

**Cour
Pénale
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**International
Criminal
Court**

Original: English

No.: **ICC-02/04-01/15**

Date: **17 July 2024**

APPEALS CHAMBER

Before:

**Judge Luz del Carmen Ibáñez, Presiding Judge
Judge Tomoko Akane
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze
Judge Erdenebalsuren Damdin**

SITUATION IN UGANDA

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

**PUBLIC
with
PUBLIC ANNEXES B-D**

Public Redacted Version of “Defence Brief in Support of its Appeal of the Reparations Order dated 28 February 2024”, filed on 24 June 2024 as ICC-02/04-01/15-2093-Conf

Source: Defence for Dominic Ongwen

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

Karim A.A. Khan, KC, Prosecutor
 Helen Brady
 Leonie von Braun

Counsel for the Defence

Chief Charles Achaleke Taku
 Beth Lyons
 Thomas Obhof

Legal Representatives of the Victims

Joseph Manoba
 Francisco Cox

Common Legal Representative for Victims

Paolina Massidda
 Orchlon Narantsetseg

Unrepresented Victims**Unrepresented Applicants
(Participation/Reparation)****The Office of Public Counsel for Victims**

Paolina Massidda
 Orchlon Narantsetseg

**The Office of Public Counsel for the
Defence**

Marie O'Leary

States' Representatives**Amicus Curiae****REGISTRY****Registrar**

Dr Osvaldo Zavala Giler

Counsel Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations
Section**

Dr Philipp Ambach

Trust Fund for Victims

Deborah Ruiz Verduzco

I. INTRODUCTION

1. Pursuant to Article 82(4) of the Rome Statute ('Statute'), Rule 150 of the Rules and Procedure and Evidence ('RPE') and Regulation 58 of the Regulations of the Court ('RoC'), the Defence for Dominic Ongwen ('Defence') hereby submits its brief on appeal against Trial Chamber IX's *Reparations Order* of 28 February 2024 ('Impugned Decision').¹

II. CONFIDENTIALITY

2. Pursuant to Regulation 23 *bis*(2) of the RoC, the Defence files this appeal as confidential as it discusses material with the same classification. A public redacted version shall be filed contemporaneously to the this. Pursuant to Regulation 23 *bis*(1) of the RoC, the Defence files Annex A as confidential as it contains communications between the Defence and Registry, and such communications are routinely classified as confidential.

III. PROCEDURAL HISTORY

3. On 4 February 2021, Trial Chamber IX ('Chamber') issued its Trial Judgment in the case against Dominic Ongwen, convicting him of 61 counts of war crimes and crimes against humanity.²
4. On 6 May 2021, Trial Chamber IX gave Mr Ongwen a 25-year sentence.³
5. On 15 December 2022, the Appeals Chamber unanimously confirmed the Judgment⁴ and confirmed, by majority, the Sentence.⁵
6. On 28 February 2024, Trial Chamber IX issued the Impugned Decision against Mr Ongwen.⁶

¹ Trial Chamber IX, *Reparations Order*, [ICC-02/04-01/15-2074](#).

² Trial Chamber IX, *Trial Judgment*, [ICC-02/04-01/15-1762-Red](#).

³ Trial Chamber IX, *Sentence*, [ICC-02/04-01/15-1819-Red](#).

⁴ Appeals Chamber, *Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgment"*, [ICC-02/04-01/15-2022-Red](#).

⁵ Appeals Chamber, *Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled "Sentence"*, [ICC-02/04-01/15-2023](#), with the *Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza*, [ICC-02/04-01/15-2023-Anx1](#).

⁶ Trial Chamber IX, *Reparations Order*, [ICC-02/04-01/15-2074](#).

7. On 14 March 2024, the Appeals Chamber granted the Defence an extension until 22 April 2024 to file its notice of appeal and 24 June 2024 to file its appeals brief.⁷
8. On 22 April 2024, the Defence filed its notice of appeal, listing 15 grounds of appeal.⁸ For posterity, the Defence decided to withdraw Grounds 10 and 15, but reserves the right to reinstate said grounds should Mr Ongwen decide after receiving the Acholi translation of the operative parts of the Impugned Decision.

IV. GROUNDS OF APPEAL

A. **Ground 1: Trial Chamber IX erred in law by refusing to order the disclosure of the names of persons in the sample of victims' dossier ('Dossier').**⁹

9. During the proceedings, the Defence requested several times for the disclosure of the persons identities in the Dossier.¹⁰ Trial Chamber IX's refusal to order the disclosure of the names of all 205 persons in the Dossier materially infringed on Mr Ongwen's right to a fair proceeding. Because of this denial of Mr Ongwen's rights, he and his Defence were unable to make a fair assessment of the Dossier with material found in the case file.¹¹ The failure to allow the Defence to make a fair assessment of the Dossier caused an increased number of estimated beneficiaries, and thus increased Mr Ongwen's overall liability.
10. In the Chamber's order of 16 January 2023, it outlined modalities for redactions to the victim applications in the Dossier.¹² The Chamber allowed those persons who did not consent to having their identities known to the Defence to remain secret from the Defence.¹³ The Defence

⁷ Appeals Chamber, *Decision on the Defence's request for time extension for the notice of appeal and appeal brief against Trial Chamber IX's "Reparations Order"*, [ICC-02/04-01/15-2080](#) (noting that the Appeals Chamber granted the same extension to the CLRV and the LRV and that the Defence could amend its brief 14 days after Mr Ongwen received an Acholi copy of the operative parts of the Impugned Decision).

⁸ Appeals Chamber, *Defence Notice of Appeal of the Reparations Order dated 28 February 2024 and Request for Suspensive Effect*, [ICC-02/04-01/15-2084](#).

⁹ See Trial Chamber IX, *Decision on the Defence Request for an Order to Disclose the Names of the Victim Sample Pool of Participating Victims*, ICC-02/04-01/15-2043-Conf and Trial Chamber IX, *Omnibus Decision on the Defence's Filings ICC-02/04-01/15-2044 and ICC-02/04-01/15-2045-Conf*, ICC-02/04-01/15-2049-Conf.

¹⁰ See Trial Chamber IX, *Defence Request for an Order to Disclose the Names of the Victim Sample Pool of Participating Victims*, ICC-02/04-01/15-2036-Conf (PRV [here](#)); email from Thomas Obhof to Dr Philipp Ambach, *Ongwen Defence – Request for the lifting of redactions to victim applications*, sent on 16 April 2023 at 13:43 CET (attached as Confidential Annex A); and Trial Chamber IX, *Defence Request for an Order to Disclose Specific Material of Persons in the Victim Sample Pool of Participating Victims*, ICC-02/04-01/15-2045-Conf (PRV [here](#)).

¹¹ The Defence here refers to material found in the case file by virtue of disclosure, not that officially submitted into evidence.

¹² Trial Chamber IX, *Decision on the Registry Transmission of List of Individuals and Relevant Information for Reparations Sample*, [ICC-02/04-01/15-2027](#), paras 10-12.

¹³ Trial Chamber IX, *Decision on the Registry Transmission of List of Individuals and Relevant Information for Reparations Sample*, [ICC-02/04-01/15-2027](#), paras 10-11.

was allowed to make requests for the further lifting of redactions and seize “the Chamber only exceptionally when no agreement can be reached.”¹⁴

11. To review the applications properly, the Defence requested the lifting of redactions for all persons in the Dossier.¹⁵ First, it requested the Chamber to order the lifting of the redactions to all of the names and identifying material of the persons chosen for the Dossier.¹⁶ Next, the Defence requested VPRS to lift the redactions of 12 specific persons in the Dossier, giving cogent reasons for the lifting of each person.¹⁷ Finally, the Defence requested the Chamber to lift the redactions for the 12 persons identified in the 16 April 2023 email after being denied by VPRS.¹⁸ All three requests were denied. It is noteworthy that in its instructions of 16 January 2023, the Chamber ordered the Defence to raise any challenges initially with VPRS.¹⁹ VPRS did not make an independent decision on lifting the redaction for which the Defence asked, but raised the request with the LRV and CLRV and followed their advice, which the Defence asserts violates the spirit of the 16 January 2023 order.
12. The Appeals Chamber’s jurisprudence states that “in granting the Defence access to the victims’ applications, the necessary redactions shall be made to protect the victims’ safety, physical and psychological wellbeing, dignity and privacy, pursuant to article 68 of the Statute.”²⁰ It is incumbent upon the Chamber to strike a necessary balance between safeguarding the rights of

¹⁴ Trial Chamber IX, *Decision on the Registry Transmission of List of Individuals and Relevant Information for Reparations Sample*, [ICC-02/04-01/15-2027](#), para. 12.

¹⁵ See Trial Chamber IX, *Defence Request for an Order to Disclose the Names of the Victim Sample Pool of Participating Victims*, ICC-02/04-01/15-2036-Conf (PRV [here](#)); email from Thomas Obhof to Dr Philipp Ambach, *Ongwen Defence – Request for the lifting of redactions to victim applications*, sent on 16 April 2023 at 13:43 CET (attached as Confidential Annex A); and Trial Chamber IX, *Defence Request for an Order to Disclose Specific Material of Persons in the Victim Sample Pool of Participating Victims*, ICC-02/04-01/15-2045-Conf (PRV [here](#)).

¹⁶ See Trial Chamber IX, *Defence Request for an Order to Disclose the Names of the Victim Sample Pool of Participating Victims*, ICC-02/04-01/15-2036-Conf (PRV [here](#)).

¹⁷ See Confidential Annex A.

¹⁸ Trial Chamber IX, *Defence Request for an Order to Disclose Specific Material of Persons in the Victim Sample Pool of Participating Victims*, ICC-02/04-01/15-2045-Conf (PRV [here](#)).

¹⁹ Trial Chamber IX, *Decision on the Registry Transmission of List of Individuals and Relevant Information for Reparations Sample*, [ICC-02/04-01/15-2027](#), para. 12.

²⁰ Appeals Chamber, *Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order”*, [ICC-01/04-02/06-2782](#), para. 689 (cited in Trial Chamber II, *Decision on the Request on Behalf of the Convicted Person seeking communication of material by the Trust Fund for Victims and the lifting of redactions applied by the Registry and the Legal Representatives of Victims’ to the victims’ dossiers*, [ICC-01/04-02/06-2847](#), para. 21 and Trial Chamber IX, *Decision on the Defence Request for an Order to Disclose the Names of the Victim Sample Pool of Participating Victims*, ICC-02/04-01/15-2043-Conf, para. 17). See also Appeals Chamber, *Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’*, [ICC-01/04-01/06-3466-Red](#), paras 249-256 and Appeals Chamber, *Judgment on the appeal of the victims against the “Reparations Order”*, [ICC-01/12-01/15-259-Red2](#), para. 90.

Mr Ongwen and “providing for an *appropriate* measure of protection for the victims, as set forth in article 68(1) of the Statute.”²¹

13. The Appeals Chamber wrote:

Whether information relating to persons at risk may be redacted must be determined on a case-by-case basis. The Appeals Chamber has had previous occasion to set out those factors to be addressed by the Pre-Trial Chamber when considering a request for non-disclosure prior to the hearing to confirm the charges, pursuant to rule 81(4). Those factors can be summarised briefly as: a thorough consideration of the danger that the disclosure of the identity of the person may cause; the necessity of the protective measure, including whether it is the least intrusive measure necessary to protect the person concerned; and the fact that any protective measures taken shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.²²

The Appeals Chamber has also stated that:

During the reparations phase of this case, the Trial Chamber noted the principle of proportionality applied in the consideration of redactions to evidence submitted in the investigation phase and criminal trial and found that ‘the same principles apply to the reparations phase’. It is also noted that, in the context of victim participation in the criminal trial, Trial Chamber I applied the above-mentioned human rights principles, expressed as the ‘principle of proportionality’, to Mr Lubanga’s right to disclosure of victims’ applications and the protective measures that may be imposed. It stated that protective measures should: i) restrict the rights of the suspect or accused only as far as necessary, and ii) be put in place where they are the only sufficient and feasible measure. In the Impugned Decision, the Trial Chamber reiterated that it ‘must strike a fair balance between the divergent rights and interests of the victims on the one hand and those of the convicted persons on the other’. In this sense, the Appeals Chamber notes that the Trial Chamber correctly identified the relevant general considerations applicable to redactions to victims’ requests for reparations.

The Appeals Chamber would note that the guiding principle for trial chambers must be to ensure that the convicted person, as a party to the litigation, has a meaningful opportunity to challenge the information on the basis of which a chamber will make an award against him or her. In reaching a decision on redactions to any information that is before it, trial chambers should apply the principles recalled in the Al Mahdi

²¹ Trial Chamber II, *Decision on the Request on Behalf of the Convicted Person seeking communication of material by the Trust Fund for Victims and the lifting of redactions applied by the Registry and the Legal Representatives of Victims’ to the victims’ dossiers*, [ICC-01/04-02/06-2847](#), para. 21 [emphasis added]. See also Trial Chamber IX, *Decision on the Defence Request for an Order to Disclose the Names of the Victim Sample Pool of Participating Victims*, ICC-02/04-01/15-2043-Conf, para. 17; Appeals Chamber, *Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’*, [ICC-01/04-01/06-3466-Red](#), para. 253; and Appeals Chamber, *Judgment on the appeal of the victims against the “Reparations Order”*, [ICC-01/12-01/15-259-Red2](#), para. 90.

²² Appeals Chamber, *Judgment on the appeal of Mr Mathieu Ngudjolo against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9”*, [ICC-01/04-01/07-521](#), para. 35 (cited in Appeals Chamber, *Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’*, [ICC-01/04-01/06-3466-Red](#), para. 253).

case above, weighing the different interests at stake. In doing so, the Appeals Chamber considers that in reparations proceedings, a trial chamber should also take into account the relevance of the information at issue and the purpose for which it will be relied upon, including whether, in reality, its non-disclosure affects the convicted person's rights. For example, if the information in the requests is considered with a view to deciding on collective reparations but not with a view to deciding on the merits of the individual requests, this may also be taken into account. What this means will depend on the circumstances of each case.²³

14. The Defence made the three separate requests with a view to decide on both collective reparations and the merits of the individual victim applicants in the Dossier. All three requests were denied. The disclosure of the names of the victim applicants in the Dossier was necessary as the non-disclosure affected Mr Ongwen's and his Defence Team's rights to conduct a meaningful review of the Dossier with information available in the case record. As an example, of the 12 persons for whom the Defence requested unredacted victim application forms, the Chamber did not dismiss seven of them.²⁴ It is also noteworthy that because it was denied the chance to conduct a proper investigation into the persons in the Dossier, the Defence only contested 27 victim applications in the Dossier.²⁵
15. First, the Appeals Chamber must look at the danger that the disclosure of the identity of the persons in the Dossier may cause to the persons. The Defence reminded the Chamber that there were no credible instances of threats or dangers caused by the disclosure of the names of victims or witnesses in the case.²⁶ The danger posed to the persons in the Dossier is near non-existent.²⁷ The Chamber made a critical error in fact and law by failing to apply this standard properly. Uganda is not in the middle of a civil uprising or war. The country is rather safe, and there has not been any significant LRA activity since the end of 2006. The Defence knowing the names in the Dossier posed no true threat or danger to the persons in the Dossier.

²³ Appeals Chamber, *Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'*, [ICC-01/04-01/06-3466-Red](#), paras 255-256 [internal citations omitted].

²⁴ Compare Trial Chamber IX, *Defence Request for an Order to Disclose Specific Material of Persons in the Victim Sample Pool of Participating Victims*, ICC-02/04-01/15-2045-Conf (PRV [here](#)), paras 18-43 and Trial Chamber IX, *Reparations Order*, ICC-02/04-01/15-2074-Conf-Exp-AnxI, paras 1006-21, 1035-49, 1350-63, 2990-3004 (found ineligible for reparations), 2702-22, 2819-31 (found ineligible for reparations), 2832-42 (found ineligible for reparations), 2843-64, 2865-74 (found ineligible for reparations), 2875-85 (found ineligible for reparations), 2896-2914, and 2931-46.

²⁵ See Trial Chamber IX, *Corrected Version of 'Defence Submissions on the Victim Sample Pool, filed on 19 May 2023'*, ICC-02/04-01/15-Corr-Conf (PRV [here](#)).

²⁶ Trial Chamber IX, *Defence Request for an Order to Disclose the Names of the Victim Sample Pool of Participating Victims*, ICC-02/04-01/15-2036-Conf, paras 22-23 (PRV [here](#)).

²⁷ The Defence writes that it is "near non-existent" instead of non-existent because no one can guarantee that something may happen, such as a hacking of the ICC system (which did happen in September 2023).

16. Second, the Appeals Chamber must look at the necessity of the redactions, including whether said redactions are the least intrusive measure necessary to protect the persons in the Dossier. The Defence stresses that the proceedings on innocence or guilt were over at the time of the creation of the Dossier. Mr Ongwen did not and still does not have any animosity towards the victims or witnesses. The redactions which the Chamber ordered to be maintained without the consent of the persons in the Dossier were completely unnecessary.
17. Third, the protective measures ordered by the Chamber should not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial reparations proceeding. In the Chamber's order of 16 January 2023, the Chamber gave no concern to the individual circumstances of the proceedings against Mr Ongwen.²⁸ From the order of 16 January 2023, the Chamber merely stated that specific types of redactions were allowed in other cases, and those would be implemented in the reparations proceeding against Mr Ongwen.²⁹ The Defence asserts that prior cases where redactions were maintained are distinguishable from these proceedings. As stated above, the LRA is gone from Uganda, and has been for nearly two decades. The risk is infinitesimally small and is not outweighed by any remote security concerns of the potential victims in the Dossier.
18. Had the Defence received access to the unredacted material in the Dossier, the Defence may have found material defects in the victim applications, much like it did with the 27 victim applications noted above. There are many items in the case file that contain the names of persons who were abducted, who abducted them, when they were abducted, which LRA group they were placed into, and when they returned home.³⁰ Had the Defence had access to the names of the persons in the Dossier, it would have been able to conduct a much thorough search of the case material, including consultations with its Client to determine if he recognised any of their faces or names. By maintaining the redactions in the Dossier, the Chamber created an unnecessary prejudice against the convicted person. Mr Ongwen and his Defence should have had access to those names in order to take a fair assessment of the individuals.
19. Considering the security situation in Uganda, and that there were no credible instances of security threats against Prosecution or Victim witnesses and participants directly related to the

²⁸ Trial Chamber IX, *Decision on the Registry Transmission of List of Individuals and Relevant Information for Reparations Sample*, [ICC-02/04-01/15-2027](#), paras 10-12.

²⁹ See Trial Chamber IX, *Decision on the Registry Transmission of List of Individuals and Relevant Information for Reparations Sample*, [ICC-02/04-01/15-2027](#), para. 11 and fn. 17.

³⁰ For example see UGA-OTP-0059-0063, UGA-OTP-0059-0064, UGA-OTP-0059-0065, UGA-OTP-0059-0066, UGA-OTP-0059-0067, UGA-OTP-0165-0124 and UGA-OTP-0244-0909.

case against Mr Ongwen at the ICC, fundamental fairness required the Chamber to disclose the identifying information of the potential beneficiaries in the Dossier. The failure of the Chamber to order this information to be given to the Defence caused unfair prejudice against Mr Ongwen and his Defence. As such, the Defence requests the Appeals Chamber to remand this issue back to Trial Chamber II with an order to release all of the identifying information of the persons in the Dossier to the Defence and allow the Defence to review the Dossier with this additional information.

B. Ground 2: Trial Chamber IX erred in law by its dismissal of the Defence’s arguments about Ugandan national proceedings related to reparations for persons from Abok IDP Camp.³¹

20. Trial Chamber IX erred in law by misinterpreting Article 75(6) of the Statute when it held that “domestic proceedings do not impact reparations before the Court.”³² This statement is an incorrect interpretation of the Statute. The correct interpretation of the Statute has the potential to decrease significantly the amount of reparations owed by Mr Ongwen.
21. On 22 March 2023, the Defence notified the Chamber, Parties and Participants of a decision of the High Court of Uganda in Lira related to legal proceedings which potentially touched and concerned victims from Abok (civil suit case 27 of 2016).³³ In that response, the Defence recommended that the Chamber order the CLRV, LRV and Registry “to determine if any victims are beneficiaries of this award.”³⁴
22. The Defence subsequently notified the Chamber of the list of beneficiaries from the 21 February 2023 decision and delineated some names that are similar or appear the same with participating victims before the Court. The Defence urged the Chamber to not only consider this when determining reparations for persons from Abok IDP Camp, but also carry out an in-depth determination of possible persons whose names are not known to the Defence and are dual

³¹ Impugned Decision, paras 48–49.

³² Impugned Decision, para. 49.

³³ Trial Chamber IX, *Defence Response to the Additional Submission on Beneficiaries and Transgenerational Harm*, [ICC-02/04-01/15-2035](#), para. 17

³⁴ Trial Chamber IX, *Defence Response to the Additional Submission on Beneficiaries and Transgenerational Harm*, [ICC-02/04-01/15-2035](#), para. 17.

claimants in the national case and the case here at the ICC.³⁵ The Chamber instead reserved its ruling on the above issues for the reparations order.³⁶

23. As stated by Trial Chamber I:

Pursuant to Article 75(6) of the Statute, a decision of the Court on reparations should not operate to prejudice the rights of victims under national and international law. Equally, decisions by other bodies, whether national or international, do not affect the rights of victims to receive reparations pursuant to Article 75 of the Statute. However, notwithstanding those general propositions, the Court is able to take into account any awards or benefits received by victims from other bodies in order to guarantee that reparations are not applied unfairly or in discriminatory manner.³⁷

24. Two years and eight months later, the Appeals Chamber would affirm this statement by Trial Chamber I almost verbatim.³⁸

25. Trial Chamber II recently held that if victims have had their harm rectified or mitigated through other means of assistance, then this will be taken into account in assessing the type of remedies to be awarded.³⁹

26. The Chamber was incorrect when it applied the standard that “domestic proceedings do not impact reparations before the Court.”⁴⁰ A Chamber is within its rights to determine what type and amount of reparations to award collectively or individually to victims of crimes for which a person before it was convicted, but must ensure that reparations are not applied unfairly or in discriminatory manner.

27. The Defence avers that as the Chamber was being called upon to make individual and collective reparation orders, it was desirable that the Chamber investigate about other forms of reparations were being given which participating victims and the communities where the crimes were committed in order to avoid duplication and the perception of discrimination among victims. Without all the names in the Dossier, the Defence was limited in its ability to determine

³⁵ Trial Chamber IX, *Defence Notification of Potential Issues with Representation of Victims*, ICC-02/04-01/15-2063-Conf-Exp, paras 13-14 (PRV [here](#)).

³⁶ Email from Trial Chamber IX to the Parties, Participants and Registry, *Decision on Defence’s Request #2068*, received on 16 November 2023 at 11:30 CET.

³⁷ Trial Chamber I, *Decision establishing the principles and procedures to be applied to reparations*, [ICC-01/04-01/06-2904](#), para. 201.

³⁸ Appeals Chamber, *Annex A to Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 order for reparations (amended)*, [ICC-01/04-01/06-3129-AnxA](#), para. 9

³⁹ See Trial Chamber II, *Public Redacted Version of First Decision on the Trust Fund for Victims’ Draft Implementation Plan for Reparations*, ICC-01/04-02/06-2860-Red, para. 191.

⁴⁰ Impugned Decision, para. 49.

whether any other organisation or state did issue reparations to persons in the crime sites. Even with such limited information, the Defence was able to find one such occurrence, yet the Chamber dismissed the issue under a standard different from that of the Appeals Chambers.

28. The Defence therefore posits that there shall be an overlap between the victims participating in the proceedings before the Court and individuals receiving reparations in national civil suit cases. The Chamber's failure to account for these reparations from the Government of Uganda shall cause those persons from Abok who are receiving reparations from the Government of Uganda to be enriched more than others from Abok, and also from those from the other three crime sites. The Chamber has an obligation to investigate and adjust the reparations accordingly to ensure fairness to the victims and Mr Ongwen.
29. The Trial Chamber thus erred in misinterpreting and misconstruing Article 75(6) of the Rome Statute based solely on the general propositions regarding the complementary nature of reparations and ignoring the exception as established by the Court's jurisprudence, thereby increasing significantly the amount of reparations owed by Mr Ongwen. The Defence requests the Appeals Chamber to reverse the Chamber's decision on the application of Article 75(6) of the Statute and remand it to Trial Chamber II for consideration and investigation with the applicable standard outlined above.

C. Ground 3: Trial Chamber IX erred in both law and in fact by determining that residents of Pajule, Odek, Lukodi and Abok IDP Camps, and non-resident civilians present at the time of the attack, are “presumed to be victims of the crimes of an attack against the civil [sic] population as such and persecution, through the underlying act of attack against the civilian population as such.”⁴¹

30. Trial Chamber IX increased the estimated number of victims by expanding the definition of victim under these crimes, thus increasing the estimated number of victims by the thousands. While the Chamber may resort to factual presumptions during the reparations proceedings, such presumption cannot violate the rights of the convicted person.
31. Relating to the standard of proof for harm, the Appeals Chamber has stated:

In the reparation proceedings, the applicant shall provide sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case. Given the fundamentally different nature of reparations proceedings, a standard less exacting than that for trial, where the prosecution must establish the relevant facts to the standard of “beyond a reasonable doubt”, should

⁴¹ Impugned Decision, paras 103 and 163-165.

apply. In determining the appropriate standard of proof in reparation proceedings, various factors specific to the case should be considered, including the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence.⁴²

In this decision, the Appeals Chamber would go on to state that, “[i]n relation to the standard of proof, the standard of “a balance of probabilities” shall apply.”⁴³

32. The Appeals Chamber would later write in *Katanga*:

The Appeals Chamber considers that, in the absence of direct evidence in certain circumstances, for example, owing to difficulties in obtaining evidence, a trial chamber may resort to factual presumptions in its identification of the heads of harm. The Appeals Chamber considers that resort to factual presumptions in reparations proceedings is within a trial chamber’s discretion in determining “what is ‘sufficient’ for purposes of an applicant meeting the burden of proof”. However, the Appeals Chamber emphasises that, while a trial chamber has discretion to freely evaluate the evidence of harm in a particular case, this discretion is not unlimited. A trial chamber must respect the rights of victims as well as the convicted person when resorting to presumptions.⁴⁴

33. The Defence asserts that the Chamber abused its discretion when applying the blanket presumption that every resident of the four IDP camps (whether present or not) and all non-residents present during the attack are presumed victims of an attack against the civilian population and persecution.
34. Residents of an IDP camp who were not present for the attack should not be presumed victims of an attack on a civilian population or persecution. To put it bluntly, one cannot be attacked if he or she is not present. It defies common sense and logic. The blanket presumption requires Mr Ongwen to pay reparations to persons who never saw an attack, who were not there. If they cannot prove some other harm, they should not be eligible for reparations.
35. Similarly, those persons who did not suffer have any interactions with LRA or the UPDF during the attack should not be presumed victims.⁴⁵ If said persons were present in one of the four IDP camps during the attack, but did not experience any of the attack, said persons should not be presumed victims. They should have to demonstrate, to the standard of a balance of

⁴² Appeals Chamber, *ORDER FOR REPARATIONS*, [ICC-01/04-01/06-3129-AnxA](#), para. 22.

⁴³ Appeals Chamber, *ORDER FOR REPARATIONS*, [ICC-01/04-01/06-3129-AnxA](#), para. 65 [internal citation omitted].

⁴⁴ Appeals Chamber, *Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled “Order for Reparations pursuant to Article 75 of the Statute*, [ICC-01/04-01/07-3778-Red](#), para. 75.

⁴⁵ For clarity, the Defence does not argue that persons who did interact with the LRA or UPDF during the attacks should be presumed to have suffered harm.

probabilities, that they suffered some type of actual harm, whether it be financial, moral or physical harm.

36. By creating the overarching presumption that everyone present in the camps on the day of the attack or anyone who lived in the camps, but not present on the day of the attacks, it opens the floodgates to abuse of the reparations system. Even though persons will have to prove to the appropriate standard that they lived at one of the IDP camps on a specific date, or that they were present on a specific date, the standard is rather low. There must be a real protection against frivolous claims to protect the true victims.
37. The Defence requests the Appeals Chamber to overturn the presumption of harm for persons who lived at the IDP camps at the time of the attack and those persons who were present suffered harm as a victim of a crimes of an attack against the civilian population and persecution, and rule that all persons must prove to the appropriate standard that they suffered some sort of harm.

D. Ground 4: Trial Chamber IX erred in law and fact by extending the potential indirect victim pool by creating the “African extended family exception”, thereby opening the floodgates to anyone of any distant relation to a direct victim to collect reparations.⁴⁶

E. Ground 11: Trial Chamber IX erred in fact when it recognised other complementary healing regimes and mechanisms but failed to recognise the complementary relevance and importance of the Acholi cultural reparation and restorative mechanisms.⁴⁷

F. Ground 12: Trial Chamber IX erred in law and fact when it decided the victims suffered spiritual attacks, cultural problems and *cen*, while characterising the conditions as mental illnesses without a clinical basis of its diagnosis.⁴⁸

38. The Chamber established principles regarding beneficiaries of reparations in which a distinction between direct and indirect victims was established in paragraph 70 of the Impugned Decision. The Chamber recalled the submissions of the TFV on ‘victims and their families’ in which the TFV submitted that, “in the context of the Ongwen case, it also must be considered that the concept of ‘family’ may have many cultural variations, which should lead the Court and the

⁴⁶ Impugned Decision, paras 128-132.

⁴⁷ Impugned Decision, paras 596, 600-610, and 612-638.

⁴⁸ Impugned Decision, paras 240-242, 368-369, 393-398 and footnotes 912-915.

TFV to have regard to the applicable social and familial structures [...]” of the affected communities.⁴⁹

39. This evidentiary enquiry which was urged by the TFV was reasonable and necessitated by the fact that, while the extended family system indeed exists in several African societies, they do so within applicable cultural and social variations. Furthermore, the Chamber did not provide a reasoned opinion on its continent-wide African extended family ‘concept’ which it defined as “a family which ‘goes beyond the strict frame of a couple and their children, to include their father and mother, brothers and sisters, and other relatives.’”⁵⁰ The contextual circumstances of this case and the attacks for which Mr Ongwen was convicted warranted the evidentiary enquiry which the TFV requested. The Chamber did not conduct this enquiry and did not rely on the evidence on the record, which was inconsistent with the broad ‘concept’ it relied on and applied for the determination of indirect victims.
40. In applying the broad Africa extended Africa family ‘concept’ to its decision on indirect victims of the attacks on the four IDP camps for which Mr Ongwen was convicted, the Chamber stated that due regard ought to be given to the applicable social and familial structures in the affected communities.⁵¹ But nevertheless, the Chamber relied on its broad understanding of the ‘concept’ of the extended family in the African continent as the basis of its decision and projections on indirect victims.”⁵²
41. The *Ntaganda* reparations decision which the Chamber relied on and referenced in the footnote to its decision was based on expert evidence regarding family members of the direct victims which indicated that “the concept of ‘family’ in the DRC includes both the nuclear family and extended family.”⁵³ The *Ntaganda* reparations order was based on expert evidence regarding family members of direct victims and that chamber took into consideration expert opinion and evidence on the applicable cultural, social and familial structures of the **affected communities in the DRC**, and is therefore distinguishable from the Impugned Decision which was not

⁴⁹ Impugned Decision, para. 71(i)(a).

⁵⁰ Impugned Decision, para. 131.

⁵¹ Impugned Decision, para. 131.

⁵² Impugned Decision, para. 131.

⁵³ Trial Chamber VI, *Reparations Order*, [ICC-01/04-02/06-2659](#), para. 124.

arrived at based on expert evidence or other credible evidential basis. The concept established in the *Ntaganda* reparation order was the sole basis on which the Chamber based its decision.⁵⁴

42. The finding that the extended family in the Acholi cultural practice whereby a woman may refer to all the children born into her husband's family as her own children, and children into the same extended family may refer to each other as siblings was based on an unsubstantiated 'concept' of the African extended family and is not in the evidence on the record of this case. The failure of the Chamber to define the concept of the 'extended or remote family' in the context of this case unjustifiably inflated the indirect victim pool and aggravated the responsibility of Mr Ongwen beyond the scope of the harm which was caused by him.⁵⁵ The concept of an extended Africa family varies from ethnicity to ethnicity, tribe to tribe, cultural, social, religious, historical and economic factors in different communities across the continent, from North to South and East to West.
43. John Reader explains these variations on the fact that "the colonial imposed boundaries of Africa cut through at least 177 ethnic 'culture areas', dividing pre-existing economic and social units and distorting the development of entire regions."⁵⁶
44. Writing on African ethnic communities and family structures, Bruce Berman *et al.*, state that:

It has become customary to distinguish the internal and external aspects of this process. The internal dimension concern relationship within the group. Termed 'moral ethnicity', a contested process of defining cultural identity, communal membership and leadership, African ethnic groups are not univocal, and the content of culture and custom as well as the boundaries of communities remain matters of frequent conflict and negotiation. Most large ethnic communities in Africa continue to contain local sub-groups and identities whose relationships are often problematic.⁵⁷
45. Regarding the Acholi, Tim Allen, one of the experts on whom the Chamber relied for its decision,⁵⁸ explains that the term "Acholi" itself appears to be a relatively recent term given by the British, which is the Luo term for "black".⁵⁹ In the Acholi language references might be

⁵⁴ The Defence notes that the Chamber cited filing 1921 from the LRV as well, but the paragraph in the LRV's submissions refer to finding to cases in the Situation of the Democratic Republic of the Congo at the ICC.

⁵⁵ Impugned Decision, para.129 (*noting* that the references in this paragraph of the Impugned Decision merely cite unsubstantiated statements from the Parties, Participants and an *amicus curiae*).

⁵⁶ Reader, John, *A Biography of the Continent of Africa*, Vintage Books, New York (1999), p. 569.

⁵⁷ Berman, Bruce *et al.*, *Ethnicity and Democracy in Africa*, James Currey Ltd, 7 Botley Rd Oxford OX2 OBS (2004), p. 4.

⁵⁸ Impugned Decision, paras 22 and 338.

⁵⁹ UGA-OTP-0270-0004, p. 0007 at para. 8.

made to the home as an identity or to the lineage. This is a population in which at the time of marriage a woman marries into a home and lives in her husband's village so there is constant in-marriage.

46. Tim Allen explains that ‘the effects of the LRA campaign and the Uganda government’s response have been catastrophic for the local population. Much of Gulu, Pader and Kitgum districts have been abandoned. The movement of people to town to garrisons has become a permanent arrangement, and from late 1996, became an integral component of the Ugandan government’s anti-in surgency policy.’⁶⁰
47. Tim Allen explained that Acholi family structure is based on lineages, patrilineal and that lineages are traced in male lines but that the said family structure was disrupted by historical, social, economic factors and the encampment of the population of Northern Uganda during the war.
48. Dr Atim and Professor Reicheter testified about the ‘post-conflict shame, trauma and stigma experienced by victims ‘for violating cultural norms and the disruption and interference by LRA commanders of Acholi traditional practices for establishing lineages, inheritance and family affiliation’⁶¹
49. According to Tim Allen:

The customary system in this region of Africa is that land is owned, it's perhaps not quite the right word, but land is the responsibility of lineages, patrilineal, that is lineages traced in the male lines. So clans are associated with particular areas of land. Women marry into a home and they are allocated areas of land to cultivate and they have access to the produce of the areas of land that they cultivate with which they feed their families. The status of women changes at marriage from the lineage of her father and brothers to the lineage of her husband. But that process occurs over time through the payments of instalments of bride price. Eventually a woman can become like a man, so to speak, and speak with the voice of a man within the lineage after she has produced many children and she has-- a bride price has been paid for her and she's become an established member of the lineage. I saw that myself on many occasions when I was living among Acholi people in the 1980s. In the displacement camps, bride price was not paid. In many cases children were born from different biological fathers. And so the whole process of who had access to land was open to question. In addition, at the same time there were efforts within Uganda to promote the idea of land ownership in a more straightforward manner, more associated with conventional land ownership. And that created other kinds of

⁶⁰ Tim Allen, *Trial Justice: The International Criminal Court and The Lord’s Resistance Army*, African Arguments, Zed Books London/New York David Philip (2006), UGA-OTP-0227-0118, p. 0189.

⁶¹ Impugned Decision, para. 300.

tensions. So a big concern for many people who had access to land was if they allowed women to come and cultivate there with their children, those children who may not be of the lineage would have access to that land in the future.⁶²

50. Dr Eric Awich Ochen, expert witness D-0114 and an Acholi,⁶³ testified that he grew up as a child in Gulu district in northern Uganda, “which has been at the epicentre of this conflict.”⁶⁴ In a research paper entitled “Traditional Acholi Mechanisms for Reintegrating Uganda Child Abductees”, which was submitted into the record by the Prosecution,⁶⁵ Dr Awich states that the Acholi are a Nilotic people and that “[t]he Acholi possess very distinct cultural practices and disciplined social organisation. [...] The kinship system is very strong among the Acholi and also the tendency to do things within the clan setting with clear respect for hierarchy and authorities.”⁶⁶
51. Dr Awich stated that the Acholi “culture has already been affected significantly by the war and some of the structures and system which held the culture were destroyed.”⁶⁷ “So people didn't have space to have more than one small hut [...]. [...] The living condition affected a lot of people socially and in different ways. [...] We have had studies where we were told over 1,000 people were dying per week in the internally displaced persons camps, so a lot more people died as a result of the internal displacement than from the bullets which were fired by the rebel.”⁶⁸
52. The Chamber made a presumption of harm to all inhabitants of the camps⁶⁹ and projected estimated number of potential eligible victims in the Impugned Decision.⁷⁰ The Chamber found the information of the sample alleged that 1.06% of victims alleged to be indirect victims only.⁷¹ It is not clear how the concept of extended African family informed the indirect victims’ projections in the reparation order. This opens the door for reparation claims which are not premised on direct victims’ families defined in the reparation order.⁷²

⁶² [ICC-02/04-01/15-T-28-ENG](#), p. 84, lns 2-24.

⁶³ The Defence notes that the Chamber accepted the witness as an expert witness during the sentencing phase.

⁶⁴ [ICC-02/04-01/15-T-247-ENG](#), p. 8, lns 7-12.

⁶⁵ Email from OTP to Trial Chamber IX, Parties and Participants, *Prosecution Submission of Material for D-0114*, received on 1 November 2019 at 12:11 CET.

⁶⁶ UGA-OTP-0286-2015, p. 2020.

⁶⁷ [ICC-02/04-01/15-T-247-ENG](#), p. 75, lns 20-22.

⁶⁸ [ICC-02/04-01/15-T-247-ENG](#), p. 81, lns 8-9, 17 and 21-23.

⁶⁹ Impugned Decision, paras 518-22.

⁷⁰ Impugned Decision, paras 747-48.

⁷¹ Impugned Decision, para. 268.

⁷² Impugned Decision, para. 553.

53. The Defence submits the circumstances in this case suggests that members of the nuclear family of direct victims who can prove a very close relationship with the direct victims and the harm suffered as a result of the crimes Mr Ongwen was convicted may be characterised as indirect victims and not individuals characterised as such under the concept of African extended family.⁷³
54. The decision on presumption of harm to all inhabitants and non-inhabitants who were present at the four IDP camps on the date of the attack is overly broad and includes violations which victims suffered due to the atrocious quality of life in the IDP camps.⁷⁴ The unsubstantiated factor of the African extended family expands the liability of Mr Ongwen and the scope and scale of the reparations awards far beyond the scope of the harm, which paragraphs 89(iii) and 586 of the Impugned Decision hoped to prevent. Tim Allen wrote that:
- Various studies have disclosed the atrocious quality of life in the IDP camps. For example, MSF Holland survey on mental health in Pader town found that 79 % of people had witnessed torture, 40 % had witnessed killing and 5 % had been forced to physically harm someone, 62 % of women think about committing suicide. Other studies have drawn attention to similar issues with others giving particular emphasis to sexual violence, including rape and other forms of abuse by government soldiers, and raising concerns about HIV/Aids.⁷⁵
55. Compounding the violation, the Chamber's use of traditions and culture during trial, in the Trial Judgment, in the Sentence and in the Impugned Decision are at odds and significantly different. The Chamber determined, referencing experts Professor Wessels and Dr Atim, that victims suffered from a phenomenon known as *cen*, which the Chamber interpreted to equate to 'mental illness' in 'Western medicine'.⁷⁶
56. The Chamber did not accord any significance to cultural factors and cultural mechanisms during trial, conviction and sentencing.⁷⁷ The legal representative of victims argued that traditional methods of restorative justice are irrelevant under the legal regime of the court,⁷⁸ and that "[v]ictims have chosen to be represented in the proceedings and to participate in the trial,

⁷³ Impugned Decision, paras 480-82.

⁷⁴ Impugned Decision, paras 103, 164 and 518-22.

⁷⁵ UGA-OTP-0227-0118, p. 0194.

⁷⁶ Impugned Decision, para. 240.

⁷⁷ Trial Chamber IX, *Sentence*, [ICC-02/04-01/15-1819-Red](#), paras 15-43.

⁷⁸ Trial Chamber IX, *Sentence*, [ICC-02/04-01/15-1819-Red](#), para. 21. *See also* Appeals Chamber, *Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled "Sentence"*, [ICC-02/04-01/15-2023](#), para. 95.

thereby recognising the Court path and procedures as an adequate way to address their situations and the crimes they have been suffering from.”⁷⁹

57. Nevertheless, Professor Recheiter and Dr Atim provided expert evidence which the Chamber relied on to inform its decisions on cultural factors. The Chamber misrepresented the *cen* psychotic disorder, which is steeped in the spiritualism of the Acholi culture by equating it to mental illness in Western medicine.⁸⁰ Professor Massisi “submitted a report on the interplay of Acholi culture with traumas and PTSD”, and testified about mass trauma and the significance of cultural factors in Northern Uganda during the temporal jurisdiction of the charges.⁸¹
58. A joint report on *cen* and *orongo* which was coauthored by Defence expert Professor Ovuga and Prosecution expert Dr Catherine Abbo on ‘*Orongo* and *cen* possessions in a cultural context in Northern Uganda’ was submitted into evidence.⁸² Further evidence on *cen* possessions and Acholi cultural mechanism of restorative justice was provided by an Acholi traditional healer, an *ajwaka*.⁸³ The witness testified that *cen* is rooted in Acholi *cen* spirit possession and in Acholi spiritualism, and that the healing is rooted in the elaborate Acholi cultural mechanism of healing, exorcism, expiation, reparation, reconciliation and reintegration.⁸⁴ The *cen* healing process is carried out by an *ajwaka*, but leads to *mato oput*, which is a process of restorative justice process of *mato oput* for the integration of the individual in the community.⁸⁵ Despite overwhelming evidence which was provided by these witnesses about the relevance of cultural mechanism in providing remedies to the violations and victimization, the Chamber placed the harm caused by the inability of encamped IDPs to perform traditional rituals and customs that were culturally important to them, on the crimes of pillaging and destruction of property for which Mr Ongwen was convicted.⁸⁶
59. The Chamber recognised cultural factors in the Impugned Decision, but failed to explicitly recognise the complementarity role of cultural mechanisms for restorative justice and cultural-

⁷⁹ Trial Chamber IX, *Sentence*, [ICC-02/04-01/15-1819-Red](#), para. 22.

⁸⁰ Impugned Decision, para. 240.

⁸¹ Appeals Chamber, *Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled “Trial Judgment”*, [ICC-02/04-01/15-2022-Red](#), paras 1299-1300.

⁸² UGA-D26-0015-0197, Ovuga, Emilio and Catherine Abbo, ‘*Orongo*’ and ‘*Cen*’ Spirit Possessions – Post-Traumatic Stress Disorder in a Cultural Context: Local Problem, Universal Disorder with Local Solutions in Northern Uganda, in Comprehensive Guide to Post-Traumatic Stress Disorder, Springer International Publishing, Switzerland (2015).

⁸³ See witness UGA-D26-P-0111, [ICC-02/04-01/15-T-183-ENG](#).

⁸⁴ See generally [ICC-02/04-01/15-T-183-ENG](#).

⁸⁵ [ICC-02/04-01/15-T-247-ENG](#), pp 29-31.

⁸⁶ Impugned Decision, para. 398.

specific therapy for *cen* spirit possessions and as viable partners in fulfilling the reparation objectives of the Rome Statute towards victims and the conflict situation in Northern Uganda.

60. Pamela Angwech, a survivor and victims' advocate in Northern Uganda, underscored the significance of the involvement of traditional and cultural institutions in the reintegration of women and their children into clans and communities which she stated, was "both crucial and urgent."⁸⁷ She then stated that:

This is particularly important given that Uganda's current Transitional Justice (TJ) policy highlights the pivotal role of cultural institutions and religious leaders in addressing stigmatization, discrimination, and fostering reconciliation and peaceful coexistence. These institutions should establish platforms for dispute resolution specifically tailored to address issues related to reintegration. This includes granting women opportunities to reconcile with their children born from instances of war and rape. Traditional mechanisms, such as alternative dispute resolution involving clan leaders, should be utilized during the reintegration process to facilitate access to justice for women and children who were born in captivity. [...] Reintegration challenges within communities necessitate comprehensive support, encompassing access to land, livelihood opportunities, seeds, and farm tools. These provisions are essential to ensure the effectiveness and comprehensiveness of the current reparations order.⁸⁸

61. In a report submitted for sentencing, Acholi religious leaders underscored the significance of "the traditional reconciliation of '*mato oput*' between Dominic Ongwen and all the people who have been affected by the LRA."⁸⁹ Prime Minister Ambrose Olua of Ker Kwaro Acholi (KKA), the cultural institution of the Acholi people, submitted a report to the Chamber for consideration in the sentencing of Dominic Ongwen, in which he emphasized the significance of the Acholi cultural mechanisms in complementing the shared objectives of justice.⁹⁰

I do recognize the ICC as a multi-lateral institution established to dispense justice for war crimes around the world, upon which member nations sign up to. In our observation and outlook, the ICC bears both strengths and weaknesses. Its strength lies on its reliance on globally accepted legal standards and practices that define formal justice. Its weakness lies in its inability to contend with intricate, complex local realities and facts existing among distinct identities of the different societies it interacts with. It sets its own parameters, limits and boundaries and goes by them while dispensing justice. Like many formal justice institutions, the ICC path to securing justice and accountability for victims of crimes against humanity has apparent variation in definition and understanding between how the formal systems

⁸⁷ Angwech, Pamela, [Symposium on Dominic Ongwen Case: Reparations in Dominic Ongwen – A Timely Intervention That Must Be Carefully Managed](#), online publishing on Opinion Juris, 9 April 2024.

⁸⁸ Angwech, Pamela, [Symposium on Dominic Ongwen Case: Reparations in Dominic Ongwen – A Timely Intervention That Must Be Carefully Managed](#), online publishing on Opinion Juris, 9 April 2024.

⁸⁹ UGA-D26-0015-1832 (Report of Acholi Religious Leaders Peace Initiative (ARLP)).

⁹⁰ See UGA-D26-0015-1812.

and informal local systems do define and understand justice and accountability. The reliance on logical inferences to come to conclusions sometimes becomes the bone of contention in the final dispensation of justice as many alternative facts lie elsewhere in the unconventional realms of human understanding for instance the influence of spirituality and divine intervention in the commission of war crimes and in the quest for justice and accountability respectively.

It is my contention that justice ought to be meaningful and wholesome. I believe that justice is a breathing organ of society that is continuously evolving and prolific cases as that of Dominic Ongwen provide a unique opportunity to enrich the culture of justice for the greater good of humanity. This opinion reiterates the above guiding principles and is not intended to undermine the processes and decisions of the ICC, including that on the judgment and sentencing of Dominic Ongwen.⁹¹

62. Pacifique Manirakiza has argued that “the utilisation of traditional justice mechanisms to combat impunity has several advantages for states emerging from conflict. The use of traditional justice mechanisms in the suppression of heinous crimes is beneficial to all stakeholders and interested parties, including the international community. This system is attractive because of its proximity to the population, its ability to accommodate or allow victims to actively participate, its sensitivity to socio-cultural factors, and its inherent protection of community interests. Since such mechanisms typically complement national and international efforts to prosecute those responsible for egregious international crimes and facilitate reconciliation, group interests in social harmony.
63. The current growing concern over the fate and place of victims in criminal proceedings justifies the active involvement of local institutions and population in suppression of the most heinous crimes. The relationship between the ICC and states courts are regulated by the complementarity principle but it is less clear with local institutions.”⁹²
64. Linda Carter writes that the cultural mechanisms aim at reconciling the parties, within the cultural group, community harmony, resolving disputes in manners which would allow the victims and perpetrators to live in the same community or society together, emphasis restitution over other forms of punishment. The prevalence of traditional practices throughout the world where atrocity crimes have occurred, make them relevant to our examination under Articles 17 and 53 and to broader issues of the value and rule of these processes. Mato oput is part of the field of transitional justice. It is a reconciliation process when there has been an intentional killing. Critical elements include a voluntary statement of responsibility by the perpetrator,

⁹¹ UGA-D26-0015-1812, pp 1813-14.

⁹² Jeremy I Levitt *et al.*, *Africa: Mapping New Boundaries in International Law, Studies in International Law*, Hart Publishing, 16C Worcester Place, Oxford, OX1 2 JW (2010) pp 44, 47

mediation to establish the true facts of what occurred and some form of compensation usually cows. The process is applicable no matter the other forms of due process such as prosecution and also amnesty such as in the case of Uganda.⁹³

65. Despite the serious lack of recognition of cultural mechanisms during trial, conviction and sentencing, the Impugned Decision opens the floodgates to any alleged indirect victim with the “African extended family exception”. As the Chamber pushed aside Acholi culture and tradition in the Trial Judgment and Sentence, it now deems it appropriate to include this exception to increase the number of persons eligible for reparations. The Chamber did so without any expert report commissioned, something which should have been performed by the Registry to inform the Chamber properly of the different culture and social structures in the different communities in Acholiland.
66. The Defence requests the Appeals Chamber to reverse the Chamber’s decision on the “African extended family exception” and remand the issue back to Trial Chamber II for further investigations and reports on the cultural and social dynamics of the Acholi people, noting specifically the customs and practices in the different regions in northern Uganda.

G. Ground 5: Trial Chamber IX erred in law and procedure by issuing the symbolic award of €750 per victim, specifically not intending this award to act as partial restitution or compensation for harm suffered.⁹⁴

67. The Chamber acted *ultra vires* in granting this €750 symbolic award as it does not fall under any of the categories outlined in the Statute or RPE, which seriously inflated the amount of reparations ordered in the Impugned Decision. Pursuant to Article 75(1) of the Statute, a chamber may issue reparations as restitution, compensation or for rehabilitation.⁹⁵ This is reaffirmed in Rule 94(1)(d)-(f) of the RPE where it allows claims for i) reparations for restitution of tangible items,⁹⁶ ii) compensation⁹⁷ and iii) rehabilitation and other forms of remedy.⁹⁸

⁹³ Linda Carter, Mark S. Ellis, Charles Chernor Jalloh, [*The International Criminal Court in an Effective Global Justice System*](#), Edward Elgar Publishing Cheltenham, UK. (2016) p. 154-156.

⁹⁴ Impugned Decision, paras 621-634.

⁹⁵ See Article 75(1) of the Statute. See also Article 75(2) of the Statute.

⁹⁶ Rule 94(1)(d) of the Rules.

⁹⁷ Rule 94(1)(e) of the Rules.

⁹⁸ Rule 94(1)(f) of the Rules.

68. After a conviction, a chamber may order the convicted person to pay individual reparations, collective reparations, or collective and individual reparations.⁹⁹ These reparations are meant to repair the damage caused by the convicted person, *i.e.* as restitution, compensation or rehabilitation of the damage caused by the convicted person.¹⁰⁰ The Statute contains no reference to a symbolic award, and this award is not founded upon restitution, compensation or rehabilitation.
69. Rule 94(1)(f) of the RPE allows for “other forms of remedy”, but statutory construction limits the “other forms of remedy” to this specific rule, which deals with reparation requests related to rehabilitation. These other forms of remedy for rehabilitation include services like “medical services and healthcare [...]; psychological, psychiatric and social assistance to support those suffering from grief and trauma; and any relevant legal and social services.”¹⁰¹ The “other forms of remedy” do not include a symbolic cash award.
70. Article 21(1)(a) of the Statute requires all chambers of the Court to apply the laws as written in the Statute, Elements of the Crimes and RPE. As the Appeals Chamber has stated, a chamber should only revert to Article 21(1)(b) and (c) when “there exists a lacuna in the primary sources of law when interpreted in accordance with the applicable canon of interpretation. [...] [T]he Appeals Chamber considers that when a matter is regulated in the primary sources of law of the Court, there is also no room for chambers to rely on purported “inherent powers” to fill in non-existent gaps.”¹⁰²
71. The Defence asserts that the Chamber, while not explicitly stating it, used inherent powers beyond the scope of its authority. The Appeals Chamber has previously stated:

[T]he notion of “inherent powers” – or “incidental jurisdiction” – refers to judicial powers which, while not explicitly conferred in the relevant constitutive instruments, are to be considered necessarily encompassed within (“inherent to”) other powers specifically provided for, in that they are essential to the judicial body’s ability to perform the judicial functions assigned to it by such constitutive instruments. The Appeals Chamber emphasises that, in the legal framework of this Court, “inherent

⁹⁹ See Rule 97(1) or the RPE.

¹⁰⁰ See Article 75(1)-(2) of the Statute and Rule 94(1)((d)-(f) of the RPE.

¹⁰¹ Trial Chamber I, *Decision establishing the principles and procedures to be applied to reparations*, [ICC-01/04-01/06-2904](#), para. 233 [internal citations omitted].

¹⁰² Appeals Chamber, *Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Decision on Sentence pursuant to Article 76 of the Statute”*, [ICC-01/05-01/13-2276-Red](#), para. 76.

powers” should be invoked in a very restrictive manner and, in principle, only with respect to matters of procedure.¹⁰³

72. Similarly, Trial Chamber IV stated that:

[T]he Chamber wishes to stress that such inherent powers or incidental jurisdiction may only be invoked in a restrictive manner in the context of the ICC. This caveat is important for the reason, among others, that its proceedings are governed by an extensive legal framework of instruments in which the States Parties have spelt out the powers of the Court to a great degree of detail. This restrictive approach should particularly be adopted when considering a procedural step [...].¹⁰⁴

73. The Chamber overstepped its boundaries when it awarded the victims of the case, all 49,772 of them, a reparations payment not found in the Statute, RPE or Elements of the Crimes. The drafters of these founding documents, the State Parties, set forth specific legal concepts in which victims could be awarded reparations, and a symbolic award is not one of them. As such, the €750 symbolic award granted by the Chamber violates Articles 21(1)(a) and 75(1) of the Statute and Rule 94(1)(d)-(f) of the RPE.

74. The Defence distinguishes the Chamber’s €750 symbolic award from the \$250 USD award in *Katanga*. In *Katanga*, the parties agreed to a symbolic award of €1 per victim, something extremely nominal, as gesture of acknowledgement to the victims.¹⁰⁵ Trial Chamber II decided on its own motion to increase the award to \$250 USD.¹⁰⁶ On appeal, the defence for Katanga did not appeal the legality of a symbolic award; it appealed whether Trial Chamber II acted *ultra petita* in increasing the amount of the symbolic award.¹⁰⁷ Furthermore, as noted by the Chamber,¹⁰⁸ the symbolic award in *Katanga* was issued by Trial Chamber II as partial compensation for the losses of the victims.¹⁰⁹ The symbolic award of €750 granted by the Chamber specifically rejected this notion, writing that “[t]he Chamber underlines that the symbolic payment awarded to the victims in the present case is not intended as restitution, nor

¹⁰³ Appeals Chamber, *Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Decision on Sentence pursuant to Article 76 of the Statute”*, [ICC-01/05-01/13-2276-Red](#), para. 75 [internal citations omitted].

¹⁰⁴ Trial Chamber IV, *Decision on the defence request for a temporary stay of proceedings*, [ICC-02/05-03/09-410](#), para. 78.

¹⁰⁵ Trial Chamber II, *Order for Reparations pursuant to Article 75 of the Statute*, [ICC-01/04-01/07-3728-tENG](#), para. 282.

¹⁰⁶ Trial Chamber II, *Order for Reparations pursuant to Article 75 of the Statute*, [ICC-01/04-01/07-3728-tENG](#), para. 306.

¹⁰⁷ Appeals Chamber, *Defence Document in Support of Appeal against the Reparations Order*, [ICC-01/04-01/07-3747-Red](#), paras 57-66.

¹⁰⁸ Impugned Decision, para. 626.

¹⁰⁹ Trial Chamber II, *Order for Reparations pursuant to Article 75 of the Statute*, [ICC-01/04-01/07-3728-tENG](#), para. 300.

as a compensation for the harm, as it was, at least in part, in the *Katanga* case.”¹¹⁰ The Chamber admitted that €750 symbolic award was outside the scope of its power under Article 75 of the Statute and Rule 94 of the RPE in granting reparations to the victims.

75. The Chamber acted *ultra vires* when it ordered reparations not found in the Statute or RPE. As the Appeals Chamber has stated, trial chambers should apply inherent powers in a very restrictive manner to matters of procedure, not to substantive law.¹¹¹ The State Parties made it very clear that reparations were to be ordered under specific circumstances as defined in Article 75 of the Statute and Rule 94 of the RPE. As such, the Defence requests the Appeals Chamber to reverse the €750 symbolic award as it is *ultra vires*.

H. Ground 6: Trial Chamber IX erred in procedure by prioritizing direct victims who were participating victims of the case over direct victims who did not participate in the case.¹¹²

76. The decision to prioritise one direct victim (not in dire need) over another goes against the spirit of reparations and shall extend the time needed to disseminate reparations to persons. Furthermore, it is against the fundamental fairness of the victims, especially those who desired to participate in the proceedings, but were unable to file their victim participation forms before the deadline set by Trial Chamber IX.

77. The Appeals Chamber has stated that:

Priority may need to be given to certain victims, who are in a particularly vulnerable situation or who require urgent assistance. The Court may adopt, therefore, measures that constitute affirmative action in order to guarantee equal, effective and safe access to reparations for particularly vulnerable victims.¹¹³

78. Trial Chamber VIII stated that:

As a general principle, all victims are to be treated fairly and equally as regards reparations, irrespective of whether they participated in the trial proceedings. The victims of the crime at bar shall have equal access to information relating to the reparations proceedings as part of their entitlement to fair and equal treatment throughout the proceedings. This said, during the implementation phase it may be

¹¹⁰ Impugned Decision, para. 626.

¹¹¹ Appeals Chamber, *Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Decision on Sentence pursuant to Article 76 of the Statute”*, [ICC-01/05-01/13-2276-Red](#), para. 75.

¹¹² Impugned Decision, para. 660.

¹¹³ Appeals Chamber, *ORDER FOR REPARATIONS*, [ICC-01/04-01/06-3129-AnxA](#), para. 19.

appropriate to prioritise reparations to those victims who were the most harm by the convicted person's conduct.¹¹⁴

79. When Mr Ongwen surrendered to the Séléka on 4 January 2015, there were seven pending charges against Mr Ongwen, all specifically relating to Lukodi.¹¹⁵ It was not until 18 September 2015 that the additional charges being levied against Mr Ongwen were made known on a confidential basis,¹¹⁶ meaning it was the first time when that the Registry could collect new victim applications focused on Pajule, Odek, Abok, child soldiers and victims of SGBC. With this announcement, it undoubtedly would take at least a month for the Registry to get programmes up and running to arrange meeting points for victims to fill out applications and collect them, not to mention to review them and disseminate them to the Parties and Participants.
80. In the proceedings leading up to the commencement of trial, the Chamber ordered that all applications for victim participation be transmitted by the Registry by 6 October 2016.¹¹⁷ The Chamber reminded the Registry of this deadline again on 26 September 2016, giving some leeway for applications filed on or around the 6 October 2016 deadline, but not yet reviewed.¹¹⁸
81. Considering that the Chamber estimated that there were 49,772 potentially eligible victims of the case,¹¹⁹ and that there were 4,095 victim applications filed on or before 6 October 2016 that were accepted to participate in the case, it would have been impossible to collect anywhere near this amount of applications without a ridiculous hiring and cash influx, something for which the Registry had no budget. The amount of accepted victim applications for participation equals to 8.23% of the Chamber's total estimated number of potentially eligible victims. If the 4,095 accepted victim applications represent one year worth of work, which it represented more than a year's worth of work, the Registry would have finished accepting victim applications for participation in the year 2027.¹²⁰

¹¹⁴ Trial Chamber VII, *Reparations Order*, [ICC-01/12-01/15-236](#), para. 29 (citing Appeals Chamber, *ORDER FOR REPARATIONS*, [ICC-01/04-01/06-3129-AnxA](#), paras 12-13, 19 and 31).

¹¹⁵ Pre-Trial Chamber II, *WARRANT OF ARREST FOR DOMINIC ONGWEN*, [ICC-02/04-01/15-6](#).

¹¹⁶ Pre-Trial Chamber II, *Notice of intended charges against Dominic Ongwen*, ICC-02/04-01/15-305-Conf (PRV [here](#)).

¹¹⁷ Trial Chamber IX, *Decision Setting the Commencement Date of the Trial*, [ICC-02/04-01/15-449](#), p. 7.

¹¹⁸ Trial Chamber IX, *Decision concerning 300 Victim Applications and the Deadline for Submitting Further Applications*, [ICC-02/04-01/15-543](#), paras 9-10.

¹¹⁹ Impugned Decision, para. 748.

¹²⁰ The Registry started collecting victim applications in 2015, and assuming that the 4,095 victim applications represent one year of work, it would take the Registry 12 years to get all.

82. The Defence often ran into persons who asked about filling out victim participation applications. When the Defence ran into someone, the person(s) would be advised that this was the job of the Registry and that s/he should contact their local councillors and cultural leaders to find out more information, or s/he could contact the ICC directly. In fact, before conducting every interview, the Defence would specifically ask each interviewee if s/he had met with the Office of the Prosecutor or a victim lawyer, or if they had filed an application to participate in the proceedings before the ICC. The Defence specifically recalls two Defence witnesses who spoke about wanting to file victim participation applications.
83. The Defence conducted its first formal interview of D-0076 on 6 July 2017.¹²¹ He asked how to fill out an application to participate as a victim in the case. The Defence had the unfortunate duty to inform him that the application process ended on 6 October 2016. While being upset, the witness still agreed to testify for the Defence.
84. The Defence conducted its first formal interview of D-0077 on 3 July 2017.¹²² This witness stated that he was supposed to go to a victim outreach meeting to fill out an application, but he never got to meet with the Registry. The Defence informed him that the application process ended on 6 October 2016.
85. The Chamber decided that both Defence witnesses were victims of the Pajule attack,¹²³ but these two persons were not participating victims through the CLRV or LRV. Even though they testified without in-court protective measures, they are being treated significantly different by the Chamber as they were unable to file an application for participation in the trial within the time frame allotted by the Chamber.
86. This type of specialised categorisation merely for filing a victim application for participation cannot stand. As demonstrated above, victims may have the desire to participate in the proceedings but may have missed the opportunity to file the appropriate paperwork with the Court as there was a limited time to do so. When it comes to direct victims, the only diversion from the principle of treating each direct victim equal should be those who are in dire need because of the victim being particularly vulnerable or are in urgent need.¹²⁴ The Chamber

¹²¹ See UGA-D26-0022-0350, p. 0351.

¹²² See UGA-D26-0022-0316, p. 0317.

¹²³ Trial Chamber IX, Trial Judgment, [ICC-02/04-01/15-1762-Red](#), para. 1325, p. 455.

¹²⁴ Appeals Chamber, *ORDER FOR REPARATIONS*, [ICC-01/04-01/06-3129-AnxA](#), para. 19.

erred by prioritising one direct victim over another because of the filing of a victim participation application.

87. The Defence requests the Appeals Chamber to overturn the Chamber’s decision on prioritising direct victims based on filing a victim application, and remand the issue back to Trial Chamber II for further consideration consistent with this ground of appeal.

I. Ground 7: Trial Chamber IX erred in fact when it failed to appreciate why the Defence demanded that specific victims in the Dossier must be required to give medical documentation to prove their disabilities.¹²⁵

88. Trial Chamber IX failed to understand the manner in which the Defence requested medical documentation from specific persons in the Dossier. The Chamber’s failure to appreciate the issues clearly outlined by the Defence caused an increase in the estimated number of potential victims eligible for reparations, causing an increase in Mr Ongwen’s liability to the victims.
89. In its submissions, the Defence highlighted specific issues related to certain victim applications to the Chamber.¹²⁶ There were certain questionable claims made by potentially eligible victims about their welfare after their alleged injuries sustained during the attacks, the Defence requested a heightened level of review for persons claiming problems similar to those emphasised by the Defence.
90. Relating to the standard of proof, the Appeals Chamber has stated:

In the reparation proceedings, the applicant shall provide sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case. Given the fundamentally different nature of reparations proceedings, a standard less exacting than that for trial, where the prosecution must establish the relevant facts to the standard of “beyond a reasonable doubt”, should apply. In determining the appropriate standard of proof in reparation proceedings, various factors specific to the case should be considered, including the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence.¹²⁷

In this decision, the Appeals Chamber would go on to state that, “[i]n relation to the standard of proof, the standard of “a balance of probabilities” shall apply.”¹²⁸

¹²⁵ Impugned Decision, paras 524-525.

¹²⁶ Trial Chamber IX, *Corrected Version of ‘Defence Submissions on the Victim Sample Pool’*, filed on 19 May 2023, ICC-02/04-01/15-2050-Conf-Corr, paras 28-29 and 30-32 (PRV [here](#)).

¹²⁷ Appeals Chamber, *ORDER FOR REPARATIONS*, [ICC-01/04-01/06-3129-AnxA](#), para. 22.

¹²⁸ Appeals Chamber, *ORDER FOR REPARATIONS*, [ICC-01/04-01/06-3129-AnxA](#), para. 65 [internal citation omitted].

91. The Appeals Chamber would later write in *Katanga*:

The Appeals Chamber considers that, in the absence of direct evidence in certain circumstances, for example, owing to difficulties in obtaining evidence, a trial chamber may resort to factual presumptions in its identification of the heads of harm. The Appeals Chamber considers that resort to factual presumptions in reparations proceedings is within a trial chamber's discretion in determining "what is 'sufficient' for purposes of an applicant meeting the burden of proof". However, the Appeals Chamber emphasises that, while a trial chamber has discretion to freely evaluate the evidence of harm in a particular case, this discretion is not unlimited. A trial chamber must respect the rights of victims as well as the convicted person when resorting to presumptions.¹²⁹

92. The Defence's complaints related to the two specific victim applicants related to serious injuries which allegedly happened on the day of the attack at Pajule IDP Camp.¹³⁰ These are not sprained ankles, twisted knees or other injuries which are common and harder to prove with medical documentation as people do not routinely seek medical attention for something this small or trivial. This is why the Appeals Chamber allows factual presumptions for such injuries. The two victim applicants, a/01996/16 and a/02006/16, have rather regular injuries which should without a doubt have medical documentation for said injuries.

93. The first applicant stated that his rather minor injury led to a permanent disability.¹³¹ Besides the fact that the Defence finds it very hard to believe that a [REDACTED] would cause a permanent disability, a person with a debilitating injury would have undoubtedly seen a medical professional sometime over the 13-year span from 2003 to filing the victim application for participation in 2016. And in visiting a medical professional, the victim applicant would more than likely have told the medical professional that said injury happened during the Pajule IDP Camp attack on 9 October 2003. With respect, it should not be that hard for this victim applicant to collect some medical documentation about his injury.

94. The second applicant stated that his injuries from the day of the attack have also become chronic and debilitating.¹³² Again, like the applicant directly above, a person with chronic medical problems would have undoubtedly seen a medical professional sometime between 2003 and 2016. More telling is that [REDACTED] should have a record of the injury as the applicant

¹²⁹ Appeals Chamber, *Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute"*, [ICC-01/04-01/07-3778-Red](#), para. 75.

¹³⁰ Trial Chamber IX, *Corrected Version of 'Defence Submissions on the Victim Sample Pool'*, filed on 19 May 2023, ICC-02/04-01/15-2050-Conf-Corr, paras 28-29 and 30-32 (PRV [here](#)).

¹³¹ ICC-02/04-01/15-2034-Conf-Exp-Anx20, p. 1, questions 1-2.

¹³² ICC-02/04-01/15-2034-Conf-Exp-Anx21, p. 1, questions 1-2.

stated that he [REDACTED] for his injuries after the attack.¹³³ There would be a record of this injury because he was seen by [REDACTED] medical professionals after the attack.

95. In both of these instances, some type of medical or military record should exist. In the eight years since filing their respective victim applications, the Defence expects that documentation which should be readily available to the victim applicants be produced to their lawyer, and by extension, the Registry. Unfortunately, the Defence has seen nothing of the sort.
96. As noted above by the Appeals Chamber, “[t]he Appeals Chamber considers that, in the absence of direct evidence in certain circumstances, for example, owing to difficulties in obtaining evidence, a trial chamber may resort to factual presumptions in its identification of the heads of harm. [...] [W]hile a trial chamber has discretion to freely evaluate the evidence of harm in a particular case, this discretion is not unlimited. A trial chamber must respect the rights of victims as well as the convicted person when resorting to presumptions.¹³⁴” Both victim applicants above describe situations where medical and/or government records will have been produced about their alleged injuries. If their claims are real, there is absolutely no need for the Chamber to resort to presumptions.
97. In addition to the fact that documentation should exist and be easily accessible/attainable by the victim applicants, the nature of these alleged injuries must be treated with caution and circumspect. The injuries described by the victim applicants are not one which normally cause permanent disabilities. A perfect example is that Mr Ongwen became permanently disable at the age of 25 with his leg injury. Even though permanently disabled, Mr Ongwen does not state that he is unable to perform day-to-day tasks and physical labour. He was in the bush, fighting and walking through jungle, for 12 years after the injury. He broke his leg and lost 3-4 cm of length in one leg.
98. The problem boils down to the discretionary nature of the Chamber’s decision. The Chamber must require documentation when it is easily or readily available or attainable. The Chamber cannot be allowed to grant a full-scale presumption to everyone claiming an alleged injury. In cases of clear evidence available to the victim applicant, the victim applicant must be required

¹³³ ICC-02/04-01/15-2034-Conf-Exp-Anx21, p. 1, question 1.

¹³⁴ Appeals Chamber, *Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled “Order for Reparations pursuant to Article 75 of the Statute*, [ICC-01/04-01/07-3778-Red](#), para. 75.

to produce the documentation as it is the right of Mr Ongwen to inspect said documentation when it is readily available to the victim applicant.

99. The Defence requests the Appeals Chamber to remand this issue back to Trial Chamber II, and to change the presumption that where documentation is readily or easily available to show harm caused by the crime, the victim applicant must produce said documentation for an inspection by the Parties and Participants in the case.

J. Ground 8: Trial Chamber IX erred in fact when it refused to take into account that Mr Ongwen was not the brigade commander of Sinia Brigade until 4 March 2004.¹³⁵

100. By failing to take into account that Mr Ongwen was not the commander of Sinia Brigade during the entire jurisdiction of the case, Trial Chamber IX significantly increased the estimated number of victims of SGBC and child soldiers for which Mr Ongwen was responsible, which caused a significant increase in the amount of reparations owed by Mr Ongwen. Mr Ongwen cannot be held responsible for crimes responsible as the brigade commander until he attained said position in the LRA.
101. First, the Defence argues this ground of appeal in isolation of Ground 9 and Ground 14 below. While Ground 8 and Ground 9 are intrinsically linked, the Defence argues them separately to highlight the differences in the two grounds of appeal. For ease of reference, statistics found in this ground of appeal are transferred over into Ground 8 were applicable.
102. Joseph Kony appointed Mr Ongwen the position of brigade commander of Sinia Brigade on 4 March 2004.¹³⁶ It was at this point when Mr Ongwen, as commander, became responsible for the abductions and SGBC committed by persons operating in Sinia Brigade, not on 1 July 2002.
103. It is true that Mr Ongwen was convicted for conscription and use of children under the age of 15 in hostilities from 1 July 2002 to 31 December 2005. This is not in contention. In its limited reasoning for denying the Defence's claim that Mr Ongwen was only responsible for all abductions committed by Sinia Brigade from 4 March 2004 to 31 December 2005, the Chamber stated "that Mr Ongwen's conviction for conscripting and use in hostilities of children under the age of 15 pertained to the period between 1 July 2002 and 31 December 2005."¹³⁷ The

¹³⁵ Impugned Decision, para. 734.

¹³⁶ Trial Chamber IX, *Trial Judgment*, [ICC-02/04-01/15-1762-Red](#), para. 137 and 1077.

¹³⁷ Impugned Decision, para. 734 (*citing* Trial Chamber IX, *Trial Judgment*, [ICC-02/04-01/15-1762-Red](#), para. 1076).

Chamber made a fatal and reversible error of fact **by attributing all of the abductions credited to Sinia Brigade** during this period.

104. When deciding the estimated number of victims of SGBC and conscription/use of child soldiers under 15 years old, the Chamber used statistics from the Berkeley Report.¹³⁸ In determining the estimates, the Chamber considered that the estimates from the Berkeley Report was for a longer time than the jurisdiction of the case and lowered the estimates accordingly.¹³⁹ While the Chamber correctly identified the temporal jurisdiction of Mr Ongwen's culpability for actions taken by **him or his subordinates**, the Chamber's estimated number of victims of SGBC and child soldiers incorrectly and fatally included actions taken by persons not subordinate to Mr Ongwen.
105. As demonstrated by the Chamber's calculations, the Chamber incorrectly ascribed all victims of SGBC and child soldiers estimated to have been attributed to Sinia Brigade during the entire temporal jurisdiction.¹⁴⁰ This incorrect assessment by the Chamber accounts for persons who were not conscripted or used in fighting by Mr Ongwen or his subordinates, and accounts for persons who were not victims of SGBC directly committed by Mr Ongwen or his subordinates.
106. The Defence offers the following example. A 14-year-old child is forcibly conscripted into Terwanga Battalion on 1 December 2002 just after Mr Ongwen entered sickbay for his near-death injury.¹⁴¹ This child fights with the LRA for the next two months, a time in which Mr Ongwen was still undoubtedly in sickbay, until the child finally escapes in early 2003. All this time, Mr Ongwen was in sickbay, and was the former commander of Oka Battalion. Under the Chamber's configuration in the Impugned Decision, Mr Ongwen is still held responsible for this child's time in the LRA, and Mr Ongwen must pay him a symbolic award of €750. Mr Ongwen was not his commander and Mr Ongwen's subordinates did not capture and force this child to fight, but Mr Ongwen must still pay. This cannot be allowed by the Appeals Chamber.

¹³⁸ See Impugned Decision, paras 676, 726-747 and fn. 2308.

¹³⁹ Impugned Decision, para. 733.

¹⁴⁰ Impugned Decision, paras 734-748.

¹⁴¹ Mr Ongwen sustained a terrible injury to his leg in November 2002, which caused him to be in sickbay for many months (see Trial Chamber IX, *Trial Judgment*, [ICC-02/04-01/15-1762-Red](#), para. 135). Pursuant to Article 24(3) of the Code of Professional Conduct for counsel, the Defence cannot in good conscience state that Mr Ongwen exercised authority over Oka Battalion in December 2002.

107. As the Defence noted to the Chamber, Mr Ongwen was not the commander of Sinia Brigade for 47.62% of the temporal scope of the case.¹⁴² This means that, according to the Chamber's logic, Mr Ongwen was the commander of Oka Battalion for 52.38% of the temporal jurisdiction.¹⁴³ As a reminder, Sinia Brigade was split into three battalions, Oka, Terwanga and Siba Battalions.¹⁴⁴
108. Using the proper percentages and the numbers determined by the Chamber to cover 1 July 2002 to 31 December 2005, the Defence asserts that these are the proper estimated number of SGBC and child soldier victims which should be attributed to Mr Ongwen. To be clear, the Defence suggests these numbers in isolation of its other grounds of appeal.
109. Consistent with the Chamber's approach, possible dual status victims must be accounted for in the calculations. "[T]he Chamber estimate[d] that approximately 2,144 *potentially* eligible victims would also qualify as both victims of the attacks on the IDP camps and victims of thematic crimes [...]"¹⁴⁵ Following the Chamber's approach, the 2,144 dual victims are removed from the 4,096 estimated number of thematic crimes victims.¹⁴⁶ This would equal 1,952 potentially eligible victims of SGBC and child soldiering.

Table 1: Defence Preliminary Estimates of Thematic Crimes Direct Victims

	Chamber Estimates	Defence Estimates 01/07/02 – 01/04/04	Defence Estimates 01/04/04 – 31/12/05	Total
Total Thematic	1,952	341	930	1,271

110. Again, following the Chamber's analysis, the total number of potentially eligible direct victims would be multiplied by a factor of 21.75% to determine the estimated potentially eligible indirect victims of thematic crimes.

Table 2: Estimated Number of Indirect Victims

Victims of:	Estimated number of direct victims	Percentage of indirect victims	Estimated number of indirect victims
Thematic crimes only	1,271	21.75%	276
Total			276

¹⁴² Trial Chamber IX, *Defence Additional Submissions on Beneficiaries and Transgenerational Harm*, [ICC-02/04-01/15-2030](#), para. 17.

¹⁴³ See Pre-Trial Chamber II, *Decision on the confirmation of charges against Dominic Ongwen*, [ICC-02/04-01/15-422-Red](#), p. 72, para. 12.

¹⁴⁴ Pre-Trial Chamber II, *Decision on the confirmation of charges against Dominic Ongwen*, [ICC-02/04-01/15-422-Red](#), p. 27, para. 57. See also Trial Chamber IX, *Trial Judgment*, [ICC-02/04-01/15-1762-Red](#), para. 127.

¹⁴⁵ Impugned Decision, para. 743.

¹⁴⁶ Impugned Decision, para. 744.

111. From these new calculations, there are a total number of direct and indirect estimated potentially eligible victims of thematic crimes of **1,547 persons**, not 2,377 as the Chamber calculated.¹⁴⁷ This calculates out to an 830-person difference, equating to a €622,500 difference in the amount of reparations liable to Mr Ongwen.

112. The Defence requests the Appeals Chamber to overturn and order Trial Chamber II to correct the errors of the Chamber and use the estimated numbers found here in this ground of appeal.

K. Ground 9: Trial Chamber IX erred in fact when it used the divisor of four (4) in determining the number of estimated victims of SGBC and child soldiers attributed to Mr Ongwen as commander of Sinia Brigade.¹⁴⁸

113. By failing to take into account that Control Altar was an operational unit, Trial Chamber IX committed reversible error by significantly increasing the estimated number of potentially eligible victims of SGBC and child soldiers for which Mr Ongwen was responsible. This ground of appeal should be read in conjunction with Ground 8, but all references shall be repeated, where necessary, for ease of reading.

114. Pre-Trial Chamber II decided that “[d]irectly under Joseph Kony were [sic] a central organ known as Control Altar and so-called Division, which was also an operational unit. Most importantly, however, the operational units of the LRA were its four brigades: Sinia, Gilva, Trinkle and Stockree.”¹⁴⁹ Pre-Trial Chamber II used the same adjective/noun combination to describe Control Altar and Division as it did for the other four brigades, an “operational unit”.¹⁵⁰

115. Control Altar, under the direct command of Otti Vincent,¹⁵¹ actively participated in attacking UPDF bases and patrols, IDP camps and convoys during the temporal jurisdiction of the case. Control Altar had fighters, not just senior commanders.¹⁵² Control Altar took part in the attack

¹⁴⁷ Impugned Decision, para. 748.

¹⁴⁸ Impugned Decision, paras 734, 737 and 738.

¹⁴⁹ Pre-Trial Chamber II, *Decision on the confirmation of charges against Dominic Ongwen*, [ICC-02/04-01/15-422-Red](#), p. 26, para. 56.

¹⁵⁰ See Pre-Trial Chamber II, *Prosecutor’s Amended Application for Warrants of Arrest*, ICC-02/04-01/15-3-Conf-Red2, para. 236.

¹⁵¹ Trial Chamber IX, *Trial Judgment*, [ICC-02/04-01/15-1762-Red](#), para. 123.

¹⁵² Pre-Trial Chamber II, *Prosecutor’s Amended Application for Warrants of Arrest*, ICC-02/04-01/15-3-Conf-Red2, para. 55.

on Pajule¹⁵³ and Pagak,¹⁵⁴ and abductees – both males and females – were kept in Control after their abductions.¹⁵⁵ For all intent and purposes, Control Altar acted as a brigade, fighting the UPDF, abducting persons and taking forced wives.

116. The Chamber estimated that there were 12,385 children in the LRA, at some point, during the jurisdiction of the case.¹⁵⁶ Following that there four brigades and Control Altar, this number should have been divided by five instead of four, giving the total estimated number of child soldiers in Sinia Brigade from 1 July 2002 to 31 December 2005 to **2,477**.
117. The Chamber also estimated that there were 1,119 females over the age of 15 who were abducted by Sinia Brigade when using the divisor of four. Working backwards, that would equate to 4,476 females over the age of 15 during the jurisdiction of the case. Using the divisor of five, this equals to be **895** females over the age of 15 who are the responsibility of Sinia Brigade from 1 July 2002 to 31 December 2005.
118. From the original 1,119, the Chamber deducted 119 females from the total to represent females who were abducted but did not fall victim to SGBC. The 119 females equates to 10.63% of the total. If one multiplies 895 by 89.37%, you get the number **800**. The estimated potential number of thematic victims are as follows:

Table 3: Unadjusted Potentially Eligible

	Defence Estimates
SGBC	800
Child Soldiers	2,477
Total Unadjusted Thematic	3,277

119. Consistent with the Chamber’s approach, possible dual status victims must be accounted for in the calculations. “[T]he Chamber estimate[d] that approximately 2,144 *potentially* eligible victims would also qualify as both victims of the attacks on the IDP camps and victims of thematic crimes [...]”¹⁵⁷ Following the Chamber’s approach, the 2,144 dual victims are

¹⁵³ See Pre-Trial Chamber II, *Prosecutor’s Amended Application for Warrants of Arrest*, ICC-02/04-01/15-3-Conf-Red2, paras 315-318 (noting that P-0048/D-0135 was in Control Altar). See also Pre-Trial Chamber II, *Document Containing the Charges*, [ICC-02/04-01/05-474](#), para. 27.

¹⁵⁴ Pre-Trial Chamber II, *Document Containing the Charges*, [ICC-02/04-01/05-474](#), para. 58.

¹⁵⁵ See Pre-Trial Chamber II, *Prosecutor’s Amended Application for Warrants of Arrest*, ICC-02/04-01/15-3-Conf-Red2, para. 104.

¹⁵⁶ Impugned Decision, para. 735.

¹⁵⁷ Impugned Decision, para. 743.

removed from the 3,277 estimated number of thematic crimes victims.¹⁵⁸ This would equal 1,133 potentially eligible victims of SGBC and child soldiering.

120. Following the Defence calculations from Ground 8, Mr Ongwen was in charge of Sinia Brigade for 47.62% of the jurisdiction of the case. Mr Ongwen would have then been in charge of a battalion for 52.38% of the jurisdiction of the case. Working from this, the new numbers are worked in the table below.

Table 4: Total Direct Victims of Thematic Crimes

	Adjusted Estimates	Defence Estimates 01/07/02 – 01/04/04	Defence Estimates 01/04/04 – 31/12/05	Total
Thematic Victims	1,133	198	540	738

121. As the Chamber did, the estimated number of potentially eligible persons

Table 5: Estimated Number of Indirect Victims

Victims of:	Estimated number of direct victims	Percentage of indirect victims	Estimated number of indirect victims
Thematic crimes only	1,133	21.75%	246
Total			246

122. From these new calculations, there are a total number of direct and indirect estimated potentially eligible victims of thematic crimes of **1,379 persons**, not 2,377 as the Chamber calculated.¹⁵⁹ This calculates out to an 988-person difference, equating to a €748,500 difference in the amount of reparations liable to Mr Ongwen.

123. The Defence requests the Appeals Chamber to overturn and order Trial Chamber II to correct the errors of the Chamber and use the estimated numbers found here in this ground of appeal.

L. Ground 13: Trial Chamber IX erred in fact in its assessment of mental health as a moral health victimization for the attacks for which Mr Ongwen was convicted.¹⁶⁰

124. The manner in which the Chamber determined that unproven mental health issues were related to the attacks, and these mental health issues translated into moral health victimization,

¹⁵⁸ Impugned Decision, para. 744.

¹⁵⁹ Impugned Decision, para. 748.

¹⁶⁰ Impugned Decision, paras 231-242.

significantly increased the amount of potential beneficiaries determined by the Chamber, and thus increased the amount of Mr Ongwen's liability.

125. In the Impugned Decision, the Chamber stated that it was "satisfied that it had been established on a balance of probabilities that direct victims of the attacks suffered moral harm as a result of the crimes committed in the context to the attacks against the Pajule, Odek, Lukodi, and Abok IDP camps, for which Mr Ongwen was convicted. The moral harm suffered by these victims includes: severe mental pain and suffering; trauma; feelings of fear, panic, helplessness, and distress; psychological abuse; psychological trauma; emotional harm; stress; recurring painful memories; nightmares; severe violation of dignity; suffering from being forced to leave their children behind; spiritual disturbances; and impaired psychosocial well-being and functioning."¹⁶¹ The Chamber acknowledged that the moral harm suffered by the direct victims of the attacks had long-lasting consequences.¹⁶² This conclusion was reached after agreeing with submissions of the LRV, the CLRV and a number of the participants who described the moral harm suffered by direct victims of the attacks. In particular, they identified mental and psychological illnesses, trauma, emotional harm, stress, flashbacks, and development of psychological disorders such as suicidal tendencies, depression and dissociative behaviour.¹⁶³ Moral harm was defined to include psychological harm or trauma, mental pain and anguish, emotional distress, psychosocial harm, and loss of life plan.¹⁶⁴
126. From the onset, the Defence posits that the definition of moral harm is opaque and unduly convolutes many factors. From the foregoing, the Chamber brought about so many mental health and other health conditions which can only be ascertained by medical, psychological and/or psychiatric evidence pursuant to the standard which the Chamber established in the proceedings after Mr Dominic Ongwen mental disease and defect. The Chamber's characterisation significantly increased the amount of potential beneficiaries determined by the Chamber, and thus increased the amount of Mr Ongwen's liability.
127. The Chamber's conclusions are even more dreadful when one factors in its refusal to consider Mr Ongwen's abduction at the age of 9 as relevant to the charges, and especially to the affirmative defences of mental disease or defect and duress under Article 31 of the Rome

¹⁶¹ Impugned Decision, para. 242.

¹⁶² Impugned Decision, para. 242.

¹⁶³ Impugned Decision, para. 231.

¹⁶⁴ Impugned Decision, para. 168.

Statute. The Chamber bluntly states that “Dominic Ongwen’s childhood experience in the LRA is not central to the issue.”¹⁶⁵

128. In the Impugned Decision, the “Ongwen Exception” is again applied by the Chamber in its findings and conclusions about: (1) moral harm, particularly psychological disorders and traumas and (2) former child soldiers as a category of victims. Throughout the sections on moral harm, the Impugned Decision cites the LRA forcing abductees and civilians to watch others being killed¹⁶⁶ and to kill others¹⁶⁷ as examples of events which caused psychological harm to victims. That these harms occurred is not being contested. But the Chamber’s omission of Mr Ongwen as a victim of these and other harms it addresses which Ugandan victims suffered at the hands of the LRA is a “double standard” on victimhood in conflict situations.
129. The Impugned Decision should have recognised that the record reflects evidence that Mr Ongwen, as a very young abductee and child soldier, was forced to watch others being killed and to kill others by the LRA. The first time he tried to escape from the LRA, Mr Ongwen was forced to kill fellow abductees who had tried to unsuccessfully to escape with him.¹⁶⁸ One of the Defence expert psychiatrists, Dr Dickens Akena, testified to this early traumatic incident which occurred in the first few months after Mr Ongwen was abducted at the age of 9 years old.¹⁶⁹ The trauma was related to skinning of people alive, being forced to carry the heads of severed persons and dumping them into a pit and having the intestines of people hung up on walls. The trauma was related to bludgeoning of little children who had tried to escape and had been brought back. The events were bad. That was the context in which the traumatic events happened.¹⁷⁰
130. Mr Ongwen also vividly described the event in detail at the sentencing hearing. The LRA commander ordered him and another abductee to slaughter the others in their group with a knife, remove their intestines and hang their intestines on the tree and put a part around their necks. They were then ordered to eat beans as the blood of the intestines dripped onto their plates.¹⁷¹

¹⁶⁵ Trial Chamber IX, *Trial Judgment*, [ICC-02/04-01/15-1762-Red](#), para. 2592.

¹⁶⁶ Impugned Decision, paras 236, 242, 264 and 266.

¹⁶⁷ Impugned Decision, paras 109, 236, 264, 293, 297 and 362.

¹⁶⁸ [ICC-02/04-01/15-T-261-ENG](#), p. 5, l. 19 to p. 7, l. 5.

¹⁶⁹ [ICC-02/04-01/15-T-249-ENG](#), pp 103-104.

¹⁷⁰ [ICC-02/04-01/15-T-249-ENG](#), pp 103-104.

¹⁷¹ [ICC-02/04-01/15-T-261-ENG](#), pp 5-7.

131. A 2007 research study entitled “Psychiatric disorders among war-abducted and non-abducted adolescents in Gulu district, Uganda: a comparative study,”¹⁷² found that the most significant traumatic experiences were predominantly direct, *i.e.* forced to kill, being forced to perform rituals, being forced to torture and forced to leave home and property.¹⁷³ The overwhelming majority of persons in the study were, like Mr Ongwen, Acholi. It recognised that Gulu district (from where Mr Ongwen hails) had the longest and most severe experience of the 18-year LRA insurgency and the largest number of internally displaced persons (IDP) camps, where about 436,239 persons were living.¹⁷⁴
132. The Defence notes that it is simply inconceivable, based on the evidence and research, that Mr Ongwen could not have suffered the traumatic experiences and harms that other victims suffered. Yet, the “Ongwen Exception” ignores this common-sense reality.
133. Psychological or emotional harm and traumas, and references to psychological disorders, suicidal tendencies, depression and dissociative behaviour are included in the Impugned Decision.¹⁷⁵ The footnotes reference the *amici* submissions, United Nations and Registry Observations. But, in these submissions, there is no direct causal link between the harms and the victims in the *Ongwen* case. The conclusions are not based on the actual examination of a victim by an expert psychiatrist or psychologist.
134. We do not take issue that harms occurred. But, even with the standard of “balance of probabilities” for reparations, there is a legal requirement of demonstrating the specific link between the harm and victim for reparations.¹⁷⁶ Obviously, it is unrealistic for all 47,772 victims found by the Chamber to be examined by mental health experts. However, the Chamber relied on a Sampling of 5% of the victims throughout the Impugned Decision. At least some of the 5% could have been examined to confirm or reject mental illnesses and other psychological issues, and to specifically corroborate the generalities on which the Chamber relies. Barring that, the Chamber should have acknowledged its lack of medical expertise (and the lack of

¹⁷² J. Okello, T.S. Onen and S. Musisi, *Psychiatric disorders among war-abducted and non-abducted adolescents in Gulu district, Uganda: a comparative study*, 10(4) AFR. J. PSYCHIATRY, pp 225-231 (2007).

¹⁷³ *Ibid.*, p. 228. The Trial Judgment draws similar conclusion in terms of the traumatic experiences of LRA abductees (Trial Judgment, paras 906-930), but does not include Mr Ongwen. The Judgment creates an “Ongwen exception” and gives no reasons. *See*, DAJ, paras. 440-441.

¹⁷⁴ *Ibid.*, p. 226.

¹⁷⁵ *See for example* Impugned Decision, paras 269 and 291.

¹⁷⁶ Trial Chamber VI, *Reparations Order*, [ICC-01/04-02/06-2659](#), para. 77.

medical expertise of the sources upon which it relied) as a limitation or shortcoming of the Impugned Decision.

135. This approach would have been prudent, especially given that Mr Ongwen's mental status was one of the central contentious issues in the Article 31 affirmative defence. The Defence experts found that Mr Ongwen suffered from dissociative disorders, severe depressive illness, PTSD and suicide ideation, among other mental illnesses. The case involved a number of medical experts and reports on both sides, including a Court-appointed expert (who concurred that Mr Ongwen suffered from severe major depressive disorder, severe PTSD and other specified dissociative disorder), and, at the Prosecution's request, the Chamber granted a rebuttal case. Generalities about psychiatric problems and psychological conditions and traumas were not acceptable to the Chamber then, and should not be now.
136. It is the Defence submission therefore that the general conclusion that victims suffered from mental health diseases as a result of the attacks on the camps was an error which caused a miscarriage of justice, as it had the effect of inflating the total number of victims for the crimes for which Mr Ongwen was convicted. There is no basis to attribute this mental health assessment on a category of victims, it affirmed not having a record of how many they were and obviously no record about how many were in Sinia brigade. Its decision is based on assumptions and presumptions based information which was not submitted and tested in the trial.
137. The Defence further notes that in paragraphs 126-127 of the Impugned Decision, the Chamber makes references to the long-lasting consequences of material and moral harm affecting child soldier victims.¹⁷⁷ This reflects the idea that the harms of child soldiering are not extinguished when a child soldier reaches a certain age, for example, 15 or 18. This concept that the harms extend beyond chronological age was exactly the evidence of the Defence Child Soldier Expert, Major (ret) Pollar Awich, himself a former child soldier who was abducted by the NRA (predecessor to the UPDF). He submitted an expert report on "The Enduring Impact of Being A Child Soldier" which included conclusions about the long-lasting mental health consequences of child soldiering. Yet, in its Trial Judgment, the Chamber totally rejected Major Awich's conclusions on the enduring effects of child soldiering.¹⁷⁸

¹⁷⁷ Impugned Decision, paras 368-369 and 414.

¹⁷⁸ Trial Chamber IX, *Trial Judgment*, [ICC-02/04-01/15-1762-Red](#), para. 612.

138. However, the Chamber makes a 180° turn in the Impugned Decision. Here, the Chamber “notes the long-term psychological suffering of child soldiers from being exposed to violence during time in the bush.”¹⁷⁹ It embraces the notion of long-lasting effects of child soldiering for the victims of abduction for the purposes of reparations, but it rejects the notion for the purposes of Mr Ongwen’s affirmative defence. This is inconsistent and another example of the “Ongwen Exception.”
139. The Defence asserts that if you accept a premise as true, then how you use the premise may differ, depending on the context. But consistency is about the content of the premise, and not the purpose for which you are using - or not using - the premise. In short, the purpose does not change the basic premise. To argue that the content of a premise can morph into its opposite, depending on the purpose or context, is distorted logic.
140. If the Chamber had applied the premise of long lasting effects of child soldiering, it would have to explain why it applied - in rote fashion - the Rome Statute, Article 26, which set the age of criminal culpability as 18. Mr Ongwen was convicted of crimes that took place when he was a few years beyond the age of 18.
141. Mr Ongwen is the first defendant who was prosecuted and convicted for a crime for which he is also a victim. For the Court to show recognition, and also empathy for the human beings who suffered as child soldiers, but to not extend this to M. Ongwen, who was in the same position, is inconceivable. One wonders, how does (or even if) the Chamber “see” Mr Ongwen?
142. The Chamber treats Mr Ongwen as a victim-perpetrator, a construct which supports its “double standard” on victims and harms: one for Mr Ongwen and one for every one else abducted into the LRA. The “Ongwen Exception” is the mirror image of this double standard. In effect, the Chamber takes Mr Ongwen out of the equation of harms and victims - as if he were invisible. This absence of acknowledgement of Mr Ongwen as a victim is not simply an act of ignoring his experiences, but it is - at the end of the day - an act of dehumanizing him.
143. From the foregoing submissions therefore, it is the defence contention therefore that Chamber erred in its assessment of mental health as a moral health victimization for the attacks for which Mr Ongwen was convicted which substantially increased the total number of victims hence occasioning a miscarriage of Justice. The Defence requests the Appeals Chamber to remand the

¹⁷⁹ Impugned Decision, para. 375.

issue back to Trial Chamber II for the purpose of applying the same standard used by the Chamber in the Trial Judgment and Sentence to the Impugned Decision.

M. Ground 14: Trial Chamber IX erred in law and fact when determining that four participating victims qualified, on a balance of probabilities, as victims of Mr Ongwen.¹⁸⁰

144. Trial Chamber IX increased the number of SGBC victims, and expanded the definition of SGBC victims beyond the Trial Judgment, when assessing the Dossier. Failure to correct this error shall result in a significant amount of persons receiving reparations who are not victims of crimes for which Mr Ongwen was convicted, and thus depriving persons who do qualify as victims.
145. In Confidential Annex A of the Impugned Decision, the Chamber approved the victim status of four victim applicants, a/07032/15, a/07053/15, a/07090/15 and a/07093/15.¹⁸¹ The Defence challenged all four of these victim applicants.¹⁸² In deciding these four victim applications, the Chamber violated the legal maxim of *in dubio pro reo*.
146. The Chamber found that victim applicant a/07032/15 was eligible for reparations from Mr Ongwen.¹⁸³ In doing so, the Chamber took great leaps to grant her eligibility as a victim in the case. In an attempt to show that it was possible for her to be an eligible victim, the Chamber used the testimony of one person, P-0205, to show that one person was abducted from the Paicho area by a Sinia Brigade battalion when Mr Ongwen was the brigade commander.¹⁸⁴ More interesting is that this testimony, appears to show that this alleged abduction of victim applicant a/07032/15 was **after** the attack on Odek, meaning that it is not possible for her abduction to be the one which P-0205 spoke about in his testimony.¹⁸⁵ In fact, when one looks at the map annotated by the witness, the Odek standby (which was 3 days after the alleged abduction of a/07032/15) was listed in spot 3, then Onekgwok at 4, Paicho at 6 and Lukodi at number 7¹⁸⁶. This is even the order in which the witness spoke about these incursions.¹⁸⁷

¹⁸⁰ Impugned Decision, Confidential Annex A, paras 2843-2864, 2896-2914, 2915-2930 and 2931-2946.

¹⁸¹ Impugned Decision, Confidential Annex A, paras 2843-2864, 2896-2914, 2915-2930 and 2931-2946.

¹⁸² Trial Chamber IX, *Corrected Version of 'Defence Submissions on the Victim Sample Pool'*, filed on 19 May 2023, ICC-02/04-01/15-2050-Conf-Corr, paras 75-79, 92-96, 97-100 and 101-103 (PRV [here](#)).

¹⁸³ Impugned Decision, Confidential Annex A, paras 2843-2864.

¹⁸⁴ See Impugned Decision, Confidential Annex A, paras 2852 (citing Trial Chamber IX, *Trial Judgment*, ICC-02/04-01/15-1762-Conf, para. 2133).

¹⁸⁵ See ICC-02/04-01/15-T-47-ENG-CONF, pp 46-50 (PRV [here](#)).

¹⁸⁶ UGA-OTP-0223-1386, at p. 1386.

¹⁸⁷ ICC-02/04-01/15-T-47-ENG-CONF, pp 46-50 (PRV [here](#)).

147. In furtherance of these great leaps taken by the Chamber to make her eligible to receive reparations from Mr Ongwen, the Chamber went on to state that since not all members of Sinia Brigade attacked Odek IDP Camp, it makes it more likely than not that members of Sinia Brigade who did not attack Odek IDP Camp committed the crimes against victim applicant a/07032/15.¹⁸⁸ With the utmost respect to the Chamber, this is not logical. Just because everyone did not go to one attack does not mean that it is more likely than not that unknown abductors – because the victim applicant did not know who abducted her – were members of Sinia Brigade. It is just as likely that she was abducted by members from Gilva, Trinkle or Stockree Brigades, especially noting that around that time, Gilva sickbay was operating around than 10 km from Paicho.
148. The Chamber took great pains to include this person as victim based on loose evidence and speculation. It does not meet the balance of probabilities that the victim applicant was a victim of Sinia Brigade, especially noting the timeline given by P-0205 and the highly speculative nature of the finding that not all of Sinia Brigade attacked Odek IDP Camp and that it was more likely than not that persons from Sinia Brigade not fighting at Odek abducted this victim applicant. As such, the Defence requests the Appeals Chamber to overturn the Chamber's decision that victim applicant a/07032/15 is eligible for reparations.
149. The Chamber found that victim applicant a/07053/15 was eligible for reparations from Mr Ongwen.¹⁸⁹ The Defence challenged this victim applicant, noting specifically that there is not enough evidence on the record to prove that the victim applicant was under Mr Ongwen control or under the control of anyone under Sinia Brigade.¹⁹⁰
150. The Chamber failed to make any concrete decision as to who abducted victim applicant a/07053/15. The Chamber merely stated that her accounts were similar to other victim applicants on the record,¹⁹¹ yet her story is similar to nearly everyone who was abducted by every brigade in the LRA. The Chamber's logic is that this victim applicant was a victim of SGBC, and Mr Ongwen was convicted of SGBC, and thus Mr Ongwen is guilty of these crimes being committed upon her without any true evidence or connection to Sinia Brigade. The Chamber's decision to find her eligible for reparations of crimes for which Mr Ongwen was

¹⁸⁸ Impugned Decision, Confidential Annex A, paras 2853.

¹⁸⁹ Impugned Decision, Confidential Annex A, paras 2896-2914.

¹⁹⁰ Trial Chamber IX, *Corrected Version of 'Defence Submissions on the Victim Sample Pool'*, filed on 19 May 2023, ICC-02/04-01/15-2050-Conf-Corr, paras 93 and 96 (PRV [here](#)).

¹⁹¹ Impugned Decision, Confidential Annex A, para. 2910.

convicted falls woefully below the balance of probabilities standard. As such, the Defence requests the Appeals Chamber to overturn the Chamber's decision that victim applicant a/07053/15 is eligible for reparations.

151. The Chamber found that victim applicant a/07090/15 was eligible for reparations from Mr Ongwen.¹⁹² The Defence challenged this victim applicant, noting specifically that redacted information in the victim application caused prejudice against the Defence from making a fair and honest attempt to determine her victim status.¹⁹³
152. The Defence asserted that some of the redacted information from the victim application was necessary to make a fair assessment of the victim applicant.¹⁹⁴ This material included the person who led the group which abducted her, what the commander was called,¹⁹⁵ the name of her forced husband¹⁹⁶ and possible names of the battalion or brigade.¹⁹⁷ This information would have made it easy for the Defence to know if she was a victim of SGBC for which Mr Ongwen was convicted. The Defence requested the Chamber to order VPRS to lift specific redactions in the victim application,¹⁹⁸ but was denied by the Chamber.¹⁹⁹
153. Quite frankly, it is easy for someone to write that they were in Oka, Siba or Terwanga Battalion, or that they were in Sinia Brigade. It is hard for someone to write this, and then give several names of persons who were allegedly in the aforementioned groups. Mr Ongwen is better placed than any other person involved with the case to determine whether the names of the persons and groups are those of persons in Sinia Brigade. Denying Mr Ongwen the right to inspect the redacted information materially affected his fair trial rights. It is frightful that the Chamber wrote that it "considers it to be more likely than not, [sic] that the person she was given to was under Mr Ongwen's command. In addition, the Chamber has reviewed the redactions implemented in the victim's dossier and does not consider them to be prejudicial to the Defence [...]"²⁰⁰ To write that it is more "likely than not" that the forced husband was

¹⁹² Impugned Decision, Confidential Annex A, paras 2915-2930.

¹⁹³ Trial Chamber IX, *Corrected Version of 'Defence Submissions on the Victim Sample Pool'*, filed on 19 May 2023, ICC-02/04-01/15-2050-Conf-Corr, paras 98-99 (PRV [here](#)).

¹⁹⁴ Trial Chamber IX, *Corrected Version of 'Defence Submissions on the Victim Sample Pool'*, filed on 19 May 2023, ICC-02/04-01/15-2050-Conf-Corr, paras 98-99 (PRV [here](#)).

¹⁹⁵ ICC-02/04-01/15-365-Conf-Anx827-Red, p. 1, question 1.

¹⁹⁶ ICC-02/04-01/15-365-Conf-Anx827-Red, p. 2, question 1.

¹⁹⁷ ICC-02/04-01/15-365-Conf-Anx827-Red, p. 1, question 1.

¹⁹⁸ Trial Chamber IX, *Defence Request for an Order to Disclose Specific Material of Persons in the Victim Sample Pool of Participating Victims*, ICC-02/04-01/15-2045-Conf, para. 40 (PRV [here](#)).

¹⁹⁹ Trial Chamber IX, *Omnibus Decision on the Defence's Filings ICC-02/04-01/15-2044 and ICC-02/04-01/15-2045-Conf*, ICC-02/04-01/15-2049-Conf, paras 17-22 (no public redacted version available).

²⁰⁰ Impugned Decision, Confidential Annex A, para. 2924.

under Mr Ongwen's command instead of "the forced husband was definitely under Mr Ongwen's command" is a serious miscarriage of justice. The Chamber should know, not guess.

154. The Defence requests the Appeals Chamber to order Trial Chamber II to lift the redactions to victim application a/07090/15 as requested by the Defence in ICC-02/04-01/15-2045-Conf, paragraph 40 and allow the Defence to make observations on the redacted victim application.
155. The Chamber found that victim applicant a/07093/15 was eligible for reparations from Mr Ongwen.²⁰¹ The Defence challenged this victim applicant, specifically noting that the failure to disclose the victim applicant's forced husband's name, the name of her commander and the name of her forced husband's escort violated Mr Ongwen's rights to a fair proceeding.²⁰² The Defence requested the Chamber to order the disclosure of this material,²⁰³ but the Chamber denied the request.²⁰⁴
156. For the same reasons stated above in relation to victim applicant a/07090/15, Mr Ongwen is the best person in the case to know whether all of this information provided by the victim applicant truly is coherent. Mr Ongwen is the best person to know who were under his command around the time of victim applicant a/07093/15 was allegedly in Sinia Brigade. The Chamber violated Mr Ongwen's right to a fair proceeding when it denied the Defence's request to disclose this material.
157. The Defence requests the Appeals Chamber to order Trial Chamber II to lift the redactions to victim application a/07093/15 as requested by the Defence in ICC-02/04-01/15-2045-Conf, paragraphs 41-43 and allow the Defence to make observations on the redacted victim application.
158. The Defence makes these arguments because quite a few of the victim applicants under the thematic crimes have been or should have been found ineligible for reparations in the case.²⁰⁵ Demonstrating that the Dossier for thematic crimes, which was chosen randomly from the

²⁰¹ Impugned Decision, Confidential Annex A, paras 2931-2946.

²⁰² Trial Chamber IX, *Corrected Version of 'Defence Submissions on the Victim Sample Pool'*, filed on 19 May 2023, ICC-02/04-01/15-2050-Conf-Corr, para. 102 (PRV [here](#)).

²⁰³ Trial Chamber IX, *Defence Request for an Order to Disclose Specific Material of Persons in the Victim Sample Pool of Participating Victims*, ICC-02/04-01/15-2045-Conf, paras 41-43 (PRV [here](#)).

²⁰⁴ Trial Chamber IX, *Omnibus Decision on the Defence's Filings ICC-02/04-01/15-2044 and ICC-02/04-01/15-2045-Conf*, ICC-02/04-01/15-2049-Conf, paras 17-22 (no public redacted version available).

²⁰⁵ See Trial Chamber IX, *Reparations Order*, ICC-02/04-01/15-2074-Conf-Exp-AnxI, paras 2990-3004 (found ineligible for reparations), 2819-31 (found ineligible for reparations), 2832-42 (found ineligible for reparations), 2865-74 (found ineligible for reparations) and 2875-85 (found ineligible for reparations),

participating victims in the case, shows that a significant amount of the persons applying as victims are not in fact victims of the crimes for which Mr Ongwen was convicted. This would demonstrate that there are less victims of the thematic crimes than the Chamber estimates, and would significantly decrease the number of estimated victims of thematic crimes for which Mr Ongwen is responsible to pay reparations to.

159. In addition to the specific requests for the four victim applications, the Defence also requests the Appeals Chamber to order Trial Chamber II to review the statistical data created by the Chamber and adjust the estimated potential beneficiaries of reparations, specifically taking into account that four more alleged victims of thematic crimes in the Dossier have been found ineligible for reparations.

V. RELIEF

160. The Defence for Dominic Ongwen respectfully request the Appeals Chamber to overturn the Impugned Decision and remand it back to Trial Chamber II.

Respectfully submitted,



.....
Chief Charles Achaleke Taku
On behalf of Dominic Ongwen

Dated this 17th day of July, 2024
At Maryland, United States of America