of Article 25, the Trial Chamber in convicting the Appellant must be satisfied that the Appellant is criminally responsible on each mode of liability as charged.
224. The LRVs submit that the Trial Chamber exhaustively discusses the events leading up to the meeting with Vincent Otti prior to the attack on Pajule. In particular, the Trial Chamber examines the testimony of many witnesses and more importantly witness P-309 who was the Appellant's escort and identified the commanders that participated in the planning for the attack on Pajule.²⁶⁵
225. The LRVs submit that the Trial Chamber exhaustively discusses the events following from the planning meeting of the LRA commanders including the Appellant. These events include the selection and briefing of the attackers by the Appellant as testified to by witness P-309 who stated in precise terms that the Appellant gave *orders to Opio Korea to choose people from his group to go for the operation.*²⁶⁶
226. The LRVs submit that the Trial Chamber exhaustively discusses evidence that places the Appellant at Pajule at the time of attack on the camp specifically at the Military Barracks and at the trading centre in which he participated in overseeing the LRA fighters pillaging and abducting civilians as testified to by witness P-309, Rwot Oywak,²⁶⁷ and witness P-249 who testified to the Appellant personally ordering LRA fighters to pillage civilians properties.²⁶⁸
227. The LRVs submit that the Trial Chamber exhaustively discusses evidence of civilians being killed in the attack;²⁶⁹ civilians being abducted;²⁷⁰ looted items being distributed within the LRA including the Appellants group;²⁷¹ addressing of abductees including by the Appellant and the distribution of the Abductees

²⁶⁴ Trial Judgment, para. 33, fn. 44.

²⁶⁵ Trial Judgment, paras 1176-1203.

²⁶⁶ Trial Judgment, paras 1204-1232.

²⁶⁷ Trial Judgment, paras 1264-1288.

²⁶⁸ Trial Judgment, paras 1289-1300.

²⁶⁹ Trial Judgment, paras 1308-1325.

²⁷⁰ Trial Judgment, paras 1326-1355.

²⁷¹ Trial Judgment, paras 1356-1357.

including to the Appellant's group.²⁷² The said attack was brought into effect as was concluded by the Chamber of the intention to kill civilians for their perceived cooperation with government of Uganda by the LRA.²⁷³

228. The LRVs submit that the above contextual findings of the attack of Pajule IDP camp provided the Trial Chamber with evidence beyond reasonable doubt upon which the Appellant was convicted. The spiritual leadership of Joseph Kony and the related rules within the LRA as outlined by the Trial Chamber provide an overall context of the LRA structure. However, with regard to the specific attack on Pajule, the evidence assessed by the Trial Chamber as noted above provides the contextual basis for the conclusions reached upon by the Trial Chamber in convicting the Appellant.

ii) Criminal Responsibility for the Attack and Crimes in Pajule

229. The LRVs oppose this ground. The ground as drafted offends the provisions of Rule 152 and Regulation 57 (e). The LRVs invite the Appeals Chamber to dismiss it *limine* in accordance with the Standard of Review of this Chamber. There is no error of law or fact identified in which the Trial Chamber disregarded favourable evidence or evidence which raised reasonable doubt in attributing criminal responsibility to the Appellant.

230. The Trial Chamber in finding the Appellant guilty as a joint co-perpetrator for the attack on Pajule IDP camp reviewed the evidence which point to the Appellant being the Oka Battalion Commander, a battalion of the Sinia Brigade being present at the meeting summoned by Vincent Otti on or about the 5 October 2003;²⁷⁴ the appointment of the Appellant as one of the commanders to go for the attack as testified to by witness P-0101 and pursuant to this appointment, the Appellant ordering fighters from his group particularly his order to Opio Korea to choose fighters to go for the attack on Pajule;²⁷⁵ the attack on the civilian population in which the Appellant joined Raska Lukwiya the overall commander of the attack at the centre as testified to by witness P-0144 moreover the Appellant led a group of LRA fighters and actively engaged in exchange of gun fire with government soldiers,²⁷⁶ as testified to by witness P-0309.

²⁷² Trial Judgment, paras 1358-1369.

²⁷³ Trial Judgment, paras 1084-1147.

²⁷⁴ Trial Judgment, paras 1176-1203.

²⁷⁵ Trial Judgment, paras 1204-1232.

²⁷⁶ Trial Judgment, paras 1233-1271.

231. The Appellant additionally exercised control over the crimes by his essential contribution as a commander and by overseeing abducted persons brought to him as well as ordering his fighters to go and abduct people and go into civilians houses and forcefully take their properties as testified to by Rwot Oywak all as part of the plan to bring about what was agreed at the meeting of the commanders summoned by Vincent Otti.²⁷⁷

232. The LRVs submit that there is no error of law or fact identified in which the Trial Chamber disregarded favourable evidence and evidence establishing reasonable doubt and no mischaracterisation of evidence, impermissible inferences, hearsay, evidence of acts not charged upon which the Appellant was convicted.

iii) Alleged Impact and consequences of the injury the Appellant suffered in November 2002

233. The LRVs oppose this ground of appeal. There is no error of law or fact occasioned by the Trial Chamber in relying on the evidence that in spite of the injury previously sustained the Appellant was put at the scene of crime on account of witness testimony. The ground of appeal simply ignores the overwhelming evidence against the Appellant.

234. The Trial Chamber properly assessed and evaluated the evidence before it including the impact and consequences of the injury sustained by the Appellant. In particular, the Trial Chamber examined and was satisfied with the evidence about the events leading to the Appellants injury and his actions whilst in sick bay including ordering people to go and “work” and being able as of April 2003 to walk with the aid of a stick as testified to by P-0205 and P-0231 on the one hand as evidence from the logbook which records Vincent Otti confirming to Joseph Kony that the Appellant can now walk and can and perform as Sinia Brigade Commander 2IC consistent with the said promotion.²⁷⁸

235. The Trial Chamber additionally reviewed evidence that placed the Appellant at the location of the crimes during the attack on Pajule IDP camp. In particular evidence which points to the Appellant being the Oka Battalion Commander, a battalion of the Sinia Brigade and being present at the meeting summoned by Vincent Otti on or about the 5 October 2003;²⁷⁹ the appointment of the Appellant as one of the commanders to go for the attack as testified to by witness P-0101 and

²⁷⁷ Trial Judgment, paras 1272-1369.

²⁷⁸ Trial Judgment, paras 1021-1074.

²⁷⁹ Trial Judgment, paras 1176-1203.

pursuant to this appointment the Appellant ordering fighters from his group particularly his order to Opio Korea to choose fighters to go for the attack on Pajule;²⁸⁰ the attack on the civilian population in which the Appellant joined Raska Lukwiya the overall commander of the attack at the centre of Pajule as testified to by witness P-0144 moreover the Appellant led a group of LRA fighters and actively engaged in exchange of gun fire with government soldiers as testified to by witness P-0309;²⁸¹ as well as evidence of the Appellant overseeing abducted persons brought to him as well as ordering his fighters to go and abduct people and go into civilians houses and forcefully take their properties as testified to by Rwot Oywak who positively identified the Appellant.²⁸²

236. The LRVs submit that there is accordingly no error of law or fact occasioned by the Trial Chamber as it exhaustively and properly evaluated all evidence before it and reached the correct conclusion about the Appellant's injury not inhibiting him from participating and actually contributing to the crimes committed during the attack on Pajule IDP Camp.

OO. Alleged error concerning findings on Odek IDP camp (grounds 77, 78 & 79)

i) Crimes against Humanity and War Crimes" at Odek IDP Camp

237. The LRVs oppose these grounds. The grounds as framed are but a mere disagreements with the factual and legal findings of the Trial Chamber. There is no error of law or fact in the Trial Chamber's conclusions about the Appellant committing jointly with the Joseph Kony and other Sinia brigade leaders and through LRA soldiers, crimes against humanity and war crimes at Odek IDP camp.

238. The Trial Chamber's legal conclusions in respect to this ground of appeal are informed by the review of the relevant factual evidence relating to the LRA attack on Odek IDP Camp as presented to it by the Prosecution.²⁸³ In particular, consistent evidence that shortly before attack on Odek IDP Camp, Joseph Kony ordered the people of Odek to be attacked and the Appellant was aware of the said order,²⁸⁴ and acted on it by ordering fighters under his command to attack the IDP camp,²⁸⁵ and directing that the attackers should be merciless, exterminate everything and

²⁸⁰ Trial Judgment, paras 1204-1232.

²⁸¹ Trial Judgment, paras 1233-1271.

²⁸² Trial Judgment, paras 1272-1369.

²⁸³ Trial Judgment, paras 1084-1147.

²⁸⁴ Trial Judgment, paras 1387-1413.

²⁸⁵ Trial Judgment, paras 1393-1413.

bring back food stuffs as testified to by P-0410.²⁸⁶ The Appellant personally participated²⁸⁷ and commanded the attack aware that he was attacking a civilian population.²⁸⁸

239. In the course of the attack, LRA fighters looted civilians' properties and committed violence against civilians including killing some²⁸⁹ and the attack climaxed with the Appellant receiving a report from his subordinate commanders and in turn he reported and took responsibility for the attack on LRA radio to Joseph Kony as testified to by P-0314 and corroborated by intercepted radio evidence.²⁹⁰

ii) LRA commanders and Sinia Leadership engaged in an Agreement or Common Plan to attack Odek IDP camp

240. The Trial Chamber in finding that there was an agreement or common plan is guided by the provisions of Article 25(3)(a) as charged. The Chamber, was further satisfied beyond reasonable doubt of the existence of the agreement and common plan by reason of oral testimony particularly of witnesses P-0410 and D-0032.²⁹¹ The Trial Chamber's conclusions are further informed by the evidence on the orders issued by Joseph Kony generally to attack civilians as basis for its finding that the Appellant, Joseph Kony and others engaged in an agreement or common plan to attack Odek IDP camp.²⁹²

241. The Appellant's actions in which he ordered Odek IDP camp to be attacked and personally participated in commanding the attack amounts to a part of a sequence of events to bring about the intention to attack everyone at the IDP camp which is consistent with the charged crimes as laid out by the Trial Chamber in the impugned Judgment.²⁹³

iii) Co-perpetration of the Attack on Odek IDP camp

242. The LRVs submit that the Trial Chamber' evidentiary findings are sound and warranted in light of the fact that it considered the operational environment of the LRA in which Joseph Kony issued orders to attack civilians in IDP camps and the

²⁸⁶ Trial Judgment, para. 1405.

²⁸⁷ Trial Judgment, paras 1414-1428.

²⁸⁸ Trial Judgment, paras 1429-1614.

²⁸⁹ Trial Judgment, paras 1458-1614.

²⁹⁰ Trial Judgment, paras 1615-1642.

²⁹¹ Trial Judgment, paras 1387-1392.

²⁹² Trial Judgment, paras 1084-1147, 2910-2912.

²⁹³ Trial Judgment, para. 2912.

Appellant as an LRA commander acted on this and other orders to bring about desire to attack the IDP camp.²⁹⁴

243. The Appellant personally participated by ordering his soldiers to attack the IDP camp and commanded the attack and received reports and he in turn reported the attack on LRA radio.²⁹⁵

244. The said findings of the Trial Chamber inform the conclusion of the Trial Chamber's legal characterisation of the facts that the elements of the crimes for co-perpetration of the attack on Odek IDP camp are met and proved beyond reasonable doubt.²⁹⁶

PP. Alleged error related (sic) to findings on Abok IDP camp (ground 80)

245. The LRVs oppose this ground in whole. There is no error of law identified in which the Trial Chamber convicted the Appellant for the attack on Abok IDP camp without the burden of proof being dispensed.

246. The Trial Chamber in convicting the Appellant for the attack on Abok IDP camp was satisfied that legal characterisation of the facts and the elements of crimes charged that the same were satisfactorily met by the evidence before it.²⁹⁷

247. The Trial Chamber's conviction decision was also informed by the evidentiary findings in particular the encouragement to attack IDP camps by senior LRA commanders including Joseph Kony and Vincent Otti;²⁹⁸ the Appellant's order to attack Abok IDP camp as testified to by witnesses P-0406, P-00054, P-0252, and P-0205;²⁹⁹ attack against a civilian population as testified to by witness Cyprian Ayoo, Oper Robson, Dorcas Ayo, V-0002 and other witnesses;³⁰⁰ and the report of the attack by the Appellant.³⁰¹

248. The LRVs submit that the evidence supports the finding of the Trial Chamber beyond reasonable doubt and for conviction of the Appellant for the attack on Abok IDP camp.

²⁹⁴ Trial Judgment, paras 1084-1147.

²⁹⁵ Trial Judgment, paras 1414-1614.

²⁹⁶ Trial Judgment, paras 2910-2926.

²⁹⁷ Trial Judgment, paras 2974-3020.

²⁹⁸ Trial Judgment, paras 1861-1863.

²⁹⁹ Trial judgment, paras 1864-1876.

³⁰⁰ Trial Judgment, paras 1877-2000.

³⁰¹ Trial Judgment, paras 2001-2008.

QQ. Alleged errors concerning findings on Lukodi IDP camp (grounds 81 & 82)

i) The Appellant and Crimes Perpetrated in Lukodi IDP camp

249. The LRVs oppose these grounds. The ground as framed offends the provisions in Rule 152 and Regulation 57(e). There is no error in law or fact identified wherein the trial Chamber disregarded favourable evidence and evidence which raised reasonable doubt.

250. The Trial Chamber found the Appellant guilty after evaluating evidence including the LRA perception of civilians,³⁰² the Appellant's order to attack Lukodi IDP camp,³⁰³ the attack on a civilian population at Lukodi including the killing of civilians, and looting of civilians items as testified to by several witnesses,³⁰⁴ and the report of the attack by the Appellant to other LRA commanders.³⁰⁵

ii) Civilian casualties and evidence on the Attack at Lukodi

251. The Trial Chamber in addressing the issue of civilians killed during the attack on Lukodi IDP camp considered the oral testimony of several witnesses including P-0406 and P-0410³⁰⁶ as well as the witness statement of P-0017.³⁰⁷ Witnesses P-0024, P-0187, Santo Ojera, Martin Kalyemenya, Pyerina Ayaa, David Komakech, Joel Opiyo, Lilly Apiyo, all testified about the killings and or attempted killing by the attacking LRA fighters.³⁰⁸ It further considered the oral testimony of witness P-0205 who testified that he did not see any civilians killed.³⁰⁹ The Trial Chamber found that the evidence of P-0205, P-0172 and P-0142 was purely speculative. The Chamber had more reliable witness accounts from which it arrived at its conclusions about the killing of civilians.³¹⁰ The testimony by P-0205 not having seen any civilians killed does not exculpate the Appellant in light of the overwhelming evidence before the Chamber.

252. The Trial Chamber further found that there was strong evidence pointing to LRA fighters upon entering the IDP camp divided themselves into two groups and

³⁰² Trial Judgment, paras 1084-1147.

³⁰³ Trial Judgment, paras 1647-1699.

³⁰⁴ Trial Judgment, paras 1700-1845.

³⁰⁵ Trial Judgment, paras 1846-1857.

³⁰⁶ Trial Judgment, paras 1723-1724.

³⁰⁷ Trial Judgment, para. 1739, fn 4389.

³⁰⁸ Trial Judgment, paras 1741-1779.

³⁰⁹ Trial Judgment, para. 1736.

³¹⁰ Trial Judgment, para. 1737.

attacked both the barracks and the camp. Both targets of the attack were clearly distinguishable moreover none of the LRA fighters testified that they were unable to distinguish between the two targets of the attack by the LRA.³¹¹

253. The Trial Chamber therefore properly evaluated the evidence before it and rightly dismissed the purported exculpatory evidence.

RR. Alleged errors concerning findings on the conscription and use of child soldiers under the age of 15 (grounds 83, 84, 85 & 86)

i) Dominic Ongwen and his Contribution to the Conscription of children who were younger than 15 years old to actively participate in hostilities

254. The LRVs submit that this ground of appeal as drafted is a disagreement with the findings of the Chamber. There is no error in law or fact identified wherein the trial Chamber disregarded favourable evidence and evidence which raised reasonable doubt of the Appellant's culpability. Furthermore, the LRVs posit that any alleged errors, would not materially affect the outcome of the Impugned Decision.

255. In finding that the Appellant made an essential contribution to children under the age 15 years actively participating in hostilities through a common plan, the Chamber noted foremost that the process of abduction of children into the LRA was coordinated and methodical in nature and the Appellant and other LRA commanders relied upon the LRA soldiers to carry out abductions, hence abductions were an organisational-wide policy.³¹²

256. The LRVs submit that contrary to the Appellant's arguments about the estimation of the ages of the persons, the Chamber in its assessment of the evidence before it advised itself on the lack of consideration regarding the estimation of ages and therefore it would assess any evidence of the age on an individual basis.³¹³

257. The Chamber accordingly considered the testimonies of witnesses including witness P-0054, P-0264, P-0233, P-0070, P-0330, P-205, P-0231, who individually explained how they were able to identify that a person abducted was under the age

³¹¹ Trial Judgment, paras 1738-1740.

³¹² Trial Judgment, paras 2312-2313.

³¹³ The Chamber's decision is consistent with the Appeals Chamber on the question of determination of ages of individuals as was discussed in the Lubanga Appeal Judgment, ICC-01/04-01/06 A 5, paras 197-198.

of 15.³¹⁴ These witnesses testified that they would compare the ages of the individual against their own age at the time they were themselves abducted or would offer an explanation why an individual was released or not after initial abduction as testified to by P-0233, or that LRA units seeking to increase their ranks abducted persons without regard to the minimum age as testified to by P-0231.³¹⁵

258. The Chamber also recalled the testimony of Witnesses P-0330 and P-0205 who testified that the Appellant ordered that no elderly persons should be abducted since these individuals would easily find their way back home, unlike young people, and gave instructions during the attack on Odek camp for boys, when found, to be abducted, but those who were not fit to be in the army or above 18 years old should be brought killed.³¹⁶

259. The Chamber further found that, consistent with the testimony of P-0231, the orders for abduction of children originated from Joseph Kony and trickled down to the hierarchical structure of the LRA.³¹⁷

260. The Chamber also assessed the evidence of the LRA's Sinia brigade abductions including the Appellant ordering abductions and personally participating in abductions,³¹⁸ on the one hand and evidence relating to abductions of children under 15 years of age during the attacks on Pajule IDP camp,³¹⁹ Odek IDP Camp,³²⁰ Lukodi IDP camp,³²¹ and Abok IDP camp.³²²

261. The Chamber's findings on the presence of children under 15 in the Sinia Brigade are further justified by evidence pointing to the presence of children under the age of 15,³²³ 'beating the civilian out of the children,³²⁴ training,³²⁵ the use of children under 15 as escorts,³²⁶ and Dominic Ongwen's knowledge of the age of the abductees.³²⁷

³¹⁴ Trial Judgment, paras 2314-2328.

³¹⁵ Trial Judgment, *ibid.*

³¹⁶ Trial Judgment, paras 2318-2319.

³¹⁷ Trial Judgment, para. 2329.

³¹⁸ Trial Judgment, paras 2340-2351.

³¹⁹ Trial Judgment, paras 2352-2356.

³²⁰ Trial Judgment, paras 2357-2360.

³²¹ Trial Judgment, para. 2361.

³²² Trial Judgment, paras 2362-2365.

³²³ Trial Judgment, paras 2366-2372.

³²⁴ Trial Judgment, paras 2373-2379.

³²⁵ Trial Judgment, paras 2380-2394.

³²⁶ Trial Judgment, paras 2395-2402.

³²⁷ Trial Judgment, paras 2403-2414.

262. The use of children to engage in hostilities was established by evidence to the requisite standard of proof, as found by the Chamber. The Chamber found that during all charged four attacks, children participated in the attacks as testified to by several witnesses including P-0252, P-0054, P-0307, P-0264, P-0144, P-0249, P-0006, P-0047, P-0264, P-0309, P-0142, P-0406, P-0410, P-0018, P-0293.³²⁸

SS. Alleged errors in respect to findings on the abduction and distribution of women and girls (grounds 66 (in part), 87 & 89)

i) Methodical Abduction and Distribution of Women and Girls in Northern Uganda

263. The Defence alleges that the Chamber erred in law by relying on acts not charged which lay outside the temporal and geographical scope of the charges³²⁹ to support the convictions for sexual and gender based crimes. In particular, the Defence alleges that ‘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.’³³⁰

264. The Defence takes issue with the testimony of P-0235 and P-0236 who became the Appellant’s ‘wives’ after the charged period and the Chamber’s consideration of sexual and gender based crimes that were not directly perpetrated by the Appellant. However, the Chamber extensively relied on direct incriminatory evidence from the Appellant’s forced wives under the charged period.

265. As is well known, Courts consistently admit evidence regarding the context and pattern of conduct even when it is outside the temporal scope of the charges. For example, the Chamber in *Ntaganda* found evidence outside the scope of the charges as relevant, probative and not unfairly prejudicial to Mr Ntaganda as it demonstrated the context and pattern of conduct.³³¹

266. The LRVs submit that the Chamber throughout the Impugned Decision cites the credible evidence of numerous witnesses within the charged period who testified about sexual and gender based crimes as both directly and indirectly perpetrated by the Appellant. Therefore, the Defence fails to demonstrate how

³²⁸ Trial Judgment, paras 2415-2447.

³²⁹ Defence Appeal Brief, para. 920.

³³⁰ Defence Appeal Brief, para. 919.

³³¹ The Prosecutor v Bosco Ntaganda, Prosecution’s Response to the “Requête de la Défense relative à l’admissibilité de certains éléments de preuve que le Procureur entend présenter à l’audience de confirmation des charges et en radiation de certaines parties du Document contenant les charges” (ICC-01/04-02/06-250-Conf), ICC-01/04-02/06-269, 3 March 2014, para. 5.

contextual evidence in addition to the plethora of relevant direct testimony relating to SGBC has rendered the Appellant's conviction unsafe.

267. Furthermore, the Defence's disagreement with the Chamber that Dominic Ongwen was involved in the agreement or common plan relating to the abduction of women during the charged period is merely that- a disagreement with the Chamber's finding and not an error of law or fact that materially effects the outcome of the judgment.

268. The Chamber's findings on the abductions of women and girls are based on the following factors: a general policy to the LRA membership and general public on the abduction of women and girls as testified to by witness P-0205;³³² and coordination amongst the LRA leadership including the Appellant to abduct women and girls within the charged period as per ISO and UPDF logbook and intercepted communication evidence.³³³

269. The LRVs submit that the Chamber did not rely on impermissible inferences and deductions. The evidence relied upon by the Chamber as indicated above was satisfactory to the standard of proof and falls within the temporal scope of the charges. Moreover, the Chamber found that the Appellant personally engaged in the LRA policy to abduct women and girls and to hold them in his household and subject them to forced marriage, rape, physical and mental abuse and forced labour and therefore he was aware and conscious of the LRA practice of abducting the said women and girls. In the Chamber's view and justifiably the actions of the Appellant were an important element necessary to sustain the systemic nature of the abuse.³³⁴

TT. Alleged error regarding forced pregnancy (ground 88)

270. The The Defence contend that the Chamber erred in convicting 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 P-0101, between July 2002 and July 2004 and P-0214, sometime in 2005.

271. The Defence alleges that with respect to these crimes the legal and evidentiary standard and burden of proof were not met beyond a reasonable doubt. In particular, the Defence takes issue with the Chamber's reliance on 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 forcibly

³³² Trial Judgment, paras 2098-2100.

³³³ Trial Judgment, paras 2101-2113.

³³⁴ Trial Judgment, para. 2113. See also paras 2009-2097.

impregnated by the Appellant.

272. The LRVs submit that the Defence arguments on this matter are mere disagreements with the findings of the Chamber and do not amount to an error of law or fact that materially effects the outcome of the judgment. Indeed, a common sense assessment of the evidence leads only to one conclusion regarding the coercive environment that existed within the LRA and the confinement of women who lived under conditions of restricted movement.

273. With regards to the interpretation of article 7(1)(g) and the legal characterization of the facts the LRVs strongly disagree with the Defence's assertions that the Chamber's finding that 'the crime of forced marriage is grounded in the woman's right to personal and reproductive autonomy and the right to family' would bring 'forced pregnancy into the political and ideological debate on women's personal and reproductive autonomy and the right to family.'³³⁵

274. The LRVs strongly urge the Appeals Chamber to disregard all arguments made by the Defence regarding forced marriage, forced pregnancy as again they present mere differences of opinion with the trial chamber rather than errors of law and fact.

UU. Alleged error in respect to "forced marriage" (grounds 90 & 66 (in part))

275. The Defence has litigated their objections to forced marriage not being a crime under the Statute previously, as such, the LRVs incorporate their prior arguments on this matter.³³⁶

276. The Chamber discussed the historical debate leading to the criminalisation of forced pregnancy as an independent crime which led it to the conclusion that "The crime of forced pregnancy depends on the unlawful confinement of a (forcibly made) pregnant woman, with the effect that the woman is deprived of reproductive autonomy."³³⁷

277. The Chamber notes that the *actus reus* of the crime is committed whether as crime against humanity or war crime when the perpetrator confines one or more

³³⁵ Defence Appeal Brief, para. 961.

³³⁶ Corrigendum to the Victims' Response to "Defence Motion on Defects in the Confirmation of Charges Decision" (Parts I-IV), ICC-02/04-01/15-1464-Corr, 26 February 2019, paras 49-62; Victims' Response to "Defence Motions on Defects in the Confirmation Decision Regarding SGBC", ICC-02/04-01/15-1618, 30 September 2019.

³³⁷ Trial Judgment, para. 2722.

women forcibly made pregnant moreover the perpetrator need not have personally forcefully made the victim pregnant.³³⁸

278. With respect to the material element, the Chamber identifies two components namely the “unlawful confinement” and the woman victim need to have been “forcibly been made pregnant.”³³⁹

279. The Chamber then notes that the *mens rea* of the crime is committed when, in addition to Article 30 mental elements, the perpetrator acts with specific intent to affect the *ethnic composition of any community or carrying out other grave violations of international law*.³⁴⁰

280. The Chamber assessed the evidence before it relating abduction of women and girls; their distribution; the coercive environment and other LRA forms of violence leading to forced pregnancy.³⁴¹

281. Accordingly, the evidence underlying the Appellant’s conduct in respect of this crime as noted in the observations above is sufficient and justifies the Chamber’s decision to the standard of proof to find the Appellant criminally responsible for the crime of forced pregnancy particularly in carrying out other grave violation, including sexual violence,³⁴² beatings,³⁴³ forced labor,³⁴⁴ and orders to beat others to death.³⁴⁵

VI. CONCLUSION

282. For the foregoing reasons, the LRVs respectfully request that the Appeals Chamber dismisses all of the grounds of appeal as in most parts the Defence re-litigates issues already raised and decided upon during the trial proceedings or present disagreements with Trial Chamber’s assessment of the evidence. The Defence have failed, in each and every one of their grounds, to demonstrate that the Chamber erred in law, fact or procedure or violated Dominic Ongwen's fair trial rights. Moreover, the Defence has failed to illustrate how any of these alleged errors could have materially affected the impugned decision.

³³⁸ Trial Judgment, para. 2723.

³³⁹ Trial Judgment, paras 2724-2725.

³⁴⁰ Trial Judgment, paras 2726-2729

³⁴¹ Trial Judgment, paras 2114-2309

³⁴² Trial Judgment, paras 2041-2070.

³⁴³ Trial Judgment, paras 2071-2081.

³⁴⁴ Trial Judgment, para. 2082.

³⁴⁵ Trial Judgment, paras 2083-2085.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Manoba', written in a cursive style.

Joseph A. Manoba

A handwritten signature in blue ink, appearing to read 'Francisco Cox', written in a cursive style.

Francisco Cox

Dated this 21st day of October 2021

At Kampala, Uganda and at Santiago, Chile